

# SEXUAL ORIENTATION AND GENDER IDENTITY, LGBT RIGHT TO PERSONAL LAWS IN INDIA: EQUALITY BEFORE LAW

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## ABSTRACT

*"The three most important events of human life are equally devoid of reason: Birth, Marriage, and Death"*

**-Austin O'Malley**

A human by birth is born with all the rights and dignity, no one should be responsible for taking away those rights. The humanly rights available which are supposed to be provided to all humans are not provided to the people having different sexual preference or so-called sexual minorities. For the people of sexual minorities, the law is a paradox. The challenges throughout the road faced by the sexual minority in India has been full of difficulties and still is ongoing. The problem faced by the LGBT (lesbian Gay Bisexual Transgender) community mostly revolves around the societal acceptance and the laws which the representative of this society (legislature) make. In 6 September, 2018 the supreme court of India made relief part for the sexual minorities, but end of the decriminalisation of section 377 of the Indian Penal Code, 1860 doesn't solve all the hurdle which they are facing, that are fundamental rights, other personal laws like marriage, adoption, divorce etc. Regarding Section 377 of IPC also going to mention apex court judgement which given idea about the sections- 377 of IPC. So, the humanly rights which should be available to all the citizens of the country safeguarded by the constitution of India and other laws are yet still not provided to the sexual minorities. This paper provides an overview of how the insufficient laws proves to be difficult for the LGBT community, and finding the reasoning.

In this paper, we also include homosexual behaviour and hijras in the Indian society. This community also should enjoy their human rights that one of the important rights is Right to marry. India is signatory to Universal Declaration of Human Rights (UDHR) but still sexual minority can't enjoy this fundamental Right. Which should equally important for them. Right to Marry of LGBT community and which has not mentioned regarding this right any other personal laws like Hindu law, Muslim law etc. we also mentioned the comparative analysis between Canada, Australia and European countries of their marriage rights of LGBT community.

**Keywords:** Section-377 of IPC, LGBT community, fundamental Rights, Personal Law, Rights to Marry, role of hijras, comparative analysis between Canada, Australia and India.

## INTRODUCTION

The month of February is very well known as a Valentine month but every year thousands of people of LGBT community gather for a march, to celebrate LGBT Pride. LGBT Pride is regarding for the society to accept the community, the LGBT community faces a lot of problem in India majorly regarding the laws and the acceptance. The 'LGBT' acronym stands for lesbian, gay, bisexual and transgender. The word lesbian is denoted two a woman who is attracted to women, the word gay usually means happiness but it is devoted to a man who is attracted to men. Bi sexual means that a person is attracted two one or more gender, transgender is a person who has a different gender identity, which is different than their assigned gender identity by birth. LGBT community are often unable to disclose their problems to their relatives.

If someone has to live while holding an integral aspect of themselves, then it is as good as being dead nobody talks about dead people. Many countries have legalised the same sex marriage because you understand the need of having freedom to love and freedom to marry whoever they want. Marriages all about love and everybody should have the right to marry irrespective of the gender. Recently the Union between a man and a transgender was refused to be registered as a marriage in Kerala, though all the ceremonies according to the Hindu Marriage Act were carried, the High Court head an opinion that the marriage between men and women can only be registered. The LGBT community also faces the problems like violence, discrimination, unemployment, poverty and lack of Healthcare. Many parts of India don't know what LGBT stands for. Some people have an opinion that they should not be the part of the family.

Discrimination against LGBTQ came up when justice Malhotra said that due to the different sexual orientation there were also discriminated in availing Healthcare. It was further added that the family pressure Forced them to get into heterosexual relationship and get married which let them to become bi sexual.

There are many judgements which took up the issues relating to the rights of the LGBT community but two judgement out of those emerged as a saviour to the community. Those two judgements are National Legal Services Authority of India vs. Union of India and Navtej Johar vs. Union of India. One talks about the recognition of fundamental rights of the transgender protected by the constitution under Article 14, Article 15, Article 16, Article 19 and Article 21 of the Constitution of India.<sup>1</sup> The other judgement talks about decriminalization of the consensual sex that takes place between the adults of same gender by reading down Section 377 of the Indian Penal Code, 1860.<sup>2</sup> Judiciary using its power have safeguarded and protected the individuals respectively, it is judicial activism but judiciary cannot overreach and provide them with legislation to grant them rights of marriage, divorce, exploitation against discrimination, protection against being a victim of rape and maintenance. The LGBT community still have no rights. Just instead of being punished now they are free from search unbearable situations still need the rights which are provided to every citizen by the Constitution of India.

## HISTORY

Family law has under gone many changes over the last couple of years, in previous years unmarried couples were not at all taken into consideration. Now we legally allow Live in Relationships, regardless of whether society considers them or not. The legal system across the globe has also changed their view point towards the same-sex couples, though in some parts of the world they are still not allowed to register their marriage. The Indian Penal Code was formed by the Britishers who ruled India for about 200 years. It reflected the laws that were present in the Britain at that time. When we talk about section 377 of the Indian Penal Code it reflects the mindset of the Britain. The ancient Indian text openly talked about the homosexual relationship. Even the carvings across the temple in India reflects that. *Vikriti Evam Prakriti*, written in Rig Veda which means that whatever is unnatural is also natural And the Scholars believe that this reflects the homosexual relations between the humans at that point of time. Shakuntala Devi also known as the human computer wrote the first book about homosexuality after discovering her husband to be a homosexual Android about the vulnerability, acceptance and their tolerance in the society do the book went unnoticed at that time.

There are many judgements of high courts and supreme court which talk about the rights of LGBT community. Some of them are National Legal Services Authority of India vs. Union of India, Suresh Kumar vs NAZ Foundation, Navtej Johar vs. Union of India, Nangai vs. Superintendent of Police, Atri Kar vs. Union of India. After the nalsa judgement there was a bill named The Transgender Persons (Protection of Rights) Bill, 2018 a private bill which talked about the right off transgender but it was lapsed in in the Rajya Sabha. While the 2018 Bill suffered from major shortcomings and was heavily criticized by the transgender community, even the bill which talked about the reservation of the transgender got lapsed.<sup>3</sup>

## LEGAL RECOGNITION OF LGBT

The citizens of India should be treated at par whether they be it of any gender. The government sitting in the parliament when it comes to its own agenda the bill passes within a day but when the fundamental rights of the citizen are concern the bill get lapsed. Same happens with the laws related to the lgbtq community. The fundamental rights of the community are in question people are facing problems the citizens are facing discrimination and nobody seems to bother that what is happening to the community. They are like the dead community and nobody wants to talk about them the basic fundamental rights of equality life and liberty and not provided to them just because they are of different gender or are of different sexual orientation. Finally, in 2018 the Supreme Court of India and the judgement Navtej Johar v. UOI finally de criminalized the voluntary unnatural sexual act between the LGBT under Section 377 of IPC. The transgender identity demonstrates the relational and fragmented nature of identity, and challenges the distinct separation of categories this is one of

<sup>1</sup> National Legal Services Authority of India vs. Union Of India.

<sup>2</sup> Navtej Johar vs. Union of India

<sup>3</sup> Shreya Ila Anasuya, 'Why the Transgender Community is Angry Over a Bill Meant to Protect Their Rights, The Wire, available at <https://thewire.in/lgbtqia/why-the-transgender-community-is-angry-over-a-bill-meant-to-protect-their-rights> (Last accessed on February 11, 2019); PUDR, 'Statement opposing draconian transgender bill', available at <http://sanhati.com/articles/19029/> (Last accessed on January 14, 2019).

the reasons why their bill should be taken seriously.<sup>4</sup> The parliament after this judgement took no steps to protect the relation between the LGBT couple.

No person in the LGBT community are allowed to get married are adopted children, neither they are protected against the violence of domestic abuse or rape in case of a live-in relationship. Two couples are not even recognised then there is no question of even getting the maintenance air restitution of conjugal rights these are the citizens of Indian nation and the kind of treatment they are getting since years are inhumane. The only right the community right now has is against getting under a criminal case that's it. On 24<sup>th</sup> of April 2019 the landmark judgement of the Madras High Court ordered the authorities of Tamil Nadu who initially rejected to register a marriage between male and transgender female, to get the marriage registered. Honourable Justice G R Swaminathan one of the judges on the bench referred the judgement of the supreme court of national legal service Authority of India vs Union of India, Mahabharat declaring the parenthood of transgender person has been recognised under the Indian Constitution. He quotes "Gender identity falls within the domain of her personal autonomy and involves her right to privacy and dignity. It is not for the State authorities to question this self-determination of the second petitioner herein," he went on to say. "For too long, the transgender persons have been languishing in the margins. The Constitution of India is an enabling document. It is inviting them to join the mainstream. It is absurd to deny the transgenders the benefit of the social institutions already in place in the mainstream."<sup>5</sup>

Recently in West Bengal also there was a marriage between a man and a transgender. It is good news in the transgender community that now the rights of marriage can be registered, similarly the rights of the gay and lesbian to get married under the special Marriage Act should also be provided. Section 375 and section 376 of the Indian Penal Code does not apply to the people belonging to the community of LGBT. This picture came into the light when the Pune district court granted bail to 4 persons who left the transgender in 2017 on the ground that section 375 and section 376 of the Indian Penal Code talks about only male and female and thus a transgender woman cannot seek relief under this act or under any act.<sup>6</sup> Similarly when we talk about the couples who are gay and lesbian are not protected against rape under IPC as the sexual orientation is not even recognised in any law.

#### LAWS AND SEXUAL ORIENTATION

When we talk about one Nation one law you should also consider general neutral law sexual orientation of a person is also not affected. When article 14 of the Constitution of India talks about equality before the law and equal protection of law then why is the LGBT community not considered in the purview of the constitution don't, they have the right to life and liberty guaranteed by the constitution? The supreme court in the NAZ Foundation case ruled out that the private act between LGBT community was not violative of the Articles 14, 19, 21 of the Constitution of India, forget about them getting the Civil rights at that time. The supreme courts view has changed in the case of Navjet Johar versus Union of India. Now it is the duty of the Parliament to Grant the community e the Civil rights which every citizen deserves the right to love, the right to get married, the right to have children, the right against domestic abuse, the right to get maintenance conjugal rights and so on.

First of all, we have to consider the community free, as a human being our mind set should change and we should accept this people of LGBT community and have uniform civil laws for everyone. April 2019 until then the transgender community was not even given the right to marry. We had to wait till a High Court or Supreme Court judge comes out openly to protect the right of the transgender. The transgender was present since there was a presence of mankind and up till 21<sup>st</sup> century they were not given the right to marry what kind of justice is this. Whoever in the parliament is forming the government only sees how the law benefits them rather than how law benefits a common citizen. Why are the transgender not seen with the upper class of the society we all know and are all aware that in what part of a society transgender works in India? We hardly see them around us in an esteemed institution, in schools, in colleges, in offices around us. We only see them in trains that too a general biggie bagging for penny. The Bill which lapsed in the parliament continued to be silent on the issue of reservations. Further, though judgments post NALSA have directed governments to grant reservations to

<sup>4</sup> Graham Mayeda, 'Reimagining Feminist Legal Theory: Transgender Identity, Feminism and the Law', Canadian Journal of Women and Law, Vol. 17 (2005).

<sup>5</sup> [https://www.vice.com/en\\_in/article/wjv5xn/a-trans-woman-can-now-be-recognised-as-a-bride-under-the-hindu-marriage-act](https://www.vice.com/en_in/article/wjv5xn/a-trans-woman-can-now-be-recognised-as-a-bride-under-the-hindu-marriage-act)

<sup>6</sup> Anupriya Chatterjee, 'Loopholes in third gender law aid four rapists to get bail', The Pune Mirror, available at <https://punemirror.indiatimes.com/pune/civic/loopholes-in-third-gender-law-aid-4-rapists-to-get-bail/articleshow/59960595.cms> (Last accessed on January 12, 2019); The Logical India, 'Pune: Loopholes In Section 377 Enable Bail For Four Men Accused Of Raping Transgender Woman', available at <https://thelogicalindian.com/news/transgender-rape-accused-gets-bailed-loopholes-of-law/> (Last accessed on January 12, 2019).

transgender persons.<sup>7</sup>We should have policies not only to up lift to socio and economic backward class of the society but also considered transgender in such class and help them uplift from whatever the situations they are present.

No matter how much operational gender neutral or we have it will be very difficult to put them in practice unless we are committed to uplift and work for the LGBT community. Given the diversity of gender identities and expressions that fall within the ambit of “transgender”, countries around the world that recognise the rights of transgender persons, instead of treating “transgender” as a protected category, recognise the right to “gender identity” and “gender expression”<sup>8</sup>

### INTERNATIONAL RECOGNITION OF LGBT COMMUNITY

Initially the European courts of human rights played an important role in providing justice when there only Nations one not providing them the human rights. Though the European Union is excellent in many fields were slow in recognizing the rights of gay individuals or same-sex couples to adopt children. The French court in 2008 denied the right of a lesbian women permission to adopt a child, when the case was referred to the European court of Human Rights (ECHR) the court held that in the case of E.B. V France, France has violated the convention for protection of Human Rights and Fundamental Freedom. <sup>9</sup>The European court of Human Rights court was established by the Convention on Human Rights to enforce its guaranties. In the current years due to travelling and diversification the problems have been crossbreds and everyone having different laws for LGBT communities it becomes very difficult for the country to deal with the matters and the jurisdiction of such issues. Only some countries have recognized same sex marriages. The European Court of Human Rights was established by the convention on Human Rights to enforce its guarantees. The court is competent to hear both inter-state cases and individual application, as long as domestic remedies have been exhausted.<sup>10</sup> The jurisprudence of the European court of Human Rights as it relates to LGBT people began in 1981 with the landmark ruling that laws criminalizing homosexual conduct violated article 8 of the Convention and the notion of respect for private life. The ECHR has given ample of judgments overruling the sovereign laws one such is when the UK Government did not allow gays and lesbian in their military service, The European court of Human Rights held that which was vocative of Article 8 of Universal Declaration of Human Rights (UDHR).

Once the legal relationship is developed in the country for the spouse’s national or the country which is foreign to him, we have to look Whether the same sex marriages are given the recognition as marriages or registered partnership. Some countries like Netherlands Canada or Spain provide no necessary reasons as to why same-sex marriage is which is concluded in other jurisdiction Should not be recognized. Even our country which has decriminalized the same sex offenders but is not providing any kind of recognition to such couples so on what grounds such established relationship will be recognize relationship will be recognized. Countries like Canada will only allow same-sex marriage to be concluded if one of the spouses Lex domiciles allows so.

### DOING JUSTICE TO LGBT COMMUNITY

When countries like Australia decided to make the laws on LGBT, they conducted voting across the nation. More than 60 percent of the Australians voted, that there should be law relating to LGBT for their civil rights. Still the registration of the same sex couple still not done in Australia but they have provided them with the right of the domestic partnership so that all of the rights I took care of. Search institution or search method could be developed in India too. So, the Civil rights of LGBT community who are the Indian citizens could be taken care of.

Once a domestic partnership is provided recognition then the right of maintenance, the right of adoption of children, the right to get out of partnership, the right against domestic abuse should be provided to every citizen would also be given to the persons belonging to LGBT community. While at a fundamental level, both the intersex and transgender rights movements share a common goal in eliminating harmful practices based on sex and gender stereotypes the issues pertaining to both the community are different.<sup>11</sup> Right now we are

<sup>7</sup> S. Tharika Banu vs. The Secretary to Government, Health and Family Welfare Department and Ors. (W.P.No.26628 of 2017 and W.M.P.Nos.28349 and 28350 of 2017), Swati Bidhan Baruah vs. The State of Assam and Ors. (PIL 15/2017)

<sup>8</sup> Paisley Currah, ‘Gender Pluralism under the Transgender Umbrella’, Transgender Rights (University of Minnesota Press, 2006); See Malta’s Gender Expression, Gender Identity, and Sex Characteristic Act, 2015; Argentina’s Gender Identity Law, 2012; Australia’s Sex Discrimination Act, 1984 as amended by Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.

<sup>9</sup> E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. § 96 (2008), available at <http://www.echr.coe.int/echr/>

<sup>10</sup>Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) § 63 (1981).

<sup>11</sup> Julie A Greenberg, ‘Intersexuality and the Law’, New York University Press, 2012, pg. 4



considering transgenders marriages to be registered. Right against exploitation and the rights against rape such kind of protection is out of the purview of the LGBT community. One of the suggestions is that the marriages between gays and lesbians could also be registered under the special Marriage Act, which would automatically provide them with the right of maintenance another rights which the union requires.

### CONCLUSION

It took many years for the supreme court to give the freedom to the LGBT community to freely demonstrate their love for each other, it's time for the government to make some efforts to provide them with the rights which are necessary to the LGBT community. The framers of the constitution made a point that the rights of every citizens should not be infringed and everyone is given equal protection with their right to life and liberty it is the duty of the Parliament that every citizen does not feel they are out of the society and are neglected, it is of utmost necessity that the laws be amended and civil rights be provided to every citizen of the nation.