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A Critical Analysis on LGBT Community Rights in India

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ABSTRACT

The Constitution of India guarantees the most basic inherent rights which are protected under Part III. All the citizens of the country, India enjoy the fundamental rights like Right to Equality, Right to Life, etc. But the persons who belong to the LGBT Community are still topic of a dispute. They are also living as a citizen in this country and should be treated similarly as other citizens. The country, India has been lost its citizenship between the individuals of this country. It is the scenario when there is lack of work, education and discrimination of their caste, creed, etc, amongst LGBT individuals in the society. The manner in which it has developed and been treated. It is implanted into the mind of people who still think it to be a mental disorder or a criminal by the olden civilization, which is a form of mind control. Bringing the idea of how India was working on it, as well as how the public are dealing only with openness of it, to the forefront. People all throughout the world are subjected to violence and inequity because of their appearance or the person they love. This creates social and economic hurdles, undesired stigmas be gone, and so this place be transformed into a safe sanctuary for people of all backgrounds, with rights being treated equally distributed between everyone present. The constant strain and scrutiny placed on the actions and the concept of LGBT causes some minor problems. Hence, Human beings are just that: human beings should be treated in the same way and in the same way.

The research will be doctrinal research. The present research divided into the following chapterizations. They are: Firstly the overview of LGBT community. Secondly, the constitutional rights guaranteed to the community. Thirdly, issues and challenges faced by the LGBT Community and lastly conclusion and recommendations. This study is an attempt to evaluate the role of LGBTQ individuals as well as their rights which are violating in the present society. And by this, researcher would like to get a new conclusion.

Keywords: LGBT, Fundamental Rights, Citizenship, Constitution, Discrimination.

I. INTRODUCTION

Despite the fact that most marriage regulations contain gender-neutral wording, the concept of marriage in society is widely seen as applying only to relationships between men and women

¹ Author is a student in India.

in most circles. Many examples of approval of homosexual marriages, on the other hand, have only recently come to light as society has begun to become more permissive of such unions.

This shift is mirrored in the growing number of jurisdictions that have decriminalized certain types of criminal behavior. The legal prohibition on homosexual marriages, on the other hand, has been upheld in many jurisdictions, despite widespread opposition from individuals and groups who consider that the sodomy legislation is outdated and should be repealed.

Thus, in most countries, same-sex relationships, based on how long they have been going on, are not legally recognized, and as a consequence, homosexual partners are deprived many of the economic and legal benefits that come with being married. These include job benefits, the opportunity to file combined tax returns, and, perhaps most critically since the onset of AIDS, health benefits as well as rights arising upon the death of a spouse, such as interstate inheritance and other rights, among other things. Many of these privileges are accessible for heterosexual de facto partners in general society, but they continue to be inaccessible to homosexual de facto couples in particular.

II. DEFINITIONS

The term “homosexuals” literally translates as "of the same sex," and “is a combination of the Greek prefix homo”, which means "same," and the Latin root, which means "sex." “As a sexual orientation, homosexuality is defined as the attraction between persons who are of the same sex and who are not attracted to each other sexually”. People who are homosexual, especially males, are referred to as 'gays,' while gay females are referred to as 'lesbians.' That is, homosexual marriages, also known as gay marriages, are marriages between two people who are of the same sexual orientation.

III. HISTORY OF LGBT COMMUNITY IN INDIA

A record from Ancient Greece, where same-sex relationships were considered the norm in society, is the earliest known “western document addressing homosexual relationships. Indeed, homosexual marriages have occurred with some regularity in the past, both inside Christian and non-Christian civilizations alike. In accordance with research, the Catholic Church, which has been highly vocal in its hostility to homosexuality in general, appears to have approved of same-sexual marriages for more than 1500 years, with only a cessation of such ceremonies occurring during the nineteenth century”.

Gender-neutral marriages, equal marriages, and gay marriages are all terms used to describe homosexual marriages. “The presence of same-sex love in various forms is also evidenced by

the literature drawn from Hindu, Buddhist, Muslim, and modern fiction, among other sources. Homosexuality is mentioned in ancient works such as the Manu Smriti, the Arthashastra, the Kamasutra, the Upanishads, and the Puranas”. There have also been reports that “sannyasins, who are unable to marry, engage in same-sex interactions on a regular basis”. As a result, there are examples of homosexuality in historical and mythological texts all throughout the world, and India is no exception to this. Even today, “in the small Gujarati town of Angaar, where a ritualistic transgender marriage is performed among the Kutchi people during the time of the Holi festival, the cultural remnants of homosexuality can be observed”.

On the other hand, in the last ten years, we have seen a shift in the legal initiatives for lesbian and gay rights, from the right to be privately sexual, that is, the “right to have any same-sex relationships at all, to the privilege to be individual civic subjects, protected from discrimination at work and in the provision of services, and finally toward the right to have relationships that are recognized by the law”. “Prior to the nineteenth century, these issues were confined to the society, but the rights of LGBT minorities began to raise concerns about the violation of their human rights in the nineteenth century. These severe challenges are brought to the attention of the public by a number of civil society organizations in India. Lesbian, gay, and bisexual issues were first expressed in a public forum in India in the late 1980s”. It was not until the final decade of the twentieth century that the gay, lesbian, bisexual, and transgender movements brought the rights of persons who were discriminated against because of their sexual orientation to the forefront of public discussion.

(A) Statement of Problem

The main issue of the LGBT Community is that in India they are facing lot of discrimination from the people in the society. And due to these discrimination they are unable to access their fundamental rights and inaccessible to the services which other citizens can avail. Hence, this paper will analyze the the legal status of the people belonging to the LGBT Community.

(B) Research Questions

1. Whether the LGBT has a socio-legal status in the society?
2. Whether the LGBT Fundamental Rights provided by the Indian Constitution are violated by the people in the society?
3. Whether the Judiciary has approached to Homosexuality in availing all their rights the society?

(C) Research Objectives

1. To explore and understand the LGBT Community.

2. To analyze Legal provisions related to LGBT Community.
3. To analyze their issues and challenges they face in the society.

(D) Research Methodology

The research is based upon doctrinal research. The author has collected the secondary sources from books, articles, judgments, news reports, etc. The researcher has reviewed both the primary as well as secondary sources to have a conclusion of the paper.

(E) Hypothesis

The researcher finds that the LGBT Community facing lot of discrimination in the country and due to that there are violations of their fundamental rights. The Judiciary plays into an important role to move the society into social society so that these discrimination against LGBT can be reduced they can live their life with dignity in the society.

IV. OVERVIEW ON LGBT COMMUNITY

In questions of sexuality, the terminology in people are using and associate with can vary greatly from different cultures. “The terms ‘lesbian’, ‘gay’, ‘bisexual’ and ‘transgender’ (LGBT) are utilized because these are the English terminology most widely used in the international human rights discourse”. However, it's in no way intended to dismiss the diversity of other names and identities, nor to deny the cultural meanings associated to these terms.²

In the sake of readability and then in order to uphold the wealth of terminology, a variety of forms are utilized in this report, largely interchangeably. “So, for example, the word lesbian and gay human rights should be understood as for the human rights of lesbian, gay, bisexual and transgender individuals”.

When a person’s emotional and sexual attraction to members of the same gender is called gay orientation if desire toward opposite sex termed heterosexual orientation and if the desire both towards gender is termed bisexual orientation people.

Gender identity describes a person experience of self-expression through relation to the social constructions of masculinity or femininity. A person may have had a male or female gender identity, with that the physiological traits of the opposite sex.

V. THE CONSTITUTIONAL RIGHTS IN INDIA

The Constitution of India guaranteed every person with the Fundamental Rights provided under Part III. The Constitution never mentions that the basic rights are only available to the men or

² Rachel Sweeney, “*Homosexuals and the Right to Privacy*” 34 CUMB L REV 171 (2018)

women. It has always mentions that every person of this Country is available with the Fundamental Rights. The every person doesn't excludes the LGBT they are also comes under every person. The situation is these people are facing lots of problems regarding employment, education, and respect in a society. After the judgment passed in 2014 by the Supreme Court, the situation is somewhere starting improving but then also there is minds of the people which has been not changed yet. The constitution has provided the basic rights to each and every citizen of this Country but shall not be judged on the basis of gender. However, no one can take such rights from the LGBT as they are also the citizen and the part of this Country. Their rights are guaranteed under Article 14, 15, 16, 19 & 21.

Article 14 – Equality before law

The foremost basic right is “*Right to Equality* under Article 14³ of Indian Constitution” which says that, the first expression “equality before the law”, says that every person will be treated equally before the court of law. “This means that no person, whatever his rank or position is, not be entitled to enjoy any special privilege before the law”. Whereas, the second expression “equal protection of the laws”, which means that there will be equal protection shall be secured to all persons within the territorial jurisdiction and the individuals enjoys their rights and privileges without any discrimination.⁴

The life of LGBT people is a daily battle as there is no acceptance anywhere and are shunned, ignored or excluded from the society. This community is in constant battle as they have to fight in each and every step of their life and discrimination from every part of the society whether it's their own family and friends or society at large.

Article 15 – “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”⁵

“The Article 15 prohibits the State from discriminating against citizens on the grounds only on religion, race, caste, sex or place of birth”. Both the clauses focus on the word ‘only’ which implies the differentiation on one or two grounds only then the law is invalid. These rights are guaranteed by the Constitution of India to every citizens. But the LGBT community has been discriminated in the society to enjoy such rights. They have been discriminated on the ground of their gender identity. In the Article 15 it has mention the word ‘sex’ which doesn't just limit to only males or females but also includes third gender.

³ The Constitution of India, 1950, art. 14.

⁴ V.N. Shukla's Constitution of India, 219 (EBC Publication, New Delhi, 16th edn, 2020).

⁵ The Constitution of India, 1950, art. 15

In “*National Legal Services Authority v. Union of India*”,⁶ the court said that “TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. The court also believed that TGs are extremely poor and shunned from the society and hence are legally entitled and eligible to get the benefits of SEBCs”.

Article 21 – Protection of life and personal liberty

Right to life is one of the basic fundamental rights and not even State has the authority to violate or take away that right. Article 21 clearly states that no person should be deprived of his life or personal liberty.⁷ Here, the word ‘person’ has been mentioned. It includes not only human beings but also the animals. However, they are gender neutral, i.e neither a male nor a female but they come under as a human. Their life and personal liberty should not be deprived just because of their gender identity. Our Constitution doesn’t provide this right, subject to the gender identification.

In “*Navtej Singh Johar v. Union of India*”,⁸ that court observed that in a “democratic Constitution founded on the rule of law, their rights are sacred as those conferred on others citizens to protect their freedoms and liberties. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individuals. Equality demands that the sexual orientation of each individual in society must be protected on as even platform”.

VI. CHALLENGES FACED BY THE LGBT COMMUNITY IN THE SOCIETY

The scope of “Section 377 of the Indian Penal Code is unclear. The extent of unnatural offences is defined under Section 377 of the Indian Penal Code. The lack of a clear demarcation between voluntary and coerced sex, against the natural order, and so forth Discrimination on the basis of sexual orientation Discrimination on the basis of sexual orientation is prohibited under the Indian Constitution as a basic right”.⁹ Discrimination in the workplace is prohibited. Individuals who identify as gay or transgender experience socioeconomic inequities, which are exacerbated in part by discrimination in the job.

Discrimination has a direct impact on their career, stability, and well-being, ultimately leading to poverty and unemployment. Human rights as well as fundamental rights are universal, but

⁶ AIR (2014) 5 SCC 438

⁷ The Constitution of India, 1950, art. 21.

⁸ AIR (2018) SC 468 (India)

⁹ M.P. Jain, Indian Constitutional Law 1271 (Lexis Nexis, Haryana, 13th edn. 2020).

the state has failed to enact special legislation to protect the rights of the LGBT minority population and to offer true justice to those who are members of this community.¹⁰ They are also human beings, and the state should give them with the same level of care as everyone else. When it comes to abusive and discriminatory behavior, LGBT folks are frequently not legally protected.

VII. LEGAL STATUS OF LGBT COMMUNITY IN INDIA

Unnatural offences are defined in “Section 377 of the Indian Penal Code (1860), which encompasses sexual orientation discrimination as one among them”. This law dealing to homosexuality in India was derived from the British penal code, which dates back to the nineteenth century.¹¹

In a similar way, the “Section 292 of the IPC refers to obscenity, and there is to put homosexuality in this category as well. Section 294 is also applicable”. According to the Indian Penal Code, any form of "obscene behavior in public" is punishable by death.¹²

It is vital to highlight that in England, homosexuality between consenting partners has been declared a criminal offence. In the United Kingdom, the Sexual Offenders Act 1967 was repealed, whilst in India, the Indian Penal Code was repealed.

For the purposes of committing an offence as described in this section, permission is essentially meaningless. As a result, in India, it is largely the Section 377 provides an explanation and definition of unnatural offences. It is this area that gives rise to the concept of homosexuality. The penalty for violating the law is life imprisonment or ten years imprisonment with a fine.

VIII. CONCLUSION

The LGBT minorities, who are defined by having a different sexual orientation than the majority of the population, are subjected to prejudice. However, on the surface, they appear to be human beings, and as such, they are subject to all human rights. In India, there are both civil and fundamental rights. The current Indian societal matrix strife in the country. The concept of marriage that is the demand for the legalization of homosexual marriage is strangely neglected and underappreciated. They would not only enable gay relationships, but they will also decriminalize the lives of those who engage in such conduct.

LGBT people have long been involved in attempts to achieve racial and socioeconomic

¹⁰ *Supra* note 2 at 8

¹¹ The Indian Penal Code, 1860 , (Act 45 of 1860), sec 377.

¹² The Indian Penal Code, 1860 , (Act 45 of 1860), sec 292.

equality and justice. Today, LGBT organizations and groups are increasingly focusing emphasis on the intersection of the struggles for marriage equality and civil rights. The rights of LGBT people, as well as the fight for economic, social, political, and racial justice. It is necessary to preserve their rights as human beings in the society in which they live.

IX. RECOMMENDATIONS

1. Safeguarding the fundamental rights without any discrimination to race, religion, or national origin towards the LGBT Community.
2. An implementation of the legislation should be enacted with stringent provisions.
3. Also, creating the chances for participation in social and economic activities..
4. The government also should take steps so that they assist employers in improving the workplace environment and resulted that the LGBT people can also avail the job opportunities.
5. The health care facilities, including medical services, should be avail to them with free of cost by the State Governments
