



Addressing the Issue of Respect: Study of LGBTQ Community in India.

Himangshu Gogoi

Date of Submission: 01-03-2023

Date of Acceptance: 12-03-2023

The Constitution of India which is the fundamental law of the country treats everyone with equality and ensures that all the individuals irrespective of their race, caste, sex, religion etc. are treated with equality and with utmost dignity and respect. The Constitution of India provides equal scope to each and every individuals under the rule of law. The article 15 of the Indian Constitution prohibits discrimination of any kind. According to this article no citizens shall on grounds of race, religion, caste, sex, place of birth etc. should be discriminated and has the right to access to public places. The Right to Equality is one of the most significant and pivotal fundamental right enshrined in the Constitution of India which states that all individuals should be treated with equality irrespective of sex, religion, caste, where the person from, how a person choose to live his/her life confirming to the rule of law. But when it comes to the right of LGBTQ community, the applicability of this article is complex to substantiate because these sexual minorities community have always seen undignified behaviour from the society and from the people and face discrimination. Although, the Constitution of India provided for the principle of equality, it will only hold its essence when the people belonging to LGBTQ community will be treated with equality in the society and get full acceptance from the society, end discrimination against them and most significantly getting respect and dignity to led a meaningful life.

The LGBTQ community which is a defined group includes Lesbian, Gay, Bisexual, Transgender and other Queer individuals are organized by a common culture and social movements. They all come under the same umbrella and generally they celebrate pride, diversity, sexuality and individuality. The LGBTQ as a term highlights and apprehends the stories of sturdiness and grapples of various individuals, culture and communities that have been viewed as non normative. The LGBTQ community depicts the story of movement for equality, justice of moments

of ascendancy and tragedy that people of the community have witnessed in day to day life and are demanding for the right to live with respect, dignity, love and thrive.

The United Nations stands on Human Rights are very vital. According to United Nations: Human Rights are those rights or entitlements which are given to each and every individuals irrespective of caste, gender, race, nationality, religion etc. Discussions of LGBTQ rights at the United Nation have included resolutions and joint statements in the United Nation General Assembly and United Nation Human Rights Council. However, since the United Nation has founded in 1945, the United Nation political bodies had not talked about LGBTQ rights in terms of equality irrespective of sexual orientation or gender identity. In December 2006, there has started a discussion in the United Nation to include gender identity when Norway presented a joint statement on Human Rights violations based on sexual preferences and gender identity at the Human Rights Commission. In July 2014, the United Nation declared it would enlarge equal benefits to employees in same sex unions entered into in jurisdiction where they are legitimate. The United Nation Human Rights Commission also passed a resolution to appoint an Independent Expert in order to look into the various reasons of atrocities and discrimination against people on the basis of their gender identity and sexual orientation and discussed with government about how to deal with it and come up with solutions to protect these sexual minorities.

Human Rights are always given priority and are most crucial part of human life. The Amnesty International which was formed in July 1961, is a non-governmental organization works for the upliftment of human rights and is a worldwide movement of people who urge for protection of human rights. The main emphasis of this organization is to ensure that each and every person should enjoys all the human rights enshrined in the United Nation Human Rights Commission and it



also laid pivotal importance of protecting and promoting human dignity.

In the contemporary Indian scenario, the LGBTQ rights in India have been changing in recent years. In 2018, the Supreme Court of India finally struck down Article 377 which was forbidding same sex relations. The country has rescinded its British era laws which directly created unfairness against homosexual and transgender identities and also specifically article 15 of the Constitution on the basis of sexual orientation and gender identity. The idea of human rights based on the central idea that all humans are equal. It implies that all human beings have dignity and all humans should be treated as equal with utmost respect. Anything which wears away that dignity is a violation as it violates and underestimates the principle of equality and paves the path for discrimination. Such discrimination also violates the significance of the preamble of the Indian Constitution which mandates and guaranteed justice and equality of status for everyone in all spheres whether it is social, economic or political.

Homosexuality means sexual desire or behaviour between people of one's own sex i.e., when a person is attracted towards the same gender to which he belongs, then he is said to be Homosexual. This is something not new. It has been present and familiar in India from a very long time. Ancient texts like Rig Veda which dates back to around 1500 BC and sculptures project sexual acts between women as utterance of a feminine world where sexuality was based on pleasure and prolificacy. The elucidation of homosexual acts in the Kamasutra, the harems of young boys kept by Muslim Nawabs & Hindu Aristocrats, male homosexuality acts in the Medieval Muslim history like Malik Kafur are some historical instances of same sex relationships. There has been clear evidence that "third gender" were not only existed in Indian society back then, but were also broadly accepted. In the Kama Sutra, a 2nd century ancient Indian Hindu text, the chapter "Purushayita" in the book depicts and talks that lesbians were called "Swarinis". These women generally marry another woman and tend to raise their children together. They were also wholeheartedly accepted both within the 'third gender' community and in the mainstream society. However, these experiences started losing their importance with the onset of Vedic Brahmanism and, later on, of British Colonialism.

In the Manusmriti there are evidences and projection of punishments like loss of caste, heavy monetary fines and strokes of the whip for gay and

lesbian behaviour. Imposing of these punishments clearly suggests that Homosexuality was prevalent at that time (Sharma, 2021).

All the people of India have taken immense pride in India's rich cultural history. The traditions have been amended without erasing their essence and people have welcomed these changes with changing times. The queer community has played a significant role in shaping India's culture and the people of India should together celebrate this beautiful heritage not because they were a part of it but because they deserve as much laugh and respect as many other communities.

The queer community forms 8% of our population and we have slowly started opening ourselves to this new broader perspective and outlook of practice tolerance and treat other individuals which respect irrespective of the differences but if you look at your history this idea is not as new as we think. Love has been celebrated and eulogised in India in every form.

Ancient India was about acceptance and celebration of love in all forms this can be evident in Indian religious books which contain homosexual characters and themes in their texts which were neutral and resemble to the idea of homosexuality.

During the medieval times there was some disapproval for homosexuality but LGBTQ people were not excluded or ostracised. The society was tolerant towards them and nobody was hounded for having a different sexual preference.

Mubarak son of Alauddin Khalji who ruled the Delhi Sultanate between 1296 and 1316 was known to be in a relationship with one of the noblemen in his court. Babur who founded the Mughal dynasty, wrote about his love for a boy named Baburi and his writing face no disapprobation during his time or after it. There were many such incidents in which noble class Mughals engaged in homosexuality (Yadav, 2023).

In 1861 after the arrival of Britishers sexual activities were seemed to be against the "order of nature" and all the homosexual activities were criminalised under the provision of section 377 of the Indian penal code. This was majorly influenced by the Catholic Church's believe that a sexual act not related to procreation was sinful.

In 1977 Shakuntala Devi published the first detailed and comprehensive study of homosexuality in India called the "World of Homosexuals". This study called and appealed for full and complete acceptance for LGBTQ community and not tolerance and sympathy.



Soon after in 1981 the first All India Hijra conference was held in Agra and 50,000 members from the community all over the country participated in it.

In 1994 Hijras were legally granted voting rights as a 3rd sex. The first petition challenging section 377 of Indian Penal Code was filed by the AIDS Bhedbhav Virodhi Andolan in 1994, however it was eventually dispersed.

In 2001, a Public Interest Litigation was filed by Naz foundation to challenge section 377 in the Delhi High Court. In 2009, Delhi High Court found that section 377 is in direct violation of the fundamental rights of life liberty privacy and equality provided by the constitution of India which is the fundamental law of the land. This meant that gay sex was not a crime anymore but it was still not considered to be legal. However, the critics, including Suresh Kumar Koushal, a Delhi based astrologer challenged the Delhi High Court decision in the Supreme Court and urged for legalisation of homosexuality acts in India. This still considered to be the huge landmark in the LGBTQ struggle for freedom.

On 24th August 2017, the Supreme Court gave the LGBTQ community the freedom to safely and freely express their sexual orientation and their sexual preference. An individual sexual orientation was protected by the right to privacy law. By this time the LGBTQ people had the right to express their sexual orientation but the sexual acts between member of the same sex still considered as a criminal offence. Finally on 6th September 2018 the Supreme Court struck down the part of section 377 which criminalise consensual homosexual activities.

On November to 26th 2019, the Parliament passed Transgender Persons (Protection of Rights) bill. This bill defined a transgender as someone whose gender doesn't match with the one person is born with. It prohibited discrimination against them in employment, education, healthcare and other services. However it was rejected by the queer communities in India as it made mandatory for each person to be recognised as transgender on the basis of a certificate of identity it should be by the distinct magistrate after a proof of sex reassignment surgery is provided. There was little emphasis on intersects gender queer and transman and it majorly focus on Hijras or transwomen. On July 2020, the Ministry of Social Justice and Empowerment passed the revised Transgender Persons (Protection of Rights) Rules 2020. Under this the government has taken the initiative of providing access to the costly sex reassignment surgeries free of cost at state run

hospitals and government will also bear the cost of schooling and accommodation for the transgender community.

The LGBTQ+ community is loosely a group of Lesbian, Gay, Bisexual, Transgender, Queer+ people. These communities generally celebrate pride, diversity, individuality, and sexuality. The LGBTQ+ people have different sexual preferences and sometimes different sexual orientation. The people of this community had been subjected to cruelty since ages because of their individuality. Due to existing cruelty and discrimination, these people are being deprived of various rights like marital rights, equal status at various platforms like employment, education etc. In India, recently, the campaigning related to the awareness regarding individuality and acceptance of the people of this community started increasing. The pride parade held everywhere around the globe is a method of normalising the existence of LGBTQ+ community. The various countries have passed legalised same-sex marriage and have passed various laws in order to uplift and normalise the existence of this community.

In India, the government has passed various laws for the upliftment and normalization of LGBTQ+ community which are as follows:-

1. DECRIMINALISATION OF SECTION 377 :

In the year 2018, the Supreme Court of India has partly decriminalised the Section 377 of the Indian Penal Code, 1860, in the case of Navtej Singh Johar v. Union of India AIR 2018 SC 4321 by the Constitutional Bench headed by then CJI Justice Dipak Mishra. The erstwhile Section 377 criminalised sexual intercourse between homosexual people. The judgment was a baby step towards the battle of equal recognition and normalisation of the people of LGBTQ community. In this case the Apex Court has explained the problems faced by the people of LGBTQ community and also upheld their constitutional rights. In the Puttuswamy case the Apex Court held that right to privacy is a part of Article 21. In Navtej Singh Johar's case the Supreme Court of India held that existence of Section 377 violates Right to Privacy and hence it is unconstitutional; the judgment was made in consonance with the Puttuswamy's case.

On the lines of decriminalisation of Section 377, petitions are filed in the courts for recognition of same-sex marriages.



2. TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT , 2019 :

The transgenders has been recognised in Indian mythology however, in the British era they have been subjected to cruelty and discrimination, which resulted in the backwardness of these people. In order to reinstate the status of transgender community various judgments and legislation has been passed.

In the case of National Legal Services Authority v. Union of India AIR 2014 SC 1863, the Apex Court has recognised Transgender as the third gender. It was the most celebrated judgment and on these lines in the year 2014 first ever Bill for the rights of transgender community had been introduced, however, it was lapsed in the year 2016. The present law was introduced in the year 2019 but was highly criticised as it was passed haphazardly. The purpose of this legislation is to provide equal access to education, jobs and other opportunities to the transgender people and uphold the principle of inclusivity.

The Act prohibits any kind of discrimination against the transgender community, further it punishes any kind of abuse towards transgender under Section 354, Section 354A, Section 354B, Section 376, Section 498A, Section 499 of Indian Penal Code, 1860. This piece of legislation also provides for medical facilities, shelter homes and rehabilitation of the people of community. It further protects the people of transgender community from their hostile families and provides provisions for their welfare (Khopar, 2021).

3.RESERVATION TO TRANSGENDER PEOPLE :

In the year 2014, in the case of National Legal Services Authority v. Union of India AIR 2014 SC 1863, the Apex Court declared transgender as the third gender. By virtue of this declaration the transgender has been made eligible to the reservation policy of India. The transgender community has been granted educational and economic reservation according to the Constitution of India.

4.RIGHTS UNDER CONSTITUTION OF INDIA :

The Constitution of India has been framed after the Independence War; the framing was itself an independence from all the shackles. The Article 14, 15, 21 has been included in the Constitution which guarantees every person right to equality and right to life which are the basic human rights. The

Article 14 prohibits any kind of discrimination on grounds of religion, race, caste, sex or place of birth and Article 21 guarantees right to life and personal liberty to every person. However, the rights conferred under Indian Constitution were not sufficient; therefore, the special laws were required to increase the effectiveness of these provision.

The LGBTQ community since ages has been made subject to the discrimination. The aforementioned legislation may not be sufficient for the resolution of the issue, but these are way forward towards normalising atleast the discussion or the situation . In India, the youth is well acquainted about the difficulties and problems related to the LGBTQ community. For the resolution of these problems, various seminars, pride parade, painting of pride wall, discussion about it on open platforms has been conducted actively. The people are trying to normalise atleast the conversation about it and the foundation stone of all this is the 377 judgment. The judgment of the Apex Court of decriminalising Section 377 has been highly celebrated throughout the country. The biggest merit of this judgment is that people started talking about these issues.

Even after the Historical evidences of some period of time which supports LGBTQ community and constitutional protection and Supreme Court of India's mandate the LGBTQ people faces a lot of problems and discrimination. India is a land of democracy, to further extend the term it is the largest democratic country. It does talk about the people, for the people and of the people but to give a wishful thought the question still arises : are the people from LGBTQ are treated as people? There are still preconceived notions and stigmas among the people and in the society which creates a hurdle in the acceptance of the LGBTQ community. They are also discriminated in the labour market, in schools and in hospitals. They face discriminatory attitude from the society and are not accepted with respect, dignity and inclusivity. In the modern contemporary India, emphasising modernisation , westernisation and significance of human life , it is also necessary to raise awareness about the LGBTQ community and look into the deeper underpinnings of respect and dignity of these sexual minorities group and come up with conclusions to what will be sufficient and what can be further done for the betterment and upliftment of LGBTQ community.