

Research Article

Rights in Rainbow Colors: LGBT Human Rights in India

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Abstract : This article deals into the complex and multifaceted issues surrounding gender identity and sexual orientation, weather forecast on the human rights of LG BT individuals in India. The introduction sets the stage for the discussion followed by a clarification of key concepts related to LGBT rights. The article then re examines the transformation and recognition of LGBT human rights tracing there evolution overtime. An analysis of international legal frameworks and their protection of LGBT rights is presented, providing a global context. The article then shifts its focus to India's legal framework, examining the country's effort to protect the human rights of LGBT individuals. The conclusion summarises the findings, emphasising the need for continued progress in recognising and safeguarding the rights of LGBT individuals in India.

Keywords: Gender Identity, Human Rights, India's Legal Framework, LGBT Rights, Sexual Orientation.

Introduction

"Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights."

Loise Arbour, Former UN High Commissioner for Human Rights¹

As rightly addressed by Loise Arbour, in this liberal economic and world culture, the stressing element of addressing and legitimizing the concerns of persons with different sexual orientation or gender identity and protection of their human rights in par with considering them equal to other citizens. This position is frequently a source of concern for several judicial and legal professions around the world, as they are tasked with the primary responsibility of protecting and ensuring the human rights of people of different sexual orientations and gender identities. As cultural standards and perceptions of propriety have revolved around religious morality ideologies. The framing of laws in relation to almost majority of spheres especially with reference to sex and gender circumscribed on the religious, moral ideologies.² Therefore

¹ Ms. Louise Arbour, The United Nation High Commissioner for Human Rights, made the statement while making a presentation at the International Conference on LGBT's Human Rights, Montreal, 26 July 2006.

² Michael Goodich, The Unmentionable Vice: Homosexuality in the Later Medieval Period, 111 (1979).

without any benefit of doubt, the framing of any legal framework concerning sexual orientation and gender identity are strongly rooted deep within societal perceptions that reflect these beliefs. And while considering the scientific discourses, during the nineteenth and twentieth centuries saw the rise of science as a forum to suppress homosexuality and in par with that biological, medical, criminological and sociological approaches several theories emerged to justify the containing of homosexuality.³ Further, in addition to moral and scientific contentions, the question of homosexuality has also been exploited for political oppressions also. Moreover, the sense of nationhood and culture relativism are being interchangeably used to oppose the movement towards decriminalizing homosexuality, stating in lieu with the aspect that it is forbidden to nation's identity, culture and values. Thus, there stand a long way addressing the question of movement towards recognition by enriching the mission towards equalizing the status and position of the homosexual in all respects.⁴

Clarifying the Various Concepts

It recalls for a conceptual clarification of some of the terms and phrases prior addressing the issues and concerns in relation to the same.

• Defining Sexual Orientation

The terms such as "gay", "lesbian", "transgendered", "transsexual" in describing one's sexual orientation.⁵ The "Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (Yogyakarta Principles)" define sexual orientation in a meaningful way. ⁶ "According to the preamble of the Yogyakarta Principles: *"refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimation and sexual relations with, individuals of a different gender or the same gender or more than one gender"*

Accordingly, the status of one's sexual orientation determines the category the person belongs to taking into concern the person's experience or sexual attraction.⁷ Further, the sexual orientation of a person is divided in a series of descriptions possessing medical interest in par with their sexuality, the classification is in terms of i) homosexual, describing same-gender attraction⁸, ii) heterosexual, describing opposite-gender attraction⁹ iii) bisexual, describing both

³ See Johansson, Warren and Percy, William A, *Homosexuals in Nazi Germany*, 118 (7th ed. Henry Friedlander, 1990); Lively Scott, *Homosexuality and the Nazi Party* 52 (George A. Rekers, 1996).

⁴ Pieter R. Adriaens and Andreas De Block, *The Evolution of a Social Construction*, 49 *Perspect. Biol. Med.* 570,585 (2006).

⁵ Pickett, Brent, *Homosexuality- The Stanford Encyclopedia of Philosophy* 791(2008).

⁶ "The Yogyakarta Principles are a collection of guidelines for how international human rights legislation should be applied to issues of sexual orientation and gender identity. The Principles establish binding international legal standards that all countries must adhere to. A renowned group of international human rights experts convened in Yogyakarta, Indonesia in 2006 to define a set of international principles relating to sexual orientation and gender identity in response to well-documented patterns of abuse. The Yogyakarta Principles are a universal guide to human rights that affirms binding international legal principles that all states must adhere to. They envision a world in which all persons born free and equal in dignity and rights are able to exercise their unique birthright."

⁷ Miller, Alice, *Sexual Rights Words and their Meanings: The gateway to effective human rights Work on Sexual and Gender Diversity*, paper submitted for the Yogyakarta Meeting, November 2006.

⁸ "Homosexual men and women, commonly known as gay men and lesbian women, are people who have a sexual preference for people of the same gender. By the second part of the nineteenth century, the term gay had become widely accepted. It was used as a therapeutic term to describe guys who expressed sexual attractions toward other men. In today's jargon, the term homosexuality refers to both male and female same-sex sexual

opposite and same sex attraction.¹⁰ Therefore, it can be enunciated that the identity creation process is indeed a complex process as it involves the scientific, religious and moral factors.

- ***Defining Gender Identity***

Gender expression must be acknowledged and identified in order to represent adequate human rights protection consistently. People who do not fall within the stereotyped masculine or feminine models have been subjected to human rights violations because of their concept of what properly characterises a gender as that of a male or female tight categorization norm. "Women's economic independence, personal deportment, form of dress, mannerisms, speech patterns, social behaviour and interactions, and the lack of an opposite sex partner are all factors that may challenge gender norms." According to the preamble of the Yogyakarta Principles, gender identity means:

"refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."

Considering the conventional method of defining a gender, it is being directly linked to different societal processes such as class, sexuality, age and ethnicity. But the formulation of a straitjacket formula constructs undeniably distresses the lives of LGBT and intersex persons. In reality, in the procedure of gender policy framing and analyses often the LGBT's and intersex people are often deliberately left out. This is regrettable because it represents a heteronormative mindset by making lesbian, gay, and bisexual people and their relationships invisible, misunderstood, and marginalized. It also restricts the scope of gender analysis and settles for a limited perspective on issues of gender and equality.

- ***Defining LGBT***

LGBT, now the connotation took a new form as it is LGBTQIA+, is an abbreviation for "lesbian¹¹, gay¹², bisexual¹³, transgender¹⁴, genderqueer¹⁵, Intersexed¹⁶, Agender¹⁷, Asexual¹⁸ and Ally¹⁹

behaviour. In the late 19th and early 20th centuries, the homosexual identity evolved into a variety of gay, lesbian, queer, and other identities."

⁹ "Heterosexual women and men, also termed as straight persons, have a sexual orientation towards persons of the opposite sex."

¹⁰ "Bisexual women and men have a sexual preference for people of the same sex as well as people of the opposite sex."

¹¹ "Lesbian is a word used to describe female-identified persons who are attracted to other female identified people romantically, erotically, or emotionally. Individual female -identified persons from many ethnic backgrounds, including African-Americans, accept the term "lesbian" as an identifying marker, despite this."

¹² "Gay is a word used in various cultural contexts to describe guys who are romantically, erotically, and/or emotionally attracted to other males. Because not all males who participate in "homosexual activity" identify as gay, the term "gay" should be used cautiously. A collective term for the LGBTQIA+ community or an individual identification name for someone who does not identify as straight."

¹³ "Bisexuality refers to a person's emotional, physical, and/or sexual attraction to both males and females. This attraction does not have to be distributed evenly amongst genders, and one gender may have a preference over the others."

¹⁴ "Those whose gender identities or gender roles differ from those traditionally associated with the sex they were assigned at birth are referred to as transgender."

¹⁵ "The word "genderqueer" refers to a person whose gender identification does not fit within a binary gender definition."

community” people. It combines the sexual orientation-based identities of lesbian, gay, and bisexual people with the non-sexual orientation-based identity of transgender people.

Relooking the Transformation and Recognition of LGBT’s Human Rights

The century old Christian tradition had placed on record death penalty for nonprocreative sex which was imbibed by the European World of the Enlightenment in its criminal laws. But the French Revolution paved a different direction by breaking the European custom by abolishing moral crimes including sodomy under a new Penal Code in 1791. But subsequently post the fall of Napoleon most countries repealed their codes except France, Belgium, Spain and Netherlands did not re-criminalize sodomy.

The mid-twentieth century witnessed the modern decriminalization movement. Post-World War II, the British Wolfenden Report of 1957 and the American Model Penal Code recommended that the crime of sodomy be abolished. The American State of Illinois became the first to adopt this recommendation in 1961. Considering the common law countries, in Europe countries like Czechoslovakia and Hungary were the initial set to abolish their sodomy laws. Also, on the other side, there also existed jurisdictions wherein never had an explicit legal prohibition of sodomy in certain groups of countries like Latin America, Japan, Mexico and Brazil also enacted a version of the Napoleonic Code. Further, United Kingdom has also repealed Victorian Law against homosexuality which was ignited by the law and morality debates which led to the drafting of Wolfenden Report, which triggered for legislative changes in the 1960s and human right interventions resulting from its engagement with the European Human Rights system.²⁰ The initial movement towards recognition of LGBT’s and allied persons witnessed during the year 1961 with the institution of the Mattachine Society of Washington in USA, whose prime motto was to work publicly “to equalize the status and position of the homosexual” ²¹. Subsequently, a trail of similar organisations emerged rapidly with the mission of repealing the anti-sodomy laws as a part of a broader human rights struggle, During the early 1969, some activists were describing their efforts as a “gay liberation”.

- ***Judicial and Legislative Interpretation with Regard to the Recognition of Rights: Relooking the International Scenario***

The European Court of Human Rights determined “buggery and gross indecency in Northern Ireland to be violations of the right to privacy” under Article 8 of the European Convention on Human Rights in 1981. In the landmark decision of *Dudgeon v The United Kingdom*²², “in which the decision arose from a challenge to the law by a gay man who resisted the existence of the

¹⁶ “Individuals born with a variety of sex traits, such as chromosomes, gonads, sex hormones, or genitals, are classified as intersex.”

¹⁷ “A transgender person perceives themselves as neither a man nor a woman, and has no gender identity or expression.”

¹⁸ “Asexuality is characterised by a lack of sexual attraction to others, as well as a lack of interest or desire for sexual engagement. It might be a matter of sexual orientation or a lack of it. It can also be classified more broadly to encompass a wide range of asexual sub-identities.”

¹⁹ “Ally is someone who confronts heterosexism, homophobia, biphobia, transphobia, heterosexual and gender straight privilege in themselves and others, cares about lesbian, gay, bisexual, trans, and intersex people’s well-being, and believes that heterosexism, homophobia, biphobia, and transphobia are social justice issues.”

²⁰ Katz J, *The Invention of Heterosexuality* 52 (1995). Also see, Douglas Sanders, 377 and the Unnatural Afterlife of British Colonialism in Asia, 4 *AsJCL* 1, 6 (2009).

²¹ Eskeridge, Michael Jose Torra, *Gay Rights after the Iron Curtain* 22.2 *Fletcher Forum World Aff.* 821, 855(1998).

²² European Court of Human Rights, *Judgement of 22 October 1981, Application No. 7525/76, para 41.*

offences declared in Northern Ireland which held him liable to criminal prosecution and infringed on his right to privacy". The court determined that the "keeping in force of the impugned legislation represents an ongoing interference with the applicant's right to respect for his private life, including his sexual life."²³

A similar stand was taken by the European Court in the case of *Norris v. Ireland*²⁴ and *Modinos v. Cyprus*²⁵, which defined a fine rubric against homosexuality based on religion and claimed that there was a legitimate aim in the "protection of morals" for maintaining the laws. The court has enunciated its judgement by citing the practice in other member states of the European Human Rights System that had long discriminated consensual sex between same sex adults. Significantly in the year 1999, the European Court expressly pressed down "sexual orientation" as a prohibited category of discrimination and as a consequence in the case of *Salguero da Silva Maouta v. Portugal*²⁶, the ECHR has struck down a Portuguese Court decision that deprived a father of his custody rights because he was gay.

Further, a group of six countries have enacted legislation allowing same sex marriage which includes the Netherlands, Belgium, Spain, Canada, Norway and South Africa.²⁷ Out of which South Africa and Canada adopted the same by their respective Supreme Court's order as in the decision of *Fourie Bonthuys v Minister of Home Affairs*²⁸, and *Reference Same Sex Marriage*²⁹. Moreover, a set of 18 countries and federal states recognized these rights under varied legal frameworks. Further, in most states of the United States of America, permits for gay and lesbian adoption by single persons or couples.³⁰ The Progress of the movements vindicating the gay and lesbian rights gradually pitched into other parts around the globe. The formation of Colombia's *Movimiento Por La Liberaicion Homosexual* concluded a successful campaign to decriminalize sodomy in 1981 followed by campaigns by local organizations in New Zealand, Israel and Australia. The movements were not only cornering on repealing of anti-sodomy laws, it included other human right concerns such as non-discrimination and recognition of rights. During the start of 1994, the several countries in the America enacted prohibitions on sexual orientation discrimination by a constitutional amendment in Ecuador³¹, by a legislation in Mexico³², by a Supreme Court ruling in Canada³³, by a series of Constitutional Court rulings in Colombia³⁴ and by an executive order in Venezuela³⁵. In June 2008 under this background, there occurred in place the adoption of the Organization of American States, by consensus of its first Resolution on

²³ Jose Torra, supra, 73, 76.

²⁴ European Court of Human Rights. Case No. 6/1987/129/180

²⁵ European Court of Human Rights. Application No. 15070/89, 25 March 1993

²⁶ Judgement of 21 December 1999, Application No. 33290/96

²⁷ With respect to Netherlands -Civil Code, Article 30, Book 1, reform of 2001; Belgium – Civil Code, Article 143, Book I, Title V, Chapter I, reform of 13 February 2003; Spain - Civil Code, Article 44, reformed by Law 13/2005, 30 June 2005, Canada – Civil Marriage Act of 20 July 2005, South Africa- Civil Union Act [No. 17 of 2006], 30 Nov 2006.

²⁸ European Court of Human Rights. Case CCT 25/03

²⁹ [2004] 3 SCR 698

³⁰ Gary J. Gates, M.V. Lee Badgett, Jennifer Ehrie Macomber and Kate Chambers, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, 3 (2nd ed. March 2007).

³¹ Ecuador Constitution art 23, para 3

³² Federal Law to Prevent and eliminate Discrimination, Equal Employment Opportunity Commission (2003)

³³ *Egan v Canada*. [1995]2 SCR 513

³⁴ Constitutional Court of Colombia. Judgements No. T-097/94, T-101/98, C-481/98, C-507/99, T- 268/00, C-373/04

³⁵ Regulation of the Statutory law of the Work, Official Journal No. 5.292 (1999).

“Human Rights, Sexual Orientation and Gender Identity” can be held to be considered as important.³⁶

Analysis of LGBT’s Rights in International Legal Framework of Human Rights

The concern of LGBT and the questions relating to gender identity and sexual orientation concern is being placed for discussion under the ambit of “The Universal Declaration of Human Rights, adopted by UN General Assembly Resolution 217A(III) of 10 December 1948”. UDHR which says about “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world”. Because of “the inalienable nature of Human Rights, all human beings are treated as persons before the law, regardless of their sexual orientation or gender identity, and are entitled to freedoms derived from the inherent dignity of the human person, including equality before the law, non - discrimination, and equal protection under the law”.

- ***Structure of Equality before the law and Non-discrimination In reference to Sexual Orientation and Gender Identity:***

In fact, because these categories are not officially included in any of the major international treaties, there is no clear claim of laying down protection clauses for sexual orientation and gender identity in international human rights law. However, the international agreements were not intended to be complete in their enumeration of status, and the phrase "or other status" is a clear indicator that the architects intended to include the protection of nameless categories, such as sexual orientation and gender identity.³⁷ As in “Article 26 of the International Convention on Civil and Political Rights (hereinafter referred as ICCPR) on equality before law and right to be free from discrimination possess the same structure and the other status category is free standing and can very accommodate to the evolving categories also.” The Organization of American States' General Assembly has passed its first resolution on human rights, sexual orientation, and gender identity.³⁸ Furthermore, sexual orientation and gender identity have been specifically included on the list of forbidden grounds of discrimination in new international instruments.³⁹

- ***Protection of Gender Identity, Sexual Orientation and UN Human Rights Treaty Bodies and UN Special Procedure:***

The UN Human Rights Treaty Bodies have determined sexual orientation as a category for protection against discrimination and equality before the law. Also, the Human rights Committee has affirmed that the reference to “equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” as dealt under Art 26 of the ICCPR which enumerates on discrimination on grounds of sexual orientation.⁴⁰

³⁶ Human Rights, Sexual Orientation and Gender Identity, AG/RES 2435 -XXXVIII-O/08 (2008).

³⁷ Melinda Kane, Social Movement Policy Success: Decriminalizing State Sodomy Laws, 1969-1998, 8 MOBILIZATION: AN INTERNATIONAL QUARTERLY 313, 315(2003).

³⁸ Resolution AG/RES, 2435 (XXXVIII-O/08) of 3 June 2008.

³⁹ “The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights in 2008, the Libero- American Convention on Young People’s Rights (entered into force in 2008); Charter of Fundamental Rights of the European Rights of the European Union (Article 21.1); and the Council Framework Decision on the European Arrest and the Surrender Procedures between Member States, adopted by the Council of the European Union on 13 June 2002.”

⁴⁰ Human Rights Committee: Opinion held in the case of Nicholas Toonen v. Australia, Communication No. 4881/1992, paras 8.2-8.7. Also refer the case of Edward Young v Australia, Communication No,941/2000, para 10.4 and in the case of X v Colombia, Communication No. 1361/2005, para 7.2.

Further, the Committee on Economic, Social and Cultural Rights enunciates that by virtue of Art 2,⁴¹ and Art 3⁴² of ICESCR which says “that discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of health status, sexual orientation which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”.⁴³

Moreover, the Committee Against Torture has considered “that the sexual orientation is one of the prohibited grounds included in the principle of non-discrimination”.⁴⁴ In its General Comments on adolescent health, HIV/AIDS, and the rights of children, the Committee on the Rights of the Child mentioned sexual orientation as one of the forbidden grounds of discrimination.⁴⁵

In 1994, in the case of *Toonen v Australia* ⁴⁶, “the UN Human Rights Committee held that laws criminalizing homosexuality constituted an unlawful interference with the right to privacy, protected and guaranteed by Art 17 of ICCPR”. The Committee also opined that Art 2(1) of the ICCPR and interpreted “sex” in Article 2(1) to include sexual orientation. And the committee came to the conclusion that: “the state party sought the Committee’s guidance as to whether sexual orientation may be considered an ‘other status’ for the purposes of Art.26. The same issue could arise under Art. 2, para1, of the Covenant. The Committee confines itself to nothing, however, that in its view the reference to sex in Art. 2, para 1, and 26 is to be taken as including sexual orientation”

Subsequently, it has addressed that the use of the “other status” provision under Art.2(1) and 26 of the ICCPR would have been more satisfying, instead of an interpretation that includes sexual orientation in the definition of sex.⁴⁷ Following the Toonen formulation, successive UN jurisprudential interpretations of sexual orientation have moved away from it, asserting protection for the category of sexual orientation in international human rights law under the sex rather than other status.

The UN Special Procedures on Human Rights issued a statement on “the issue of nondiscrimination and equality before the law in relation to discrimination based on sexual orientation and gender identity”. Also, the “UN Working Group on Arbitrary Detention, in expressing its views on homosexuals who are detained on given prison sentences solely because of their sexual orientation” held that “detention is arbitrary because it violates articles 2(1) and

⁴¹ Article 2.2 of ICESCR – “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁴² Article 3 of ICESCR- “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

⁴³ Committee on Economic, Social and Cultural Rights, General Comment No. 14; “The right to the highest attainable standard of health (Article 12) para 18, See also, Committee on Economic, Social and Cultural Rights, General Comment No.15.”

⁴⁴ Committee Against Torture, General Comment No. 2: Implementation of Art 2 by State parties, para 21 and 22.

⁴⁵ Committee on the Rights of the Child, General Comment No. 4: Adolescent Health, para 6 and General Comment No.3 HIV/AIDS and the rights of the child, para. 8

⁴⁶ UN Doc. CCPR/C/50/D488/1992of 4 April 1994.

⁴⁷ Sarah Joseph, Gay Rights under the ICCPR- Commentary on Tooner v Australia , 13 U Tas L Rev. 14, 17(1994); Anna Funder, The Tooner Case 5 Pub L Rev 22, 26 (1994); Wayne Morgan, identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations, 19 Melb. U. L. Rev. 33, 36 (1994).

26 of the ICCOR which guarantees equality before the law and the right to equal legal protection against all forms of discrimination, including based on sex"⁴⁸

• **European Union's Initiatives**

A Within the European Union, a variety of legal policies have been implemented to prevent discrimination based on sexual orientation.⁴⁹ Undeniably, these instruments invokes the legislative banning of discrimination especially with regard to employment based sexual orientation.

- i. "Article 13 of the 1997 Treaty of Amsterdam empowered Member States of the European Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".
- ii. "Employment Directive of 2000, all member states were required to pass legislation against discrimination in the workplace on a variety of grounds, including sexual orientation."
- iii. "Directive 2004/58/EC of the European Parliament listed sexual orientation among the prohibited grounds for discrimination."
- iv. Staff Regulations of Officials for the European Communities provides that "officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect to sex or sexual orientation, without prejudice to the relevant provisions requiring a specific marital status"⁵⁰
- v. The European Arrest Warrant preamble recognizes that "this framework decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union"⁵¹.
- vi. In the "Charter of Fundamental Rights of the European Union, Art. 21(1) on non-discrimination declares that discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

• **Non-discrimination and European Court of Human Rights**

Unlike the period of *Dudgeon's case* adopting a narrow scope for gay rights in 1999, the European Court expressed a broader role for the right to privacy and non-discrimination as

⁴⁸ Report of the Writing Group on Arbitrary Detention, UN Doc.E/CN.4/2004/3, of 15 December 2003, para 73

⁴⁹ Article 13 of the 1997 Treaty of Amsterdam empowered "Member States of the European Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"

⁵⁰ "Council Regulation (EC, ECSE, Eurotom) No. 781/98 of 7 April 1998 (The Staff Regulations Article 1a (1))."

⁵¹ Art 6 the Treaty on European Union - "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

observed in the twin cases of *Lustig Prean and Beckett v United Kingdom*⁵² and *Smith and Grady v United Kingdom*⁵³, the court observed that the “the question of the Court is whether the above-noted negative attitudes those of a different race, origin or colour and to the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority constitute sufficient justification for the interferences at issue”. Further, relying on Article 8 of the European Convention on Human Rights⁵⁴, the Court invalidates laws that excluded gays and lesbians from the military and opened up an interpretation of privacy that envisaged the public manifestations of the gay experience. The European Court in *S.L. v Austria*⁵⁵, taking into consideration the scientific evidence in favour of equal age of consent for both heterosexuals and homosexuals. In the case of *Goodwin v United Kingdom*⁵⁶, the court dealt with the questions of gender identity as in with regard to the applicant has raised allegation of violation of Art 8, Art 12⁵⁷, Art 13⁵⁸ and Art 14⁵⁹ of European Convention on Human Rights in respect of the legal status of transsexuals in the United Kingdom and specially the treatment in the areas of employment, social security, pensions and marriage.

- ***Phase of Protection of Gender Identity, Sexual Orientation and Inter American System of Human Rights***

With the similar interface like other international human rights instruments, there doesn't exist an explicit reference to sexual orientation or gender identity in the human rights instruments of the Inter- American System⁶⁰ also with the exception of “the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas”. The initial phase of its protection “on human rights and sexual orientation in the Inter-American system”, the decision in the case of *Marta Lucia Alvarez Giraldo v Colombia*,⁶¹ the court held that “in principle, the claim of the petitioner refers to facts that could involve, inter alia, a violation of Article 11(2) of the American Convention in so far as they could constitute an arbitrary or abusive interference with their private life”

⁵² European Court of Human Rights, Judgement of 27 September 1999, Application No. 31417/96 and 32377/96

⁵³ European Court of Human Rights, Judgement of 27 September 1999, Application No. 33985/96 and 33986/96

⁵⁴ Art 8 of the European Convention on Human Rights deals with right to respect for private and family life

1. “Everyone has the right to respect for his private and family life, his home and his correspondence.”

2. “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”

⁵⁵ European Court of Human Rights, Application no. 45330/99 9 January 2003

⁵⁶ European Court of Human Rights, Application No 17488/90, Case No 16/1994/463/544, ECHR 1996

⁵⁷ Art 12 of ECHR – “Right to marry Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

⁵⁸ Art 13 of ECHR – “Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

⁵⁹ Art 14 of ECHR – “Prohibition of discrimination the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁶⁰ See “Art II of the American Declaration on the Rights and Duties of Man: Arts 1(1) and 24 of the American Convention on Human Rights; Article 9 of the Inter- American Democratic Charter”; Principle 2 of the Declaration of Principles on Freedom of Expressions.

⁶¹ Case Number 11.656, Report No. 71/99 (Admissibility) of 4 May 1999, para 21.

Further, the Inter- American Commission has enunciated on the fact that the “criminalization of homosexuality and deprivation of liberty simply because of sexual preference is a practice contrary to the provisions of various articles of the American Convention and must therefore be corrected”⁶². Also, the Special Rapporteurship on Migrant Workers and their Families of the Inter -American Commission on Human Rights has taken consideration of its decision based on the principle of equality and non-discrimination.⁶³

India’s Legal Framework of the Protection of LGBT’s Human Rights

• Residues of Homosexuality in the History

Homosexuality may be found in ancient India’s religious literature, as well as in contemporary fiction, which attests to the existence of same-sex love in various forms. The notion of homosexuality is also mentioned in ancient literatures such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads, and Puranas. There have been reports of same-sex activities among sannyasins who are unable to marry. As a result, historical and mythical books from all around the world, including India, include references to homosexuality. Even today, there are evident cultural remains of homosexuality practised in a small village in Gujarat called Angaar, where a ritualistic transgender marriage is performed among the Kutchi population during the Holi festival. It is quite unusual as both the Ishaak and Ishakali are men which is being practiced for the past 150 years. As a result, history is replete with evidence demonstrating the presence of homosexuality in the past.⁶⁴

With the current shift in rights-focus happening all around the world, the path from decriminalisation to civil protection to civil recognition isn’t fully linear. Considering the situation in India during the pre-codification era, the multi-religion culture is providing various penalizing protocol to homosexual offences. With the first consistent criminal laws adopted in India in 1860, codification of laws began during the British period.⁶⁵ The Indian Penal Code contains a unified definition of homosexual behaviour in the form of unnatural offences, as well as its nature and penalty. Although sexuality minorities have always existed in India, their challenges have never been fully expressed, sometimes in culturally sanctioned forms (such as the hijra) and other times in invisibility and silence. After the nineteenth century, LGBT minority addressed issues relating to violations of their human rights, and numerous civil society organisations in India took up their cause. Lesbian, gay, and bisexual issues were first addressed in a public forum in India in the late 1980s with the publication of Bombay Dost, the first homosexual magazine in India, and the founding of Sakhi, a lesbian collective in Delhi. In fact, most Indian human rights organisations, such as the Individual’s Union of Civil Liberties (PUCL), have yet to address the subject of mistreatment of homosexuals, lesbians, bisexuals, and transgender people due to their sexuality. This ignores the fact that sexuality is closely linked to repressive societal ideologies and systems like patriarchy, capitalism, caste, and religious fundamentalism. As a result, the struggle for sexuality rights is closely tied to the broader human rights movement for economic, political, and social liberation.

⁶² Inter- American Commission on Human Rights, Press Release No. 24/1994.

⁶³ Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, OEA/Set.L/V/II.111. Doc.20 rev., 16 April 2001.

⁶⁴ Dipika Jain et al, Bureaucratization of Transgender Rights: Perspectives from the ground, 14 SLR 16, 19 (2018).

⁶⁵ Alok Gupta, This Alien Legacy: The Origins of ‘Sodomy’ Laws, British Colonialism (Sept 3, 2020,10.30 AM) <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>.

• **Judicial Interpretation and the struggle for development of LGBT's rights in India**

In modern India, the first literature on homosexuality was authored by Shakuntala Devi in the year 1977. Sec 377 of Indian Penal Code deals with the criminalization of homosexuality in India. It all triggered off with the movement to repeal Sec 377 by AIDS Bhedbhav Virodhi Andolan in 1991. Following that, in 2001, it regained impetus when the Naz Foundation filed a Public Interest Litigation in the Delhi High Court. The landmark decision of *Naz Foundation v Government of NCT Delhi*, which was filed by Non-governmental organisation based in Delhi, Naz Foundation. "The petitioners' main argument was that Sec 377 infringed on the basic rights provided by Articles 14, 15, 19, and 21 of the Indian Constitution. The lawsuit was brought in the public interest, arguing that its efforts to stem the spread of HIV/AIDS were hampered by acts of discrimination against the gay community as a result of Sec 377. Discrimination has also resulted in major concerns such as abuse, harassment, and assault by public officials, putting the LGBT community at risk by restricting their fundamental rights. Another main submission was that the right to non-discrimination on the ground of sex in Article 15 should not be read restrictively but should include sexual orientation. And the hon'ble Delhi High Court stated that Sec 377 violates Art. 14,15 and 21. With marking the criterion of Art. 14 i.e., the classification should be on an intelligible differentia which has a rational relation to the objective sought." It concluded that "Section 377 does not distinguish between public and private acts, or between consensual and non-consensual acts, therefore does not consider relevant factors such as age, consent, and nature of the act or absence of harm. Thus, such criminalization in the absence of evidence of harm seemed arbitrary and unreasonable". Discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.⁶⁶

The judgment was restricted to adults. Section 377 applied to minors. Section 377 had permitted the harassment of LGBT people. With de-criminalization of homosexuality, the discrimination would not go away immediately. But this would violate the law. "It will take time for the judgment to bed-in".⁶⁷

Subsequently, the decriminalization of homosexuality led to many appeals before the Delhi High Court. And in the earmarked case of *Suresh Kumar Koushal v Naz Foundation*⁶⁸, the major contention put forth by the appellant was Sec 377 should be transformed to the status of gender neutral and should be inclusive of acts such as carnal intercourse which are committed voluntarily irrespective of gender. It does not infringe right to privacy under Art. 21. The arguments raised by the appellants reflects the fact that the previous judgement affects the social structure of India and the whole institution of marriage. On the flipside, the respondent argued that Sec 377 pulls down the dignity and is targeted at their sexual orientation. Adding to it, then contented that 'It outlaws sexual activity between men which is by its very nature penile and non-vaginal, it impacts homosexual men at a deep level and restricts their right to dignity, personhood, and identity, equality and right to health by criminalizing all forms of sexual

⁶⁶ Melissa Cyril, Sec 377: LGBT Rights and HR Policy in the Indian Workplace, India Briefing (Aug. 23, 2024, 09:10PM).<https://www.india-briefing.com/news/section-377-india-lgbt-rights-hr-policyindian-workplace-17804.html>.

⁶⁷ Robert Wintemute, Same- Sex Love and Indian Penal Code Sec 377: An Important Human Rights Issue for India, 4 NUJS L Rev.31 35 (2011). 1 -36. Also see, R. Wintemute, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, 60 Mod. L. Rev 334, 337 (1997); R. Wintemute, Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators, 14 King's Law J 267, 269(2003).

⁶⁸ Civil Appeal No. 10972 OF 2013

intercourse that homosexual can indulge in'. On December 2013, the two-judge bench of the hon'ble Supreme Court overruled the Delhi High Court decision and held that it is legally unsustainable. Also, declared that "Section 377 does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offense. Such a prohibition regulates sexual conduct regardless of gender identity and orientation." And for the first time in the judicial history of India, which brought a ray of hope in the life of 'hijras'. In the land mark judgement of *National Legal Service Authority v. Union of India*⁶⁹, created 'third gender' status for hijras or transgenders. The transgender persons' right to decide their self-identified gender is also upheld. The court has identified apart from hijras, other wide range of transgenders includes *Enunch*⁷⁰ *Kothi*⁷¹, *Jogtas /Jogappas*⁷², *Shiv - Shakthis*⁷³. On a further declaration, the hon'ble apex court has laid down the measures or steps that need to be absorbed by the both respective authorities of Centre and State Government, which is as follows:

- i. With respect to granting legal recognition of their gender identity such as male, female or as third gender.
- ii. Adopt measures to treat them under the category of other backward classes and cannot be subjected to discrimination in availing equal opportunities in education and employment opportunities in educational institutions and government jobs.
- iii. Initiating operative mechanism as in an exclusive HIV Sero – surveillance Centres due to the reason that Hijras/Transgenders face several sexual health issues.
- iv. Effort should be initiated in addressing the emotional and phycological traumas faced by the community such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc,
- v. Adopting measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
- vi. Adopting measures for structuring various social welfare schemes for their better livelihood.
- vii. Adopting measures to create public awareness so that they fell that are also part and parcel of the social life and be treated as untouchables. And thereby they can regain their respect and place in the society.

On 2 February 2016, criminalization of homosexual activity was reviewed by the Supreme Court. In August 2017, "the Supreme Court unanimously determined that under Article 21 of the Indian Constitution, the right to privacy is an inherent and fundamental right, giving LGBT

⁶⁹ (2014) 5 SCC 438, decided on 15 April, 2014 by a bench comprising of Justice K.S. Radhakrishnan and Justice A.K. Sikri.

⁷⁰ "Eunuch refers to an emasculated male and Intersexed refers to a person whose genitals are ambiguously male-like at birth, but this is discovered later, the child previously assigned to the male sex is reclassified as intersexed – as a Hijra."

⁷¹ "Kothis are a diverse species. Biological males who exhibit varied degrees of 'femininity' – which may be situational – are referred to as 'Kothis.' A small percentage of Kothis engage in bisexual activity and marry women."

⁷² "Jogtas, also known as Jogappas, are devotees and servants of goddess Renukha Devi (Yellamma), whose temples may be found in Maharashtra and Karnataka. 'Jogta' refers to the Goddess's male servant, while 'Jogti' refers to the Goddess's female servant (also known as 'Devadasi')."

⁷³ "Shiv-Shakthis are males who have feminine gender presentation and are possessed by or particularly connected to a goddess. Senior gurus induct Shiv-Shakthi into the Shiv-Shakti society, teaching them the norms, conventions, and rituals that must be followed."

supporters hope that Section 377 will be removed soon. The Court also decided that a person's sexual orientation is a personal affair.”

Conclusion

When it comes to the identification of the rights of the transgender people's gender identity and sexual orientation, a right-based approach should be adopted, where each of them, exempting their sexual orientation or identity, they have the right to full equality, legal protection against discrimination, social rights such as marriage and adoption, and the opportunity to participate in decision-making. They also have the “right to enjoy social and cultural rights. such as visibility and freedom of expression, access to education, healthcare, and sexual health services, inclusion in statistics and research, establishment and registration of organisations, and the ability to organize meetings and activities.” These can be considered as the fundamental rights that can be addressed and enabled for assuring the realization of the principles of equality and non-discrimination. As the resolution passed by the UN stands outright in the creation of a positive impact all over the world but India’s approach is quite disappointing in addressing the concern. The time demands for an emergent wiping off the conservative attitude and adoption of a strong established steps for the welfare of the sexual minority. So, in this 21st century of a liberal and globalized entities, there demands for a stronger protection for leading a life of respect and attaining recognition in its fullest by the transgenders as being homosexual is not disease which demands treatment but a state of being born with such instincts beyond the human control.

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