

UNTOLD STORY OF GENDER IN THE CLOSET

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ABSTRACT

Researcher in the paper is of the view that mere non conformity with the moral or religious views of a section of society where sexual acts of two consenting adults acting privately are being penalized severely affects the rights and interests of homosexuals, bisexuals and Transgender and deeply impairs their dignity. Criminalization of such act grossly violates their right to equality, right to freedom of expression and right to privacy and live their life with dignity embodied in Article 14, Article 15 and Article 21 respectively. Present legal status of such communities around the world along with the reference to instances of harassment faced by these communities which forms the essence of queer politics is also been discussed in the paper.

Naz foundation judgment provides the plinth for elimination of all forms of discrimination against persons not merely on the basis of their sexual orientation but also their gender identity but merely after 4 years holding the judgment unsustainable and deeming section 377 not unconstitutional by the Apex Court again forced people of LGBT community to diminish in darkness. Deeming of section 377 constitutional embodies within itself a primacy of the heterosexual and maintain the assumption of compulsory heterosexuality crystallizing the society's firm belief that the world around us is heterosexual until proven otherwise.

Judiciary can play an important role by deeming the section unconstitutional which can provide this section with the basic human rights who are witnessing identity crisis because of having unnatural sexual orientations. The author throughout the article provides an overview of the relationship between law enforcement and the community.

Keywords: *LGBT, sexual orientation, gender identity, non-conformity, heterosexuality*

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INTRODUCTION

LGBT (Commonly used abbreviation to denote Lesbian Gay Bisexuals and transgender), a section of society which is being criminalized by section 377 of Indian Penal Code by the virtue of being having different sexual orientation and thereby condemning a sizeable section of society and forces them to live their lives in the shadow of exploitation, humiliation and harassment.

Lacking precise definition, Section 377 became subject to varied judicial interpretation over the years. Initially covering only anal sex, it later included oral sex and still later, read to cover penile penetration of other artificial orifices like between the thighs or folded palms. The law made consent and age of the person irrelevant by imposing a blanket prohibition on all penile-non-vaginal sexual acts under the vague rubric of 'unnatural offences'. Homosexuality has for long been treated as an unnatural act against the divine order.

“For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home.”³

Human Rights and LGBT Community

In the words of Nelson Mandela:

“To deny people their human rights is to challenge their very humanity”

The issue of LGBT is not merely a social or medical issue but there is a need to adopt human rights approach towards the community which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them.

Human rights can be defined as those rights which naturally and inherently belong to a person for being a human being which can be further explained as a foundation of justice and freedom and recognition of human dignity. Concept of human rights was recognized as a part of jurisprudence in 20th Century, in the Atlantic charter issued by President Roosevelt and

³ National Coalition of Gay and Lesbian equality (NCGLE) v ministry of justice, 1999 (1) SA 6

Wilson Churchill, after the 2nd World War.⁴ Charter of the United Nations adopted at the San Francisco succeeded by Universal declaration of human rights adopted by the General Assembly mark the most important documents in the field of human rights. Within two years of the adoption of UDHR, India attained independence and the task of framing of constitution was adopted by the drafters and the principle was echoed by the drafters in Indian Constitution and was enshrined in part III of Constitution.

The proclamation of UDHR and the basic objective of Indian Constitution i.e. “all human rights for all” should not merely remain as a declaration on paper but it must be the spirit of living for all individual. The respect for human rights is the basis for integration of mankind, both internally and internationally.

Principle of “All human rights for all” is being hampered on a wide scale by denying equal rights to the people who belong to the community of LGBT. It is the human dignity which is fundamental and foundation to all human rights. In fact, Article 21 of the Constitution of India, which pertains to life and liberty, has been so widely interpreted by expanding its frontiers entirely on the touchstone of human rights.

In the words of Justice V.R. Krishna Iyer rights like gender identity are cardinal to a decent human order and protected by constitutional armour⁵. Gender identity is understood to refer 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 mannerisms⁶.

lesbian, gay, transgender and bisexual people, and those perceived to be LGBT, are attacked more than heterosexuals relative to their estimated population size.

Section 377 was used as a tool by the police to harass, extort and blackmail homosexual men and prevented them from seeking legal protection from violence; for fear that they would themselves

⁴ 'The Atlantic Charter', 14 Aug. 1941 accessed http://www.nato.int/cps/en/natohq/official_texts_16912.htm last visited on 12 feb 2016 13:10

⁵ Paul S Davies, Justine Pila, The Jurisprudence of Lord Hoffmann: A Festschrift in Honor of Lord Leonard, 1st Edition, Bloomsbury publication, 2015

⁶ Laura Palazaani, Gender in philosophy and law, springer publication, 2nd edition (2012)

be penalized for sodomy. The stigma and prejudice created and perpetuated a culture of silence around homosexuality and resulted in denial and rejection at home along with discrimination in workplaces and public spaces.

Anecdotal evidence suggests that hate crimes against LGB and transgender persons are under-reported in India. Some victims do not report sexual orientation-motivated hate crimes because they do not want to be identified in police reports as lesbian, gay, bisexual and/or transgender. Moreover, sexual orientation and gender identity-based hate crimes may not be perceived as bias-motivated by responding officers because of their inexperience, lack of education or their own biases. Many police departments do not have protocols in place for the accurate reporting of bias crimes. In addition to this, many hate crime victims occupy more than one out-group position in terms of sexual orientation, gender identity and expression, sex, race, ethnicity, religion, national origin and/or disability. The most common hate crimes committed against lesbians, gays and bisexuals are physical assault and/or intimidation.

In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 of Indian Penal Code denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality. Section 377 Indian Penal Code denies any person of the category a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

JUDICIAL JOURNEY TILL NOW

An independent, vibrant and dynamic Indian judiciary has acted as the torch bearer and has interpreted the constitutional provisions and various laws for expanding the scope and ambit of human rights laws.

Lacking precise definition, Section 377 became subject to varied judicial interpretation over the years. The expression “carnal intercourse” is used in Section 377, IPC as distinct from the expression “sexual intercourse”, which appears in Sections 375 and 497, IPC. The expression, “carnal intercourse” is broader than “sexual intercourse”. The penetration contemplated in the

section is that of the penis and even that partial penetration would be sufficient. Non-penile penetration does not come within the purview of penetration in Section 377, IPC.

The expression “carnal intercourse” refers to all sexual acts other than penile vaginal. This is further evident from the expression against the order of nature used in Section 377, IPC. The expression “carnal intercourse against the order of nature” refers to penile- non-vaginal sexual acts that do not result in procreation.

The acts covered under Section 377 were interpreted by the time and concept was further widened by the judiciary:

- a) Initially oral sex was held not to be covered by Section 377⁷
- b) Later, however, oral sex was included within the ambit of Section 377⁸. Therefore, in addition to anal sex, oral sex came to be covered under Section 377.
- c) Subsequently, several other acts were held to be covered under Section 377:
 - I. Coitus per nose of a bullock⁹
 - II. Intercourse between the thighs of another (intra crural)¹⁰
 - III. Acts of mutual masturbation¹¹
 - IV. Penetration into any orifice of anyone’s body except the vaginal opening of a female¹². The underlying rationale for holding acts as covered under Section 377 has also undergone change over the years:

In 2001, Lawyers Collective, on behalf of *Naz Foundation (India) Trust*, filed a writ petition in Delhi High Court challenging the constitutionality of Section 377 on grounds of violation of right to privacy, dignity and health under Article 21, equal protection of law and non-discrimination under Articles 14 and 15 and freedom of expression under Article 19 of the Constitution. Notice was issued to Union of India in 2002 and the Attorney General was asked to appear. The Ministry of Home Affairs filed an affidavit opposing the petition in September,

⁷ Govt. v. Bapoji Bhatt 1884 (7) Mysore LR 280

⁸ Khanu v. Emperor 1925 Sind 286

⁹ Khandu v. Emperor AIR 1934 Lahore 261

¹⁰ State of Kerala v. Kundumkara Govindam 1969 Cri LJ 818

¹¹ Brother John Antony v. State 1992 Cri LJ 1352

¹² State of Gujarat v. Bachmiya Musamiya 1998 (3) Guj L.R. 2456

2003. The petition was dismissed by the High Court on 02.09.2004 for lack of cause of action as no prosecution was pending against the petitioner.

In 2009, the Delhi High Court decision in *Naz Foundation v. Govt. of NCT of Delhi*¹³ found Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution. The Court also held that Section 377 offends the guarantee of equality enshrined in Article 14 (under the fundamental Right to Equality charter) of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class.

The Court held that the word "sex" includes not only biological sex but also sexual orientation, and therefore discrimination on the ground of sexual orientation is not permissible under Article 15. The Court also noted that the right to life under Article 21 includes the right to health, and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts. The Court did not strike down Section 377 as a whole. The section was declared unconstitutional insofar it criminalizes consensual sexual acts of adults in private. The judgement keeps intact the provision insofar as it applies to non-consensual non-vaginal intercourse and intercourse with minors. The court stated that the judgement would hold until Parliament chose to amend the law.

The *Naz Foundation* judgment declared that Section 377 in so far as it criminalized consensual adult sex in private violated Articles 21, 14 and 15 of the Constitution. It brought human rights of LGBTQ people in line with international legal norms applied in Europe, the U.S., Canada, South Africa, Australia, New Zealand, Hong Kong and Fiji among others.

On 23 February 2012, the Ministry of Home Affairs expressed its opposition to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as being immoral. The Central Government reversed its stand on 28 February 2012, asserting that there was no legal error in decriminalizing homosexual activity.¹⁴

¹³ (2009) 160 DLT 277; W.P. (C) No. 7455/2011 of 2009 (Delhi HC)

¹⁴ J. Venkatesan "goof up on gays right puts centre in a fix", *The Hindu* (5 march 2012) accessed <http://m.thehindu.com/news/national/goofup-on-gay-rights-puts-centre-in-a-fix/article2923640.ece>/last visited 15-Feb- 2016 18:30

On 11 December 2013, the Supreme Court set aside the 2009 Delhi High Court order decriminalizing consensual homosexual activity within its jurisdiction.¹⁵¹⁶ The apex court said “We hold that Section 377 does not suffer from vice of unconstitutionality and declaration made by the division bench of the Delhi High Court is unsustainable.”¹⁷

A subsequent judgment delivered by the Supreme Court (Justices K.S. Radhakrishnan and A.K. Sikri) on April 15, 2014 in *National Legal Services Authority v. Union of India*¹⁸ recognized a third gender status for transgender people and their fundamental rights as human beings. The Court has directed Centre and State Governments to grant legal recognition of gender identity whether it be male, female or third-gender. In recognizing the third gender category, the Court recognizes that fundamental rights are available to the third gender in the same manner as they are to males and females. Further, non-recognition of third gender in both criminal and civil statutes such as those relating to marriage, adoption, divorce, etc. is discriminatory to the third gender.¹⁹

Shashitharoor introduces private members bill seeking to decriminalize homosexuality. The bill sought amendment to the IPC by advocating that the section 377 should be substituted. However the bill was voted out²⁰.

On 2 Feb 2016, Curative petition submitted by Naz Foundation and others was admitted by the Supreme Court against Section 377 of the Indian Penal Code and referred the case to a 5 judge Constitution bench and thereby giving the last hope to the section of society. Three member bench headed by the Chief Justice of India T. S. Thakur said that all the 8 curative petitions submitted will be reviewed afresh by a 5 member constitutional bench.²¹

¹⁵ . J Venkatesan "Supreme Court sets aside Delhi HC verdict decriminalising gay sex". The Hindu (Chennai, 11 Dec 2013). <http://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece?homepage=true> last visited 15 Feb 2016 21:15

¹⁶“Homosexuality is criminal offence: Supreme Court” The Economic Times, Dec 11, 2013 http://articles.economictimes.indiatimes.com/2013-12-11/news/45080584_1_apostolic-churches-alliance-decriminalisation-utkal-christian-council last visited 16 Feb 2016 01:20

¹⁷ Suresh Kumar Koushal v Naz foundation, AIR 2014 SC 563

¹⁸(2014)5 SCC438

¹⁹“ India court recognises transgender people as third gender”(15 April 2014,India)<http://www.bbc.com/news/world-asia-india-27031180>

²⁰“Tharoor’s Bill on homosexuality voted out” (NEW DELHI, December 19, 2015)<http://www.thehindu.com/news/national/shashi-tharoors-bill-on-homosexuality-voted-out/article8006047.ece>

Though facially neutral and ostensibly applying to both heterosexual persons and homosexual men, an analysis of judgments on Section 377 shows that over the years, heterosexual couples have been practically excluded from the ambit of Section 377 while primarily targeting homosexual men on the basis of their ‘association’ with proscribed acts.

the interpretation of ‘carnal intercourse against the order of nature’ in India has become very uncertain and wide, due to lack of any precise legal definition.

CONSTITUTION VALIDITY OF SECTION 377

Section 377 of Indian Penal Code to the extent it is applicable to and penalizes sexual acts in private between consenting adults is violative of Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution as the provisions of Section 377 of Indian Penal Code also governs non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

The thrust of Section 377 Indian Penal Code is to penalize sexual acts which are "against the order of nature"; that the provision is based on traditional Judeo-Christian moral and ethical standards and is being used to legitimize discrimination against sexual minorities; Section 377 of Indian Penal Code does not enjoy justification in contemporary Indian society and that the section's historic and moral underpinning do not resonate with the historically held values in Indian society concerning sexual relations.^{172nd} Report of the Law Commission which had recommended deletion of Section 377 considering the same as detrimental to people's lives and an impediment to public health due to its direct impact on the lives of homosexuals²²; the section serves as a weapon for police abuse in the form of detention, questioning, extortion, harassment, forced sex, payment of hush money; perpetuates negative and discriminatory beliefs towards same sex relations and sexual minorities in general; as a result of that it drives gay men and MSM and sexual minorities generally underground which cripples HIV/AIDS prevention

²¹UtkarshAnand, "Supreme Court agrees to revisit law criminalising homosexuality"(Feb 3, 2016) <http://indianexpress.com/article/india/india-news-india/supreme-court-agrees-to-hear-petition-on-section-377-refers-matter-to-five-judge-bench/>last visited 18 feb,2016 15:00

²²law commission of india, one hundred and seventy second report on review of rape laws,(March 25, 2000)<http://www.lawcommissionofindia.nic.in/rapelaws.htm>last visited 18 Feb ,2016 19:05

methods. According to the statistics of NACO adult HIV prevalence among the general population is 0.36 percent while it is 5.69 percent among Men who have Sex with Men (MSM)²³

Section 377 is used predominantly against homosexual conduct as it criminalizes activity practiced more often by men or women who are homosexually active. The evidence that refutes the assumption that non-procreative sexual acts are unnatural includes socio-scientific and anthropological evidence and also the natural presence of homosexuality in society at large.

Historically, Hijras and Transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically. A transgender person is someone whose deeply held sense of gender is different from his/her physical characteristics at the time of birth. A person may be female-to-male transgender (FTM) in that he has a gender identity that it is predominantly male, even though he was born with a female body. Similarly a person may be male to female transgender (MTF) in that she has a gender identity that is predominantly female even though she was born with a male body or physical characteristics. During the British rule, a legislation was enacted to supervise the deeds of the Transgender community, called the Criminal Tribes Act, 1871, which deemed the entire community of Transgender as innately criminal and addicted to the systematic commission of Non-Bailable offence.²⁴ The Criminal Tribes Act was however, been repealed in August 1949²⁵. Section 377 criminalized all penile non vaginal sexual acts between persons, including anal sex and oral sex, therefore criminalizing all the Transgenders for their sexual activities. In *Queen Empress vs Khairati*²⁶, a transgender person was arrested and prosecuted under Section 377, IPC on the suspicion that he was a habitual sodomite and was later acquitted on appeal.

Even though he was acquitted on appeal, this case demonstrated that section 377 of Indian Penal Code though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and Transgender persons.

²³ Department of health and family welfare, "HIV Data" http://naco.gov.in/NACO/Quick_Links/HIV_Data/ last visited 19 Feb, 2016 21:20

²⁴ Criminal Tribes Act 1871, accessed on <http://ccnmtl.columbia.edu/projects/mmt/ambekar/web/readings/Simhadri.pdf> last visited 20 Feb 2016

²⁵ "Colonial Act still haunts denotified tribes: expert" *The Hindu* (March 27, 2008) last visited on 20 Feb 2016 <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/article1227400.ece>

²⁶ (1884) ILR 6

Private, consensual sexual relations are protected under the right to liberty enshrined in Article 21 under the privacy and dignity claim. Section 377 of Indian Penal Code is not a valid law because there exists no compelling state interest to justify the curtailment of an important fundamental freedom; Article 21, where enlarged scope of the right to life and liberty also includes right to protection of one's dignity, autonomy and privacy.

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 Indian Penal Code denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 Indian Penal Code denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the constitution.

Section 377 of Indian Penal Code insofar as it criminalizes consensual, non-procreative sexual relations is unreasonable and arbitrary and therefore violative of Article 14. Article 14 referred to the tests of permissible classification as also the requirements of reasonableness and non-arbitrariness and the classification created by Section 377 Indian Penal Code does not bear any rational nexus to the objective sought to be achieved.

Section 377 creates a classification between "natural" (penile-vaginal) and "unnatural" (penile-non-vaginal) penetrative sexual acts. The legislative objective of penalizing unnatural acts has no rational nexus with the classification between natural (procreative) and unnatural (non-procreative) sexual acts and is thus violative of Article 14.

As held in *AnujGarg v. Hotel Association of India*²⁷, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against "reasonableness" under Article 14 but be subject to "strict scrutiny". The impugned provision in Section 377 Indian Penal Code criminalises the acts of sexual minorities particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision

²⁷AIR2008 SC 663

runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution. Section 377 Indian Penal Code in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.

Right to health is an inherent part of the right to life under Article 21, it is recognized by the ICESCR which has been domesticated through Section 2 of the Protection of Human Rights Act 1993. Article 12 of the ICESCR requires states to take measures to protect and fulfill the health of all persons. States are obliged to ensure the availability and accessibility of health services, information, education facilitates and goods without discrimination especially to vulnerable and marginalized sections of the population. The Govt. has committed to addressing the needs of those at the greatest risk of HIV including MSM and transgendered persons. The risk of contracting HIV through unprotected penile anal sex is higher than through penile vaginal sex.

As there is a presumption of constitutionality in favor of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.²⁸ The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. Section 377 of Indian Penal Code to the extent it is applicable to and penalizes sexual acts in private between consenting adults should be deemed unconstitutional. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature.

Section 377 Indian Penal Code is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalized are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 Indian Penal Code has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer,

²⁸Constitution of India 1950, Art 13

repugnant, the whole Gay and Lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised and turned in on itself as stated by Sachs, J. in the *National Coalition for Gay and Lesbian Equality v. The Minister of Justice*²⁹

LGBT RIGHTS AROUND THE WORLD

In this world where everyone is talking about human rights, there are still some people around this world who face violence and inequality because of who they love, how they look, or who they are. These people are Lesbians, Gays, Bisexuals and Transgender. The International Lesbian, Gay, Bisexual, Trans and Intersex Association, or ILGA, lists 75 countries where the sexual activities by Lesbian, Gay, Bisexual, Transgender or intersex people are being criminalized.³⁰ The legal status of LGBT community depends very much on where they live. There are some countries where homosexuality is legal but same sex relationships are being treated differently, such as having an unequal age of consent or a ban on marriage.

In most corners of Western civilization, homosexuality came to be labeled both sinful and criminal, an outrage to god and man indicative of social decay. This view persisted for more than nineteenth centuries until it was replaced, at least in some quarters, by medical authorities equation of homosexuality with disease. Although the foundations for the change were laid in the eighteenth century, the transition from the religious model to the medical model of homosexuality occurred mainly during the nineteenth and took firm hold during the first half of the twentieth century.

In India, Section 377 of Indian Penal Code makes homosexual intercourse a criminal offence. The Section treats it as a 'carnal intercourse against the order of nature.' India is not the only country where LGBT community is being punished under criminal laws for their sexual activities. In Russia, gay teenagers are being tortured and being forcibly outed on the internet against a backdrop of laws that look completely out of step with the rest of Europe. President

²⁹(1998) ZACC 15

³⁰ The International Lesbian, Gay, Bisexual, Trans and Intersex Association, , Report on "a World Survey of Laws: criminalization, protection and recognition of same-sex love", (May 2015)

Putin passed a number of anti-gay laws and the country also has power to arrest and detain foreign citizens believed to be gay. There are many African countries where homosexuality is already illegal, and more draconian anti-gay laws are being passed and violence against such people is increasing. In the United States, anti-sodomy laws were held to be unconstitutionally by the U S Supreme Court in 2003, but they are still operative in 13 States. In central Asia, Kyrgyzstan in 2014 was about to adopt an anti-gay propaganda law harsher than that of in Russia. If that bill, becomes law, any type of distribution of information on same sex relation or even just a discussion on same sex relation in the presence of minor, would become a criminal offence.

In Britain eventually after the Wolfenden Report, laws punishing homosexual conduct in the Sexual offences Act 1967 were repealed. In the case of northern Ireland too, which retained its criminalization of sodomy laws till the 1980s. In its groundbreaking decision in *Dudgeons v UK*³¹, the ECtHR held that this amounted to a breach of the right to privacy under the convention.

In last few years, we have also been witnessed some positive response towards the LGBT people. We have a U S President who supports Gay marriage and now a pope who says “if someone is gay and he searches for Lord and has goodwill, who am I to judge?” Robert Biedron made a history by becoming Poland’s first openly gay mayor.³² He was also the first openly gay parliamentarian in 2011. Argentina passes Gender Identity Law in 2012 which allowed the change of gender on birth certificate for transgender people. Argentina also legalised same sex marriage in 2010. There are also few countries that support the LGBT group such as Uruguay, Mexico, Vietnam, Singapore etc.

The Supreme Court of India passed a landmark judgment in 2014, in the case of National Services Authority vs Union of India³³, and held that transgender people including hijras and eunuchs should be treated as ‘third gender’. The Apex Court held that the Fundamental Rights granted under Constitution shall be equally applicable to transgender people.

³¹ 45 Eur. Ct. H.R

³² Poland elects its first openly gay mayor, 1 December 2014, available at <http://www.theguardian.com/world/2014/dec/01/poland-elects-openly-gay-mayor-robert-biedron> last visited on 18th January 2016

³³ “Beyond male and female, the right to humanity”, The Hindu, April 19 2014, available at <http://www.thehindu.com/opinion/op-ed/beyond-male-and-female-the-right-to-humanity/article5926142.ece> last visited on 19th January 2016

If we talk about the Indian scenario, the actual problem is not the Judiciary but lies deep down in the society. If the Supreme Court passes a law legalizing the same sex marriage, then there will be a far more push back than support. At present, India as a global power is ready for gay marriage, but India as a society of 1.2 billion is still not ready to accept such philosophy.

CONCLUSION

LGBTQ people are treated as “unapprehended felons” — a great blow to the doctrine of equality, privacy and dignity embodied in liberal judgments of our Supreme Court under Articles 21, 14 and 15. It has caused enormous public mischief and, as represented by the Ministry of Health, contributes to gravely exacerbating the spread of HIV.

The nature of the provision of Section 377 Indian Penal Code and its purpose is to criminalize private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalize conduct which fails to conform with the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity. This vast majority is denied "moral full citizenship"

One cannot expect a change in the psyche of members living in the society as long as the legislature or judiciary keeps shying away from reinterpreting Section 377. Judgements passed by the judiciary not only affect the present but will bind future generations to a life of indignity and stigma. It is time we rise above our prejudices and pave the way for the happiness and rights of minorities.

The supreme court on February 2, 2016 agreed to reexamine its verdict on homosexuality and referred the matter to a five-judge bench. The gay rights activist said that thousands of people from LGBT community became open about their sexual identity once the judgment of Delhi HC came in 2009 during the past four years when Delhi High Court decriminalized the gay sex and they are now facing the threat of being prosecuted. Considering the urgent need to amend the laws accordingly, judiciary should play active role in order to avoid such injustice.

Several Questions still remains unanswered

Whether the LGBT community will get their freedom, their rights?

Will Indian Society accept their position as equivalent to heterosexuals or not?

RECOMMENDATIONS

- a) To develop a stronger professional relationship with the LGBT communities, law enforcement agencies should integrate training on such issues into academy and in-service programs.
- b) When employing any officer belonging from any such community, law enforcement agencies should remain diligent in creating an inclusive environment, recognizing and proactively seeking to prevent discriminatory behaviors and policies.
- c) Officers must have a thorough understanding of proper terminology when addressing or referring to transgender individuals.