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SHORT ARTICLE

Gender Equality vis-a-vis Right to Sexual Orientation

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Abstract

The right to sexual orientation is an essential component of individual liberty, dignity and equality. Despite the constitutional guarantee of equality and non-discrimination under the Indian Constitution, the LGBTQIA+ community continues to face social exclusion, discrimination and legal challenges. This article examines the relationship between gender equality and the right to sexual orientation in the Indian constitutional framework. It analyses the limitations of existing legal provisions concerning marriage, adoption, employment and education, which continue to affect the recognition and protection of sexual minorities. It further examines landmark judicial pronouncements, including NALSA v. Union of India, K.S. Puttaswamy v. Union of India and Navtej Singh Johar v. Union of India, which have strengthened the constitutional recognition of gender identity, privacy and sexual autonomy. The article emphasises the need for legislative reforms and greater social acceptance to ensure substantive equality, dignity and equal protection of rights for the LGBTQIA+ community.

1. Introduction

> *'Justice has always evoked ideas of equality of proportion of compensation. Equity signifies equality. Rules and regulations, right and righteousness are concerned with the quality of value. If all men are equal then all men are of the same essence and the common essence entitles them to the same fundamental rights, equal liberty... In short, justice is another name of liberty, equality and fraternity.'*
>
> – Dr B.R. Ambedkar

Our constitution i.e. the Indian Constitution is one of the lengthiest and diverse constitutions in the world. It comprises rights, duties and powers bestowed on the legislature, executive and the judiciary but none are above the constitution meaning the Constitution is supreme.

Every citizen of India enjoys equal protection of their rights and freedoms as enshrined under the constitution but these rights seem illusory as there still lives a 'minuscule minority' which though are citizens of this nation but have no say for themselves or their rights.

We all know that gender inequality is still persistent in India even after 75 years of our independence. But have we got independence to identify ourselves? Is there any right to sexual orientation? Do we even know what it is? Let us see what sexual orientation is. 'Sexual

orientation' pertains to a person's emotional, affectional and sexual attraction to individuals of a different gender or the same gender or more than one gender. According to a majority of us it is only men and women who have a right as citizens but what about the other 'minuscule community' as I referred above i.e. the LGBTQIA community. Aren't they citizens of India? Haven't they got the rights enshrined under the Indian Constitution? Though our constitution does not make any such difference amongst its citizens but it is we who do so and shun the already suffering community making them suffer to their own miseries. Though the society has reached the far universe and the earth's core, there still lives a minor part of the society which is downtrodden, trampled and gagged making them to stop, to stand up, speak up and even to crawl amongst the so called 'normal people'.

2. Constitutional Framework for Gender Equality and Sexual Orientation

The society is deeply conservative but not the constitution for example Article 14 states that *'the state shall not deny to any person equality before law or the equal protection of laws within the territory of India'* whereas Article 15 '*prohibits discrimination on grounds of religion, race, caste, sex or place of birth but unfortunately the phrase sexual orientation finds no place'.*

Talking about transgenders, lesbians, gays, queers and asexuals in specific. These minorities are the ones who suffer as they have no implied or expressed identity in this country till now. No statutory book or law is made for them specifically to cater their predicament. These members of the society are the ones who are shunned because of their way of style, language and gestures which makes them the aliens or the clowns in the eyes of the people. If we categorise these into a single class we name them as the *third gender.*

Only conversing and presenting sermons are not going to bring them at par with the society but there is a tremendous need to amend our laws in the statute books and morals and ethics in our minds.

3. Legal and Social Challenges Faced by the LGBTQIA+ Community

Sexual orientation includes a catena of other perspectives involving marriage, adoption, protection at workplace, jobs, education and most importantly social ostracizing. The laws in our country are not up to the mark as they restrict their reach to men and women in general. None of the statutes talks about the third gender as they are not considered as beings of the earth but something else.

Taking a few examples such as the marriage act of India. The opprobrium of marriages in India opined that marriage is a bond between biological man and a biological woman. It is for the legislature to legislate and to enforce such societal morality and public acceptance based on social ethos. Though here in India we have a Special Marriage Act, 1954 which states that a marriage under it can be solemnised irrespective of the religion, race, caste but abandoning the phrase sexual orientation as by and large marriage is a bond between two people of opposite sexes.

In another instance according to the India's Adoption Regulations 2017 there is no mention of same sex and transgender individuals to adopt a child and the road for adoptions by LGBTQ

community seems blocked and it is still an arduous battle for the community to fight against the evil. It is the call of the society to modify such rules and regulations regarding adoptions so as to include the *right to motherhood* and *right to reproductive autonomy* as enshrined under Article 21 of the Constitution.

4. Judicial Recognition of the Right to Sexual Orientation in India

Since a few years the courts of India in many cases have given a space to the citizens with different sexual orientation to get them recognition in the society.

4.1 Naz Foundation v Government of NCT of Delhi

In *Naz Foundation v Government of NCT of Delhi*[1] the High Court of Delhi in 2009 held that section 377 of IPC imposed an unreasonable restriction over two adults engaging in consensual intercourse in private. Thus it was a direct violation of their basic rights under Articles 14, 15, 19 and 21 of the Indian Constitution.

4.2 National Legal Services Authority v Union of India

In the case of *National Legal Services Authority v Union of India*[2] the Supreme Court in its landmark judgement created the third gender status for hijras and transgender. As earlier the transgender people were forced to mark themselves as either male or female but after the judgment they could proudly identify themselves as transgenders. Justice Radhakrishnan in his separate judgement said *'We… conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG (transgender) community'.*

The court recognised the difference between both the genders and biological components of sex. The court defined biological characteristics to include genital, secondary sexual features, chromosomes, etc. but define gender attributes as one's self image i.e. an individual's deep emotional or psychological sense of sexual identity and character which is not restricted to the binary sense of male and female but can lie on a broad spectrum.

4.3 K.S. Puttaswamy v Union of India

However in *K.S. Puttaswamy v Union of India* Justice Chandrachud's opinion featured a section titled *'discordant notes'*. Justice Chandrachud observed that sexual orientation also falls within the wide ambit of right to privacy. *Suresh Kumar Koushal*'s case also faced criticism in the light of this judgment as stated that the minuscule population of LGBT plus community cannot be the ground to deprive them of the basic fundamental rights and such curtailment of the fundamental rights cannot be held tolerable even when a few as opposed to large number of people are subject to hostile treatment.

[1] *Naz Foundation v Government of NCT of Delhi* AIR 2009.
[2] *National Legal Services Authority v Union of India*, Writ Petition (Civil) No 400 of 2012.

4.4 Navtej Singh Johar v Union of India

The limelight of such judgments was the 6th of September, 2018 in *Navtej Singh Johar v Union of India*[3] case the apex court of the nation decriminalised section 377 of the Indian Penal Code to exclude consensual intercourse between adults of the same sex. The Supreme Court also held that '*sexual orientation is an inherent part of self identity and invalidating the same is denying the right to life and the fact that they constitute at the minuscule section of the population cannot be a valid justification to deny them this right'*.

5. Legislative Developments and Social Recognition

These days we can see that the states are coming forward with new ways to cater the plight of the minuscule community by legislating new laws, adding up resources and spreading awareness. One such step was taken by the Uttar Pradesh government in the year 2019. The government opened India's first ever university for transgenders at Kushinagar district setting up an example for others to follow.

The union government passed the Transgender Persons (Protection of Rights) Act, 2019 with the objective to provide for protection of rights of transgender people their welfare and other related matters.

Even our Hindu scriptures such as the most canonical one the Rigveda says *'vikriti evam prakriti*' meaning what seems unnatural it is also natural which some scholars believe recognises homosexual dimensions of life. Thus recognising sexual orientation as right in the constitution and other concerned statutes is the need of the hour.

6. Conclusion

In the end I might prefer to say that the various judgements of the honourable Supreme Court have laid ample stepping stones for us and the legislature to make laws and regulations to prevent atrocities against the LGBTQ community. It is high time to move in tandem with the Supreme Court judgments and make ourselves concerned towards this minor community as we are towards the women and children so as to lessen their suffering. The time has come to give the *'right to sexual orientation'* a constitutional status.

I conclude my words by the famous saying of Martin Luther King Jr:

'Injustice anywhere is a threat to justice everywhere.'

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[3] *Navtej Singh Johar v Union of India* (2018) 1 SCC 791.