

## GENDER EQUALITY VIS-À-VIS RIGHT TO SEXUAL ORIENTATION

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### ABSTRACT

*Be Yourself*, is the preaching we try to inculcate within the minds of our young generation, we encourage our society to be rid of the showcases and pretending, but then behind the curtains we ask our little daughter to visit a doctor when she expresses her feelings towards a girl, ironic? This article involves a series of thought invoking realities, with regard to the LGBTQ+ community and tries to define 'Sexual Orientation' in true sense.

### Introduction: Sexual Orientation vs Gender Identity vs Gender Expression

The term 'Sexual Orientation'<sup>1</sup>, is coined to describe the pattern of one's emotional, romantic or sexual attraction, this pattern may be towards the same gender (homosexuality), the different gender than your own (heterosexuality), both the male and female gender (bisexuality), all genders (pansexuality) or neither (asexuality).

'Gender Identity'<sup>2</sup>, talks about the psychological and internal sense of oneself as a woman, man, both, in between or neither. It is the process of identifying oneself under the umbrella of a particular gender or none. This may or may not be different from the birth-assigned sex and could only be identified by the individual.

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<sup>1</sup> HealthLinkBC, <https://www.healthlinkbc.ca/health-topics/abj9152> (Last visited Aug. 14, 2021).

<sup>2</sup> HealthLinkBC, <https://www.healthlinkbc.ca/health-topics/abj9152> (Last visited Aug. 14, 2021).

The representation or expression of a person's gender in public, is known as 'Gender Expression'<sup>3</sup>. This is how a person expresses themselves either through behavior or outward appearance, using their chosen name or pronoun. This expression communicated by the person, is how others perceive the gender of the person.

### **History of Indian Culture:**

The road of 'Sexual Orientation' has been an embellished one since the primordial times, below mentioned are few precedents to support the belief:

1. In the 4<sup>th</sup> century A.D., Kamasutra mentions about the physical relations and unions between male-male gender vividly.
2. The eloquent Bengal folklore of 14<sup>th</sup> century narrates the story of a sexual relationship between two widows.
3. During the medieval times, Bhakti saints would effeminize themselves to worship Lords Krishna and Shiva.
4. In the 18<sup>th</sup> century, nawabs in the court of Awadh would dress up as woman on certain holy days for the celebration.
5. Till 1800's, Indian poets like Insha and Rangin were openly writing about male-male and female-female relations, in the same tones as they would write about heterosexual relationships.

There have been various instances which showcase that though homosexuality was not an open practice during the ancient times and lacked the proper definition of the term, but these practices, when performed were never derided or looked down upon.

This pleasant situation took a drastic turn when Thomas Macaulay introduced Section 377 into the Indian Penal Code, in the year 1860, this was modelled after the English Buggery Act of 1533, and

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<sup>3</sup> Ontario Human Rights Commission, <http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression/3-gender-identity-and-gender-expression> (Last visited Aug. 14, 2021).

with the insertion of this Section, homosexuality was criminalized and considered as ‘against the order of nature’.

The consequence of this was witnessed on various stands, by the 1920’s when Hindi write ‘Ugr’ published his collection of short stories named ‘Chocolate’, it caused an uproar, even though it denounced homosexuality. An even colossal repercussion was seen in 1998 when an Indo-Canadian filmmaker Deepa Mehta released her lesbian love story ‘Fire’, this release led to numerous protests and the content was accused of being ‘alien’ to the Indian society.

These upheavals resulted in a series of protests held by people, who tried hard to make space within their fundamental rights, for their right to determine sexual orientation and be treated equally, eventually in 2018 the Supreme Court of India decriminalized Section 377 of Indian Penal Code and their efforts were rewarded.

#### **Decriminalization of Section 377: Court of Law vs. Court of Society**

- 1. Court of Law:** De-Re-De Criminalization of Section 377 of Indian Penal Code went through a rollercoaster of decisions, in light with the following rights granted:
  - Article 14: Right to Equality (The Test of Intelligible Differentia and Rational Nexus)
  - Article 15: Prohibition of Discrimination on the Ground of Sex (Biological Sex and Sexual Orientation)
  - Article 19: Freedom of Speech and Expression (Freedom to express personal and gender identity) and
  - Article 21 of the Indian Constitution: Right to Life and Liberty with Dignity (The privacy attribute)

In view of the above-mentioned rights available, the Supreme Court landed their final decision after going through the following landmark judgements:

- a. NAZ Foundation v. Govt. Of NCT of Delhi<sup>4</sup>: In this case, the question to repeal Section 377 was tossed and the court, considering Article 21 and Article 14 with Article 15, Delhi High Court held that the part of Section 377 which criminalizes the homosexuality, should be declared as ‘unconstitutional’.
- b. Suresh Kumar Koushal v. NAZ Foundation<sup>5</sup>: The arguments put up in this case were that homosexuality is a criminal offense and only Parliament has the power to decriminalize it, secondly, ‘Right to Privacy’ should not be extended up to the level where an offence could be committed under it. After the judgement of this case, homosexuality was again taken as a criminal offence.
- c. NALSA v. Union of India & Ors<sup>6</sup>: In this case, light was shed upon the loophole that each and every law constituted in India was based on binary genders, either male or female and no rights were formed or granted to the transgender community, which resulted in discrimination towards the community. In this case, Supreme Court recognized various facets of transgender rights under Article 14, Article 15, Article 16, Article 19 and Article 21 of Constitution of India.
- d. Justice K.S. Puttaswamy v. Union of India<sup>7</sup>: In this case a 9-judge bench of the Supreme Court affirmed that ‘Right to Privacy’ comes under the umbrella of Fundamental Rights, and Justice Chandrachud held that it is the duty of the Supreme Court to rectify the mistake made in Suresh Kumar Koushal case and declared ‘Sexual Orientation’ as the ‘Essential Attribute of Privacy’.
- e. Navtej Singh Johar v. Union of India<sup>8</sup>: This most celebrated judgement provided by the 5-judge bench of Supreme Court ‘De-Criminalized all consensual sex among adults in private, including homosexual sex’, thus, de-criminalizing Section 377 of the Indian Penal Code.

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<sup>4</sup> AIR 2009, Delhi High Court

<sup>5</sup> AIR 2014 1 SCC 1

<sup>6</sup> AIR 2014 SC 1863

<sup>7</sup> AIR 2018, Supreme Court of India

<sup>8</sup> AIR 2018 10 SCC 1

After this judgement granted in 2018, Indian legal system has been supporting various rights of homosexual people and grants freedom to individuals to express their sexual orientation.

**2. Court of Society:** Sad truth about the Indian society is, 'Change never changes anything here', even though the legal system provided freedom to the community, the Indian society has not been very amiable towards the homosexual people. Vishwa Hindu Parishad announces 'Homosexuality' as an 'Imported Disease', and even Subramanian Swamy claimed that fighting for the LGBTQ+ rights is an 'American Game'. The road of acceptance in the society is a very long one to cover and is full of hurdles to cross, few of the struggles faced by the LGBTQ+ community in the present scenarios are:

- Sex Reassignment: The practice of sex change has been emerging within the Indian households since children have started coming out openly about their sexual orientation.
- When taken a survey<sup>9</sup> from various people passing on common streets, the popular opinion states that relations between a man and a woman are the only natural, God made union, and apart from this union, any union would be unnatural. Also, due to lack of legal literacy, people have also confused 'Gay Rights' with edible food 'Ghee Rice'.
- In the rural parts of the country, homosexuality is considered as 'being bewitched by some evil spirit' and could only be resolved by performing rituals and rites.
- Honor Killing is now being considered as a thing of past, where a union between inter-caste or inter-religion persons was discouraged by illegal killings, this practice is now being performed to avoid same-sex unions.
- The rainbow symbol used by the LGBTQ+ as a badge of honor is now being used by the capitalists' companies for advertisements and though it promotes awareness about the rights of the community, it grants monetary profits to the organizations, the symbol is 'to be earned, not to be earned from'. Instead, the queer community should be given discount coupons, offers or deals during the 'Pride Month', to reward their courage and efforts.

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<sup>9</sup> The Quint, [https://www.youtube.com/watch?v=EvOS219qZ\\_M](https://www.youtube.com/watch?v=EvOS219qZ_M) (Last visited Aug. 15, 2021).

- The term ‘Homosexuality’ is being tossed around by teenagers as a word of abuse and humor, mainly to bully the other person.
- The sexual, mental and emotional harassment faced by the LGBTQ+ community is another momentous level of issue which needs pressing attention of our society.

Conclusion: ‘We will not kill you, but we’re not going to make this easy for you either’<sup>10</sup>, is not the type of attitude we want within our Indian society! Culture is formed by the people living in it and nurtures with the views of those same people, the young and future generation of the society is progressing and accepting but still we need to go a long way to wipe out the homophobic, misogynist and orthodox thoughts, to grant the rights and freedom in true sense.

**“To be honest about who you are and be embraced by the new community.”**



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<sup>10</sup> Xtra Magazine, <https://xtramagazine.com/power/politics/india-lgbtq-challenges-covid-19-184735> (Last visited Aug. 15, 2021).