

“Homosexuality and LGBTQIA+ Rights still on Denial or just another hoax?”*Purbasha Mukherjee**Jogesh Chandra Chaudhuri Law College**(Affiliated to Calcutta University)***INTRODUCTION**

Sometime in 1960s, in one of the archeological expedition held in Europe to find something ground breaking, inside a tomb, the explorers were surely not disappointed. Outside Cairo, near the famous step Pyramid of Necropolis of Saqqara brought forth no bejeweled mummies of staggering royal household rather, in full grace it brought forth, in a wall art, two men standing and embracing each other, holding each other's hand and engaged in an act of nose kissing with an inscription overhead: *Niankhkhnum and Khnumhotep*. Back in 2380 to 2320 BC, these two men were the chief manicurists of the King and was highly esteemed in the Palace, known then as the fifth dynasty of the old kingdom¹. After numerous debates by well known scholars, talking of which debates on this are still taking place in 21st century, there were three probable speculation reached –

- Niankhkhnum and Khnumhotep were brothers
- Niankhkhnum and Khnumhotep were a homosexual couple
- Niankhkhnum and Khnumhotep were conjoined twins (a very recent speculation by Dr. Connor)²

But, with this hypothesis, came forth the probability of the first gay couple in the history of mankind, the first sown seed of LGBT+ and it also brought forth the problems the homosexual people/couple face in the society that might lead them to make a family of their own and give births to children for taking the family forward and this is also the reason for which the other two hypothesis of them being brothers or twins were reached because even today when homosexuality is legalized in most countries, two same sex person involving in any act of intimacy is still frowned upon.

LGBTQIA+

The acronym LGBTQIA+ stands for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Asexual and it's a commonly used umbrella term for gender identity and sexual orientation of a person.

Among the initials of the acronym, the first that came into the wide fore ground is homosexuality i.e. same sex preferences. Homosexuality is the romantic or sexual attraction between two people of same sex. It is a pattern of romantic, sexual or emotional endurance for two people of same sex. Homosexuality is also an identity pattern for people who have attraction towards people of

¹ <https://www.nytimes.com/2005/12/20/science/a-mystery-locked-in-timeless-embrace.html>

² <https://www.nytimes.com/2005/12/20/science/a-mystery-locked-in-timeless-embrace.html>

similar sex. Etymologically the word homosexual is a Greek and Latin hybrid. It wasn't until 1869 that people came across the word homosexual. The word was published in a German pamphlet where an Austrian born novelist *Karl Maria Kartbenny* argued against an anti sodomy law. Later in 1886, *Richard von Kraft-Ebbing*, a psychiatrist, in his book *Psychopathia sexualis* used this word and since then it became a talk among doctors as well as laymen. The first homosexual couple, a topic still being debated upon, were Niankhkhnun and Khnumhotep of Egyptian kingdom. But the term homosexual, now, holds a negative meaning in USA and was firstly replaced by homophile and then, subsequently, to Gay for homosexual men and Lesbian for homosexual women in 1970s. Later the Transgenders and Bisexuals came upfront and tried to find a place in the society for themselves. The other terms, Queer, Intersex and Asexuals are quite a new addition to the community. Each community had gone through different struggles to find a place in the society for themselves and is still fighting through different forms of violence, crude comments, sexist remarks, family struggles, hate crimes and most importantly getting identified by the law of their Country.

HATE CRIMES

Over the years the hate crimes against LGBTQIA+ people has subsequently risen by, almost, more than 78% from 6% in 2013 to 16% in 2017. 1 among 5 LGBTQIA+ people have experienced hate crimes³. Almost 11 transgender people in USA had been shot or violently killed by different means in 2019 and especially biased violence against black transgender women is more than other biased crimes against other LGBTQIA+ people according to HUMAN RIGHTS CAMPAIGN⁴. Almost 81% of the LGBTQIA+ people have experienced hate crimes but didn't report it due to fear and almost 10% have faced prejudiced violence and crimes like homophobia, biphobia or transphobia⁵. Different countries in the World, still, do not have proper laws to protect the LGBTQIA+ people of their Countries. Countries like Ghana criminalizes "penile penetration of anything other than vagina" under their section 104 (1) (b) of his Criminal Offences Act commonly referred to as anti-gay law, however the law is a colonial law but yet the Government has not taken any step to stiffen the criminal penalties against consensual same sex conducts. Among different cases of violence and hate crimes faced by LGBTQIA+ people, a 30 year old woman from Ghana's Kumasi district, Pearl, came upfront with her story. She said that in the year 2009 the chief executive of her town called her and made her sit among 50 people and asked her if she was a lesbian and when she said no, a police officer kicked her and dragged her out of the room while continuously hitting her at the same time. She also said that they put tire around her neck and poured petrol on her and were getting ready to burn her. She also added that

³ <https://www.stonewall.org.uk/lgbt-britain-hate-crime-and-discrimination>

⁴ <https://www.usatoday.com/story/news/2019/06/28/anti-gay-hate-crimes-rise-fbi-says-and-they-likely-undercount/1582614001/>

⁵ <https://www.stonewall.org.uk/lgbt-britain-hate-crime-and-discrimination>

the pastor of the Church was also present there and asked her to confess everything before she dies.⁶

There have been several reported crimes and mob attacks against lesbian and gay people in different parts of the country and the vast majority of the crimes are perpetrated by male warmongers towards male victims which can be connected to ‘aggressive heterosexual machismo’, in simple terms as male chauvinism. And most of these arise from homophobia or prejudice against homosexual people.

Some of the major reasons why hate crimes are committed:-

- **Bias against sexual orientation**

A strong dislike or biased opinion about LGBTQIA+ people is what causes discrimination against them. These prejudiced behavior towards these people, i.e. towards Homosexuals, Transgenders and Bisexuals are called Homophobia, Transphobia and Biphobia, respectively. Theorist like *Thomas Calvin* and *Judith Butler* have suggested that a person’s homophobia can root from their individual fear of being identified as gay or lesbian. The theorists also said that a person who shows signs of homophobia, biphobia or transphobia doesn’t only do so to convey their beliefs about the class but also to socially distance them from the class and by that they want to reaffirm their roles as a heterosexual person in the heteronormative culture. And, also, in many psychoanalytical theory these phobias are expressed as a threat to his or her own same sex impulses which, in turn, can cause repression, denial or same sex impulses.

- **Religion**

Freedom of religion is a right of each and every individual irrespective of their gender or identity in their Countries but LGBTQIA+ people have experienced the most discrimination based on their religion and culture. There are religious institutions that deny admission to the these people or have rules of no dating for same sex students and, even, in some places they are not allowed to enter their religious places. There are numerous times, the advocates of religion, the priests or the religious leaders, plan persecution of these people in the name of Almighty. They preach their followers anti-LGBTQIA teachings and promote homophobic crimes and violence.

- **Peer pressure and fear of being left out**

Stigmatization of LGBTQIA+ people have been so commonly promoted, even after the laws supporting them has been passed in most countries, that the greater population deems it fit to hate the community as a whole because they feel that hating Homosexual or Transgender

⁶ <https://www.hrw.org/report/2018/01/08/no-choice-deny-who-i-am/violence-and-discrimination-against-lgbt-people-ghana>

people is the only natural thing to do and fear that if they don't follow the normative stigmatism of this community then they won't be accepted by their peers and the society.

- **Family and beliefs dominating generations**

Children are passed on beliefs of their parents and family members that have dominated them from generation and in turn learn to believe things that may not apply to the current situation or just be wrong. In recent times these children with biased thoughts bully kids who do not act according to society's standards of a gender and make them more vulnerable or push them to a situation where they are bound to accept an identity that is not theirs and in most cases the adults, as well, support them and these bullied people get scarred for their entire lives and suffer from different mental health issues and problems with accepting their own selves.

- **Thrill seeking or adventure**

It has been seen by the experts that many times there are no real reason for these hate crimes and adults and teens, drunk or in a daze of addiction, commits this crime just because their views do not match with that of the victim's and often they do it just for the thrill of committing a crime and thinks society will applaud them for it.⁷

SECTION 377: REPEALMENT AND DECRIMINALIZATION

India marked one of its landmark ruling on September 6, 2018 by a five judges bench comprising of the then Chief Justice of India Dipak Misra, Justice R F Nariman, D Y Chandrachud, A M Khanwilkar and Indu Malhotra by ruling section 377 of Indian Penal Code, 1860, that criminalized consensual intercourse between two same sex people as unconstitutional. Just like many other Countries, India also criminalized homosexuality and same sex intercourse as 'carnal intercourse against the order of nature' since 1860 but was rather late in decriminalizing it. The Section 377 was titled as 'unnatural offences' and stated "*whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to [a] fine.*"⁸ The issue arose in the year 2009 when a few portions of the section relating to same sex intercourse was struck off by Delhi High Court but it was overturned by the Supreme Court on 11 December, 2013, in *Suresh Kumar Kaushal & Amr v. Naz Foundation & ors (kaushal)*⁹ as something that should be left on the Parliament to be decided and not by the judiciary but in the year 2014, a two judges bench in Supreme Court approved it¹⁰. Later in 2016, when another petition was filed challenging the

⁷ <https://www.cnn.com/2017/06/02/us/who-commits-hate-crimes/index.html>

⁸ <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>

⁹ *Suresh Kumar Kaushal & Amr v. Naz Foundation & ors* (2014) 1 SCC 1

¹⁰ <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>

decision made in 2014, the Court reviewed a few more petitions from the *Naz foundation and others* and decided to review it again by five member constitutional bench and ultimately in September 2018, after agreeing to revisit the *Naz Foundation* judgement made in 2013 the Court unanimously ruled section 377 of Indian Penal Code, 1860, as unconstitutional in *Navtej Singh Johar v. Union of India*.

Navtej Singh Johar, Ritu Dalmia, Ayesha Kapoor, Aman Nath and Sunil Mehra, five people from the LGBTQIA+ community, filed a writ petition challenging the constitutionality of section 377 of Indian Penal Code, 1860, seeking their right to sexuality, right to sexual autonomy and the right to choose sexual partner to be a part of their life. The court deliberated on the *kaushal* judgement to see whether it violated article 14, 15 and 19, i. e, ‘the Right to Equality and Non-Discrimination’, ‘Right to Life and Personal Liberty’ and ‘Right to Expression’. Some opposition arbitrators argued that carnal intercourse between two same sex people was derogatory ‘to the constitutional concept of dignity’ and that such acts might pose higher risk for HIV/AIDS in the society and that repealing section 377 might harm the sacred institution of marriage between a man and a woman and that it might violate article 25, Freedom of Conscience and Propagation of Religion. Another opposition added, “if Section 377 is declared unconstitutional, then the family system which is the bulwark of social culture will be in shambles, the institution of marriage will be detrimentally affected and rampant homosexual activities for money would tempt and corrupt young Indians into this trade.”¹¹

The court also deliberated on the last ruling of section 377, i. e, ‘unnatural intercourse that goes against the order of nature’ and said, “A person’s sexual orientation is intrinsic to their being. It is connected with their individuality and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality”¹² and thus the Court upheld the right to equality to citizenship of the LGBTQIA+ community in India and legalized consensual same sex intercourse between two people striking down the previous 158 year old colonial law.¹³ The court relied upon *National legal services authority v. Union of India*¹⁴ and *K. S Puttaswamy v. Union of India*¹⁵ to reiterate the intrinsicity of one’s gender identity and the right to privacy of the LGBTQIA+ community who are the minority people in the country would be a denial of their fundamental rights. The Court also relied upon its judgement in *Shafin Jahan v. Asokan K.M*¹⁶

¹¹ <https://feminisminindia.com/2020/05/19/same-sex-marriage-india-unveiling-marriage-project/>

¹² <https://feminisminindia.com/2020/05/19/same-sex-marriage-india-unveiling-marriage-project/>

¹³ <https://translaw.clpr.org.in/case-law/navtej-singh-johar-vs-union-of-india-section-377/>

¹⁴ National legal services authority v. Union of India (2014) SCC 438

¹⁵ National legal services authority v. Union of India (2017) SCC 1

¹⁶ Shafin Jahan v. Asokan K.M (2018) 5 SCALE 422

*and Shakti Vahini v. Union of India*¹⁷ to reaffirm an adult's right to choose his /her life partner falls under a person's individual liberty that cannot be denied.

HOMOSEXUAL RIGHTS STILL ON DENIAL?

With the repealment of criminalization of homosexuality acts in most countries, it was thought that people will start becoming more acceptable towards same sex people and in some international surveys the graphs and data shows the same as well. In a global project The World Value Survey (WVS), a small sample of India's culture along with that of the other countries was composed and it showed that from 1990 to 2014 people who believed 'homosexuality is never justifiable' have gone down from 89 % to 24% which is way less than expected. Also, around the globe, the countries are growing much more accepting of homosexuality and their rights and India has been placed among 60 liberal countries along with some European countries by WVS because India has only 24% to 30% of people still against homosexuality whereas the countries like Pakistan and some other Asian countries have far more stronger opposition towards it like China, Singapore and South Korea¹⁸ but in contrary there are other surveys that prove the exact opposite. In a survey by the Center of the Study of developing society (CSDS) and Azim Premji University, it was found that only 28% agreed with the statement that sexual relationship between two men or two women should be accepted by the society and 46% disagreed to the statement and the rest had no opinion.¹⁹

In our modern world where almost everything is powered by the internet and social media, the hate crimes and false news plays a hazardous role which is also spread through these sites. Biased opinions and false arguments about a minority community like the LGBTQIA+ community have proven to be affecting these people the most because each of these sites have billions of reach and every other person in the entire world gets to see the things, especially the false and fabricated and biased things, and somehow it plays a huge part in convincing people of what is wrong as something that is right. Also, the influencers in these social sites play a huge part with huge number of fan followings who are always ready to follow these idols and when these idols brings forth their homophobic nature, the huge fan base deems it as a right thing to do because they believe that their idols can never really be wrong and also it appeals to their biased side and thus triggers more outrage toward these certain minority classes and thus the homophobia that already existed in these people, accelerates. They start calling homosexual

¹⁷ *Shakti Vahini v. Union of India* (2018) 7 SCC 192

¹⁸ Broadly supportive of homosexuality (in %) 050198219901995200220072014Brazil200725Brazil200725 Brazil United States Pakistan Sweden China India Broadly supportive refers to the sum of responses rated 5 and above out of 10 to the question "do you believe homosexuality is justifiable?" with 0 being "never justifiable" and 10 being "always justifiable"

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people with slang words like ‘chakka’ and cyber bullies and blackmails them. Their individual rights aren’t paid enough attention to by the protectors of laws and their complaints are laughed away in another fit of name-calling and harassments. They are denied shelter and education and are not given rental places to stay just because of their not so heterosexual ways of living. They are disregarded and shamed for being homosexual and their upbringings are questioned. They’re denied jobs and called all sorts of negative adjectives like ‘attention seekers’. Homosexual men are taunted for being feminine and their effeminate ways of talking or a different fashion sense that does not match society’s standards of masculinity. Their families disowns them if they disagree to live like the way society wants them to. They’re beaten up for being who they are and are put through conversion therapy as a way to cure them off their non-heterosexual ways and preferences. At times their identities are considered as a mental disorder and as funny as it sounds there are times they’re asked to do a blood test or other weird things to confirm their identities.²⁰ An example of it remains the suicide of a queer women of Kerala in the month of May, 2020, who claimed in an Facebook video a few days before her death that she was put through conversion therapy and taken to different de-addiction centres by her family to cure her of her gender orientation and allegedly because of this, her friends revealed, she was suffering from depression.²¹

The transgender community in India faces the greatest turmoil where almost only 2% gets to stay home with their parents. According to a study conducted by Kerala development society on behalf of NHRC, almost 92% of transgender people are denied their basic rights to participate in any economic activities and are also refused jobs even though they’re highly qualified which probes them to choose beggary or sex work as their means of livelihood and are exploited and beaten up by their clients. “They are totally invisible in all spheres of economic activities. Low level of education and social exclusion limits their employment and livelihood opportunities” the study observed.²²

The decriminalization of the homosexuality act in different countries brought about a major revolution around the globe and the youths of our society are much more accepting of the gender identities and orientation of the LGBTQIA+ community nowadays and many are fighting for their rights, as well, but still they face a denial of their rights in almost everything they do and everywhere they go and maybe that is because the most reprehensible people are the one who are still left in our society with their ludicrous homophobic views and ways constituting a small part of a surveyable data but still constituting the most huge and dangerous part of a particular Country. In a speech by

²⁰ <https://www.lgbtqcommunities.com/problems-faced-by-lgbt-in-india/>

²¹ <https://m.hindustantimes.com/india-news/kerala-student-s-suicide-puts-focus-on-dubious-conversion-therapy/story-fmgMhK8nFVUuddV97xvDXN.html>

²² https://m.timesofindia.com/india/left-alone-just-2-of-trans-people-stay-with-parents/amp_articles/65380226.cms

Sacha Baron Cohen targetting social media and how false information are spread, he said and I quote “those who deny the holocaust aims to encourage another one” and this particular statement stands true for all kinds of social stigmas and stereotypes.²³

Thus with changing times and mindset where people are expected to be much more lenient and accepting, the LGBTQIA+ community is still facing problems that are making them take away their own lives and the one question that continues to linger is that when the law has accepted and have given this community their deserved rights, are they actually getting any of it or are their rights just another hoax in the face of other critically acclaimed laws that haven’t still gotten their deserved identities even after getting a clean chit from the highest Court of law of the Country?

²³ <https://www.facebook.com/TheIndependentOnline/videos/2744138865813303/>