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LGBTQIA+: DEMAND OF IDENTITY?

By Himanshoo Atri

In 'Philadelphia' movie when Joe Miller (The Advocate) encountered with a young man in Pharmacy enquiring his identity. Joe Miller irritated says, do I look like a gay to you? Young man (looking down at his clothes) replied, do I look gay to you? The scene questioned the society for its structural formation, the way gender identities are being stereotyped. The civilization as we know from the very inception of it has been always restricted in the binary of man and women, whether in love, literature, legends or law. The contradiction arose with openness of grey shades within binary of man and women as quoted by **Jason Collins**, "Openness may not completely disarm the prejudice, but it is a good place to start"¹. This grey shade has been inclusively termed as LGBTQIA+ (Lesbian Gay Bisexual Transgender Queer Intersexual Asexual). The sad part about this grey area is that despite a strong moment from mid of 20th century in the West and with the mainstreaming of agenda in India from the case of *Naz Foundation v. Govt. of NCT of Delhi*², which was further overruled in *Suresh Kumar Koushal v. Naz Foundation*³, in last with the recognition of 'third gender' in *NALSA v. U.O.I.*⁴ and with declaring part of 'Sec. 377' of IPC, Act 1860 which criminalize unnatural sexual intercourse between two adults as unconstitutional in *Navtej Singh Johar v. U.O.I.*⁵, the reaction of civilization is very much stigmatized to their rights. The main focus of this civilization, which in itself has been tainted with the patriarchal hegemony, was always to eradicate them from the very structure of the society in order to restrict the power and resources to the binary defined by the patriarchy. Like 'Lavender Scare' in 1950s-60s when U.S. government started witch hunting

¹James Collin's Courage in coming out, January 1st 2013, by Abbe Land (CEO The Trevor Project), available at https://www.huffpost.com/entry/jason-collins-courage-in-b_3193476, (visited on March 17th 2020)

²160 Delhi Law Times 277

³Civil Appeal No. 10972 of 2013

⁴AIR 2014 SC 1863

⁵W. P. (Cr.) No. 76 of 2016 D. No. 14961/2016

of LGBT to eliminate them from State departments and terms like perverts and sexually deviant were often used for them, which led to the persecution of many LGBT persons. The reason backing this was that these people were morally deprived and can be easily influenced and control by communists⁶. This shows how self-acclaimed titled of 'straight humans' tries to stigmatize other genders of human race, maybe by symbolic or cultural stereotypes. The reason for why all this have been done is, simply to maintain their hegemony and authority over the control and distribution of the resources.

Research Question

The present paper pre-acknowledges the existence and rights of LGBTQIA+ and hence, does not focus on their historical moment or defines the different categories included and reason for their inclusion with terminology, LGBTQIA+. The paper only focus on the ways to achieve their rights in the present structure of society.

In order to put forward any argument on the position of LGBTQIA+ and ways to achieve their rights. First, we have to understand that discrimination they face is cultural and symbolic but it is different from other minorities like women, caste and race. We can understand it by taking an analogical approach to the works of Oliver Cromwell Cox's contrast between '*Anti-Semitism and Racism*'. She stated that Anti-Semitism and Racism toward Colour people are different as one is a social intolerance while other is race prejudices respectively. Thus, with Jews the dominant group has feeling of their elimination as they are alien or their existence is an abomination. But with colour people there was a concept of superiority over them i.e. they exist but are inferior which justifies their exploitation by dominant group and here is no question of their elimination from the structure of civilization⁷. With the case of Jews there is sense of hatred or jealous about their position in the society, here the aggressor want to eliminate their space in the system. Their identity is not defined by the aggressor but questions the existence of their authority, where as in

⁶ LGBT History: The Lavender Scare, October 3rd 2017, by James Gleason, available at <https://www.nglcc.org/blog/lgbt-history-lavender-scare>, (visited on March 17th 2020)

⁷ Oliver Cromwell Cox; *Caste, Class and Race* 393 (Monthly review Press, New York, 1959)

case of racism their identity, their position, their profession, everything is defined by the predominant self-acclaimed racially superior group and the so called group do not want them to exist outside their predefined structure. LGBTQIA+ can be a part of those hit by Anti-Semitism or Race prejudice or caste based minority. So, there demand of identity recognition is also different from other gender based minority such as women. The reason is same as was stated in social intolerance and race prejudice, i.e. women are considered part of the society structure as their existence is not questioned but are considered inferior to men in male dominant patriarchal society. Though there is honor killing and female feticide but they have acquired a particular space as a different identity within society. The problem with LGBTQIA+ is that their independent identity of being different gender and sex is the point of question. The dominant group within system do not considered as a different identity but just an unnatural phenomenon or deviance within the existing biological identities. The demand of biological identity is more than just a social identity.

Why demand of identity is necessary? Because the identity is not a singular direction mechanism. A person have many identities based on a particular identity, like 'women' it a gender identity upon which other identities like, practice a particular religion 'religious identity', belongs to particular region 'regional identity', supports particular political opinion 'political identity'⁸, and many other which are dependent on the role played in the society. But all these will come in to play when basic identity of being human of equal status is there. All these identities also represents different rights attached to them and assertion of these rights depends upon the consideration of being part of particular identity group.

Next question, how to categorize their demand of rights. There is also a dichotomy here that do we consider their demands to be a demand of human rights or basic human needs as differentiated by **Upendra Baxi**. The 'rights' in liberal sense means freedom, i.e. freedom of speech, association, assembly, of conscience and religion, of political participation. Whereas basic needs includes food, shelter, clothing, health, education. The problem is between 'bread' and 'freedom'. It is not only fight between bread and freedom but rather who has how much of each, for how

⁸Amartya Sen, *Identity & Violence: The Illusion of Destiny* (Penguin Books, London, 2006)

long, at what cost to others, and why⁹. Though we can include both freedom and basic needs in broader concept of basic human rights but the present situation necessitates prioritizing satisfaction of basic needs because for a victim freedom is useless without them. This is also categorized by A.H. Maslow in his hierarchy of needs where he has considered the need of food, shelter, clothing, health, safety above personality and self-actualization¹⁰. LGBTQIA+ stands in very troublesome situation here since, they neither have freedom nor means to earn bread. One among these will only be realized when someone has his/her/their space in the structure of society, at least categorized as inferior human but they are not even considered that! As discussed above that their existence is an abomination. So, the demand is of both bread and freedom i.e. basic human rights firstly, later on it will be decided how much of each and for how long.

The thrust of discussion here lies in finding the way to achieve these rights, what will be a way to do Justice with LGBTQIA+ persons. The concept of Justice has been evolved through stages. Can the rights be achieved by way of recognition of their identity beyond the social symbolic and cultural discrimination or it has more to do with redistribution of resources? Recognition; **Article 6 of UDHR** states that everyone has right to recognition everywhere as a person before law¹¹. But what does recognition mean? It has evolved from Hegelian philosophy, phenomenology of consciousness. It can be understood in ideal reciprocal relation between subjects in which each sees the other as its equal and also separate from it. Recognition seems as ethical promoting self-realization which plays a part in social interaction and interdependence¹². The redistribution of resources refers to the distribution of economic resources which may include wealth, productive forces among those who has been historically discriminated or isolated from the resources. Ronald Dworkin states that first the distribution of income and wealth is not fair when it reflects inequalities in the distribution of physical endowments and other features of brute luck. The second is that a fair distribution is dynamic in the sense that it allows the distribution at any given time to be sensitive to people's ambitions, that is, choices about occupation, investment

⁹UpendraBaxi, From Human Rights to Right to be Human: Some Heresies (1986), available at <http://upendrabaxi.in/>, (visited at March 19th 2020)

¹⁰ A.H. Maslow, "A theory of human motivation" 50 (4) Psychological Review 370 1943

¹¹ The Universal Declaration of Human Rights, 1948

¹² Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* 10 (Verso, New York 2003)

and consumption. So to treat people as equals is to try to make sure that the distribution of income and wealth at any given moment is ambition-sensitive but not endowment-sensitive¹³. Then how come LGBTQIA+ persons need redistribution, since their main agenda is biological identity recognition, or atleast that is the presumption. To answer this we need to recall that how identities play a party in economic opportunities. Most of among LGBTQIA+, like I take example of Transgender in India are orphan or deserted by family. This gives them no option except being sex worker or beggar and may find difficult even to claim share of the property or inherit what would be lawfully theirs. Moreover, identity has both political-economic dimensions. These socially and culturally symbolic stigmas helps in creating the ideologies which justifies the economic exploitation and causes hindrance in opportunity to economic resources also. This economic hindrance further make them socially vulnerable. If a person is not satisfied of her hunger and sustainability then there is no chance that she will think of other things like personality development or enjoyment of other rights¹⁴. Take example of unequal pay for equal work among male and females, this phenomenon is an economic exploitation but is backed by predominant patriarchal social structure. From here it is very much clear that the rights of LGBTQIA+ will only be achieved when demands are for both right of recognition and redistribution are considered as supplementary to each other.

Justice Approach

Plato has described, Justice is achieved when all different classes in the society are free to do their work at their best and in coordination with each other. The Plato has categorized the society into three different classes, i.e. The Philosopher King, Warriors, and Workers. He has taken an approach of describing things from micro to macro level. According to him, Justice is an idea which can be achieved when everyone is doing what is its own. He has described that every human is not capable of doing things, so their functions should be differentiated according to their capabilities and in Ideal State Justice can only be achieve if there is harmonious functioning

¹³ Alexander Brown, *Ronald Dworkin's Theory of Equality: Domestic and Global Perspectives* 50 (Palgrave Macmillan, London, 2009)

¹⁴ Supra 7

of their work. Thus he has concluded the concept of Justice to the person's capability to achieve the best out of them to form Ideal Just State¹⁵.

But in medieval period the discourse was shifted toward the idea of 'General Will' of Rousseau which lead to formation of the State through a Social Contract between its subjects or Bentham's utilitarianism, the greatest happiness of greatest number . These approaches restrict the scope of Justice at micro level as they directly focused on the macro level Justice by ignoring and justifying means to achieve a common idealized end. These preaches the notions of common good and collective security rather than satisfying the individual needs. And no focus was given to individual personality development and capacity building to bring him at equal level in the society.

Since last century the discourse about Justice is again in limelight. And with Theory of Justice by John Rawls and further extension of it by Amartya Sen in his Idea of Justice, the concept of Justice is again shifted towards the individual's position in the Just society. The Rawls Theory of Justice talks about two basic Principles, i.e. to create Just institutions and second is to give advantages to the most disadvantages peoples in the process of Justice¹⁶. Whereas Amartya Sen has given but is full apt with work of Social Work in the society. The approach of Amartya Sen is more about individual's capacity building in the society rather than top dressing - Justice through Just institutions and about just means rather than achieving end through whatever means. The idea of capacity building by Amartya Sen is also reflection of what Ambedkar refers to, cultivating democracy at the root level, the top dressing of democracy is in itself undemocratic. Thus the discourse is about focusing on 'individual' but how much flexible or inclusive this approach is, this is the question to be asked. Does this 'individual' and our positive action in this approach includes all identities or it is also restrict only to 'Cis man' and 'Cis women'.

Affirmative Actions

Can these rights be achieved through legislation by making new laws for the protection of these persons or by giving them reservations in opportunities? If the answer is yes, then I can say, we

¹⁵ M. B. Foster, On Plato's Conception of Justice in the Republic, The Philosophical Quarterly (1950-) Vol. 1, No. 3 (Apr., 1951), Oxford University Press

¹⁶ Infra 19

support the affirmative action. 'Affirmative action' means to accept the already developed dimensions of identities and structure in which it works, thus we give protection and vest some preferred rights in favor of these socially stigmatized identities. Not like transformative action which means reconstructing the pre-existed structure of society which is the root cause of these problems. There is a problem with affirmative action because it is only institutional or it is topdressing from the legislature. But the problem is at social level and lies at the root. Also with passage of time these affirmative actions will create more stigma against them as the false narrative can be developed that these persons are taking extra privileges, just as in case of the position of other minority identity, SCs and STs in India at present. While B.R Ambedkar has also stated that the caste system can only be eradicated by the breakdown of the basic structure from where it is being derived¹⁷. These affirmative action can well function for short term but cannot be a longer term solutions. Measures through legislation is also what seems like Rawls point of creating 'Just institutions' and giving opportunities more to benefit of least advantages groups. But 'Just institution' cannot form 'Just societies', for the application of law also we have to create 'Just society'¹⁸ which cannot be done by affirmative actions. The law should develop from the root level because creating more laws will make people depend on the institution rather than their own responsibility to better the system.

There is also a capability approach which postulates that Justice can be achieved by 'Equality of Capabilities', the whole focus of this approach is providing capabilities to everyone to best use the resources available to him. The main contention of this approach is that without capability to utilize the resources there is no meaning of redistribution of it, for example the distribution of resources like land, money to physically challenged or person who is illiterate are of no use until they are capable of using in a productive way¹⁹. So, main focus should be upon increasing capabilities of each individual but for this we have to understand that persons should be recognized as individuals on an equal scale then their question of capabilities will be considered, like a weak man, illiterate, physically challenged all these are at least considered human though

¹⁷B.R. Ambedkar, *Annihilation of Caste: An Undelivered Speech* (Arnold Publishers, New Delhi, 1990), In this book the Babashaeb has stated that caste will never go till the basic root 'Vedas' from which the caste has been derived in the Hindu religion (SanatanDharm) is being destructed.

¹⁸This has been discussed by Amartya Sen while critically examining the Rawls theory of Justice. Amartya Sen, *The Idea of Justice*, (Penguin books, London, 2010)

¹⁹Ibid.

less or more. Again the question of recognition is there which means the one right should be dealt in parallel with other. Thus co-existence of these rights should be equally considered and dealt when dealing with LGBTQIA+ or any other oppressed minority. The reason for focusing on recognition as a basic demand around which other demands revolve is because of the question of dignity, right to have a dignified life. As it stated in Navtej Singh Johar case²⁰. Recognition is consciousness of individuals identifying each other equal and opposite while being in relation of interdependency upon each other. What kind of consciousness allows one to be indifferent towards others? If relations are built in a way which are questioning or undermining the dignity of one community then how can we think of making a just society inclusive of every community?

Now, the question can be asked by all this discussion is important. To this it can be stated that it is very much important to provide a space to all identities and communities in every aspect of public sphere whether it is academic or professional sphere. Like we have Feminist Jurisprudence we also need to study the law, social science through LGBTQIA+ perspective. The reason for it that if we do not this then somewhere though the so called Stakeholders are those who are thinking that they are trying to upliftment the marginalized miss the minute things because of insensitivity to basis of these identities. Like some examples can be quoted from existing Indian Laws;

Take case of Agency Principle especially the 'Principle implied agency between Husband and Wife', the husband and wife are bound by marital obligations and in general sense none of them is an agent of other. But either through express contract or by holding out or by ratification the relationship of agency may be formed between husband and wife. Besides this, between husband and wife, a presumption of implied agency may exist in certain circumstances. Even the law in certain situations empowers the wife to bind her husband by her contract on the ground of necessity to pledge her husband's credits without husband's authority²¹. The agency can be inferred from sec. 187²² which defines 'Implied agency'. Basically this agency forms its basis from the concept of construction of our society, where wife lives in the dominion of the husband and is dependent on the husband for her necessities and in return she looks after the domestic

²⁰ Supra5

²¹ Kanhayalal v. Indarchandji, A.I.R. (1974) Nag. 84

²² The Indian Contract Act, 1872

work of the husband's household²³. The rationale behind this explanation is that, the wife is the responsibility of the husband and husband is the bread earner in the marital relation; and women is a domestic worker dependent upon husband in order to have economic support. The interesting point in this context arises out of the fact that, at present homosexuality has been legalized in India. It happened after abolition of sec 377 of IPC, 1860 19 by Supreme Court and recognizing third gender in National Legal Service Authority v. U.O.I. In fact the marriages between LGBTQIA+ community persons and undoubtedly these concepts are out of our conservative binaries of male and female. But our outdated laws cannot cater to these social developments which either makes them insufficient or exposes the lacunae within them. Hence, the legal development is necessary in this field of 'Husband-Wife Agency, especially when we are defining legal obligation on the basis of our existing social institutions. Even these marriages are not till date recognized by the Personal Laws, which clearly then reflects the lack of sensitivity of our makers and interpreters of Laws, those who have in their mind reformed the existing law.



²³ Ibid.