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Rights of LGBTQ+ Community under Rule of Political Homophobia: A Comparative Study of SAARC Nations

ANAMIKA SHUKLA¹

ABSTRACT

A tireless progress has been made in the past 50 years by many-an-unnamed individual activists, advocacy organisations across the globe at all local, regional, national and international levels. The history of discrimination across the South Asian region tastes of a bitter colonial past reflected in the same shade of cultural subjugation and penalization on expression of non-normative gender behaviours. Even religious strain guides homophobia in the region and gets translated into State policy. It is perhaps when political homophobia is cloaked under the garb of 'protection of traditional values' that the argument for criminalizing homosexuality takes on its most pernicious form. In this research study, we try to meander through the periphery of international principles, legal provisions and challenges faced and overcome, wherever applicable, by the SAARC nations to uplift their LGBTQIA+ communities.

Keywords: *LGBTQIA+ community, religious & political homophobia, decriminalizing homosexuality, SAARC approach.*

I. INTRODUCTION

Universality is considered the most fundamental aspect of human rights in any given field of inquiry. Tangents like civil, political, economic, social, and cultural, human rights are deeply entrenched in the fabric of human existence. The enjoyment of such innate rights must be ensured without any discrimination and arbitrariness. The examination of the right of the LGTBQIA+ community through the lenses of human rights is a sacrosanct study that must be undertaken. Human rights are innate and attached to the essence of being a human. While tracing the evolution of human rights jurisprudence at the international law platform, it is essential to draw from the various principles which have been the touchstones of some of the progressive and inclusive adaptations of LGBTQIA+ rights in domestic law tapestry.

The LGBTQIA+ rights are a direct reflection of a person's autonomy and individuality. A

¹ Author is an Assistant Professor at Gujarat National Law University, Gandhinagar, India.

person's gender identity², sexual orientation³ and the freedom of such expression is a feature of LGBTQ rights which primarily translate into a fundamental human right even on literal scrutiny. One's individuality and its expression thereby must be a matter of free will and choice. Often, when the State breaches into this aspect, it breaches the foundational social contract on which lays the entire civil structure. Therefore, the violations of the human rights of LGBTQIA+ persons, precisely, for this reason, cannot pass the reasonability test of the present era's understanding of human rights and dignity.

However, the discrimination, disrespect and abuse faced by the LGBTQIA community occur due to the lack of understanding of this individuality. The normative heterosexual, cisgender, the so-called majority often lacks understanding of one's individuality if it is dissenting from the conforming-accepted values are in that specific society. Often being different is feared, hated and looked down upon stemming from the cultural, religious, moral standpoints of different societies across the globe.

(A) Literature Review

C. Wilkinson, P Gerber & AJ. Langlois (2017) in the paper “LGBT Rights in Southeast Asia: One Step Forward, Two Steps Back?” explore the shadow of political homophobia in Southeast Asia. They study the trajectory of SOGI rights as human rights from four distinct perspectives to examine the political state of LGBT community. In arguing religion’s negative influence on the evolution of human rights, the authors try to provide a way forward to achieve higher protection of LGBT rights. The paper however, falls short of covering the status of multiple key nations in the region.

C. Lennox & M. Waites (2018) in the book “Human Rights, Sexual Orientation And Gender Identity In The Commonwealth” provide a rich repository of comparative stances of the commonwealth nations on the LGBTQ community, their rights and struggles. These are studied in context of the colonial past in comparison to the progressive contemporary landscape for LGBTQ rights in specific regions. Various chapters by different experts harp on a range of tones affiliated to the subject but fall deficient in providing for a consolidated common analysis and conclusion of the various themes discussed under the Commonwealth nations.

S. Baudh (2018) in the chapter titled “Decriminalisation of consensual same-sex sexual acts in the South Asian Commonwealth: struggles in contexts” goes on a journey to explore the on

² Yogyakarta principles, Introduction to Yogyakarta Principles, as available at: <https://yogyakartaprinciples.org/introduction/> (last accessed on 10.11.2021 at 9:19pm)

³ Ibid.

ground reality of the homophobic laws in place and the firsthand accounts of human rights violations felt by individuals of the LGBT community in various South Asian nations. The author however fails to provide a connect between the interviews he majorly translates in his work and its examination against the national and international legislations.

L.R. Mendos (2019) in the journal article titled “State-Sponsored Homophobia” extensively covers the socio-politico scenario of status and rights of LGBTQ+ community across all major nations. An exhausted global perspective is showcased in this work which sufficiently acts as an encyclopaedia for the reader to bulk up on the current status of LGBTQ+ communities. Yet, the author by a hair’s breadth misses to make suggestions for the way forward for the range of nations listed therein.

(B) Research Objectives

To examine the status of rights of the LGBTQIA+ community within the SAARC region and examine its punctured growth in the region.

(C) Research Questions

- i. Whether South Asian region is suffering from paralysis in recognizing the human rights of the citizens?
- ii. Whether SAARC nations are lagging behind in development of its human rights in context of LGBTQIA+ community?
- iii. Whether change with regard to rights of the LGBTQIA+ community, even if merely in terms of their recognition and acknowledgment, is brewing?

(D) Methodology (DUE TO PAUCity of time and resources)

The following study shall be conducted on the basis of doctrinal research methodology i.e. non-empirical research. The researcher shall refer to books, journal articles, national and international legislations, etc., for the purpose of gaining an insight into the subject matter at hand. This research paper shall lean on understanding the struggles and rights of LGBTQIA+ communities under the SAARC jurisdictions and through a comparative analysis fulfill the object of this research study.

II. VOICE OF RECOGNITION WITHIN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

The Yogyakarta Principles play an essential role in the comprehension of one’s individuality

through the ideas of sexual orientation and gender identity (SOGI)⁴ concepts clarifying the foundational basis of being an LGBTQIA+ person. According to the principles, the concept of gender identity can be understood in terms of one's internal feeling and sense of inclination or belonging to a certain gender or on the gender spectrum which is often expressed through their mannerism, dressing, speech and personal values. Personal autonomy and individuality need to be the pillars of one right to life analogous to the notion of dignity while understanding human rights in terms of the LGBTQ community. The choice of an individual to conduct themselves in their personal sphere, relationships, dressing up choices, attractions and sexual encounters form the core of the autonomy.

Yogyakarta Principles reiterate all persons in this world as '*born free and equal in dignity and rights*' as established other human rights declarations and documents. It emphasises on human rights vis-à-vis sexual orientation and gender identity as an integral composition of all human beings' dignity.

Article 1⁵ of the Universal Declaration of the Human Rights (hereinafter referred to as the UDHR) amplifies the innate nature of an individual born free and her equality in dignity and rights backed with reason and conscience. Following suit, **Article 1⁶ of the Yogyakarta principles** declares an individual's right to the universal enjoyment of human rights. It is at the helm of LGBTQ rights, paving the dialogue for the same as human rights.

The notion of one's dignity has been accepted as an inalienable facet of the human personality under innumerable domestic laws across the globe. Under Article 21⁷ of the Indian Constitution, dignity has been duly recognised as an essential, foundational aspect of the right to life and the meaning of being a human and also encompasses the tangent of one's privacy.

Article 12 of the UDHR,⁸ encompasses the privacy tangent by propounding that individuals must live free of *arbitrary interference with their privacy or attacks upon their honour and reputation*.

Article 6⁹ of the Yogyakarta Principles propounds the right to privacy to every person regardless of sexual orientation or gender identity. It provides protection to one's choice of

⁴ Michael T. Tiu, Jr, "The Rainbow Flag Among The Flags Of Nations: Are LGBTQ Rights International Human Rights?", 93 Phil. L.J. 56 (2020), available at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/philplj93&div=8&id=&page=> (last access on 10.11.2021, 9:51pm).

⁵ See Article 1 of the UDHR.

⁶ See Article 1 of the Yogyakarta principles.

⁷ Constitution of India, 1950, Art. 21.

⁸ See Article 12 of the Universal Declaration of Human Rights, 1948, Article 17 of the International Covenant of Civil and Political Rights, and Article 8 of the European Convention on Human Rights.

⁹ See Article 6 of the Yogyakarta principles.

disclosing or not disclosing any information regarding their sexual orientation or gender identity. It condemns arbitrary interference in matters involving consenting adults regarding intimate decisions, and human relations, including consensual sexual activity. It further asserts decriminalisation of consensual sexual activity among same-sex persons over the age of consent.

The principles strive to achieve equality among the gender spectrum and sexual orientation through a holistic, inclusive approach to human rights law.

III. AN INQUIRY INTO CRIMINALISATION & DECRIMINALISATION OF LGBTQIA+

A tireless progress has been made in the past 50 years by many-an-unnamed individual activists, advocacy organisations across the globe at all local, regional, national and international levels. The history of discrimination across the South Asian region tastes of a bitter colonial past reflected in the same shade of cultural subjugation and penalization on expression of non-normative gender behaviours. In this chapter, we try to meander through the periphery of legal provisions and challenges faced and overcome, wherever applicable, by the SAARC nations.

Bangladesh has barely been synthesizing the wave of LGBTQIA+ rights with the international SOGI movement. As of date, the nation criminalizes homosexuality and puts a ban on gay marriages. The sexual minorities face fervent harassment, persistent social stigma and an utter lack of redressal under any state mechanism. Most potently, the law enforcement agencies of the nation cite §377¹⁰ of the Penal Code, 1860 to harass the LGBTQIA+ community, and more particularly the MSM (men who have sex with men)¹¹, a preferred term by the gay male community of the region.¹² In the same breath, §54¹³ of the Criminal Procedure Code, 1898 and §86¹⁴ of the Dhaka Metropolitan Police Ordinance, 1976 are used as routes of human right violations of the LGBTQIA+ community, give way to custodial violence and unlawful arrests and without an order or warrant from a magistrate, allow for detention of individuals on a mere suspicion of criminal activity. The provision of §54¹⁵ of the Criminal Procedure Code, 1898 was challenged by Bangladesh Legal Aid and Services Trust (BLAST) in 1998. Ultimately in 2003, the Supreme Court of Bangladesh High Court Division, taking note of the myriad instances of abusive exercise of power by the authorities and violation of fundamental rights of

¹⁰ Penal Code, 1860, §377 (Bangladesh).

¹¹ Ibtisam Ahmed, *Decolonising Queer Bangladesh: Neoliberalism Against LGBTQ+ Emancipation*, E-INTERNATIONAL RELATIONS (Oct. 31, 2021, 5:56 PM), <https://www.e-ir.info/2019/08/16/decolonising-queer-bangladesh-neoliberalism-against-lgbtq-emancipation/>.

¹² *Ibid.*

¹³ Criminal Procedure Code, 1898, §54 (Bangladesh).

¹⁴ Dhaka Metropolitan Police Ordinance, 1976, §86 (Bangladesh).

¹⁵ Criminal Procedure Code, 1898, §54, No. 5, Acts of Parliament, 1898 (Bangladesh).

the citizenry, recommended that the Government revise the said provision.¹⁶ However, the harsh reality remains that state inflicted violence, threats from religious radicals and an overall hostile climate engulfs the nation's LGBTQIA+ community which has lead many of them to either conceal their identities or flee the region.

Ironically, **Maldives** paints itself as a nation of sprawling greenery and vibrant beaches while the study of its cultural reality showcases quite a contrast. What is interesting in the situation here is that till July, 2015, when the nation's Penal Code came into force, there was no regulation on consensual homosexual expression and/or conduct. The Penal Code of 2014 brought a slew of abrasive provisions on human rights including §§410, 411, 412¹⁷ of Code. After the adoption of the said law, multiple arrests of gay men and other homosexual individuals have been reported. It can be suggested that this nation is highly volatile to the LGBTQIA+ community. It is no surprise that extremist groups endorsing nationalist-radical Islamic ideology have often attacked and targeted civil society groups, liberal media outlets, allies and individuals part of the LGBTQIA+ community. These groups have been known to have sturdy links with politicians in prominent positions, including President Abdulla Yameen Abdul Gayoom (2013-2018) in whose time in office, the human right violations grossly peaked. The irony is that Maldives continues to embrace international criticism, including that of the United Nations, and keeps reiterating to the forums that its laws are compliant of the international obligations towards protection of human rights. Needless to say, the ongoing suppression of critical speech, the fetters on political pluralism, threat to an independent judiciary, and the surge in human rights violations, especially those towards the sexual minorities, paves a treacherous path for this nation to convert to an autocratic rule.¹⁸

In the same breath, **Sri Lanka** also doesn't pass with flying colors in providing a safe space to its LGBTQIA+ community. The nation criminalizes homosexuality vide its Article 365 and Article 365A of Penal Code (1885) (as amended by the Penal Code (Amendment) Act, 1995). While this amendment was projected to gender-neutral, a Human Rights Watch Report of 2016 marked the situation for gender and sexual minorities in the country as a 'chill factor' who continue to face discrimination and violence in the region. The said report took note of police afflicted violence and targeting of LGBTQIA+ individuals based on their homophobic biases and such torturous acts finding their legitimacy under State approved penal sanctions. Such

¹⁶ Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and Ors., 55 DLR (HCD) (2003) 363 (WRIT PETITION NO. 3806 of 1998).

¹⁷ Penal Code, 2015, §§410, 411, 412 (Maldives).

¹⁸ Patricia Gossman, An All-Out Assault on Democracy, HUMAN RIGHTS WATCH (Oct. 31, 2021, 7:19PM), <https://www.hrw.org/report/2018/08/16/all-out-assault-democracy/crushing-dissent-maldives>.

prosecutions under vaguely worded and corrosively broad laws include ‘cheating by personation’, or ‘committing acts of gross indecency’, or being incorrigible rogues’ procuring ‘illicit or unnatural intercourse’, etc. While the country dabbles to politically march ahead on the issue, the national conversation on LGBTQIA+ rights has gained much traction in the past few years. The government has made a pendulum out of its stand on repealing laws reeking with discrimination and their underlying effect of perpetuating violence towards the LGBTQIA+ communities. They have convoluted to remove SOGI as a basis for providing protection due to such a policy posing wide ‘social and cultural implications’.

It is perhaps a religious strain that guides homophobia in the region and gets translated into State policy. Keeping up with the grim trend, **Pakistan** comes out as a glaring example of state sponsored homophobia. A dichotomous interpretation of both sexuality and gender dictates the popular narrative with a sparingly vast majority believing homosexuality to be a sin that shames their national and religious interests. The influence of the highly conservative and orthodox Islamic religious leaders, confluences to act as a key barrier to any progress of human rights in the region, especially those of the LGBTQIA+ communities. The nation noxiously relies on a skewed argument of morality to dictate its policy over the citizenry.¹⁹ The penal provisions around homosexuality find their home ground under §377 and §294 of the Penal Code 1860, §4 and §34(1) of the Hudood Ordinance 1979. Pakistan Telecommunication Authority also has the authority to remove or block access to content as it deems fit in the interest of the glory of Islam, decency, morality or public order.²⁰ Reverberating State’s homophobic outlook, the national religious authorities termed the first ever pride parade in June 2011, sponsored by the US embassy in Islamabad within its compound, as a ‘cultural terrorism’. Doubling down on this problematic ideology, when a confession by a serial killer to having murdered 3 gay men owing to their sexual orientation surfaced, the Pakistani media hailed the man as an ‘epitome of righteousness’. While hope may be fickle, it is not all lost. The Transgender Persons (Protection of Rights) Act, 2018 was passed by the National Assembly of Pakistan on May 05, 2018. This legislation is aimed at ensuring protection of rights of transgender persons. Even the Lahore High Court in September 2018, enunciated that a separate facility for transgender patients must be provided in public hospitals of Punjab province to shield their right to privacy, and protect them against discrimination. Lahore also saw its first trans-pride parade in December 2018.

¹⁹ Saad, *The Flickering Edge of Hope: Pakistan’s LGBTQ+ Community Battles Prejudice and Discrimination*, THE DIPLOMAT (Oct. 31, 2021, 6:50PM), <https://thediplomat.com/2021/04/the-flickering-edge-of-hope-pakistans-lgbtq-community-battles-prejudice-and-discrimination/>.

²⁰ Lucas Ramón Mendos, *State-Sponsored Homophobia*, 13th Edition, ILGA, (2019), https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf.

However, there is no National Human Rights Institution in the country contrary to international principles and conventions.²¹

But as the queer movement gained traction and public support, it was hit by the socio-political mainstream in several parts of the world. The obstacles to overcome wouldn't be short of a century. And yet, on such a day, in such a light, perhaps the most glaring beacon is offered by **Nepal** which does not find excuses in its strong patriarchal roots to justify the criminalization of homosexuality. The nation's tolerance did hold ground in 2007 when the country's Supreme Court called on the government to repeal laws which discriminate on the basis of SOGI, to recognize the third-gender as an independent category, and to set up a committee for earmarking the option of legalization of same-sex marriage as a direction in the case of *Sunil Babu Pant and Others v. Government of Nepal and Others*²². However, the progress fluctuates due to massive political instability in the nation. Following the collapse of its constituent assembly in 2012 and its failure to effect a written constitution, the November 2013 Constituent Assembly elections were contested by visibly more than 60 prominent LGBTQIA+ leaders. It is worth noting that none of them were elected to office or even nominated under the proportional representation system. Regardless, strong visibility and public advocacy circumferencing policy and legislative reforms for addressing LGBTQIA+ issues and rights find significant exposure on mainstream media in the nation.²³ Even §18(3)²⁴ of the Constitution of Nepal, 2015 mandates the State to not discriminate against 'sexual minorities' which offers an umbrella protection to the LGBTQIA+ community. A historic landmark echoing the efforts of the community can be traced to September 2017 when the Supreme Court declared that members of gender and sexual minorities shall be allowed to have official documents including their citizenship and educational documents issued per their gender identity.²⁵ The nation also plans to conduct an official LGBTQIA+ count of its citizenry as part of its nation census for the first time in 2022 to assist the gender and sexual minorities to have better access to health and educational schemes.²⁶

Bhutan does not fall far behind in its support of LGBTQIA+ community either. As a country famous for its 'gross national happiness' index, Bhutan stands as the elite minority of SAARC

²¹ *Id.*

²² *Sunil Babu Pant and Ors. v. Government of Nepal and Ors.*, WRIT NO. 914 OF 2007.

²³ UNDP, *Being LGBT In Asia: Nepal Country Report*, USAID, [2014], https://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-nepal-country-report.pdf.

²⁴ Constitution of Nepal, 2015, §18(3).

²⁵ UNDP, *supra* note 22.

²⁶ Gopal Sharma, *Bhutan parliament decriminalizes homosexuality, to delight of activists*, REUTERS (Oct. 31, 2021, 6:06 PM), <https://www.reuters.com/article/bhutan-bill-lgbt-idUSKBN28K1SK>.

nations to have decriminalized its archaic and colonial era provisions of law which criminalized homosexuality. On December 10, 2020, its parliament voted in favour of repealing §213²⁷ and §214²⁸ of penal Code, 2004 read with §3 of the said act which were labeled as the legal sanction towards discrimination of the sexually marginalized communities. While the nation reportedly never had any prosecution under these provisions of law, they nonetheless subjected the citizenry's intimate and private life to unwarranted scrutiny. The redundancy of these provisions which also attracted cynical eyes from various international human rights bodies motivated the ruling government to formally repeal them, a move tremendously lauded as the nation's sign of respect for its LGBTQIA+ community.²⁹

Regardless of much resistance from the conservative majority of society, from a series of historical judgments, **India** took a step forward in its human rights tapestry in view of SOGI. Section 377³⁰ of the Indian Penal Code, a British colonial legacy criminalized same sex consensual sexual acts violating fundamental rights of the LGBTQ community. In 2009, the Delhi High Court through *Naz Foundation v. Govt. of NCT of Delhi*³¹ wrote history through the one of the most progressive judgements acknowledging and decriminalising same sex relationships. This judgement was later overturned in the case of *S.K. Kaushal v. Naz Foundation*³² wherein the Supreme Court regarded the nation's LGBTQ population as *a miniscule fraction* for which the Delhi High Court had erroneously relied upon international precedents lead by anxiety. It failed to acknowledge and protect the human rights of the community by noting that the matter should be debated and decided upon in the Parliament. However, India looked towards a strong, positive change in the human rights horizon through its landmark judgment in *Navtej Singh Johar v. Union of India*³³ when a five-judge Constitutional bench declared Section 377 unconstitutional to the extent it criminalised consensual sexual conduct between adults of the same sex. The Court relied on another landmark judgment, *Justice K.S.Puttaswamy(Retd) v. Union Of India*³⁴ propounding sexual orientation as a matter of one's privacy and personal sphere extending protection under Article 21 encompassing the right to privacy. Through the decriminalisation, the path to equality has just been initiated.

²⁷ Penal Code of Bhutan, 2004, §213.

²⁸ Penal Code of Bhutan, 2004, §214.

²⁹ Kyle Knight, *Bhutan on Brink of Overturning Same-Sex Conduct Ban*, HUMAN RIGHTS WATCH (Oct. 31, 2021, 6:12 PM), <https://www.hrw.org/news/2020/01/17/bhutan-brink-overturning-same-sex-conduct-ban>.

³⁰ Indian Penal Code, 1860, §377.

³¹ *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277.

³² *S.K. Kaushal v. Naz Foundation*, Civil Appeal No. 10972 OF 2013.

³³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³⁴ *Justice K.S.Puttaswamy(Retd) v. Union Of India*, (2017) 10 SCC 1.

IV. CONCLUSION

An inspection of SAARC regime's take on LGBTQIA+ points towards the fact that there is no sanctuary for the community. The reality of SAARC nations is that the recognition and protection of human rights of LGBTQIA+ community remains illicitly uneven, deficient, often conflicting and arbitrary, which showcase the unstable and turbulent national, regional and international politics at play entangled with intersecting dynamics of privilege and marginalization. Under such a veil, instruments calling for social change contribute to authoring a shift in political language and the legitimate expectation borne off it, in which making human rights claims and pushing for such demands through performative protests, etc., become a legitimate activity. While this does not guarantee expected consequence, it provides for a politically-sanctioned stage – for one side to watch and for the other to perform.

It is perhaps when political homophobia is cloaked under the garb of 'protection of traditional values' that the argument for criminalizing homosexuality takes on its most pernicious form. The attack on traditional values traces its roots to the centrality of religion upholding morality in a society; the necessity of a functional family and protection of children from being swayed and misled; and the holy imperative of exhibiting and falling into only "natural" gender roles. Without a trace of scientific evidence, this notion inexcusably reeks of an overtly anti-feminist, transphobic and homophobic stance. These "traditional values" advocates unabashedly rely on their heteronormative, patriarchal, pronatalist and theocratic ideology to profoundly find justifications in their right to discriminate on the basis of moral judgments about other people's behavioral roles that do not comply with that of the traditional set up.

This socio-politico impasse moulds itself as a de facto legitimization of discrimination against the citizenry at large, especially at the expense of sexual and gendered minority as well as any individual falling into non-normative self expression. Regardless of the motivation behind religious leaders and traditional values advocates, the consequences of political homophobia are radically extensive and far reaching. It perpetuated a chilly socio-politico scenario where there is little in the name of any protection from and safeguard against exclusion, discrimination, marginalization, violence and criminalization of the very state of a being. In this light, political homophobia scraps the role of State from being a guarantor and protector of its inhabitant's rights to being a moral arbiter and regulatory agent of sexual and gender expressions of its citizenry. This powerful leviathan inturn acts as a barrier to the evolution of human rights of the LGBTQIA+ community in any region including a vicious infringement on rights to their privacy, right to sexual autonomy, right to life with dignity, etc.

To navigate through this political homophobia, the incumbent way forward for SAARC nations would be to not blindly transplant West's queer culture and political policy but to instead examine the community's own uniqueness specific to each nation and to adopt a uniform approach to address the issues and challenges of the LGBTQIA+ community in the region; to effect strong legislation that recognizes the status of, provides protection to and furthers the human rights of LGBTQIA+ community regardless of their orientation, religious background, or geographical demography they belong to.

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