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The Evolution of Sexual Orientation Discrimination Laws

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ABSTRACT

In recent times, a person's sexual orientation has come to be closely associated with the person's identity. With an increase in awareness among the people and an increase in their sense of empathy, the people have developed a more understanding attitude towards the different sexual orientations. As a result of this increased understanding, the laws related to the same have evolved. The people from the LGBTQI+ have faced a lot of discrimination in the past and have had to go through many revolutions to get the rights that they have now. This research paper aims to understand the different laws related to sexual orientation that are present in the USA and India and make an in-depth comparison between the two. This research paper will look into the history of the sexual orientation laws in the USA and India. The paper will also give a detailed description of how the laws in these two countries evolved and where they stand in the current situation. The laws in the USA have developed at a much faster pace than those of India. There are many factors for this, the major ones being the difference in development and cultural differences. These laws have evolved gradually, but a lack of proper awareness slows down this process.

I. INTRODUCTION AND MEANING OF SEXUAL ORIENTATION

“If the world conference on women is to address concerns of all women, it must similarly recognize that discrimination based on sexual orientation is a violation of basic human rights.”

- Beverly Palesa Ditsie

With the growth and development around the world and the people becoming more aware of the different aspects of human life, it has become important to protect these rights. With this awareness has come a new awareness around the world related to sexual orientation.

The international and regional organizations and governments must protect the people irrespective of their gender identity or sexual orientation. There are many laws in place today that protect people from any discrimination based on colour, race gender, etc. But what about the people from the LGBTQ+ community?

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These people need protection so that they can lead safe and happy life. This is true not only in society but also in the workplace. The people belonging to the LGBTQ+ community face discrimination from the very beginning in almost all the spheres of their life be it in society for equal rights such as marriage, or in the workplace like promotions. Harassment and abuse are very common aspects of the lives of people from the LGBTQ+ community. It is for these reasons that the laws safeguarding them are necessary.

The development and evolution of these laws have been rather slow in the country as well as in the world. There have been a few recent developments that have taken place around the world regarding these laws thanks to the growing awareness about these sexual orientations than it was a few years back.

In the United States of America, there has been a comparatively faster pace of evolution of these sexual orientation discrimination laws as compared to many other parts of the world. The most recent development is the legal validity given to intersex marriages in most of the states in the USA.

The case of India is quite different in this aspect. Since India is a vastly cultural and not so modern country, accepting that there are many sexual orientations present in society has taken some time. There have been laws that have helped in the growing protection of the people from the LGBTQ+ community but there is still no law that allows for their marriage.

It was illegal to consider oneself from any other sexual orientation other than heterosexual until recent years. It has taken a lot of time and effort from the people to make themselves legally valid in the eyes of law in India.

The major reason for the difference in the rate of evolution of these laws in these two countries is the fact that one country is a rich and developed country with a more open and modern mentality while the other is a poor and developing country with a society still following its cultures and traditions and are not susceptible to change.

Today, both these countries have developed their sexual orientation discrimination laws from what they were before but there is still a long way to go before the people from the LGBTQ+ community get their due share of rights in society.

With the spread of awareness about the presence of different sexual orientations other than the heterosexuals, there was a need to bring about new laws and regulations that not only provided every person, irrespective of their sexual orientation, the right to live a life but also protected them and provided them a safe society to live in.

The most apparent problem that was faced by the people was the discrimination that was done against them based on their sexual orientations. They had to face a lot of hate crimes and were in constant fear for their lives. They were also discriminated against in every sphere of their lives, from schools to jobs, and had to live a life that was less than what they deserved.

The people of different sexual orientations had to prove to the world that they were no less than others and had to fight even for the basic rights that every person deserves from their birth.

With the coming of a few laws in favour of the people of different sexual orientations and the decriminalization of same-sex couples, life became a little easier for them but it is still not better. We need to learn from each other and understand the basic concepts of human rights and that no person should be discriminated against based solely on their sexual orientation.

(A) Research Objective

The main objectives of this research are to:

- Understand the different sexual orientations present in the world today.
- Understand the history and evolution of sexual orientation discrimination laws in the USA and India and their comparison.
- To evaluate and compare the present sexual orientation discrimination laws in USA and India.
- What are the reasons for the difference in the sexual orientation laws in the two countries?
- How can the situation be made better for the people of every sexual orientation?

(B) Literature review

Today, people are no longer agreeing to the set societal norms and are more aware of themselves and their sexualities. They are more open and confident to talk about their needs and thoughts. This has led world leaders to make laws that can protect the people and also allow them to celebrate their sexualities without any fear.

Coleman in his paper **Assessment of Sexual Orientation (2010)** had said that until recent times, the differentiation and the assessment of the sexual orientation of people were done according to their gender or their genitalia. This is not true anymore based on recent studies. Sexual orientation is based on many complex dimensions that include self-identification by that person, sex-role identity, gender identity, etc.

In another recent article **Sexual Orientation, Controversy, and Science by Bailey and others in 2016**, it was stated that the increased debates around the world around the topic of

homosexuality and different sexual orientations have led to a surge in the laws related to their protection in western countries but there has been not so much in the eastern countries. There are still a lot of harsh punishments for people who come forward claiming to have any other sexual orientation with punishments leading to death sentences.

According to **Cramer** in his paper **Hate Crime Laws and Sexual Orientation (1999)**, hate crimes have been committed based on the sexual orientation of the people and thus should be included in the law as the intention and the methods in which those crimes are committed are the same. The people face hatred based on their sexual orientation in society and have a constant fear for their safety which violated the basic human right to live peacefully.

In a recent study conducted in the US by **Henry and Steiger in Psychology, Public Policy, and Law in 2019**, it was seen that the states that had a lesser wage gap between men and women have more advanced and developed sexual orientation discrimination laws even when all the other variables were kept constant. This proves that a more developed society that is more accepting of its women will further lead to being more accepting of the different sexual orientations.

According to **Valcore** in his article **Sexual Orientation in State Hate Crime Laws: Exploring Social Construction and Criminal Law (2017)**, he stated that as many as 45 states out of the 50 states in the United States of America have laws relating to hate crimes but only 30 of those states include the provisions relating to sexual orientations in the hate crime. The main reason for this is the social construct around the sexual orientation laws in the country. Hate crime is still not considered to be committed to be based on the sexual orientation of the people in these states or the people have been unable to make the lawmakers aware of the crimes and the need to have more stringent laws regarding the same.

In a recent article titled **The Contribution of Gender Equality to the Coexistence of Progressive Abortion and Sexual Orientation Laws by Henry, Russel, and Bellovary (2022)** stated that there is a direct link between the sexual orientation rights in the USA and the abortion rights or other basic rights that are enjoyed by the women. They found that by studying the laws relating to abortion rights and relating to the LGBTQ+ community, it can be determined how progressive any society is. This also stands true for other countries as well. By studying one aspect of the law, it can be compared to studying how people from different sexual orientations live in society and the rights and freedoms enjoyed by them.

(C) Literature Gap

There are a number of researches done on the different types of sexual orientations and why

there was a need to develop sexual orientation discrimination laws in not only some countries but in all the countries alike. It is not that no research has been done in this field but it is also true that not enough importance and time has been given to understanding all the aspects of the sexual orientation discrimination laws in the world.

There is a lot of data present about what are the different sexual orientations present in the world and their definitions, but there is not enough data present which helps us understand as to why there is a visible difference in the sexual orientation discrimination laws in the different countries.

The United States of America has evolved and developed its sexual orientation discrimination laws extensively throughout these years but the same has not happened in India. There is huge gap present between the laws concerning sexual orientation discrimination.

This paper tries to bridge this gap in the present literature relating to the sexual orientation discrimination laws and tries to understand the reasons for the early evolution of these laws in the USA and the delay in providing the basic rights in India. This paper also tries to understand what are the reasons for the present-day difference that is present in the sexual orientation discrimination laws in the two countries.

This paper tries to fill in these lacunas that are present in the present literature related to the sexual orientation laws of the two countries in a hope to better and evolve the present laws related to sexual orientation discrimination.

(D) Research Methodology

The new age and generation have been trying to bring about a change in society and people are thus starting to accept the things and ideas that they were earlier skeptical about. These realities are still new to the world and thus, it will take time for everyone to accept the same and be comfortable with it.

In this paper, I have tried to understand the different laws that are present in the United States of America and in India related to the sexual orientation of the people and have also tried to evaluate their evolution throughout the years. I will also try to compare the laws in these two countries and look into why a difference exists.

For this purpose, I will use qualitative data. I will also use a descriptive methodology to prove my research objective. Along with it I will use comparative analysis by comparing the laws that are present in the two countries as well

II. MEANING

Almost every person in society, if not all, has some other sexual orientation. If we try to explain the term sexual orientation generically, it would mean or refer to the sexual attraction one person has towards another person.

In the orthodox sense, people only considered there to be three forms of sexual orientations, namely, straight, gay, or bi. However, these three sexual orientations are very limited and these did not consider the other forms of orientations that are very much present in society and which cannot be ignored.

Explain sexual orientation, it is about who a person is attracted to sexually and to whom the person feels romantically or emotionally drawn.

It is important to note that the gender identity of a person is completely different from sex and the gender of the person in no way determines the sexual orientation of that person. The gender identity of a person is the concept of male, female, or neither of them, or a blend of both. It refers to how a person perceives themselves and what they want to be called or call themselves. On the other hand, the sexual orientation of a person refers to the attraction of a person towards the other person, whether it is sexually, emotionally, or romantically.

Gender refers to the person's perception of themselves whereas sexual orientation refers to the fact that whom that person wishes to date or be intimate.

Most studies of the past have stated that the sexual orientation of a person was something to do with their behaviours, but recent studies have shown that the sexual orientation of a person has to do with the psychology of that person (Dawood, 2015, p. 779-784).

III. HISTORY AND EVOLUTION OF SEXUAL ORIENTATION LAWS

Laws have been in our society since the establishment of a society for the protection of people and to ensure that everyone can live their lives without any fear. With the developments around the world and people becoming aware of the different things that are present in society, these laws also saw a change to incorporate these changes.

It took a lot of time for people who had a different gender or sex than the male gender to get their due rights in the world. This meant that people had to fight for their rights all around the world and thus these laws become all the more important.

History and evolution of sexual orientation laws in the United States of America

American revolution for the rights of the LGBTQ+ community began a long time back in the

United States of America. Since the advent of society, there has been proof of the presence of homosexuals in society but the rights that are enjoyed by them are very few and limited.

The oldest and the most apparent movement that started this LGBTQ+ rights movement started in 1924 when Henry Gerber founded the Society for Human Rights in Chicago which was immediately shut down (CNN, 2021). In 1950, the first sustained gay rights group was formed by Harry Hay known as the Mattachine Society. This society focused on the support of homosexuals and also worked towards their protection. Things took steps back when the American Psychiatric Association stated homosexuality as a sociopathic personality disturbance in its manual list. President Dwight D. Eisenhower, in 1953, banned homosexuals from working in federal government jobs through an executive order saying that they were a security risk. In 1955, Daughters of Bilitis was formed in San Francisco which was USA's first known lesbian rights organization.

The Supreme Court had reversed a lower court's decision by providing constitutional protection to a gay magazine that was started by the Mattachine Society. (*One, Inc. v. Olesen, 1958*)

Things took a major positive turn when Illinois decriminalized homosexuality in 1961 and became the first state to do so by repealing the sodomy laws (CNN,2021). In another case, the Supreme Court refused to listen to the arguments of the party as the court did not think that it raised any substantial federal question when two men raised the question of violation of the constitution for not allowing two men to marry (*Baker v. Nelson, 1971*).

In the year 1973, the first legal organization that fought for the rights of gays and lesbians came into picture which was called Lambda Legal. In the same year, the Kentucky Court of Appeals struck down the request of two women for a marriage license (*Jones v. Hallahan, 1973*). Along with this, Maryland statutorily banned same-sex marriages and became the first state to do so. By the end of the year, the America Psychiatric Association had to remove homosexuality from its list of mental disorders.

A major step in the sexual orientation discrimination laws was the introduction of the first federal gay rights bill that was introduced in 1975 to address the discrimination faced by people based on their sexual orientations. In 1976, Renee Richards was denied entry into the United States Open based on sexual orientation. She won an injunction and later went on to participate in the 1977 competition (*Richards v. United States States Tennis Association, 1977*)

In 1982, Wisconsin became the first state in the USA to outlaw discrimination based on sexual orientation. In 1991, the Minnesota Court of Appeals took a major decision by recognizing the

relationship of a lesbian couple and granting one guardianship of the other after 10 years of fighting (*Re Guardianship of Sharon Kowalski, 1991*).

The Hate Crime Sentencing Enhancement Act came into effect in 1995 as a part of the Violent Crime Control and Law Enforcement Act of 1994. This Act allowed a judge to give harsher punishment to anyone if it was found that there was discrimination made or a hate crime committed because of the person's perceived race, gender, sex, age, nationality, sexual orientation, etc.

In 1996, Hawaii became the first state in the country to recognize the fact that gay and lesbian couples have the same rights like that as any heterosexual married couple. Governor Arnold Schwarzenegger vetoed a bill in 2005 making California the first state in the USA to allow same-sex marriages. This was followed by the New Jersey Supreme Court ruling that lawmakers should make laws allowing marriage between same-sex couples in 2006.

The California Supreme Court, *in re Marriage Case (2008)* ruled in favour of the same-sex couple's marriage rights stating that disallowing them to marry was unconstitutional. This was followed by Connecticut which became the second state to allow same-sex marriages. This was followed by other states, which made same-sex marriages legal in the country.

History and evolution of sexual orientation laws in India

India has a long history of people belonging to different sexual orientations that are other than heterosexuals. The evidence of the same is found in our scriptures and for the same reasons, the country never had any problems with the sexual orientation of people, and everyone was allowed to identify themselves as they felt comfortable.

With the coming of the British Era, the British Government criminalized homosexuality through its laws. The East India Company passed the Indian Penal Code in 1860 which criminalized any form of sexual activity that was against the order of nature which included homosexuality through Section 377. There have been no changes in these British Laws since and hence the same laws have been followed since.

There has been very little development in India related to the sexual orientation laws and Section 377 is the law that deals mainly with this. In a judgment, the Supreme Court of India had held a man responsible for having homosexual relationships with a boy which was considered to be illegal and against the natural order (*Fazal Rab v. State of Bihar, 1983*).

The first issue regarding Section 377 and the rights of homosexuals was raised by the Naz Foundation and the AIDS Bedhbhav Virodh Andolan in 2001 when they raised the issue in the

Delhi High Court. The petitions by both these non-governmental organizations were dismissed by the High Court. Eight years later, the Delhi High Court decriminalized any sexual intercourse between same-sex couples as it was considered to be unconstitutional as it infringed on the privacy of the LGBTQ+ community and also discriminated against them, and became the first time the court decriminalized homosexuality in the country. (*Naz Foundation v. The Government of NCT of Delhi, 2009*). This was one of the most important and major cases relating to sexual orientation rights in the country. The Constitution of India ensures the right of freedom and the restriction on any discrimination based on any caste, class, sexuality, etc. Discrimination based on sexual orientation is considered a class and such discrimination infringe on the rights and freedoms of the LGBTQ+ community.

Things however took a back turn when the Supreme Court reversed this decision of the Delhi Court and said that any sexual act between two people of the same sex is a sexual offense and the High Court did not have the power to decriminalize it. The Supreme Court stated that only the Parliament had the power to decriminalize it and the act of homosexuality was not covered in the right to privacy. The Supreme Court held that Section 377 of the Indian Penal Code, 1860 could not be considered to be unconstitutional (*Suresh Kumar Koushal v. Naz Foundation, 2013*).

The LGBTQ+ community in India got some hope in 2014 with the directions of the Supreme Court in the *National Legal Services Authority v. Union of India* (2014) case in which the court held that the people from the LGBTQ+ community should be recognized as a third gender in the country and the non-recognition of them meant a violation of Articles 14, 15, 16 and 21 of the Indian Constitution. The Supreme court in the same case also held that the government should make proper facilities for the LGBTQ+ community and provide them government jobs and educational reservations. In 2017, the Supreme Court reversed the decision of the Naz Foundation Case (2013), stating that the privacy of a person includes their sexual orientation and must be protected at all platforms and the non-recognition meant a limitation on the enjoyment of basic human rights and fundamental rights by a large number of people (*K.S. Puttaswamy v. Union of India, 2017*).

The most important and historic judgment related to the sexual orientation discrimination law in the country came in 2018. On 6 September 2018, the Supreme Court of India, through a five-judge bench, which homosexuality, under Section 377 of the Indian Penal Code was decriminalized. The court held that the sexual orientation of people cannot be limited and cannot be tried to put in a set and defined box. The court also held that the discrimination against the LGBTQ+ community was completely unconstitutional and also apologized to the

LGBTQ+ community and their family members for years of discrimination and taking years to give them the honour and respect they deserve (*Navtej Singh Johar v. Union of India, 2018*).

IV. SEXUAL ORIENTATION DISCRIMINATION LAWS TODAY

It took a lot of time for the world and these two countries to evolve their laws in such a way that they found a place for the LGBTQ+ community. It ensured their safety and a life of respect and honour in society. Since society is ever-evolving and so are the laws of the world and the different countries, it is important to understand what is the case the sexual orientation discrimination laws in the USA and India on this day.

(A) In USA

The United States of America consists of 50 states with each state having the right to make laws for itself. Because of this reason, the laws related to sexual orientation discrimination are different in different states. This means that some states still do not recognize same-sex couples or couples belonging to different sexual orientations, other than heterosexuals to be legal.

In 27 states of the USA, there are no laws that provide protection based on gender identity, or sexual orientation in housing, employment, or public accommodations. In Wisconsin, there are laws protecting housing, employment, and public accommodations based on sexual orientation but there are no such laws on the protection based on gender identity. The state law in Utah provides protection based on sexual orientation and gender identity in housing and employment but provides no such protection in public accommodations. In the District of Columbia and 21 other states, there is full protection for people based on gender identity and sexual orientation and provides law for the protection from discrimination in employment, public accommodation, and housing.

At present all the states in the USA allow same-sex marriages and also consider them to be legal. The laws relating to adoption by people belonging to different sexual orientations and whether they are a couple or are single also vary according to different states with some states allowing same-sex couples to adopt while others have different criteria for the same. Apart from Texas, all the other states allow all people, irrespective of their sexual orientations, to serve in the military.

(B) In India

With the striking down of Section 377 of the Indian Penal Code, 1860, consensual sex between any two people of any sexual orientation was legalized in India. Since there is a single Supreme Court in the Country and most decisions and laws on major issues are made by the Federal

government, it means that a single law applies to all the states of the country.

Today, any form of discrimination is illegal based on gender identity and sexual orientation. Laws also prohibit any kind of discrimination in employment. Any person of any sexual orientation and gender identity can join the military without any discrimination provided they pass the required qualifications.

However, it is illegal to adopt people of a different sexual orientation other than heterosexuals in the country.

Marriage between same-sex couples is still considered to be illegal in the country. Even though the Supreme Court, through its various judgments, has stated that a person who has attained the age of majority has the legal and fundamental right to marry any person of his or her choice, this right is not provided to homosexuals in the country yet.

V. ANALYSIS OF SEXUAL ORIENTATION DISCRIMINATION LAWS IN THE TWO COUNTRIES

The paper has explained the history of sexual orientation discrimination laws and the present scenario of these laws in the USA and India. This part of the paper will try to explain why these differences in the development of the sexual orientation laws took place and why there is a huge difference in the situation of how these laws are currently working in the two countries at present.

The United States of America had gone into a developing stage and was considered a developed country a long time back. Most people have modern and evolved thinking and are not much rooted in their cultures and are more acceptable to changes. This was the main reason why the revolution relating to the rights of sexual orientation discrimination laws started early on in the country.

India, on the other hand, was under British rule for a long time and the people found independence of the country to be a more important topic and worked towards that rather than revolting against sexual orientation discrimination laws. Furthermore, India is a highly cultural country that has managed to keep its culture through the years. Even though the Hindu scriptures from ancient times talk of homosexuals and their presence in society as well as the respect and honour given to them, the Indians, post-independence, considered the idea of having any other sexual orientation, other than heterosexuality, to be a western concept.

The concept of homosexuality or having any other sexual orientation other than heterosexuality is a topic that is rarely discussed in the country and is considered a taboo topic, unlike in the

USA. The ideas and concepts of sex, gender identity, and sexual orientations are openly discussed in the USA and therefore people are much more aware of not only these topics but also of their own identities. More awareness among people means that changes that affect these parts of our societies are brought faster.

Another reason why the sexual orientation discrimination laws have not evolved as much in India is because of the vote bank politics that takes place in the country. The LGBTQ+ community does not form a significant part of the community to affect the vote banks or the result of the elections in a major way and thus the political parties have not given much heed to their needs and their rights. Along with this, India still has a large rural population and a large number of people still live in villages with limited education and a large number of populations being uneducated unlike the USA, which had developed its most backward areas as well. These people, who have got a minimal amount of education or no education at all, find a different sexual orientation to be something that can never be a part of their societies even after the decriminalization of homosexuality in the country. It becomes easier for people to come out in cities and urban areas rather than in rural areas.

It has to be kept in mind that it was easy for the people in the USA to spread awareness in the society relating to sexual orientation discrimination laws. It also needs to be noticed that the revolution for the rights of all the sexual orientations began in the USA even before any of the World forums for Human Rights and World Peace were created. The USA was one of the first countries to have started the revolution for equal rights and freedom for people of different sexual orientations. They had no backing and also no examples for the same.

When India decriminalized section 377 of the Indian Penal Code, a lot of countries had already legalized same-sex marriages. India also had the backing and the examples of other countries as well as World Human Rights Commissions and Non-Governmental Organizations.

This shows that the culture of a society has a huge role to play in the evolution of the sexual orientation discrimination laws in any country. The culture of the country decides how the people will perceive a change or new aspect that has been present in the society but about which they were not aware about.

VI. SUGGESTIONS

The world has come a long way from where it was related to the sexual orientation discrimination laws. This however does not mean that we have achieved enough and do not have to work anymore. We still are a long way from giving people from different sexual orientations equal rights and allowing them to live freely in the world.

The LGBTQ+ community needs a lot of support from the government and the people and society. People form governments around the world and people can affect the policies and laws made by the government. This means that if people from different sexual orientations get support from society, they can pressurize the governments world over to make better and more stringent sexual orientation discrimination laws.

The governments of the world should make laws and rules that are more friendly to people with different sexual orientations and should protect them as well. The governments need to work on their rules, regulations, and laws in such a way that they provide protection to everyone in the society and are friendly to everyone and not just a small part of the society. The main law-making body of the world is the United Nations Organization and most countries of the world are a part of it. The laws made in different countries are about the laws and rules laid down by the UN, therefore it becomes important that the UN creates laws and takes action on the sexual orientation discrimination laws.

Television is the main way through which most people form their opinions today. Awareness must be raised not only through rallies and protests but also through television. It is important that people who have a following and who have an impact on people come forward and talk about different sexual orientations that are present in the world and the fact that they should be accepted.

The people of the LGBTQ+ community should stand up for themselves and take the cases to the court of law. Keeping quiet gives a boost to the people who discriminate between different people in society. We need to make this world a better place for everyone to live in and not just a few.

VII. CONCLUSION

People from the LGTQ+ community have worked hard to gain rights and have reached significant milestones in this regard. It does not however mean that they have achieved enough. They still have a long way to go to feel safe in society and get equal rights as their heterosexual counterparts.

The USA and India have seen very different histories and have very different cultural societies and that is the main reason for the difference in their sexual orientation discrimination laws. The USA has achieved and provided rights such as same-sex marriage and adoption rights to their citizens which are not yet possible for their Indian counterparts. Hate crime is a major issue in India, many people still feel scared to come out of the closet.

Social changes do not happen fast and take eons to happen. But that does not mean that they give up and accept society as it is. We, as a society, would have achieved nothing had it not been for social changes that made the society better. Serious conversations need to take place at the top level as well as personal levels. The government needs to come up with better sexual orientation discrimination laws and the people themselves need to talk more openly about their sexual orientations so that the topics stop being taboo.

The month of June is celebrated as Pride month every year and the 28th of June is celebrated as Pride Day. But celebrating different sexual orientations for a month or a day is not enough. They need to be celebrated every day. And this is what the governments and the people of the world should work towards.

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