

***Gender Dysphoria and The Socio-Legal Evolution of LGBTQ
Community Rights in India***

**Dr. V.Bhuvaneswari¹ Dr. Razit Sharma² Dr. Deepankur Joshi³ Ms. Manali
Saxena⁴**

Abstract

The concept of human rights is based on the assumption that all persons are equal. Because all persons have dignity, they should be treated equally. Anything that weakens that dignity is a violation since it contradicts the concept of equality and allows discrimination to occur. Homosexuality is one of the most contentious subjects in the world, raising concerns about human rights. People all across the world become victims of violence and discrimination only because of who they love and how they appear. The year 2018 brought a light of hope to the LGBT community, who had been struggling for their rights for a long time, and eventually, homosexuality was decriminalized in the Navtej Singh Johar case. While the laws have changed, violence and discrimination against the LGBT community continue at the hands of state apparatus, demonstrating the LGBT community's low status. Same-sex marriage is still a dream in India. We must look forward to the international statute in order to achieve the Constitution's true goal, which is that all citizens are equal. There is a need to alter society, to change the underlining belief that it is not a taboo or a mental problem, and to make everyone feel that human rights are for everyone. This research aims to analyze homosexual marriages in India as an unseen struggle that is successfully concealed. It also aims to define and explain other elements of homosexuality, such as its evolution, causes, and society attitudes and reactions towards such relationships.

Key Words: LGBT, discrimination, social aspects, legal evolution

¹ Associate Professor, Law College Dehradun, Uttarakhand University, Uttarakhand, India
bhuvaneswarivellayan@gmail.com

² Assistant Professor, ICFAI Law School, ICFAI University, Dehradun
razitsharma@gmail.com

³ Assistant Professor, School of Law, Uttarakhand Open University, Haldwani, Uttarakhand.

⁴ Student. Law College Dehradun, Uttarakhand University, Uttarakhand, India
10saxena.manali@gmail.com

Introduction

The day of September 6, 2018, was unlike any other. On that day, something momentous happened that "blew a life of "constitutionality" in the deceased members of the LGBTQIA+ community, who had been subjected to decades of mind-numbing toil. The Supreme Court of India delivered a momentous decision decriminalizing homosexuality by partially overturning Section 377 of the Indian Penal Code, making the day noteworthy for the LGBT+ community.

The LGBT community celebrated their victory against a 200-year-old British-era legislation that criminalized same-sex partnerships across the country. The importance of this decision can be deduced from Justice Indu Malhotra's statement during her 50-page verdict that "History owes an apology to the members of this community and their families, for the delay in providing redress for the ignominy and ostracism that they have suffered throughout the centuries."

Despite the decriminalization of homosexuality, India's laws still discriminate against the LGBT population in a variety of ways. This is because there is a significant gap between legislative and judicial development of LGBT law in India. In the landmark judgments of *National Legal Services Authority v. Union of India*, *Navtej Singh Johar v. Union of India*, and *Justice K.S. Puttaswamy v. Union of India* (Puttaswamy), the Supreme Court of India laid the groundwork for the queer and non-binary community to be granted a bundle of basic human rights, the legislature has failed to keep up with recent developments. As a result, the campaign for equality continues, despite the fact that there is still a long road ahead, fraught with countless challenges, considering that the LGBTQ+ population is still denied civil rights.

The IPC section 377 reads as follows: "377. Unnatural offences. — Whoever willingly engages in sexual intercourse against the natural order with any man, woman, or animal shall be punished by life imprisonment or a period of imprisonment of either kind of up to 10 years, as well as a fine. Explanation: "Penetration is enough to constitute the carnal intercourse required for the offence indicated in this section."

History of LGBTQ in Ancient India

First and foremost, homosexuality existed in Ancient India. As a result, it has always been a part of India's history. For example, it was shown in various Hindu temples, where we might see representations of same-sex persons hugging or presenting their genitals to one another. It's also stated in other sorts of writings, such as religious texts, notably in sanskrit religious sources like Manusmriti and Shikhandi, or even a portion of Vatsyayana's Kamasutra.

After then, everyone knew about these activities and their presence, but it was absolutely not tolerated because it was already badly perceived.

Furthermore, the Mahabharata - one of the two major Sanskrit epics of ancient India - can be translated as "the great tale of the Bhrata"; Bhrata being a symbol of dharma - which corresponds to the behaviors to have in order to have a life that makes sense but also makes the universe work - and Bhrata can also be linked to a certain kind of idealism.

Need for decriminalization of Section 377 of IPC

There were several reasons for decriminalizing Section 377 of the IPC, some of them are listed below:

- It is a breach of the Right to Privacy, the Right to Equality, the Right not to be discriminated against on the basis of sex, gender, caste, creed, or other factors, and the Right to Life, since one cannot limit the freedom of consenting adults as long as their freedom does not harm others.
- It's difficult to tell what kind of sex two consenting adults are having in private, and the British, who enacted this legislation in India, have repealed it in their own country. Keeping the outmoded rule is only a reminder that we're still recovering from our post-colonial hangover.
- It is not appropriate to legislate against sexuality. Although decriminalizing it won't end discrimination, yet it will open a window of acceptance and achievement for LGBTs.

The journey ahead

We are in a position to grasp how these judgements will impact the future of the LGBT rights movement in India after having such a detailed debate about the growth of the LGBT rights movement in India and appreciating the importance of various court declarations. As a result, it is critical to remember that the relevance of the NALSA and Navtej Singh Johar decisions goes beyond the acknowledgement of third gender identification and the decriminalization of homosexuality. But these rulings are also progressive because, in addition to resolving the matter at hand, they established the framework for conferring a slew of additional fundamental rights that were previously unavailable to the LGBT community but are ordinarily enjoyed by the heterosexual persons and cisgender persons. These civil rights include the right to marriage, right to adoption, right to surrogacy, right against discrimination, freedom from sexual assault etc.

Evolution of LGBT Rights

This antiquated rule, which had become a weapon for harassing and exploiting anybody who did not conform to the traditional binary of sexuality and gender, took more than 70 years and two decades of judicial fights to dismantle. But first, consider how India's current laws, even after Section 377 was repealed, fail to safeguard the LGBT+ community's basic human rights. In order to have a power full debate, let us first examine the history of the LGBT rights movement in India, followed by a discussion of some significant court rulings and their effect on the LGBT rights movement.

Naz Foundation Govt. v. NCT of Delhi

Background: In July 2001, Lucknow police invaded a park and imprisoned a few guys on suspicion of being homosexuals under Section 377 of the Indian Penal Code.

The police also detained nine additional males linked with the "Bharosa Trust," an NGO that worked to raise public awareness about safe sexual practices and STDs. These individuals were subsequently charged with operating a prostitution ring and refused bail. The Lawyers Collective, a legal assistance organization, subsequently stepped forward and demonstrated that the allegations brought against these persons were unfounded, and they were eventually released. Following the Lucknow event, an NGO called Naz Foundation, along with Lawyers Collective, petitioned the Delhi High Court in 2001 challenging the constitutional validity of section 377 of IPC.

Judgement: Finally, in 2009 in the case of *Naz Foundation Govt. v. NCT of Delhi*, the High Court of Delhi held that Section 377 of IPC imposed an unreasonable restriction over two adults engaging in consensual intercourse in private. Thus, it was in direct violation of their basic fundamental rights enshrined under Articles 14, 15, 19 and 21 of the Indian Constitution.

National Legal Services Authority v. Union of India

Background: Due to their degraded social, educational, and economic standing, the transgender population in India has been the biggest victim of exploitation among the whole LGBT+ community. These individuals were never considered a part of society and were always exposed to exploitation, ostracism, humiliation, and violence at the hands of society or the authorities in authority. Because of continual rejection and a lack of money, these people frequently succumb to beggary or poverty. Prostitution exposes individuals to prejudice, STDs, and crimes such as human trafficking.

But the 2014 Judgement of the Supreme Court brought in a new ray of hope and euphoria for these transgender people as for the first time in the history, they were recognized as the third gender.

Judgement: The Supreme Court in its landmark judgement created the ‘third gender’ status for hijras or trans genders. As earlier, the transgender people were forced to describe themselves as either male or female, but after the judgement, they could proudly identify themselves as transgender. But apart from this, what made this judgement so special was that it laid down the framework to guarantee the transgender community a whole spectrum of basic human rights which can be surmised as follows:

1. The court held that the non-recognition of their identities was in violation of Article 14, 15, 16 and 21 of the Constitution of India.
2. The Supreme Court further directed the Government of India to treat the members of “Third Gender” as an economically and socially backward class.
3. It was also stipulated that government should make proper policies for the transgender community in the light of Articles 15(2) and 16(4) to ensure equality of opportunity in education and employment. As per the judgement, the third gender would be categorized as other backward classes [OBC] to confer them the benefit of reservation in relation to government jobs and educational institutions.
4. The court also took cognizance that a conflict between one’s birth gender and identity is not essentially a pathological condition. So, rather than adopting a “treatment of the abnormality”, the focus should be on “resolving distress over a mismatch”.

After this decision, transgender persons can now alter their gender without having to undergo sex reassignment surgery. They also have a constitutional right to self-identify and register as the third gender. Apart from that, different state governments have taken tiny initiatives to help the transgender community by enacting health and housing regulations.

Navtej Singh Johar V. Union of India

1. Background: After the Delhi High Court's decision was overturned in 2013, gays were once again considered criminals.
2. When high-profile figures such as hotelier Keshav Suri, actress Ritu Dalmia, and dancer Navtej Singh Johar, among others, came forward and filed a petition with the Supreme Court challenging the constitutional validity of Section 377 of the Indian Penal Code,

there was an increase in the number of LGBT rights protests in India.

On September 6, 2018, the Court handed down its decision, which can be summarized as follows:

1. The Supreme Court unanimously declared Section 377 illegal because it violates the basic rights of intimacy, autonomy, and identity. In addition, homosexuality was decriminalized by amending Section 377 to prohibit consensual relations between adults of the same sex/gender.
2. The court rationalized that the Section 377 is vague and does not create intelligible differentia between what is “natural” and what is “unnatural”. It also curbs freedom of expressing one’s sexual identity, i.e. Right to freedom of expression as enshrined under Article 19 of the Indian constitution. The court went on to say that sexual orientation is an essential aspect of self-identity, and that to invalidate it is to deny the right to life, and that the fact that they make up a small percentage of the population cannot be used as a sufficient reason to deny them this right.
3. The court also slammed the Koushal decision, describing it as illogical, capricious, and clearly unlawful.
4. It was also emphasized that discrimination based on sexual orientation is unlawful because it is a natural phenomenon, as scientific and biological evidence demonstrate.
5. The Supreme Court also directed the government to create public awareness regarding LGBT rights and to eliminate the stigma surrounding the LGBT people. The judges further elaborated upon the issues surrounding mental health, dignity, privacy, right to self-determination and transgenders.

Transgender Persons (Protection of Rights) Bill, 2019

Transgender Persons (Protection of Rights) Bill, 2019 was enacted with an objective to protect the rights of the Transgender Community by prohibiting discrimination against them with regards to employment, education. Healthcare, access to government or private establishments. But in the name of empowering the community, the bill further exposes them to institutional oppression and dehumanizes their body and identity.

The trans community in India has vehemently rejected the bill citing following provisions of the bill as they infringe their fundamental rights and do not comply with the NALSA judgement.

1. The bill snatches from an individual the right to determine his/her sexual orientation which is an integral component of the right to privacy as pronounced in the NALSA judgement. As per the bill, the change of gender identity in documents can only be done after proof of sex reassignment surgery which must be certified by the District Magistrate. This takes away from the Trans community the basic human right of autonomy and privacy and further exposes them to harassment in the hands of authorities.
2. Another discriminatory aspect of the bill is that the punishment prescribed in the case of 'Sexual abuse against Transgender' is only of two years while a similar kind of offence if, happened against women attracts a serious punishment extending up to 7 years. Thus, stipulating different levels of punishments for the same nature of crime only on the basis of gender identity is inherently discriminatory, arbitrary and against the equal protection clause.
3. The bill is also worthy to be criticized as the bill erroneously neglects the viciousness and atrocities that transgenders encounter within their own family. The law disentitles them from leaving their families and joining the trans-community thus infringing their right to be a part of any association and right to movement. The only recourse available to the trans community in case of family violence are the rehabilitation centers.
4. Although the bill seeks to provide "inclusive education and opportunities" to the transgender community but fails to lay down any concrete plan to achieve the same. There are no provisions in relation to providing any scholarships, reservation, changing the curriculum to make it LGBT+ inclusive or ensuring safe inclusive schools and workplaces for the trans-community.

Therefore, it can be concluded that on one hand where the courts are taking progressive steps to empower and uphold the rights of LGBTQIA+ community, on the other hand, the legislature is invalidating the same rights. It is high time that the government should acknowledge and frame laws in accordance with the landmark judgement, else the LGBTQ community will continue to face setbacks in their struggle to have the same rights as those available to heterosexual people.

Same-sex Marriages

The Special Marriage Act of 1954 makes it possible for Indian citizens and Indian nationals living abroad to marry regardless of their creed, caste, or religion. So, while India's marriage

laws have developed through time, there is now no provision for same-sex couples to marry, which seems sensible given that the Supreme Court just decriminalized homosexuality two years ago. However, the legislature will have to address these issues sooner or later.

Several legal cases involving same-sex weddings are now pending. The next step for LGBT campaigners is to promote and demand that the government draught laws allowing LGBTQ couples to marry, adopt children, and inherit their spouse's assets. The reality is that, while the Union government left the constitutionality of section 377 to the courts in 2018, it has also signaled that it will likely oppose any petition for same-sex marriage.

But this seems to be contradictory in the light of the judicial pronouncements considering that if we really want to adhere to the principle of equality in the context of LGBT people then the right to marry, bequeath property, share insurance (medical and life) are all part of this. Therefore, denial of these basic rights only on the basis of sexual orientation is objectionable and unconstitutional violating of the constitutional rights of right to equality (Article 14) and liberty (Article 19).

Making marriage laws inclusive of LGBT+ community

In order to recognize same-sex marriages, some new laws will have to be drafted, modified or inserted, as the present laws cannot be applied in the case of LGBT marriages. There are 3 ways by which the marriage laws can be made LGBT+ inclusive.

1. One view suggests that same-sex marriages can be permitted after reinterpreting, modifying or amending the existing laws or by making the language of the act gender-neutral.
2. The second view suggests that same-sex marriages should be permitted after drafting a whole new Act by considering the LGBT+ as a separate community.
3. The third view suggests that considering India is still not progressive enough and open to the idea of LGBT marriages, the legislature instead of legalizing same-sex marriages can rather give them a different status such as that of a civil partnership, where they may not have all the rights of marriage but can still enjoy various other significant rights like sharing of insurance, filing joint tax returns etc. i.e. it can be rather recognized as a relationship based on emotional and economical interdependency.

Present Scenario

Today, in India there has become more acceptance towards the LGBT community but their

struggle is still not over. While we see some LGBTs accepting their sexuality, there still remains a greater portion of LGBT groups who are not free to openly express their gender choices. Social media groups and corporate initiatives have also come forward with increasing awareness on LGBT rights, but condition of gay men is more upbeat than for other third gender persons.

Indian families have their own ways of dealing with the gender identity of their kin. Within the boundaries of family, schools or any part of this society acceptance of sexuality of LGBT group is still a struggle. In some parts secret honor killings are planned which compels these people to run without money or social support. In other parts lesbians are subjected to corrective rapes and which in most cases are executed by their own family members.

In a nutshell gays, lesbians, bisexual individuals, and transgender people have not been accepted and understood as a gamut of the human condition. Instead, they are stereotyped as deviants and they have also been suffering from marginalized social status.

Consequence of Discrimination

Our constitution has recognized several equality rights for the different sections of society and it recognizes the rights of gender as well. Indian constitution explicitly states that in Article 14 no state shall deny equality before the law and equal protection before the law within the territory of India, Article 19(a) states that right to freedom of speech and expression, Article 21 states that protection of life and personal liberty in which also gives right to live with dignity. These are the basic fundamental rights that are denied to some people because of their sexual orientation.

Discrimination is faced by LGBTQ at various levels, be it at home or be it outside the home. The struggle of people in this community starts from the moment they are born. Families are ashamed to reveal the identity of their family members and they treat it as disease and perversion and accordingly treat them badly. The discrimination against the heterosexual people is fairly common. It is very difficult for a person to express their preferences just because it is unacceptable by their family members. A study found that 73% of Indian men surveyed said they would hit their sons if they found out they were gay.

Outside the home, they experience severe conditions and are ostracized because of their sexual orientation be it at workplace, schools, colleges or any other public place. They are subjected to derogatory and hateful remarks as they are unable to voice their opinions, incapable of cultural representation and they also lack economic opportunities provided to the general public. They are displaced as their family members do not accept their sexual identity because

of the societal taboos relating to their sex. “Hijras, khotis, gay men, and lesbians are rejected by society – often at a very early age and in a violent manner– because of their femininity (in the case of men) and the threat they represent to the patriarchal society imposed by British law and social norms. Homophobia is no more a cultural or religious issue than any other part of the gender agenda.” They are not even provided with equal opportunities at workplace in the European Union (EU), 13% of LGBT people felt they experienced discrimination while job hunting because of their sexual orientation.

When it comes to the religious status of same-sex weddings in India, the following might be summarized:

Hinduism: While Hinduism's adherents have differing views on homosexuality in general. There is, however, ample literature in Hinduism that speaks volumes about same-sex relationships and, by implication, same-sex weddings.

In India, sculptures representing same-sex partnerships may be seen in temples. In mythological legends, such as the birth of God Ayappa from Lord Shiva and Lord Vishnu, examples can be found. Some historical evidences of same-sex partnerships include the story of Bhagiratha being born from two women who had sexual intercourse under heavenly blessings, descriptions of gay actions in Kamasutra, a queer figure named 'Sikhandi' in Mahabharata, and homosexual Tantric ceremonies.

However, homosexuality is prohibited in certain writings, although this is based on the concept that humans place too much emphasis on sex.

Islam: The Quran and Muhammad's Sunnah are used to create Islamic Shariah law. In Islam, homosexuality is clearly a vice that is penalized. All four fundamental schools of Sunni jurisprudence have the same position. Furthermore, according to Islamic traditions, effeminate men and manly women are cursed and should be driven out of their homes.

Christianity: The sole point of contention in Christianity regarding homosexuality is how homosexuals should be handled. Should they be treated as criminals or should their actions be changed? The position is clear in both cases: homosexuality is forbidden in Christianity.

Parsis: Homosexuality is also considered wicked in Zoroastrianism and is strictly prohibited. Some followers, however, accept LGBT+ persons and believe that the aforementioned interpretation is a perversion of the underlying concept of "good thinking, good word, good action."

Buddhism and Jainism: The Jains have a very definite view on Buddhism. Apart from homosexuality, they condemn any forms of sexual behaviors that are not done for the sake of reproduction, which implies that premarital sex, heterosexual sex, or sex for enjoyment are all prohibited.

While Buddhists believe that any sexual behavior is allowed as long as it is voluntary and motivated by love. Similarly, the Dalai Lama believes that homosexual intercourse is OK as long as no one is injured and it is totally consenting.

Sikhism: Because the sacred teachings are quiet on the subject, no same-sex weddings are permitted in Sikhism's gurudwaras.

The need of debating the religious status of same-sex weddings is a must, before any policy or law on same-sex marriages is drafted. Because almost all of the personal laws that regulate weddings are taken from the accessible religious texts. Keeping in mind that, with the exception of Hinduism and Buddhism, homosexuality is considered disgusting and undesirable in most religions. As a result, any changes to personal legislation relating to LGBT+ cannot be a viable answer in the current situation.

CONCLUSION

A person's choice of partner should not be restricted because of his or her sexual orientation. It not only restricts their basic fundamental rights of equality and privacy but it also takes away their right to live with dignity enshrined within the right to life and liberty. In India, just because a person is born out of the two major genders they are ostracized and are they rejected on the grounds that they belong to a third gender. There is no use of introduction of anti-discrimination bill as quoted by Shashi Tharoor if people are discriminated on the basis of their preference. In the case of Navtej Singh Johar & Ors. v. Union of Ministry of Law and Justice Secretary it was also noted that social morality also changes from age to age. The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. It will remain a taboo if we continue to disrespect and not treat them equal to us. It's high time that LGBTQ should be freed from the shackles of orthodoxy and bridge a huge gap between the communities and disgrace the regressive laws and embrace progressive laws.

References

<https://link.springer.com/article/10.1007/s40894-019-00118-w>

<https://blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/>

<https://www.voicesofyouth.org/blog/evolution-perception-and-acceptance-lgbtq-community-india>

<https://www.ijlmh.com/paper/rights-of-lgbtq-in-india-and-the-struggle-for-societal-acceptance/>

<https://www.legalserviceindia.com/legal/article-7932-lgbt-rights-in-india.html>

https://en.wikipedia.org/wiki/LGBT_rights_in_India#:~:text=Same%2Dsex%20marriages%20are%20not,sex%20marriage%20involving%20two%20women.

<https://blog.ipleaders.in/is-gay-marriage-legal-in-india/>

<https://timesofindia.indiatimes.com/readersblog/sblog/status-of-lgbtq-community-in-gender-equality-39180/>

<https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDdbP/Being-LGBT-in-India-Some-home-truths.html>

<https://www.drishtiiias.com/daily-updates/daily-news-analysis/milestone-for-lgbtq-rights>

<https://theleaflet.in/same-sex-marriage-in-india-why-are-indian-courts-taking-so-long/>

A book on; LGBTQ: Lesbian, Gay, Bisexual, Transgender and Queer (Identities in Select Modern Indian Literature) by KUHU SHARMA CHANANA