

## EVOLUTION OF LGBT RIGHTS IN INDIA

### Abstract

Lesbian, gay, bisexual, and transgender (LGBT) rights have evolved rapidly in recent years. India has been successful in repealing its colonial era legislation discriminating the homosexuals and transgender identities. The framers of the Constitution have used the expression 'person' under Article 21, which is non-discriminatory. However, the LGBT community has been deprived of their fundamental rights until pronouncement of the landmark judgment of *Navtej Singh Johar v. Union of India*<sup>1</sup> in 2018 by the Hon'ble Supreme Court of India. The landmark judgment decriminalized consensual homosexual intercourse under Section 377 of the Indian Penal Code on Unnatural Offences.

The research paper attempts to provide an overview and study the evolution of LGBT rights in India with leading case studies.

**Keywords:** LGBT Rights, Section 377 IPC, Transgender, Legislative Framework

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<sup>1</sup>*Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

## I. INTRODUCTION

The concept of human rights is founded on the fundamental assumption that all people are created equal. Accordingly, such people are guaranteed dignity, and all humans should be regarded as equals. Therefore, any act that weakens dignity leads to a breach of equality and opens the door to discrimination. Irrespective of the multiple legislations safeguarding human rights in place, human rights abuse is committed all over the globe. There are several instances where people are discriminated based on their actual or perceived sexual orientation or gender identity. Eventually, the lesbian, gay, bisexual, and transgender (“LGBT”) community is one of the most vulnerable classes due to society's non-acceptance of their sexual orientation. Also, it is pertinent to mention that such persons are victimized on a colossal scale even though the Indian Constitution guarantees social, economic, and political justice for all its citizens. The members of the LGBT community have to face several kinds of exploitations, including the most heinous acts of arbitrary imprisonment, torture, extrajudicial killings, etc. In addition, many pieces of national legislation, customs, and regulations criminalize sexual orientation and gender identity. Therefore, non-acceptance of sexual orientation often legitimizes human rights abuses against homosexuals, lesbians, bisexuals, and transgender individuals. This scenario is a cause of worry in several legal systems across the globe.<sup>2</sup>

Human rights courts and organizations are nowadays prioritizing the issues of the LGBT community. Regional courts and organizations have made significant contributions to protecting the rights of people of various sexual orientations or gender identities and in developing legal arguments based on international law. In the last decade, laws and legal norms have addressed the concerns of the LGBT community, both at the global and regional levels. In addition, international organizations, such as the United Nations, have issued resolutions that criminalize human rights violations based on sexual orientation and gender identity.<sup>3</sup>

Within the heterosexual-homosexual continuum, sexual orientation falls into three general categories: *heterosexuality*, *homosexuality*, and *bisexuality*. Behavioral, social, and medical science have recognized that homosexuality is a normal and healthy variance in sexual orientation.<sup>4</sup> However, during the late twentieth century, there has been a change in perception regarding homosexuality, and it is considered devoid of sin, criminality, and disease. In 1973, the American Psychiatric Association and the World Health Organization has also formally recognized it as a "normal variant." Since then, many nations have decriminalized homosexuality, and some have even recognized same-sex civil unions and marriage as a valid practice.<sup>5</sup>

Many research further shows that the psychological tests can not differentiate between heterosexual and homosexual orientation, and further, homosexuals also share the same emotions as heterosexual male and female. In addition, research has shown that individuals

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<sup>2</sup> International Commission of Jurists, Geneva “Sexual Orientation, Gender Identity and International Human Rights Law” 3 2009.

<sup>3</sup> *Ibid.*

<sup>4</sup> The 2008 Community Center Survey Report “Assessing the Capacity and Programs of Lesbian, Gay, Bisexual and Transgender Community Centers.” 29 2008.

<sup>5</sup> Rao, T S Sathyanarayana, and K S Jacob. “Homosexuality and India.” 54 *Indian journal of psychiatry* 1-3 (2012).

who identify themselves as homosexuals do not suffer from any observable psychiatric disorders or deficits in judgment, stability, or occupational skills. Thus, now homosexuality has been accepted as a natural variant of human sexuality by psychiatric, psychoanalytic, medical, and mental health experts.<sup>6</sup> However, in many countries following orthodox practices, LGBTs have not been legally recognized, which is a matter of concern and a significant hurdle towards the protection of their rights.

**1. Homosexuality in India:** India is a multi-cultural society and the prevalence of homosexuality can be traced back to the ancient era. Its presence can be found in Hindu scriptures, which acknowledge and accept homosexuality without considering it a taboo. Evidence suggesting homosexuality can be found in the ancient Sanskrit texts like 'Kama Sutra', a text on human sexual behavior discussing men's homosexual desire in great detail. On the contrary, Hindu texts like, Manusmriti and Arthashastra, have prescribed various punishments for homosexuality. Hinduism has also recognized the third gender, and characters like Shikandi in Mahabharata, who was born as female but identified as male and marries a woman later in life, also supports the existence of third gender. Also, the famous temple situated in Khajuraho, Madhya Pradesh, built in Chandela Dynasty, has depicted several erotic sculptures on homosexuality. This symbolizes the moral acceptance of homosexuality in Hindu mythology.<sup>7</sup>

Even though the rights of LGBT are celebrated widely in the urban parts of India through pride parades, meet-ups, and social media conversations, the plight of LGBT population in rural areas is different. Honor killings are widespread in rural areas, and members of LGBT community are forced to escape to a city without any money or social support for their survival. In India, the society decides how a member of LGBT community may live, work, and whom they can marry. Societal isolation and humiliation often result in psychosomatic diseases and depression in them. It has also been reported, that homosexuals are being subjected to corrective rapes by their family members to cure their disease.

Vyjayanti Vasanta Mogli, who identifies herself as a transwoman and is also a LGBT activist and Public Policy Researcher at Tata Institute of Social Sciences in Hyderabad, states the situation of LGBT members in rural areas in following words: "*Village medics and babas often prescribe rape to cure lesbians of homosexuality. Refusal to marry brings more physical abuse. Stories of family acceptance that you see on TV and other media are more of an urban phenomenon.*"<sup>8</sup> She even recalls the saying of Dr. B.R. Ambedkar: "*Ambedkar thought of the village as a unit of violence, which is most true for LGBT issues.*"<sup>9</sup> The situation in rural area depicts the non-acceptance of people who identify themselves from the LGBT community despite decriminalization under the law.

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<sup>6</sup>*Ibid.*

<sup>7</sup>Vanita, R. Queering India: Same-sex love and eroticism in Indian culture and society (Routledge, London, 2001).

<sup>8</sup>Rashmi Patel, "Being LGBT in India: Some home truths" *Live Mint*, August 27, 2016 available at: <https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDdbP/Being-LGBT-in-India-Some-home-truths.html> (Last Visited on June 16, 2022).

<sup>9</sup>*Ibid.*

**2. Evolution of LGBT Rights in India:** The provision against homosexuality was first inserted in 1860 in the Indian Penal Code, during the rule of Lord Macaulay, who headed the First Law Commission. The relevant portion of the provision is mentioned as follows: *“whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”*<sup>10</sup> The said provision, Section 377 of the IPC, classifies consenting sexual intercourse between same-sex individuals as an ‘unnatural offence’ and against the order of nature. Further, the provision prescribes a maximum penalty of 10 years imprisonment along with fine. The provision is a remnant of Victorian legislation that has persisted until the twenty-first century. It is noteworthy to mention that homosexuality has not been criminalized in approximately 123 nations across the world, however, the practice of same-sex relationship is illegal in 57 countries at present.<sup>11</sup>

The decriminalization of Section 377 of IPC has not been a single day task, and it has been vested with a lot of challenges and hurdles. Therefore, to understand the decriminalization of homosexuality, it is pertinent to mention the chain of judgments pronounced by the Indian Judiciary concerning the LGBT issues.

The trajectory of judgments concerning LGBT rights starts with the case of *Naz Foundation Govt. v. NCT of Delhi*,<sup>12</sup> where few persons were detained by the police while conducting a raid in the park on suspicion of them being homosexual. Further, nine other persons were arrested who belonged to an NGO called “Bharosa Trust”. All of them were charged for running a sex racket. Additionally, in this case, the Delhi High Court, while dealing with the question of the natural and unnatural nature of the offences, discussed several medical and psychiatric opinions about the naturality of homosexuality in Medical Science. Accordingly, the court drew attention to the Diagnostic and Statistical Manual of Mental Disorders and mentioned that, WHO doesn’t consider homosexuality a disease under the list of mental illnesses in the International Classification of Diseases.

Also, the Delhi High Court considered the statement of Dr. Ambedkar, which was strongly asserted in Constituent Assembly on the concept of constitutional morality by differentiating popular morality in following words: *“popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. As distinct from constitutional morality derived from constitutional values, popular morality is based on shifting and subjecting notions of right and wrong. If there is any type of morality that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality.”* While considering the various contentions and facts of the case, the Hon’ble Delhi High Court held that the provisions of Section 377 IPC lays down an unreasonable restriction and also violates the fundamental rights provided under Article 14, 15, 19 and 21 of the Constitution of India.

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<sup>10</sup> The Indian Penal Code, 1860, (Act 45 of 1861) S. 377.

<sup>11</sup> Constitutionality of Section 377 IPC, available at: <https://www.scobserver.in/court-case/section-377-case> (Last Visited on August 08, 2021).

<sup>12</sup> *Naz Foundation Govt. v. NCT of Delhi* SCC Online Del 1762, (2009) 160 DLT 277.

On the contrary, in 2013, in *Suresh Kumar Koushal vs. Naz Foundation*,<sup>13</sup> the question to reconsider the constitutional validity of Section 377 of the Indian Penal Code was raised before the Supreme Court. The division bench of the Hon'ble Supreme Court opined that the LGBT persons constituted a 'minuscule minority' and did not deserve constitutional protection. As a result, they overturned the judgment of the Delhi High Court and held that Section 377 of the Indian Penal Code would be re-criminalized.

Further, in the case of *National Legal Services Authority v. Union of India*,<sup>14</sup> the landmark judgment regarding the recognition of the third gender was pronounced by the Hon'ble Supreme Court, which gave a ray of hope to the members of the LGBT community by considering the main issue: "*Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice more so, when such a person after having undergone the operational procedure, changes his/her sex as well?*" While dealing with this question, the Hon'ble Supreme Court stressed upon several expressions mentioned under the Constitution of India. Such as 'person' under Article 14 and 21, and 'citizen' under Article 16 and 19. By considering such expressions, the Supreme Court opined that all such expressions are gender-neutral, referring to human beings regardless of their sex and gender. Hence, it is not restricted to only male and female. Therefore, hijras/transgender are also included in these expressions. Accordingly, they also enjoy the guarantee of fundamental rights mentioned under Part III of the Constitution of India. The court held that "...*Gender identity as already indicated forms the core of one's self, based on self-identification, not on surgical or medical procedure. Therefore, gender identity, in our view, is an integral part of sex, and no citizen can be discriminated on the ground of gender identity, including those who identify as the third gender.*" However, in this case, the criminality under Section 377 of IPC was not considered.

Finally, in 2018, homosexuality was decriminalized by the Hon'ble Supreme Court of India as held in *Navtej Singh Johar v. Union of India*<sup>15</sup>. In this case, a writ petition was filed by Navtej Singh Johar, a member of the LGBT community along with other four members, for invalidation of Section 377 of the Indian Penal Code by contending that it is violative of Article 14, 15, 19 and 21 of the Constitution of India. The petitioners prayed for "right to sexuality", "right to sexual autonomy", and "right to choice of sexual partner" to be inclusive of Article 21 of the Constitution of India. The Supreme Court examined Section 377 and stated that: "*an examination of Section 377 of IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a reasonable or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm public decency or morality. Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution.*" The court held that the portions of Section 377 relating to consensual sexual acts between adults as unconstitutional. However, the portions of the said provision on sex with minors, nonconsensual sexual acts and bestiality still remain in force. It further said that sexual orientation is an intrinsic

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<sup>13</sup>*Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.

<sup>14</sup>*National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

<sup>15</sup>*Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

component of one's self-identity, and rejecting it is tantamount to depriving someone of their existence. They represent a minuscule segment of the population which cannot be used as a legitimate reason to deny them this right. Additionally, the Supreme Court ordered the government to raise public awareness about LGBT rights and eradicate the stigma associated to LGBT persons. The judgment entitles members of LGBT community, equal citizenship and protection under law without discrimination.

## II. CONCLUSION

The LGBT group is one of the most vulnerable classes due to the orthodoxy vested in the Indian societal setup. Even though medical science has established that homosexuality is a natural phenomenon, homosexuals still have to face humiliation and social exclusion in their day-to-day life. The case of *Navtej Singh Johar v. Union of India*<sup>16</sup> has entrusted the fundamental rights to the LGBT community, which they deserve. Still, the government has not taken any step forward for guaranteeing these fundamental rights into a statutory framework in India. Further, the provision on same-sex marriage has not been included in the legislative framework in our country. There is a need for the legitimization of various aspects in the lives of members of the LGBT community. The government should take steps to enable social acceptance of homosexuality in the society.

We should also appreciate the efforts of Transgender & Human Rights activists like *Laxmi Narayan Tripathi*, who has been a pioneer in representing the issues of the members of the LGBT community. She has spoken at various national and international forums such as the Asia Pacific Region for the equal treatment of transgender people who have been marginalized ever since one can recall! She has played a pivotal role in the landmark case of *NALSA vs. Union of India*<sup>17</sup>, where the Supreme Court held that transgender people are allowed to enjoy all the rights under the Indian constitution as Article 14 is a right enjoyed by "any person." Thus, transgender people have equal right to health care, education, employment, along with civil rights and legal rights. Any discrimination based on sexual orientation and gender identity is a violation of Article 14.

But even after so many judicial pronouncements, LGBT community has not received the same status and inclusion in the society. The irony is we look up to the members of transgenders or hijras community for their blessings on pious occasions, but would we be open to such a scenario in our own family and surrounding? As a knowledgeable member of society, one should play their part and support the members of the LGBT community in every manner possible! This could only be done by mainstreaming the LGBT community and accepting them without any psychological and social barriers in our minds.

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<sup>16</sup>*Ibid.*

<sup>17</sup>*NALSA v. Union of India* (2014) 5 SCC 438.