

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 6 | Issue 2

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2023

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# The Rights of the LGBTQ+ Community and the Long Road Ahead

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## ABSTRACT

*This paper aims to enlighten the readers on the sensitive yet an extremely crucial topic of the LGBTQIA+ Community and their rights. LGBTQIA+ Community includes people who identify themselves as gay, lesbian, bi-sexual, transgenders, queer, intersex, and asexual. For several decades, people belonging to LGBTQIA+ Community have been suffering discrimination, bullying, torture, and threats and are also prone to suicide due to a lack of support from their family members. Owing to society's non-acceptance and lack of basic human rights concerning employment, education, etc., they are forced to depend on prostitution and beggary to sustain themselves. Though there has been a scanty improvement in the last few years, especially concerning the decriminalization of section 377 of the Indian Penal Code, the society has nevertheless failed to welcome the landmark judgment of the court about the decriminalization of section 377 with open arms and are still hesitant to recognize and accept people from this community.*

*The writer in this paper also highlights the presence of homosexuality in ancient times in India and draws the attention of the readers toward the various constitutional rights of LGBTQ+ people.*

*Thereafter, the writer finally talks about the long road ahead that lies to make our country an LGBTQIA+ friendly country and accept their identity without forcing them into surgeries or making them feel guilty for their sexual orientation. However, making India an LGBTQIA+-friendly Country is not an easy task due to the rich culture, ethics, morality, and diverse religious principles that are followed in this country.*

**Keywords:** *LGBTQIA+ Community, Homosexuality, Basic Fundamental Rights, Section 377 IPC, Transgenders.*

## I. INTRODUCTION

In the state of Karnataka, a young boy named Manoj was coerced into gay conversion therapy. His family made him believe that there is something unusual with him and he is abnormal. Along with that, he was forcibly given shock treatment. This all happened when he was a teenager. However, he had no other option but to leave home and stay away. Now as an adult,

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he happily admits his homosexuality.<sup>3</sup>

This is just one such case. There are plenty of similar cases. In some instances, people belonging to LGBTQ also decide to end their lives when they are ignored, abused, and threatened by their family members or loved ones.

The Constitution of India promises key fundamental rights to all the inhabitants of the country. Every human being deserves to be treated equally and with full dignity irrespective of gender, sex, caste, or creed. Just because some people have different sexual orientations and preferences, they cannot be denied these basic rights that are available to all other human beings. If such a thing happens, it is a clear infringement of the fundamental rights of the Constitution of India.

The increasing number of protests and gay parades indicate that the youth of the country are more accepting of it.

#### **(A) Meaning of the term ‘LGBTQIA+’**

- L stands for Lesbian (female interested in a female)
- G stands for Gay (male interested in a male)
- B stands for Bisexual (any person interested in both- males and females)
- T stands for Transgender (Those who recognize, identify, and express their gender as different from the one in which they were born that is their birth sex)
- Q stands for Queer (Neither heterosexual nor cisgender)
- I stand for Intersex
- A stand for Asexual
- + signifies that it comprises further kinds and the above list is not all-inclusive.<sup>4</sup>

## **II. EXISTENCE OF HOMOSEXUALITY IN INDIA SINCE ANCIENT TIMES**

Homosexuality is certainly not a new concept in India. It has been existing for a very long time. Examples of Homosexuality are mentioned in Hindu Mythology like sexual acts among women have been depicted in the ancient texts of Rigveda and sculptures. Further evidence showing the presence and practice of such acts in the past include Kamasutra where in the chapter of 'purushayita', there was a mention of lesbians being called swarinis, harems of young boys kept

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<sup>3</sup> Tanika Godbole, India- Do India's calls for LGBTQ rights reform go far enough, DW, 25 June 2021, <https://www.dw.com/en/india-do-indias-calls-for-lgbtq-rights-reform-go-far-enough/a-58045742>

<sup>4</sup> Rachit Sharma, Rights of LGBTQ in India and the Struggle for Societal Acceptance, 4(3) IJLMH 18, 19 (2021)

by Muslim Nawabs and Hindu Aristocrats, and male homosexuality that existed in the medieval Muslim history like Malik Kafur. In the temple of Khajuraho in Madhya Pradesh, some sculptures portray homosexuality. Even in the Hindu Epics, several characters are portrayed as homosexuals like two widows who made love with each other and gave birth to King Bhagirathi<sup>5</sup> and the story of the birth of Lord Ayyappa who was born from Lord Vishnu (Mohini Avatar) and Lord Shiva. Thus, it is evident from these facts that homosexuality was present and accepted in India since ancient times.

Things started to change with the dawn of Vedic Brahmanism and British Colonisation. It has been found that homosexuality was repressed with the Aryan invasion.

This led the concept of homosexuality to undergo a major shift from being called natural to unnatural which is against the order of nature over a matter of time.

### **III. RISING SUPPORT OF CAMPAIGNERS AND ACTIVISTS TOWARDS LGBTQ+ COMMUNITY AND THEIR RIGHTS**

Some of the activists went beyond their limits to bring a positive impact on society by openly talking about homosexuality. One such activist was the famous human computer 'Shakuntala Devi' who in her book 'The World of Homosexuals' gave a broad clarification on the problems faced by homosexuals with the help of interviews with homosexual men. In her view, it was ignorance and bias on sexual matters which was the chief cause of human complications or difficulties. This was in the year 1977.

In the year 1999, the first pride parade was held in Kolkata, West Bengal wherein 15 people partook. This parade was famously called as friendship parade.

In 1992, a protest was organized by the AIDS Bhedbhav Virodhi Andolan outside the police headquarters in New Delhi. This protest was held owing to the arrest of 18 people from central park in Connaught Place who were suspected to have been involved or about to partake in homosexual acts. Several public protests, meetings, and demonstrations were held by ABVA. Later, in the year 1991, a report was made which was the first document ever to claim queer rights in India. The report was labelled as 'Less than Gay: A Citizen's Report on Homosexuality in India'. Additionally, in 1994, a public interest litigation was filed by ABVA for opposing and questioning the constitutional legality of section 377. The reason behind the filing of PIL was the rejection by the jail authority to distribute condoms to the Tihar Jail inmates.

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<sup>5</sup> Sanjana Ray, Indian Culture Does Recognize Homosexuality, Let Us Count the Ways, the quint, (11 September 2018, 10:28 pm) <https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377#read-more#read-more>

Another famous LGBTQ+ Activist is Ashok Row Kavi who is a journalist by profession and also the founder and chairperson of 'Humsafar Trust'. He has always put forward strong support, especially in the matter of health and human rights of LGBTQ+ people from the year 1994. He has organized several events in Mumbai to spread awareness and enlighten the audience on this topic. The 'Bombay Dost'- a magazine for queer and homosexuals which was founded by Ashok Row Kavi has become a huge hit and is in circulation from the year 1990.

Even Art and Literature have helped mould the homosexual and queer movement in India with several magazines as well as books on homosexuality being published and movies on gays and homosexuals.<sup>6</sup>

#### **IV. THE PROGRESS OF LGBTQ+ RIGHTS**

In the Indian Penal Code, Section 377 punishes any individual who engages in carnal intercourse against the proper order of nature with any male, female, or animal with imprisonment for up to 10 years along with a fine.<sup>7</sup> Indian Penal Code was enacted in the year 1860 which confirms the fact that such a rule which criminalized homosexuality was a despotic law enacted by the British Colonial Government and was based on orthodox Victorian Morality.

Nevertheless, the battle for the protection of rights for the LGBTQ+ Community continued and it finally received its reward after 70 years and 2 decades to declare section 377 as unconstitutional.<sup>8</sup> That day in September 2018 can never be forgotten. It was an emotional day for many who could not control their tears of happiness. However, the battle was not yet over. Even though the section was decriminalized, the laws that are existing in India are antagonistic and detrimental to the community. Though the Judiciary has come out with various case laws to provide fundamental rights and dignity to the community, the legislature is lacking behind and showing apathy in framing laws, particularly for LGBTQ+ Community, especially in regards to same-sex marriage. Thus, there is some mismatch between the judicial and legislative development of LGBTQ+ laws.

Here, the LGBTQ Community cannot be mistreated for cohabiting with each other and conducting their personal affairs peacefully. On the contrary, other laws are still discriminatory against LGBTQ+.

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<sup>6</sup> Ankit Srivastava & Dr. Vivek Kumar, SECTION 377 AND LGBT ACTIVISM IN INDIA, 6(2), IJRAR 30, 31-32 (2019)

<sup>7</sup> <https://indiankanoon.org/doc/1836974/>

<sup>8</sup> Yatin Gaur, Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal, iPleaders, (June 21, 2020) [https://blog.iplayers.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/#KS\\_Puttaswamy\\_v\\_Union\\_of\\_India\\_2017](https://blog.iplayers.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/#KS_Puttaswamy_v_Union_of_India_2017)

**(A) Some of the famous landmark judgments that helped in the evolution of LGBTQ+ rights are as follows:**

**1. Naz Foundation Govt. v. NCT of Delhi<sup>9</sup>**

In this case, a park was ransacked by the police wherein a few men on the suspicion of being homosexuals were arrested. Not only this but also, several men from an NGO named Bharosa Trust were arrested on the pretext of running a sex racket and later were granted bail. It was observed by the High Court of Delhi that irrational constraint is being imposed by section 377 IPC on two adults who had consented to the private act of sexual intercourse and thus, it violates the fundamental rights (Art 14, 15, 19 and 21) guaranteed to us by the Constitution of India.

**2. Suresh Kumar Koushal v. Naz Foundation<sup>10</sup>**

In this case, when various persons appealed against the decriminalization of section 377 before the Supreme Court, section 377 was once more recriminalized by the Supreme Court of India in the year 2013 and thus, overruled the judgment of the High Court of Delhi. The decision was based on the point that the community comprises only a minority of people in the nation and need not necessarily require any special constitutional protection. This led to severe criticism from the public and further rekindled the activism.

**3. National Legal Services Authority v. Union of India<sup>11</sup>**

In the landmark judgment of this case, the Supreme Court for the first time created and recognized the status of third gender which led to a huge sigh of relief for transgenders who suffered most of the exploitation among all other categories of the LGBTQ+ Community. Additionally, it also laid down a basic framework that assures fundamental rights to transgenders. The Government was directed to include transgenders in the OBC class so that they can take the benefit of reservation which would help them in fetching opportunities in education and employment. Non-recognition of the individuality of a transgender would be a breach of the basic fundamental rights guaranteed under Articles 14, 15, 16, and 21 of the Constitution of India. But this judgment faced downfall due to the passing of the Transgender Persons Bill, 2018. Instead of uplifting the transgender community, it further subjected them to institutional harassment.

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<sup>9</sup> Naz Foundation Govt. v. NCT of Delhi, 160 Delhi Law Times 277

<sup>10</sup> Suresh Kumar Koushal v. Naz Foundation, Criminal Appeal No. 10972 of 2013

<sup>11</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

#### **4. K.S. Puttaswamy v. Union of India<sup>12</sup>**

In this case, Justice Chandrachud opined that sexual orientation would also come in right to privacy and therefore the court stated that it is wrong to say that the LGBTQ+ Community which comprises a minority of the population doesn't require basic fundamental rights. This cannot be ground to rob them of their rights.

#### **5. Navtej Singh Johar v. Union of India<sup>13</sup>**

In this case, several high-profile people like Navtej Singh Johar, Keshav Suri, etc. had come forward to file a petition in the Supreme Court for questioning the constitutional legitimacy of section 377. It was held by the Supreme Court that section 377 is unconstitutional as it violated the basic fundamental rights like the right to privacy, equality, freedom of expression, rights of intimacy, and individuality. The court further disapproved the judgment of Koushal's case and declared it arbitrary and unreasonable.

The above two judgments of Navtej Singh Johar and NALSA have a lot of significance towards contributing to the recognition of third-gender persons and for decriminalizing section 377. Apart from that, it also carries importance in paving the way for progressive development in conferring basic human rights to the LGTBQ+ Community which were not previously offered to them.

However, there is a long way to go because they still lack the right to marry, the right to adoption, the right to surrogacy, etc. It's just the starting point towards a new world of liberation for the LGBTQIA+ Community.

#### **6. Arun Kumar v. Inspector General of Registration<sup>14</sup>**

In this case, the Madras High Court broadened the class of women as brides under the Hindu Marriage Act and included transwoman in it. It states that a person can identify themselves as any gender identity without having to evaluate by any authority or state which is called self-identification.

### **V. CONSTITUTIONAL RIGHTS OF THE LGBTQ+ COMMUNITY**

The Constitution of India guarantees to every individual some basic fundamental human rights along with equal standing before the law and equal safeguard of laws. The word 'Any Individual' includes every individual without showing favor or prejudice based on sex, caste, creed, or

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<sup>12</sup> Justice K.S. Puttaswamy (Retd) Vs Union of India (2017) 10 SCC 1

<sup>13</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

<sup>14</sup> ARUN KUMAR V. INSPECTOR GENERAL OF REGISTRATION, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019

religion. People who are transgenders and who come under the category of third gender are also included in the word 'any individual' and must not be discriminated against based on the non-application of any laws due to their dissimilarities thus violating their basic fundamental rights.

It was observed by the Supreme Court of India in one of the landmark cases that gender and biological traits comprise different constituents of sex. Genital part, secondary sexual traits, and chromosomes are included within biological characteristics and Gender characteristics consist of an individual's image of the self, profound psychological and emotional sense of sexual identity, and personality. It's pertinent to note that discrimination based on sexual identity is encompassed within the discrimination on the ground of sex under Articles 15 and 16 of the Constitution of India. Sex doesn't mean only male or female but it also includes a person who identifies themselves as neither male nor female. The main aim of both these articles is to provide social equality to persons of such communities and help them in gaining employment and education. Since transgenders are now included in the socially and economically backward classes, the state shall have the power to make special provisions for them. Sufficient amenities and opportunities must be expanded to them so that they can also live a life with dignity and on an equal standing with other heterosexuals.

The most important right is the right to choose one's own identity. And this right is covered under the article of right to life which the state has to safeguard from getting breached. This right to a dignified life which is covered under Article 21 of the Constitution of India is a right that is conferred to the transgender community. All this is related, as their right to gender identity and recognition of it, is what gives them the right to live a life with dignity. However, non-recognition will lead to a breach of it. The right to protection is also expanded to them.<sup>15</sup>

The people of the transgender community are ill-treated and face brutal torture and humiliation which also affect their right to reputation and their importance in society.

Among the LGBTQIA+ Community, transgenders are the ones who suffer a lot and are mistreated. Due to their indulgence in prostitution, beggary, and other corrupt activities owing to low-income status, they are often looked down upon by society.

## **VI. CONCLUSION**

Even though people from the LGBTQIA+ Community constitute a minority in the nation, this factor alone doesn't give the right to discriminate against them and not provide them with the

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<sup>15</sup> V. Revathy & Dr. S. Pandiaraj, *The Violation of Human Rights Against LGBT Community in India- A Critical Study*, 120 (5) *IJPAM*, 4875, 4880-4881 (2018)

basic human rights that are available to all other individuals.

Those individuals who identify themselves as homosexuals are not abnormal and neither homosexuality is a sin. All of such preconceived notions were fed into the minds of the people and thus, people started looking upon them as taboo in society. This was the result of the British Invasion where the Britishers brought with them the Christian and Victorian ideologies and considered them as a sin. It is evident from several books and sculptures of ancient times that homosexuality was practiced and even widely accepted in India.

For several years, the LGBT people would never come out of apprehension of persecution. Also, they used to suffer social discrimination and lack of equal status in employment opportunities. However, things started to change after the advent of the 20<sup>th</sup> Century, when a greater number of people especially the youth started accepting and supporting the community of homosexuals more than the old generation. All this couldn't have been possible without the continuous support and protests by the activists who arranged pride walks and public demonstrations. The activism led to the filing of petitions that eventually helped in securing basic human rights for the people of the community especially transgenders.

The Navtej Singh Johar and the NALSA Judgement led to a tremendous rise in safeguarding rights for the LGBTQIA+ community. Although the Judiciary has shown its support through its relentless case laws, society needs to implement them and openly accept such individuals without forcing or coercing them to undertake gender-changing surgeries or making them feel that something is wrong with them.

It's high time to change the attitude of the people and the government towards homosexuals and bring amendments to the existing laws to provide greater facilities and opportunities to the people who belong to the LGBTQIA+ Community. For instance, there is a need to bring new laws on marriage with same-sex, adoption, surrogacy, employment opportunities, inheritance, rental facilities, educational institutions, health care services, etc.

Thus, it can be implied that decriminalization of section 377 of the Indian Penal Code is only the first step towards liberation and equal standing for LGBTQIA+ Community. There's a long way to go particularly for various other rights that normally heterosexuals enjoy in society and are not available to homosexuals. Once, the legislature and the society start accepting the community and come forward to provide support to such individuals, that will open doors to further liberation.

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