
LGBTQ AND THEIR TEDIOUS JOURNEY FOR EQUAL RIGHTS

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ABSTRACT

'I am what I am, so take me as I am'

-Johann Wolfgang von Goethe

Lately, In India, the rights of LGBTIQ (lesbian, gay, bisexual, transgender, and queer) community have improved a lot. However, when compared to those who are not the part of the LGBTQ community, LGBTQ residents still suffer social and legal challenges. It is the core responsibility of our Indian Courts to pass just and rational orders, the government's duty to guarantee that the judgement reaches the general public, and the public's responsibility to enthusiastically accept the court's decision. After the historical judgement of Supreme Court and several other developments by the government, LGBTQ people have not got the societal validation yet. The legislative bodies and the governmental authorities can only pass the resolutions but the responsibility to provide them with equal status and to make them feel inclusive, is solely of the society as a whole.

INTRODUCTION

“Peace can only last where human rights are respected, where people are fed, where individuals and nations are free” — Dalai Lama¹

The basic rights which are available to all the human beings by virtue of their birth in human race are called as Human Rights. According to the Protection of Human Rights Act, 1993, *“Human Rights”* means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India”.² Human rights have a long history in India, and the notion of human rights is based on the core principle that all persons are equal. All human beings are born free and equal in rights, equipped with reason and conscience, and should act towards one another in a spirit of brotherhood is the ideology of human rights and values. This philosophy arose from the concept of *वसुधैव कुटुम्बकम्* which means that the whole world is a single family and encourages people to show the greatest sense of brotherhood possible, regardless of caste, color, ethnicity, nationality, or religion. Human rights provisions were also found in Hindu religious books and religious literature such as the Gita, Vedas, Arthashastra, and Dharmashastra, as well as Buddhist and Jain principles. Muslim monarchs such as Akbar and Jahangir were also admired for their concern for human rights and justice.

India has a diverse population and it is regarded as a model of a multicultural and legally pluralistic nation.⁴ Not only are laws of our nation intended to be written in such a way that they honor all the communities, but they are such that it represents all the communities respectably. The Preamble⁵ of our Indian Constitution signifies the equality for each and every individual in terms of social, economic, and political position. Part III enumerates several fundamental rights⁶ to which Indian citizens are entitled to, so as to make sure that the Universal Declaration of Human Rights can be adopted in a form that makes it legally enforceable⁷, whereas Part IV contains Directive Principles, which offer the State with supplementary suggestions in order to ensure the welfare of its people. Despite the Indian

¹ The 14th Dalai Lama- Nobel Lecture, < <https://www.nobelprize.org/prizes/peace/1989/lama/facts/>>

² Protection of Human Rights Act, 1993, §, 2, No. 10, Act of Parliament, 1993, (India).

³ Vasudhaiva Kutumbakam, < <https://www.speakingtree.in/blog/vasudhaiva-kutumbakam>>

⁴ Yashomati Ghosh, Anirban Chakraborty, Secularism, Multiculturalism and Legal Pluralism, <<https://journals.sagepub.com/doi/full/10.1177/2322005819859674>> Accessed 20 February 2022.

⁵ *Kesavananda Bharati v. State of Kerala*, AIR (1973) 4 SCC 225

⁶ V.G. Ramchandran, *Fundamental Rights and Constitutional Remedies* Vol.1, 1964, p. 1

⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

judiciary's significant commitment to promoting equality and harmony in society, lesbian, gay, bisexual, and transgender people continue to be denied basic human rights in our country.

HISTORY OF LGBT COMMUNITY IN INDIA

LGBT is a word used to describe people who are lesbian, gay, bisexual, or transgender. Homosexuals are another name for this group of people. Gender equality is a well-known subject in today's society all across the world. The issue of gender equality appears to have existed not only in the present, but also in the past. In the past, homosexuality was not considered equal and also civil rights were denied to homosexuals.⁸

1. PRE-COLONIAL ERA

In ancient India, *Gender Fluidity*⁹ was a very cognized concept for human beings as well as for the *yakshas*. Homosexuality has been manifested in various ways across cultures. There are various incidents in India's ancient history that highlight the presence of homosexuality and acceptance of homoeroticism. In Hindu mythology, Mahabharatha has a narrative of *Shikhandini* or Shikandi¹⁰, daughter to King Drupad. She was born as a female but was being raised as a male. Later in life, with the help of a Yaksha named Sthunakarna, she transformed into a man and entered the fight of Kurukshetra, causing Bhishma to be defeated. Shikhandi is the one who helped the Pandavas in defeating the Kauravas. Another tale from ancient history that acknowledges homosexuality is that of *King Bhagiratha*, who was born by two women as written in Krittivasi Ramayana, composed by a Bengali poet, Krittibas Ojha¹¹. It's difficult to address homosexuality in ancient India without mentioning one of its most visible and affirmative 'proofs.' The carvings in the *Khajuraho temple* of Madhya Pradesh are noted for their overt homosexual themes¹². The temple is estimated to have been constructed sometime around the 12th century. Same-sex love is mentioned in Hindu mythology; however, it is

⁸ Ruth Vanita and Saleem Kidwai, *Same-Sex Love in India: A Literary History*, Palgrave Macmillan; 2000th edition (7 July 2000)

⁹What is Gender Fluid?, <<https://www.verywellmind.com/what-is-gender-fluid-5075600>>

¹⁰ Pattanaik, Devdutt, *Shikhandi: And Other Tales They Don't Tell You*. (Zubaan Books, 2015)

¹¹ DID HOMOSEXUALITY EXIST IN ANCIENT INDIA?, < <https://devdutt.com/articles/did-homosexuality-exist-in-ancient-india/>>. Accessed 30 June 2009.

¹² Ray, Sanjana. "Indian Culture Does Recognise Homosexuality, Let Us Count The Ways." *The Quint*, 2018, <www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377#read-more#read-more>. Accessed 26 June 2021.

frowned upon. Such actions are punished in the Narada Purana, Manusmriti¹³, and Arthashastra. Apart from literary evidences, visual remnants of homosexuality are also present in Indian history. These records have been turned into art, paintings, and sculptures all around the country, foreg. Sculptures on the façade of the Sun temple in Konark, Orissa, also known as *Surya Devalaya*, as well as the Temples of Puri and Tanjore, depict explicit imagery of homosexual couples. A statue at *Bhubaneswar's Rajrani temple* depicts two women having oral sex. The life of Gautam Budha is depicted in Buddhist monastery caves at Ajanta and Ellora. The sculptures and paintings are examples of high-quality architecture. In between the paintings of Budha, few other paintings are also there depicting sensuality and erotic scenes between same sex couples.¹⁴ Stories related to Homosexuality and transgenders are not mentioned in Abrahamic faiths such as Christianity and Islam.

Despite of the fact that homosexuality does not go against our cultural values and tradition, gender fluidity and sexual norms of India did not fit into Britain's strict Victorian conceptions of appropriate sexual behavior.

2. COLONIAL ERA

Our country was not morally upright during the colonization era. On the early nineteenth century, as the British Empire grew stronger in the Indian subcontinent, so did their ideals about culture, society, and law. Homosexuality was not banned in India prior to the arrival of the British. By 1861, however, the British had solidified their control over India and were enforcing Section 377 of the penal code, which could result in life imprisonment for individuals who committed sodomy or other homosexual crimes.¹⁵ This regulation survived India's independence in 1947, becoming Section 377¹⁶ of the Indian Penal Code.

When the British colonial rulers placed homosexuality under "*unnatural offences*"¹⁷ in section

¹³ Devdutt Pattanaik, What Does Dharmashastra and Manusmriti Say About Homosexuality? <<https://www.dailyo.in/lifestyle/dharmashastra-manusmriti-karma-devdutt-pattanaik-mythology-hindu-epics/story/1/14814.html>> Accessed 10th March 2021.

¹⁴ Deepanshi Mehrotra, The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western? <<https://www.google.com/amp/s/www.lawctopus.com/academike/history-of-homosexuality-in-india/%3famp=1>> Accessed 1st March 2022.

¹⁵ The Origins of "Sodomy" Laws in British Colonialism, <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism#_ftn21> Accessed 3rd March 2022.

¹⁶ Indian Penal Code, 1860, § 377.

¹⁷ Neerja Gurnani, Unnatural Offences under the IPC, <<https://www.lawctopus.com/academike/unnatural-offences-under-the-ipc/>> Accessed 15 January 2022.

377 of the Indian Penal Code in 1862, it was the first time in India that a statute criminalizing homosexuality was enacted. Even in the twenty-first century, this legislation, which punishes anyone who freely engages in "*carnal intercourse against the order of nature*"¹⁸ with any man or woman, remained the most significant hindrance to LGBTQs' full expression of sexuality and personality in India. Many countries around the world had abandoned their colonial and mediaeval yoke by this time, beginning with Netherlands, which was the first to legalize homosexuality in 1811. In 1967, England decriminalized homosexuality as well.

LEGAL BATTLE FOR DECRIMINALIZING HOMOSEXUALITY IN INDIA

In the year 2009, Delhi High Court made a historic decision in the matter of *Naz foundation vs. Government of NCT*¹⁹ of Delhi, ruling section 377 of IPC unconstitutional²⁰ and providing relief to LGBT community. However, the Supreme Court of India overturned this judgement of High Court in year 2013 in matter of *Suresh Kumar Koushal vs. Naz foundation* and reinstated section 377 of IPC. In its judgment, the SC stated that section 377 of IPC doesn't contradict article 14, 19 & 21 of the Indian Constitution and such relationships increases the probability of AIDS from 1% to 8%.²¹

3. NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA, 2014²²

In the year 2014, when the Supreme Court in *National Legal Services Authority v. Union of India* recognized transgender as the "*third gender*," India took a major step towards acknowledging the rights of LGBTQ community. Following this ruling, transgender people who had previously been forced to identify as "male" or "female" could now legally identify as transgender or "third gender." This ruling also affirmed that they had been guaranteed all of the rights provided in Part III of India's Constitution as Fundamental Rights.²³

4. JUSTICE K.S. PUTTASWAMY (RETD.) AND ANR. V. UNION OF INDIA AND ORS., 2017²⁴

¹⁸ Indian Penal Code, 1860, § 377.

¹⁹ *Naz foundation v. Government of NCT of Delhi*, 160 Delhi Law Times 277.

²⁰ *Ibid.*

²¹ *Suresh Kumar Koushal v. Naz Foundation*, AIR 2014 (1) SCC 1

²² *National legal services authority vs Union of India*, AIR 2014 SC 1863.

²³ V.G. Ramchandran, *Fundamental Rights and Constitutional Remedies* Vol.1, 1964, p. 1

²⁴ *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, 10 SCC 1, AIR 2017 SC 4161

The Supreme Court's decision in the case of *K.S. Puttaswamy v. Union of India in 2017* was India's second major stride forward in recognizing LGBTQ people's rights. The Supreme Court rejected the "*miniscule minority*" theory in this case, ruling that the LGBTQ community's small population cannot be used to deny them their fundamental rights, and that such restrictions cannot be justified even when only a small number of people are subjected to unfriendly treatment. This judgement also recognized that everyone's sexual orientation is different, and that everyone's right to privacy²⁵ includes his or her sexual preferences.

5. NAVTEJ SINGH JOHAR & ORS. v. UNION OF INDIA THR. SECRETARY MINISTRY OF LAW AND JUSTICE, 2018²⁶

In the case of *Navtej Singh Johar & Ors. v. Union of India thr Secretary Ministry of Law and Justice*, the Supreme Court of India overturned a 157-year-old law criminalizing homosexual intercourse on September 6, 2018, marking a watershed event for LGBT rights in the world's largest democracy. A five-judge panel unanimously affirmed the right to equality and dignity and overturned the clause and Justice Indu Malhotra stated, "*History owes an apology to members of the community for the delay in ensuring their rights.*"²⁷ For more than a decade, activists have been working to repeal Section 377 of the Indian penal code, a colonial-era provision. The law prohibited consensual "carnal intercourse against the order of nature."²⁸ Despite the fact that the Act was rarely used as a basis for prosecution, it resulted in threats, harassment, and extortion against LGBT people. It was also a constant reminder to the LGBT community that their sexuality was illegal in the eyes of the government. This win was the end of a prolonged legal battle that was started in year 2001 with the filing of a writ petition in the Delhi High Court. The petition argued that section 377 of the IPC was unconstitutional because it infringed on the rights to equality, freedom of expression, life and personal liberty, including the rights to privacy²⁹, dignity, and health.

²⁵ Kharak Singh vs The State Of U. P. & Others, AIR 1963 SC 1295

²⁶ Navtej Singh Johar & Ors. v. Union of India, AIR 2018 SC 4321, (2018) 10 SCC 1

²⁷ Ushinor Majumdar, History Owes An Apology: Justice Indu Malhotra On Section 377, <<https://www.outlookindia.com/website/story/history-owes-an-apology-justice-indu-malhotra-on-section-377/316160/amp>> Accessed 10th March 2022

²⁸ Sheetal Joon, Carnal Intercourse against order of Nature as punishable under Sec.377 IPC, <<https://www.google.com/amp/s/www.latestlaws.com/amp/case-analysis/carnal-intercourse-against-order-of-nature-as-punishable-under-sec-377-ipc-what-constitutes-it-hc-explains-180873>> Accessed 23rd February 2022.

²⁹ Kharak Singh vs The State Of U. P. & Others, AIR 1963 SC 1295

RECENT DEVELOPMENT FOR LGBTQ COMMUNITY IN INDIA

The National Academy of Legal Studies and Research is poised to become India's first gender-neutral educational institution. It has begun to provide gender and sexual minorities with inclusive training.³⁰

The majority of Indian universities lack gender-neutral places such as hostels and washrooms. The University of NALSAR would be the first to feature gender-neutral dorms. The institution already has an interim policy in place and is in the process of drafting a draught policy to promote inclusive education on campus. On its diploma certificates, the institution has also eliminated gender salutations such as Miss and Mr. The establishment will have a non-discrimination policy in place, ensuring that students are not being differentiated on the grounds of their clothing choices, hairstyles, or other factors. Scholarships for students from the LGBTQ community would be a fair way to help them. Aside from that, specific programmers on gender and sexual minorities would be established to raise awareness among college students. Teaching and non-teaching employees, as well as security guards and other service providers, would be sensitized to make the campus truly accessible for every student.

CONCLUSION

The progress of LGBT rights is often directly tied to – sometimes through indirect routes – multiple fights for human dignity and freedom.”- Michael Bronski.³¹

Indian colonial heritage which acknowledges gender diversity in temple sculptures, myths, and religious treatises, and the Supreme Court's historic judgement on September 6, 2018, are some significant steps forward for transgender people in India but there is still a long way to go until complete equality and liberty is not attained. Intolerance, stigma, prejudice, and violence continue to plague this community. Families, educational institutions, businesses, law enforcement agencies, healthcare facilities, the media, and society as a whole are all affected by human rights breaches against LGBTQ people.

³⁰ Preeti Biswas, Nalsar to go gender-neutral, first in country to have such policy, <https://www.google.com/amp/s/m.timesofindia.com/city/hyderabad/nalsar-to-go-gender-neutral-1st-in-country-to-have-such-policy/amp_article/show/90467171.cms> Accessed 27th March 2022.

³¹ Melissa Cyril, Section 377:LGBT rights and HR policy in the Indian workplace, INDIA BRIEFING <https://www.india-briefing.com/news/section-377-india-lgbt-rights-hr-policy-indian-workplace-17804.html/> Accessed 12th March 2022

The Supreme Court's decision simply said that under the Indian Constitution, voluntary homosexual intercourse could not be a crime. As a result, the judgment's scope was constrained. The legal principles – that a queer individual has the right to full protection of the laws free from any inequity by the state – have also paved the way for future objections against discriminatory laws. The unrestricted discussion of sexuality and queerness in public areas without fear of punishment from authorities has been the most notable positive change. However, there is still a long way to go. The Transgender Persons (Protection of Rights) Act³² was passed by Parliament in 2019, and the transgender community has vehemently opposed it, claiming that it contains many clauses that are in violation of their fundamental rights i.e., Articles 15, 19, and 21 of the Indian Constitution, that protects *inter alia* individuals' rights to equality before the law, non-discriminatory treatment on the basis of sex, freedom of speech, and the protection of life and personal freedom. This Act has been challenged in the Supreme Court and there is an urgent need to remedy its more draconian provisions.³³ There is no comprehensive anti-discrimination law in India. While the Constitution forbids discrimination, the prohibition solely applies to government and its representatives. As a result, the private sector is free to discriminate in employment, housing, health, and education, among other sectors. While there is debate regarding the need for such legislation, there appears to be little political agreement in support of its passage. Even the courts have failed to recognize this problem, which has a significant impact on the lives of LGBT people. Although, we Indians are not oblivious about homosexuals but then also we do not feel free to openly address the topic of homosexuality so frequently and explicitly, hence the Indian worldview persists. The sensibilities of LGBT people can easily be understood by young people, but not by the older generation. Homosexuals and their behavior are frequently labelled as deviant. Homosexuality is not uncustomary in India. India is still a developing country and for the enormous growth and evolution, implementation of progressive laws should be done in abundance. Homosexuality will continue to be an anathema until and unless the society will not stop sweeping it under the rug of oblivion. The Government and the legislation should take more and more actions to put an end to the ongoing prejudice against the LGBT community and also we the people should accept them wholeheartedly as members of our society in order to give them with the true essence of democracy.

³² The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Act of Parliament, 2019 (India).

³³ Alexandra Oancea, The Shortcomings Of India's New Transgender People's Act <https://www.google.com/amp/s/www.humanrightspulse.com/mastercontentblog/the-shortcomings-of-indias-new-transgender-peoples-act%3fformat=amp> Accessed 27th January 2022.

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6. Suresh Kumar Koushal Vs. Naz Foundation Civil Appeal No. 10972 OF 2013.
7. Naz Foundation Government Vs. NCT of Delhi 160 Delhi Law Times 277; W. P. (Civil) No.7455/2001.
8. <https://www.google.com/amp/s/blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/%3famp=1>.
9. V.G. Ramchandran, *Fundamental Rights and Constitutional Remedies Vol.1*, 1964, p. 1
10. <https://devdutt.com/articles/did-homosexuality-exist-in-ancient-india/>.
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