
STUDY OF LAWS PROTECTION OF LGBT COMMUNITIES IN INDIA

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ABSTRACT

The evolution of the Indian judiciary's stance on Section 377 of the IPC, has marked a pivotal moment in the debate over sexual rights. This shift has opened up avenues for discussing and potentially transforming public perceptions on the issue. India has seen significant development in statutory laws concerning transgender individuals over time. The absence of legal protections for acknowledging and safeguarding the interests of marginalized communities in India highlights a significant gap in the legal framework. The legislative landscape concerning LGBT community rights in India has evolved significantly with key enactments and proposed bills. Beginning with the Transgender Bill of 2014 and culminating in the enactment of The Transgender Persons Act, 2019, the Indian Parliament has been working towards improving the welfare and rights of transgender people.

Keywords: Indian Judiciary, LGBT, Statutory Laws.

Introduction

In India, aside from a few individuals in metropolitan areas involved in fields like advertising, fashion, design, and the arts, most men and women with same-sex partners do not identify as homosexual or even acknowledge their sexual preferences. Many married men engage in sexual activities with other men, but only a very small number are willing to see themselves as homosexual. Sexual relationships with other men are often seen more as a means of personal satisfaction or, for some, a way to earn money, rather than a form of friendship. Conversely, sex within marriage is viewed as a serious matter intended for procreation. Most men who engage sexually with other men will still marry a woman, and many continue these same-sex relationships even after marriage; Kaur and Sharma (2016)¹. Such sexual activities with men do not create internal conflict as long as the individual does not identify as homosexual, views these relationships as a mere preference rather than a defining aspect of their identity, and maintains their masculine identity by marrying a woman and fulfilling the expectations of procreation.

It is ironical that reactionaries, belonging to difficult religions who reject homosexuality as a decadent of western phenomenon follows the same Indian Penal code that is so unfamiliar to the Indian tradition; Singh & Bhatt (2017)². The M.S.M (Men who have sex with men) is not uncommon in India nor is abnormal. Psychiatrists state that homosexuality is as natural as heterosexuality. It is just that their position is attached with a stigma, hence they cannot openly express their sexuality. They cannot marry and adopt children, or live a life of dignity in society.

The Indian Penal Code represented a major effort, alongside other codifications like the Civil Procedure Code (C.P.C) and the Criminal Procedure Code (Cr.P.C), to apply the principles of common law in British India. There is considerable debate regarding the provisions related to the rights of transgender individuals, particularly Section 377. This section, which falls under the category of offenses affecting the human body, also encompasses the crime of rape.

¹ Kaur, K. & Sharma, D. (2016). Section 377 of Indian Penal Code: A Revival of Hart Devlin Debate on Legal Moralism, *Indian Bar Review*, 43(2), 111-125.

² Singh, C. & Bhatt, D.K. (2017). A humanist exposition of rights of transgender and the Indian Law, *Indian Bar Review*, 44(4), 1-22.

However, it remains unclear how homosexuality is specifically classified as an offense against the human body under Section 377.

Section 377 of the IPC states that any person who voluntarily engages in carnal intercourse "against the order of nature" shall be punished. This provision criminalizes certain sexual acts deemed unnatural, regardless of consent. It applies to sexual intercourse with a man, woman, or animal, as long as it involves penetration and is considered "against the order of nature"³.

The Delhi High Court's judgment in the Naz Foundation case⁴, delivered on July 2, 2009, marked a pivotal moment in India's progress towards becoming a more progressive nation committed to the principles of equality, anti-discrimination, and the inclusive right to life and liberty. Chief Justice Ajith Prakash Shah and Justice S. Muralidhar ruled that Section 377 of the IPC, in so far as it criminalizes consensual sexual intercourse between adults in private, violates Articles 21, 14, and 15 of the Indian Constitution; Basu (2019)⁵.

The Delhi High Court, through the clear and precise terms set by Justices Shah and Muralidhar, established a significant legal and constitutional framework for the nation. It is challenging for even the Supreme Court of India to overlook the substantial impact of the Delhi High Court's ruling in this case on the understanding of India's constitutional jurisprudence.

Review of Literature

Grossman et al. (2009)⁶ note that social tension among LGBTQ adolescents is compounded by marginalization, loneliness, alienation, bullying, and a dearth of supportive adults and safe spaces. Addressing these challenges is crucial for fostering the well-being and inclusion of LGBTQ youth in society.

³ The Dichotomy of the Legal Status of Lgbt Communities, available at: <http://uumjls.uum.edu.my/images/currentissues/The-Dichotomy-of-the-Legal-Status-of-SexualMinorities-A-Critical-Analysis-of-Judicial-Trends-across-the-Globe-and-India.pdf>

⁴ Naz Foundation v. Govt. of NCT of Delhi (2009)160 Delhi Law Times 277.

⁵ Basu, D.D. (2019). Introduction to the Constitution of India, LexisNexis, Butterworths Wadha Publication, Nagpur, 24th edn.

⁶ Grossman, A. H., Haney, A. P., Edwards, P., Alessi, E. J., Ardon, M. & Howell, T. J. (2009). Lesbian, Gay, Bisexual and Transgender Youth Talk about Experiencing and Coping with School Violence: A Qualitative Study, *Journal of LGBT Youth*, 6, 24-46.

Lannoy et al. (2020)⁷ revealed that LGBTQ adolescents experience elevated rates of aggression, victimization, despair, and suicidal tendencies compared to their heterosexual peers. Moreover, they are at increased risk of developing psychosocial disorders including substance abuse and eating disorders. Addressing these disparities requires comprehensive support and inclusive interventions in healthcare and education systems.

Banerjee et al. (2022)⁸ explore the significance of the year 2014 for the Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI+) community, marked by a watershed moment when the Supreme Court of India delivered a groundbreaking verdict in the case of National Legal Services Authority of India (NLSA) Vs Union of India (2014). This landmark judgment compelled the Central Legislature to undertake the drafting of a comprehensive legislation, leading to the enactment of The Transgender Persons (Protection of Rights) Act in 2019. This pivotal legal development reflects a significant step forward in recognizing and safeguarding the rights of transgender individuals in India.

Singh (2023)⁹ delves into an analysis of the legislative advancements and judicial decisions that have shaped India's journey towards LGBTQ++ equality, with particular emphasis on the landmark judgment that overturned Section 377 of the Indian Penal Code.

Statutory Laws for Transgender Persons in India

The evolution of the Indian judiciary's stance on Section 377 of the IPC, as noted in Ratanlal and Dhirajlal (2010)¹⁰, has marked a pivotal moment in the debate over sexual rights. This shift has opened up avenues for discussing and potentially transforming public perceptions on the issue. The Delhi High Court's judgment in the Naz Foundation case shifted the focus from public morality to constitutional morality, moving the debate away from whether homosexuality undermines social norms to addressing how legal gaps and societal prejudices have marginalized, oppressed, and exploited members of the LGBT community in India.

⁷ Lannoy, S., Mange, J., Leconte, P., Ritz, L., Gierski, F. & Maurage, P. (2020). Distinct psychological profiles among college students with substance use: A cluster analytic approach, *Addictive behaviors*, 109, 106-477.

⁸ Banerjee, S. & Bhatnagar, V. D. (2022). The Transgender Persons (Protection of Rights) Act, 2019: Beneficial or Detrimental to the LGBTQ Community, *Journal of Emerging Technologies and Innovative Research*, 9(3), 331-334.

⁹ Singh, A. (2023). Unveiling Lgbtq+ Realities in India: Constitutional Analysis, Socio-Legal Challenges and Identity Dynamics, *Commonwealth Law Review Journal*, 9, 443-463.

¹⁰ Ratanlal and Dhirajlal (2010). *The Indian Penal Code*, LexisNexis, Butterworths Wadha Publication, Nagpur, 33rd edition, 231.

The absence of legal protections for acknowledging and safeguarding the interests of marginalized communities in India highlights a significant gap in the legal framework. Although the Indian Constitution guarantees the right to be free from discrimination based on sex, the interpretation of "sex" has traditionally been limited to biological distinctions between male and female.

India has seen significant development in statutory laws concerning transgender individuals over time. Beginning with the Transgender Bill of 2014 and culminating in the enactment of The Transgender Persons Act, 2019, the Indian Parliament has been working towards improving the welfare and rights of transgender people.

1. The Rights of Transgender Persons Bill 2014¹¹

On April 24, 2015, Tiruchi Siva introduced the Transgender Persons Bill, 2014 in the Rajya Sabha. The bill highlighted that 29 countries, including leading democracies like the US, Canada, France, Australia, the UK, Italy, and Singapore, had enacted legislation to safeguard the rights of transgender individuals. Key features of the 2014 bill included:

- Formulating a comprehensive national policy for the development and welfare of transgender people.
- Establishing National and State Commissions for Transgender Persons.
- Setting up Employment Exchanges and a Special Transgender Rights Court to protect their rights.
- Prohibiting the separation of children from their parents solely on the basis of being transgender, unless directed by a competent court.
- Implementing a 2% reservation for transgender individuals in educational institutions and government jobs.
- Introducing penalties for making derogatory comments about transgender persons,

¹¹ Transgender-protection-rights-bill 2014, available at :<https://blog.ipleaders.in/transgenderprotection-rights-bill/>

including imprisonment for up to one year and fines.

While the bill was passed in the Rajya Sabha, it did not advance in the Lok Sabha.

2. The Transgender Persons (Protections of Rights) Bill 2016¹²

Thaawarchand Gehlot, in August 2016, the Minister of Social Justice and Empowerment, introduced this 2016 Bill in Lok Sabha. This bill was opposed by the opposition parties.

Key features of the bill are as below¹³.

The 2016 Bill defines a transgender person as someone who is (i) neither exclusively male nor female, (ii) a blend of both male and female, or (iii) neither male nor female. Additionally, it includes individuals whose gender identity does not align with the gender assigned to them at birth. This definition encompasses trans women, trans men, gender-queer individuals, and those with intersex variations.

Recognition of Identity of Transgender Persons

Under this bill, transgender individuals have the right to self-identify their gender to access the benefits and rights available to the transgender community. However, obtaining a certificate of identification is mandatory for them.

Offences and Penalties

Anyone who forces a transgender person to leave their home or village, coerces them into begging or bonded labor, denies them access to public spaces, or inflicts mental or physical harm will face punishment. This penalty includes a minimum of six months imprisonment, with a possible extension up to two years, along with a fine.

3. The Transgender Persons (Protection of Rights) Bill 2018¹⁴

On December 17, 2018, the Bill was introduced in the Lok Sabha with certain amendments,

¹² The Transgender Persons (Protections of Rights) Bill 2016

¹³ An analysis of The Transgender Persons, available at : <https://blog.ipleaders.in/transgenderprotection-rights-bill/>

¹⁴ The Transgender Persons (Protection of Rights) Bill 2018

and it was subsequently passed on December 18, 2018. The Bill defines a transgender person as someone whose gender identity does not align with the gender assigned to them at birth, encompassing trans-women, trans-men, individuals with intersex variations, and gender-queer persons. It also recognizes socio-cultural identities such as kinnar, aravani, hijra, and jogta.

Following sex reassignment surgery, a transgender person can apply for a revised identification certificate by submitting a certificate from the hospital's medical officer where the surgery was performed, directly to the District Magistrate. The District Magistrate is empowered to issue the identification certificate without requiring recommendation from a District Screening Committee.

The Bill mandates that every establishment, regardless of size, appoint a compliance officer to address complaints of discrimination. It prohibits any form of discrimination against transgender persons by individuals or establishments.

The state will provide coverage for medical expenses related to Hormonal Therapy, Sex Reassignment Surgery, and other health issues through an insurance policy for transgender individuals. The National Council of Transgender Persons will have authority to address and resolve grievances raised by transgender individuals.

The initial version of the bill faced criticism for not incorporating all suggestions made by the Standing Committee. It particularly drew criticism for retaining the provision mandating the establishment of District Screening Committees for issuing Identity Certificates. Additionally, the bill did not decriminalize begging and did not include mandatory reservations for transgender persons in educational institutions and employment.

Subsequently, a revised version of the bill was introduced by Thaawarchand Gehlot and passed by voice vote in the Lok Sabha¹⁵. The revised bill eliminated the requirement for District Screening Committees. However, it stipulated that transgender individuals must undergo Sex Reassignment Surgery (SRS) to obtain a revised identification certificate, thus excluding those who do not undergo SRS from the right to self-perceived gender identity. The revised bill

¹⁵ An analysis of The Transgender Persons, available at : <https://blog.iplayers.in/transgenderprotection-rights-bill/>

decriminalized begging but did not include provisions for reservations in educational institutions or employment for transgender persons.

4. The Transgender Persons (Protection of Rights) Act, 2019

This 2019 Act¹⁶ was enacted to protect the rights and welfare of transgender individuals. Introduced in the Lower House by Minister of Social Justice and Empowerment, Mr. Thaawarchand Gehlot, on July 19, 2019, this Act addressed the shortcomings and issues that led to the lapses of the previous Transgender Persons Bills of 2014, 2016, and 2018. Both the Lok Sabha and Rajya Sabha passed the 2019 bill, and it received presidential assent on December 5, 2019. The Act was published in the Gazette of India and came into effect on January 10, 2020.

Under this Act, a transgender individual is defined as someone whose gender identity differs from the gender assigned to them at birth. This definition includes trans-women, trans-men, individuals with intersex variations, gender-queers, and those with socio-cultural identities such as kinnar and hijra. The term "intersex variations" specifically refers to individuals born with primary sexual characteristics or external genitalia that deviate from the typical male or female norms.

Under this Act, a transgender person can apply to the District Magistrate (D.M) for an identity certificate in the prescribed format. For minors, the application must be submitted by a parent or guardian. If a transgender person has undergone surgery to transition to male or female, they must submit their application along with a certificate from the Chief Medical Officer who performed the surgery. The District Magistrate will review these documents and, if satisfied, issue a revised certificate reflecting the gender change. With this updated certificate, the individual can then update their birth certificate and other official documents to align with their new gender designation.

The Government is required to ensure the establishment of specialized health facilities, including separate HIV surveillance centers and services for sex reassignment surgeries.

¹⁶ Transgender-persons-protection-of-rights-act-2019,available at : <https://www.latestlaws.com/articles/all-about-transgender-persons-protection-of-rights-act-2019//>

Additionally, it should update the medical curriculum to address transgender health issues and provide comprehensive medical insurance schemes for transgender individuals.

5. THE LGBTQIA+ PERSONS (PROTECTION OF RIGHTS) BILL, 2022

The LGBTQIA refers to individuals who identify as lesbian, gay, bisexual, transgender, queer, intersex, and asexual. LGBTQIA+ extends this to include those whose sexual orientations and gender identities may not fit into these categories. The LGBTQIA+ Persons (Protection of Rights) Bill, 2022 seeks to ensure the rights of LGBTQIA+ individuals, affirming their dignity and emphasizing that cultural norms, traditions, or customs cannot justify the infringement of their fundamental and constitutional rights.

The court's judgment marked a significant step forward, yet it highlighted the necessity for a comprehensive law ensuring equal protection of rights for LGBTQIA+ persons and addressing the shortcomings of previous legislation. The pervasive homophobia and discrimination faced by LGBTQIA+ individuals in their daily lives significantly undermine their dignity and privacy. Therefore, the Bill aims to establish legal safeguards to uphold the rights of LGBTQIA+ persons, allowing them to live with dignity and equality under the law. It seeks to rectify existing gaps in legislation and provide a framework that protects LGBTQIA+ individuals from discrimination and ensures their fundamental rights are respected across all aspects of life.

Conclusion

Section 377 of the Indian Penal Code, enacted during British rule, criminalizes "carnal intercourse against the order of nature." It encompasses non-procreative sexual acts including oral and anal sex, impacting LGBTQIA+ individuals, particularly transgender people and sex workers. The legislative journey for transgender rights in India has progressed through significant milestones, starting with the introduction of the Transgender Persons Bill in 2014 and culminating in the Transgender Persons Act of 2019. These efforts have aimed to protect and enhance the welfare of transgender individuals across various facets of life. The 2014 bill emphasized the need for a national policy on transgender development, the establishment of commissions and special courts, and provisions for education and job reservations. However, it did not advance beyond the Rajya Sabha. Subsequently, the 2016 bill was introduced in the Lok Sabha, defining transgender persons and outlining procedures for obtaining identity

certificates. It proposed penalties for discrimination and mandated welfare schemes and employment opportunities, but it faced criticism for its vague definitions and the requirement of identity certificates, contradicting the principle of self-identification endorsed by the Supreme Court. The legislative landscape concerning transgender and LGBTQIA+ rights in India has evolved significantly with key enactments and proposed bills. The Transgender Persons (Protection of Rights) Act, 2019 defines transgender individuals broadly, including provisions for identity certificates without the need for a District Screening Committee, although requiring Sex Reassignment Surgery for updated certificates drew criticism. The Act prohibits discrimination, ensures access to healthcare and employment, mandates complaint officers in establishments, and establishes the National Council for Transgender Persons. It aims to integrate transgender persons into society with rights to family life, education, and non-discrimination in employment.

The LGBTQIA+ Persons (Protection of Rights) Bill, 2022 seeks broader protection for LGBTQIA+ individuals, emphasizing dignity and equal rights. It addresses gaps in earlier legislation, aiming to safeguard against discrimination based on sexual orientation and gender identity. The bill underscores the need for comprehensive legal safeguards to ensure equal protection under the law, highlighting ongoing societal challenges faced by LGBTQIA+ communities in India.

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