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## FROM DISCRIMINATION TO DIGNITY: THE FIGHT FOR LGBTQ+ PERSONAL RIGHTS

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### ABSTRACT

“The three most important events of human life are equally devoid of reason: Birth, Marriage, and Death”

- Austin O'Malley

A human being is born with inherent rights and dignity and it is unacceptable for someone to violate these rights. The human rights that owe to their universality, are often denied to the people with diverse sexual orientation, or gay people (as widely called sexual minorities). For these people, the legal framework is a contradiction. The sexual minority community in India has had a long, hard road to travel and still has a long way to go. The LGBT (lesbian, gay, bisexual, transgender) community mostly faces problems due to the society acceptance and laws voted by them. To some extent, on 6th September 2018, the Supreme Court of India offered some relief to sexual minorities by striking down Section 377 of the Indian Penal Code, 1860; however, this landmark decision does not solve all the hurdles they face, such as fundamental rights and other personal laws associated with marriage, adoption and divorce. The Supreme Court judgement itself highlights the ripple effects of Section 377. And this is even after the discontinuance of this provision in law and the constitutional guarantees for the protection of all citizens in India. To this end, this paper seeks to identify the effects of lack of legal frameworks on the LGBT community and to reflect upon what might be the drivers behind these issues. We will also touch upon homosexual behavior and hijras in Indian society, and the need for this minority to exercise and enjoy their human rights, including the important right to marry. Indeed, constitutionalism mandates that every citizen, even those from sexual minorities, are entitled to this fundamental right as outlined in international law and human rights, which India, as a signatory of the Universal Declaration of Human Rights (UDHR), must ensure. Existing personal laws, like Hindu or Muslim law, do not address the right to marry for the LGBT community.

## Introduction

On 6 September 2018, the Supreme Court of India decriminalised homosexuality by reading down Section 377 of the Indian Penal Code in the landmark case of *Navtej Singh Johar v Union of India*, a colonial era law that criminalised “carnal intercourse against the order of nature”. Patil, which reiterated that freedom is a fundamental right of every human being irrespective of their sexual orientation and gender identity. Its legal status may be relaxed, but the LGBTQ community continues to face what’s known as social stigma. The word “homosexual” literally means same gender — it is a sexual orientation where a person feels sexual attraction or sexual desire to a person of the same sex. Over time, a number of labels have arisen to cover this spectrum of identities; today, the term LGBTQ, which stands for Lesbian, Gay, Bisexual, Transgender and Queer, is used to describe them collectively.

**Lesbian:** A woman who is romantically or sexually attracted to another woman is termed a lesbian.

**Gay:** A gay man is one who experiences sexual attraction to other men.

**Bisexual:** A bisexual individual is someone who is attracted to people of both genders.

**Transgender:** This term refers to individuals whose gender identity and expression differ from the societal expectations associated with their biological sex.

**Queer:** The label "queer" encompasses a range of sexual orientations and gender identities that do not conform to traditional heterosexual and cisgender norms.

In its ruling in *National Legal Services Authority v. Union of India*<sup>1</sup>, the Supreme Court of India made a landmark decision by recognizing transgender individuals as the "third gender." This judgment empowered individuals to self-identify as male, female, or third gender, affirming that the fundamental rights enshrined in the Indian Constitution are equally applicable to them.

### What is Section 377 of Indian Penal Code?

Section 377 of IPC talks about *Unnatural Offences*, which means Whoever voluntarily has carnal intercourse against the order of nature with any man, women or animal shall be punished with Life Imprisonment or Imprisonment for up to 10years and shall also be liable for fine.

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<sup>1</sup> NLSA v. UOI 2014 INSC 275

*Explanation-* Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

**Note:** The Supreme Court recognized that contemporary psychiatric and legal frameworks do not classify homosexuality as a mental illness. Additionally, the Court noted that homosexuality is present in various species within the animal kingdom. The **2017 Puttaswamy** ruling upheld the principle of privacy, which encompasses sexual orientation.

**Section 377 is considered to be a serious offence. Hence it is a cognizable and non-bailable offence. It can be tried in the court of judicial magistrate first class.**

### **Historical context**

Hindu scriptures indicate the recognition of a third gender within Hinduism. Certain characters in the epic "Maharashtra" are said to have undergone gender transformation. One notable figure is Shikhandi, who is believed to have been born female but later identifies as male and marries a woman. The hijra community venerates the fertility goddess Bahuchara Mata as their patron deity. Significant Sanskrit texts, such as the Naradasmriti and the Sushruta Samhita, assert that homosexuality is an inherent trait and prohibit individuals from marrying those of the opposite sex.

Conversely, the Manusmriti, another important Hindu text, prescribes various penalties for homosexual acts.

According to the Manusmriti, engaging in sexual relations between two men or between a homosexual and a heterosexual individual in a bullock cart would result in a loss of caste. The term "homosexual" refers to individuals who are attracted to members of their own gender. This concept is not new; it has been present in Hinduism for centuries. Ancient texts and sculptures depict sexual interactions among women, illustrating a feminine realm where sexuality was associated with pleasure and fertility, as seen in the Rig Veda, which dates back to approximately 1500 BC. Historical instances of same-sex relationships can also be found in the Kamasutra, the harems of young boys maintained by Muslim Nawabs and Hindu aristocrats, and accounts of male homosexuality during the Middle Ages, such as that of Malik Kafur.

Section 377 of the Indian Penal Code was enacted by the British colonial administration. This provision criminalizes homosexuality and bisexuality in India. The Manusmriti contains references to various penalties for homosexual and lesbian activities, including loss of caste, substantial fines, and corporal punishment. The enforcement of these penalties clearly indicates

that homosexuality was prevalent during that period. Since 1974, homosexuality has been removed from the classification of mental disorders and is no longer viewed as deviant behavior. This illustrates the transformation of homosexuality from a completely natural behavior to one that is perceived as contrary to the natural order.

### **Statutory recognition of LGBTQ**

The citizens of India deserve equal treatment, regardless of their gender. When the government prioritizes its own agenda, bills are swiftly passed in Parliament; however, when it comes to safeguarding the fundamental rights of citizens, such bills often languish. This pattern is evident in the legislation concerning the LGBTQ community, whose fundamental rights remain under threat. Individuals within this community face discrimination, yet there appears to be a lack of concern regarding their plight. They are often marginalized, as if they do not exist, and discussions about their rights are notably absent. The essential rights to equality, life, and liberty are frequently denied to them solely based on their gender identity or sexual orientation. It was not until 2018, with the Supreme Court of India's ruling in *Navtej Johar v. UOI*, that the voluntary unnatural sexual acts among LGBTQ individuals were decriminalized under Section 377 of the Indian Penal Code. No individual within the LGBTQ community is permitted to marry or adopt children, nor are they afforded protection against domestic violence or sexual assault in the context of cohabitation. Same-sex couples lack legal recognition, which precludes any possibility of claiming maintenance or restitution of conjugal rights. These individuals are citizens of India, yet the treatment they have endured for years is inhumane. Currently, the only legal recourse available to this community is to avoid criminal charges. On April 24, 2019, a significant ruling by the Madras High Court mandated that Tamil Nadu authorities, who had previously refused to register a marriage between a male and a transgender female, must proceed with the registration. **Honourable Justice G R Swaminathan**, a member of the bench, referenced the Supreme Court's decision in the case of **National Legal Services Authority of India vs. Union of India**, which recognized the parenthood rights of transgender individuals under the Indian Constitution. He stated, "Gender identity falls within the domain of her personal autonomy and involves her right to privacy and dignity. It is not for the State authorities to question this self-determination of the second petitioner herein." He further remarked, "For too long, transgender individuals have been marginalized. The Constitution of India is an enabling document, inviting them to integrate into the mainstream. It is unreasonable to deny transgender persons the benefits of existing social institutions."

Recently, in West Bengal, a marriage between a man and a transgender individual was also recognized, marking a positive development for the transgender community, as it signifies the possibility of legal marriage registration. It is imperative that similar rights for same-sex couples, including those of gay and lesbian individuals to marry under the Special Marriage Act, be established. Furthermore, Sections 375 and 376 of the Indian Penal Code do not extend protections to members of the LGBT community.

This issue emerged when the Pune district court approved bail for four individuals who abandoned a transgender woman in 2017. The court's reasoning was based on the interpretation of sections 375 and 376 of the Indian Penal Code, which pertain exclusively to male and female individuals, thereby suggesting that a transgender woman is ineligible for relief under this legislation or any other. Furthermore, it is important to note that gay and lesbian couples are similarly unprotected against rape under the IPC, as their sexual orientation is not acknowledged in any legal framework.

### **Challenges facing by LGBTQ+**

The LGBTQ+ community in India has endured a protracted and challenging journey in their quest for social justice and equal rights. Despite the nation's rich tapestry of cultural and historical diversity, the community continues to encounter numerous challenges and barriers in their daily lives. The primary challenges confronting the LGBTQ+ community in India regarding social justice can be broadly classified into several key areas:

**Discriminatory Social Attitudes:** The community experiences discrimination and stigma from society, often fueled by prevailing cultural norms, values, and religious beliefs. This results in a significant lack of acceptance and understanding, further intensifying the difficulties they encounter.

**Health Inequalities:** There exist considerable health disparities, including obstacles to accessing healthcare services. The stigma and discrimination linked to their sexual orientation and gender identity frequently deter individuals from seeking essential medical treatment and care.

**Lack of Employment Opportunities:** The LGBTQ+ community in India faces substantial hurdles in securing employment, as they are frequently subjected to discrimination in the workplace based on their sexual orientation and gender identity. This situation exacerbates the financial and social inequalities they experience.

**Lack of Education:** The community grapples with insufficient educational resources and support, which often results in limited access to education and fewer opportunities to enhance their skills and capabilities.

### Legal Analysis

#### **Naz Foundation V. Government of New Delhi<sup>2</sup>**

This Landmark case is challenged the constitutionality of **Section 377** of Indian Penal Code, and the writ petition filed in High Court for Legalizing the sexual intercourse between Consenting Adults and the court held in 2009 that section 377 has violated the right of equality, privacy and personal Liberty. But Supreme Court overturned the Delhi High Court's decision in 2013 and stating that Section 377 of IPC was Constitutional.

#### **Suresh Kumar Koushal V. Naz Foundation<sup>3</sup>**

The legal battle centered around the constitutionality of Section 377 of the Indian Penal Code (IPC), which prohibits same-sex sexual relations. This case was initiated by Suresh Kumar Koushal and several other parties, including the All-India Muslim Personal Law Board, Trust God Missionaries, and Krantikari Manuwadi Morcha. The respondents in the case were the Naz Foundation, a non-profit organization dedicated to HIV/AIDS prevention and intervention.

In its ruling, the Supreme Court affirmed the constitutionality of Section 377. The Court clarified that the law does not target a particular demographic but instead penalizes acts deemed as "*carnal intercourse against the order of nature.*" Furthermore, the Supreme Court emphasized that the potential for misuse of the law by authorities does not warrant its invalidation. It also urged that the issue should be addressed through parliamentary discussion and decision-making.

#### **Navtej Singh Johar V. Union of India<sup>4</sup>**

A significant legal decision in India that abolished the criminalization of consensual same-sex relationships among adults was brought forth by a coalition of LGBT activists, which included notable figures such as dancer Navtej Singh Johar, Ritu Dalmia, Ayesha Kapur, Aman Nath, and Sunil Mehra.

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<sup>2</sup> 2009 SCC OnLine Del 1762

<sup>3</sup> Suresh kumar Koushal v. Naz Foundation (2014) 1 SCC 1

<sup>4</sup> Navtej Singh Johar v. Union of India (2018) 10 SCC 1

### **Key Aspects:**

The challenge to the constitutionality of Section 377 of the Indian Penal Code.

The court determined that Section 377 infringed upon fundamental rights related to equality, freedom of expression, life, and privacy.

The ruling affirmed that sexual orientation is a natural and unchangeable characteristic.

The court recognized that the decision to engage in intimate sexual relations with an individual of the same sex constitutes an expression of personal autonomy and self-determination.

Furthermore, the court established that the LGBT community is entitled to equal protection under Part III of the Constitution.

### **Prevention of challenges**

**Educational Initiatives:** It is essential for governmental bodies and civil society organizations to collaborate in developing educational initiatives that foster understanding and acceptance of the LGBTQ+ community. These initiatives should aim to enhance awareness regarding the difficulties encountered by LGBTQ+ individuals and motivate the public to advocate for their rights and dignity.

**Healthcare Access:** The government must strive to ensure that healthcare services are both accessible and inclusive for the LGBTQ+ community. This entails offering training for healthcare professionals to equip them with the skills necessary to deliver appropriate and respectful care to LGBTQ+ patients.

**Workplace Inclusion:** The government should enact policies and programs that facilitate employment opportunities for the LGBTQ+ community. This includes launching initiatives aimed at supporting the employment of LGBTQ+ individuals and tackling discrimination within the workplace.

**Support Systems:** Collaborative efforts between the government and civil society organizations are crucial in establishing support systems for the LGBTQ+ community, which should encompass counseling and mental health services.

Such services can play a significant role in mitigating the stigma and discrimination faced by the LGBTQ+ community, providing essential support to help them navigate the challenges they encounter.

## **Initiatives done by government**

**National Health Policy 2017:** The policy acknowledges the health requirements of transgender individuals and advocates for the delivery of comprehensive healthcare services, which encompass gender reassignment surgeries.

**National Council for Transgender Persons:** This council was established to provide guidance to both central and state governments on policy, legislative, and administrative issues concerning transgender individuals.

**Swabhiman Scheme:** Initiated by the Ministry of Social Justice and Empowerment in 2015, this scheme aims to assist transgender individuals in the domains of education, employment, health, and social security.

## **TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019:**

The Transgender Persons (Protection of Rights) Bill, 2019, was enacted to safeguard the rights of the transgender community by prohibiting discrimination in various sectors, including employment, healthcare, education, and access to both public and private institutions. Nevertheless, the bill inadvertently subjects individuals to institutional oppression and undermines their bodily autonomy and identity under the guise of community enhancement. The concerns regarding the bill are as follows:

- i. The legislation restricts transgender individuals' right to determine their sexual orientation. It mandates that a District Magistrate's certification of a sex reassignment procedure is necessary before any changes can be made to gender identity on official documents. This requirement infringes upon the autonomy and privacy of transgender individuals and exposes them to potential governmental harassment.
- ii. Under the provisions of the Transgender Persons (Protection of Rights) Bill of 2019, the penalty for sexual assault against a transgender individual is limited to a mere two years of imprisonment. In contrast, the Indian Penal Code prescribes a more severe punishment of up to seven years for the same crime committed against a woman.
- iii. The bill lacks provisions for the establishment of scholarships, necessary accommodations, or modifications to the school curriculum to ensure LGBT+ inclusivity. Furthermore, it does not guarantee that the transgender population will have access to safe and inclusive educational and workplace environments.

### **Transgender Persons (Protection of Rights) Rules, 2020:**

- This initiative will enable transgender individuals to apply for certificates and identity cards online from any location within the country, eliminating the need for in-person interactions with officials.
- It will provide a mechanism for tracking application status, handling rejections, and addressing grievances, thereby promoting transparency throughout the process.
- Issuing authorities will be required to adhere to strict timelines for processing applications and delivering certificates and identity cards, ensuring timely service without unnecessary delays.

### **Establishment of Garima Grah:**

- A new facility has been established in Vadodara, Gujarat, in collaboration with the Lakshya Trust, a community organization managed entirely by transgender individuals.
- The 'Shelter Home for Transgender Persons' initiative offers a range of services, including accommodation, meals, clothing, recreational activities, skill development programs, yoga, fitness training, library access, legal assistance, and guidance for gender transition and surgeries.
- The program aims to support the rehabilitation of at least 25 transgender individuals in each designated home as identified by the Ministry.

### **Conclusion**

The journey for the Supreme Court to grant the LGBT community the freedom to openly express their love has spanned many years. It is now imperative for the government to take meaningful steps to ensure that the rights essential to the LGBT community are recognized and upheld. The framers of the Constitution emphasized that the rights of all citizens must be protected, ensuring equal access to life and liberty. It is the responsibility of Parliament to ensure that no citizen feels marginalized or overlooked within society. Therefore, it is crucial that laws be revised and civil rights be extended to every individual in the nation.