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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Mrs.S.Kalpana

Assistant professor of Law

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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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LAWS REGULATING LGTBO+ RIGHTS: A COMPARATIVE ANALYSIS BETWEEN USA AND INDIA

Authored by - Ekta M. Khatri¹

I. ABSTRACT

The Indian constitution guarantees that no individual living in India will be discriminated against on the basis of their age, gender, sex, caste, creed, religion, place of birth, or any other factor. This protection extends to every citizen of India. On the other hand, there is a significant portion of the population that is regularly and frequently throughout the course of a day susceptible to discrimination due to the fact that they are "gay," "lesbian," "Transgender," etc. Homosexuality is one of the most contentious issues in the world today, the question on humanitarian law. People around the globe are becoming the prey of terror of discriminatory practices based exclusively on who they love and how they appear. The year 2018 ushered a glimmer of optimism for the LGBT community, which has been fighting for their rights for a long time, and finally, homosexuality is decriminalized in the judgement of the Navtej Singh Johar case. Regardless of the fact that it is crucial to comprehend that representatives of the LGBT community should not feel pressured to conform to what is perceived as normal by the majority of society, since doing so frequently results in them being subjected to prejudice and condemnation for their differences such as Post-traumatic stress disorder, anxiety, depression and other similar factors. But slowly and surely, we are endeavoring to advance towards providing a secure atmosphere and equal rights to all. It is necessary to acknowledge that the LGBT community is entitled to the same rights as other people, including marriage equality, a safe environment, a comfortable workplace to live in, and the ability to adopt children. Although this research paper primarily focuses on the United States of America and the situational analysis in India, there is a dire need for the evolution of LGBT rights for a healthier and tranquil standard of living. This paper discusses the evolution of LGBT rights in a form of a comparative analysis of the provisions of the United States of America and India, with their relevant and significant cases.

¹ PRN: 1182200014
Third year; BBA-LLB(H)

The paper progressively discusses different issues such as marriage, discrimination, and humanitarian violation of LGBT rights.

Keywords: *Human rights, Homosexuality, India, USA, Gay, Queer, Decriminalization, Section 377, LGBTQ+*

II. INTRODUCTION

The abbreviation LGBTQIA stands for, “Gay, Lesbian, Bisexual, Transgender, Queer, Intersex and Asexual”. All the above mentioned terms denote either identifying oneself gender or preferring a sexual orientation over the other.

For the longest time since time immemorial perhaps, Being part of The LGBTQ+ community has been considered taboo, some of these misconceptions myths, and prejudice actually are repercussions being “too religious” or “too spiritual”, in the Simple sense, most human beings of every given religion or caste have a prejudice lodged in their minds that, following the school of natural law, that “we, human beings are creature of gods, and we should accept the ‘gender identity perhaps, ‘sexual orientation’ which is given to us”.

In many ways, religions, mythology, are to be blamed for the members of LGBTQ+ community to feel so closeted and different from the rest of the society. In the eyes of law, everyone is equal and they should all be treated equally with fair means, rights and privileges.

Once, the idea of equality settles in the minds of society as a whole., then they must realize that members belonging to different communities, for instance LGBT community, they are deserving to be treated with respect as any other human being, adoration to choose a different path, facing numerous adversities, endeavor to fight for their basic human rights, such as right to vote, right to marry anyone of their choosing, right to adoption and maintenance and so on and so forth.

In the hope of providing equal opportunities to all individuals, people have been debating and fighting for LGBT rights for the better part of the last century. Although LGBT relationships and sentiments have been acknowledged as far back in history as the seventh century BC, actual significant activism has only risen from the beginning of the 20th century.

The concepts of sex, sexuality, and gender are frequently confused with one another and used interchangeably.

A gender identity is believed to be a natural component of an individual, the removal of which may or may not need surgical or hormonal intervention treatment or occupational therapy. It has also come to people's attention that the sexual qualities that make up a person might differ in essence and all folks must be able to formulate their judgments concerning their own body Authenticity and control over one's own body

A fresh tide of consciousness has recently swept across our planet as a direct result of the proliferation of the internet. Even if this has helped the queer community become more visible, the most important question that needs to be answered is whether or not the increased visibility is credible.

In the 21st century, queer rights have been the focus of intense attention from researchers all around the world. From a global viewpoint, the rights of LGBT people have not yet been established in their entirety, and the objective of making the society a slightly better place is still quite a way off from where we are right now.

As more time has elapsed, LGBT rights have evolved into a topic of widespread concern in a number of different nations. In countries all throughout the world and in every region, people who identify as gay face violations of their human rights. They are subjected to a variety of human rights crimes, including murder, as well as incarceration, torture, and atrocities that are directed explicitly at sexual minorities, such as activities that try to change their sexual orientation through coercion.

It is of extreme importance that the queer community feel safe at every corner of the world, and are not subjected to cruel atrocities.

III. HISTORY OF LGBTQ rights in the USA and INDIA.

A. GAY RIGHTS IN USA.

Even though the United States Supreme Court has already ruled on the matter, homosexual marriage continues to be one of the most contentious constitutional issues in the country, right up there with abortion. The question has not been determined by the Supreme Court. The federal government of the United States recognizes marriages between people of the same gender, and these unions have been made lawful in 36 of the country's 50 states.

However, the states of Mississippi, Missouri, Arkansas, South Dakota, Nebraska, and Texas continue to refuse to recognize marriages between people of the same sexual orientation. These states have either amended their constitutions or enacted legislation that stipulates that marriage can only take place between a man and a woman².

In the United States, judicial opinions on gay marriage are inconsistent, despite the trend toward supporting homosexual people's other rights. Because the clause on equal protection offers no additional protections for LGBT persons, the emphasis in American trials is placed more on individuals' rights to privacy. Indeed, in the United States, the substantive due process case known as **Lawrence v. Texas** was the most important win for LGBT rights won by the Supreme Court.

The Supreme Court concluded in **Bowers v. Hardwick**³ in 1986 that gay sodomy violated no constitutionally protected rights. Justice Byron White wrote the majority judgement, which stated that "a basic right to engage in gay sodomy" was not guaranteed by the Constitution. Chief Justice Warren E. Burger, writing in a dissenting opinion, referenced the "historic origins" of restrictions against gay intercourse by paraphrasing William Blackstone's assessment of homosexual sex as a "infamous crime against nature," worse than rape, and "a crime not fit to be named."

In **Romer v. Evans**⁴, decided in 1996, the Court invalidated a Colorado initiative that would have preempted any municipal or state legislation protecting homosexual individuals. Justice Anthony Kennedy said that the referendum was a per se violation of the constitution because it showed bias towards the LGBT community and denied them equal protection under the law against discrimination. There wasn't "a reasonable link to legitimate state interests," as the Romer majority put it. The logical grounds test was not met by the proposed change to the state constitution. Justice Antonin Scalia wrote a dissenting opinion, arguing that it was reasonable to strip legal protections from the group that engages in gay sodomy if it were possible to prohibit homosexual sodomy.

In **Lawrence v. Texas**⁵, Lawrence, written by Kennedy in 2003, disregarded Bowers. With a 6-3 vote, the Supreme Court overturned a Texas statute criminalising same-sex sexual practices and, by implication, 13 other states' sodomy laws, effectively making same-sex consensual sex lawful in every state and territory in the United States.

² Siddharth Dalabehera, "Gay Rights: A comparative Study" (2015) < <https://www.lawctopus.com/academike/gay-rights-comparative-study/>> Accessed on 1 October 2022

³ **Bowers v. Hardwick**, 478 U.S. 186 (1986)

⁴ **Romer v. Evans**, 517 U.S. 620 (1996)

⁵ **Lawrence v. Texas**, 539 U.S. 558 (2003)

Kennedy underscored the decision's focus on consensual adult sexual conduct in a private setting: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."⁶

The Massachusetts case of **Goodridge v. Dept. of Public Health**⁷ is considered a seminal state appellate court decision on the topic of same-sex marriage in that state. This historic judgement, handed out on November 18, 2003, was the first time a state supreme court in the United States upheld the legality of marriage between people of the same sex. According to the ruling, it is unconstitutional to deny someone the rights, privileges, and responsibilities that come with legal marriage because they want to wed someone of the same sex.

The harmful assumption that same-sex partnerships are inherently unstable and inferior to opposite-sex relationships and are unworthy of respect is given governmental stamp of approval by the common misunderstanding that "marriage is procreation." Denying marriage licenses to one group of people has no effect on the marriage rates of another group, and the idea that marriage between a man and a woman is the "ideal environment for child raising" is meaningless⁸.

B. GAY RIGHTS IN INDIA

India is a South Asian nation with a lengthy and intricate history that has seen several visitors from around the globe settle there. Only in 1947 did the British Empire, who were in India for more than 200 years, make it illegal to engage in gay acts under **Section 377**⁹ of the Indian Penal Code. The British were there for more than 200 years.

Contrary to popular belief, homosexuality has little cultural significance in the West.

Since section 377 was introduced, it has become clear that homophobia is a Western import, not just in India but also in a number of other former British territories. The Indian and Malaysian criminal codes' section 377's ban of homophobia is just as same in Singapore, Pakistan, Bangladesh, Jamaica, the Maldives, and Myanmar.

⁶ Lawrence v. Texas, 539 U.S. 558 (2003) [577] [578] [579]

⁷ Goodridge v. Department of Public Health & another 440 Mass. 309

⁸ Goodridge v. Dept. of Public Health [2003] SC 318

⁹ Indian Penal code, 1860, section 377

Various pieces of evidence from the past reveal that mediaeval India recognized and welcomed members of the trans and intersex community, as well as celebrated all types of romantic love. Harbans Mukhia, a renowned historian, claims that in order to understand why the British made homosexual activity illegal in India, one must have knowledge of India's history.

In India, the British introduced their own legal framework, which included Section 377, which criminalized homosexuality and rendered it a criminal offence. They were the ones who upheld this law, despite the fact that it was not in line with India's perspective toward the practice of homosexuality. It was more related to the Christian belief systems that they had "he explains. He adds that the verdict of the court has restored India to its traditional ways (BBC India, 2018)

The Indian Penal Code, Section 377, was adopted in 1860, while India was still under British rule. Punishable by up to 10 years in jail or a fine, section 377 made it illegal to knowingly engage in carnal intercourse "outside the order of nature" with a human or animal¹⁰.

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This provision appears to be nondiscriminatory because it criminalizes only specific sexual activities and not specific persons.

It has been utilized against homosexuals, but never against consenting heterosexuals. The provisional law's main flaw is that it does not take into account the age of the parties involved or their ability to give informed consent. Consensual same-sex actions between adults are therefore made illegal. Since 2001, opponents of Section 377 have been battling it out in the courts. First, Naz Foundation filed a petition with the High Court of Delhi.

In 1977, **Shakuntala Devi**, an outstanding mathematician, released "the world of homosexuals"¹¹ which is considered to be the first research paper on homosexuality in India.

¹⁰ Indian penal Code, 1860, Section 377

¹¹ **Shakuntala Devi**, "the world of homosexuals"

It advocated for the legalization of the behavior in question as well as "full and total approval" rather than tolerance and compassion.

AIDS BedhBhav Virodhi Andola was the organization that submitted the initial appeal in 1994 contesting Section 377. In point of fact, the petition wasn't granted.

1999 marked the year when Kolkata played home to the very first Pride March that was ever organized anywhere in South Asia¹².

In 2001, the NAZ foundation for the public interest litigation filed a petition in the Delhi High Court against Section 377. The Delhi High Court ruled in 2009 that Section 377 and other legal provisions against private, adult, consensual and non-commercial same-sex conduct were in direct violation of fundamental rights guaranteed by the Indian Constitution. This ruling came in the case of **NAZ Foundation vs. government of NCT of Delhi**¹³.

In the Constitution, Article 15 makes it illegal to discriminate on the basis of certain traits, one of which is gender. The Court decided that the term "sex" encompasses not only a person's biological sex but also their sexual orientation; hence, discrimination based on a person's sexual orientation is not permitted.

Article 15 of the Constitution, The Court also took note of the fact that Article 21 protects a person's right to life, which includes the right to health, and came to the conclusion that Section 377 is a barrier to public health since it interferes with attempts to prevent the spread of HIV.

The entirety of Section 377 was not overturned by the Supreme Court. It was determined that the provision violates the Constitution because it makes sexual conduct between consenting adults that take place in private illegal. The court came to the following conclusions:

“Section 377 criminalizes the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution”.

¹² Suyashi Smridhi, “22 Years On, AIDS Bhedbhav Virodhi Andolan: The Struggle Continues” (2020) <<https://feminisminindia.com/2020/03/05/20-years-aids-bhedbhav-virodhi-andolan-struggle-continues/>> Accessed on 30 September 2022

¹³ Naz Foundation V. Govt. (NCT of Delhi), (2016) 15 SCC 619, 130

The ruling of the Delhi High Court from 2009 that decriminalized gay behavior with consent was overturned by the Supreme Court in December of 2013. The judge's bench stated that the issue should be discussed in Parliament, which should then make a decision.

In **Suresh Kumar Koushal v. NAZ Foundation**¹⁴, the Supreme Court overturned the ruling of the Delhi High Court and concluded that Section 377 did not violate the constitution and is, as a result, lawful. This decision was the result of the case. The decision of the Supreme Court was based on a number of different factors.

The Supreme Court rejected this line of reasoning and decided that the Sexual Offenses Definition Act (S.377) solely addresses sexual conduct and says nothing about sexual orientation or gender identity. Because of this, even straight people who engage in sexual behaviors that are illegal under S.377 would be subject to the law's repercussions. As a result, the part does not target members of the LGBT community as a group¹⁵.

In addition, the Supreme Court reached the conclusion that the Delhi High Court improperly relied on cases from other nations in its haste to protect what it saw to be the rights of LGBT individuals. They hold the view that precedents established in other nations cannot properly be applied to the situation that exists in India. In reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that “a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgender” and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that “this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.” In light of the above factors considered, the Supreme Court reversed the decision of the Delhi High Court and upheld section 377.

It concluded that “Section 377 does not suffer from the vice of unconstitutionality” with no further elaboration.

In, **Navtej Singh Johar V. Union of India**¹⁶ Following the decision of the Delhi High Court in 2013 to overturn an earlier order, gays are once again regarded to be criminals.

¹⁴ Suresh Kumar Koushal v/s Naz Foundation (2014) 1 SCC 1

¹⁵ Suresh Kumar Koushal v/s Naz Foundation (2014) 1 SCC 1, 65

¹⁶ **Navtej Singh Johar V. Union of India**, AIR 2018 SC 4321

When some elevated individuals in India, such as hotelier Keshav Suri, Ritu Dalmia, and dancer Navtej Singh Johar, amongst many others, came forward and filed the petition before the Supreme Court trying to challenge the constitutional provisions of Section 377 of the Indian Penal Code, India witnessed an increase in the number of demonstrations for LGBT rights.

As it violates people's right to privacy, choice, and the ability to express who they are, the court has unanimously found that Section 377 is unconstitutional. It reinterpreted Section 377 to no longer criminalise homosexuality when practiced by consenting individuals of the same sex or gender.

The court reasoned that Section 377 is ambiguous since it fails to clearly define "natural" and "unnatural." It also restricts the freedom of speech and expression, which is guaranteed by Article 19 of the Indian constitution, which includes the liberty to express one's gender orientation.

They are a tiny minority, but the court ruled that shouldn't be used against them when upholding their claim to equal protection under the law.

The court also ordered the government to eradicate discrimination against LGBT individuals and raise public awareness of their rights. The judges provided further details on the concerns of transgender rights, cognitive functioning, morality, secrecy, and the right to self-determination.

In the same vein, **the Indian Psychiatric Society** issued a statement in February 2014 declaring that homosexuality is not an illness and that the society does not recognize it as such¹⁷.

In the case of **National legal service authority vs. Union of India**¹⁸, which took place in April 2014, the Supreme Court of India decided that persons who identify as transgender should be considered as a third gender category.

In December of 2015, a measure seeking to decriminalize section 377 was presented to Parliament; however, it was defeated by a vote of a majority of the members present. On the other hand, at the same time, legislation to legalize marriage between people of the same gender had already been enacted in the United Kingdom.

¹⁷ Malathy Iyer, "Homosexuality is not a disease, psychiatrists says," (2014) < <https://timesofindia.indiatimes.com/>> Accessed 30 September 2022

¹⁸ National legal service authority vs. Union of India, AIR 2014 SC 1863

Paradoxically, the country that gave us Section 377, a legislation that criminalizes homosexuality, has now made it legal for persons of the same sexual inclination to marry each other in marriage. Since 1967, it has been established that homosexuality does not constitute a crime in and of itself in the United Kingdom.

The Supreme Court of the India made the decision in February 2016 to reconsider the criminalization of homosexual engagement.

Namma Pride was the first March in India to be made accessible for people with disabilities, and it took place in November of 2016. Roughly thirty-five individuals living with disabilities took part in the March and the associated events¹⁹.

The country's LGBT community now has the right to safely express their sexual orientation after the Supreme Court of India issued a ruling on August 24, 2017, allowing them to do so. According to the verdict, "discrimination against an individual on the basis of sexual orientation is fundamentally repugnant to the dignity and sense of self-worth of an individual."

The court held that privacy and protection of sexual orientation lie at the core of the fundamental rights under Article 14, 15 and 21. The verdict comes as a redemption for the LGBT community which has fought a long legal battle to protect their privacy, sexual orientation and be protected from social stigma and legal action²⁰.

Under the legislation of this nation, a person's right to privacy is upheld regardless of their sexual orientation. However, the Supreme Court did not specifically strike down any laws that criminalize relationships between people of the same sexual orientation.

LGBT community members are permitted to declare their sexual orientation, yet the Indian Penal Code still considers homosexual activities to be illegal. At this moment, the legislative posture is in a perplexing paradox.

The advancement of LGBT rights in India has been a sluggish process.

¹⁹ Rajani, Ritesh and Madhumitha Venkataraman "The making of India's first disability-accessible Pride: Namma Pride, Bengaluru, 2016" (2017). <<http://orinam.net/making-of-indias-first-disability-accessible-pride-bengaluru-2016>> Accessed on 1 October 2022

²⁰ Navtej Singh Johar V. Union of India, AIR 2018 SC 4321

IV. DISCRIMINATION

Adverse consequences on LGBT people's ability to contribute to and benefit from the changes might be expected when their human rights are violated via discrimination and other forms of exclusion. LGBT persons are often subject to impoverishment, prejudice, and brutality because of these factors. The probability of losing one's job, home, education, and access to health care increases significantly if one is openly gay, lesbian, bisexual, or transgender (LGBT), or is merely considered to be (Ball 2010)²¹.

LGBT people must be acknowledged as rights holders and sellers who have an inalienable right to have their voices heard in matters that directly affect them and the larger community. Discrimination occurs at an early age and spreads across several industries. They also don't have any close relatives who can help them. (Ball, 2010, Rosa, Fullerton, and Keller, 2015). Because of their identities, origins and backgrounds these individuals are frequently the targets of hostility. In the working world, LGBT persons also face discrimination and abuse in all regions and in all stages of the employment cycle: hiring, advancement, training, compensation and termination, and in the implementation of benefits throughout. As a result, LGBT people are forced to conceal their sexual orientation and gender identity, which can lead to considerable anxiety and loss of productivity²².

LGBT people also face discrimination in access to housing. In addition, exclusion from homes and communities leads to a disproportionate representation of LGBT people among the homeless. They also face discrimination in accessing shelters, and further exclusion, criminalization and stigma because they are homeless²³.

V. STATUS OF SAME-SEX MARRIAGE

Although, there is not a lot of information about same-sex marriage because statistically not many states have adopted same-sex marriages, but there are some states who have enacted legislative provisions to allow same-sex marriages within their countries. Although international human rights law has not yet been interpreted to require States to ensure marriage equality, a small number of cases before the United Nations and regional human rights bodies have begun to flesh

²¹ Ball, Carlos A. (2010). "From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation". Beacon Press.

²² United nations, "Effective inclusion of LGBT persons" < <https://www.ohchr.org/>> Accessed on 1 October 2022

²³ United nations, "Effective inclusion of LGBT persons" < <https://www.ohchr.org/>> Accessed on 1 October 2022

out the underlying principles. However, these bodies appear reluctant to recognize marriage equality as a fundamental right unless and until this becomes the cultural and legal norm. The Human Rights Committee, in its sole decision regarding same-sex marriage, upheld the State's right to refuse to provide gay couples with the right to marry²⁴.

The LGBT community is only now beginning to receive the attention it deserves in India, which has only recently begun to go in that direction. The LGBT community in India faces a lengthy and arduous fight to get marriage rights, depriving them of daily access to fundamental civic rights. Due to the biased and orthodox view of Indian culture that deems "Homosexual Relationships" to be "Morally reprehensible and against their respective Cultures and Religions," it has been a fiercely discussed subject and has sparked many religious conflicts.

The LGBT community in India is still far from receiving all the liberties, entitlement and privilege that the country's heterosexual community does, despite the decriminalization of Section 377 of the Indian Penal Code in 2018. India is still a considerable distance from recognizing same-sex relationships, legalizing same-sex unions, allowing same-sex couples to adopt children together, or even implementing anti-discrimination legislation.

Only Kerala and Tamil Nadu in India have legalized transgender adoption, permitted it, and granted members of the LGBT community the ability to change their gender marker.

In 2009, the European Court of Human Rights first addressed the right of same-sex couples to marry. The applicants in the case claimed that the Austrian law limiting marriage to heterosexual couples violated Article 12 (the right to marry and found a family) and Article 14 (freedom from discrimination) taken together with Article 8 (right to private and family life). The Court found that "States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples."²⁵

²⁴ Human Rights Committee, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc CCPR/C/75/D/902/1999

²⁵ *Schalk and Kopf v. Austria* [2010], 107.

VI. CONCLUSION

Most Indians or people in general belonging to any religion, caste, race or creed have heard about gays; therefore, they aren't in denial about them.

But the Indian people's political traditional stigma against homosexuality and their own cultural perspective on the matter persist.

Young people nowadays are more attuned to the feelings of LGBT people than they are to those of the traditional ancient human beings. Homosexuals and their lifestyle are often labelled as abnormal and dangerous. Just because homosexuality is not as common as it formerly was in India does not imply it does not exist there. normal.

If something is out of the ordinary, that's no longer a reason to criticize it. The country of India is an expanding nation, and what will further expand and enrich the nation is the arrival of ground-breaking regulatory policies. As long as society as a whole is ready to see homosexuality as taboo, to sweep it under the rug of insignificance, despite the fact that they account for a significant 10% of our population, it is imperative that the state provide them with equal human and other rights. Hence there is a dire need to accept homosexuality as a part of "nature's element", and help the LGBT Community to fight for their humanitarian rights, so that the need for discrimination, elimination would not be "normal"

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