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COMBATING QUEER DISCRIMINATION IN THE AGE OF LGBTQ RIGHTS - INDIA

Authored by- Anushka Chowdhary, Delhi, India August, 2022

Index

Topic	Page Number
Introduction <ul style="list-style-type: none">- Status In India- Statement Of Problem	3
Hypothesis	5
Data Collection	6
Research Analysis	7
Limitations	9
History of LGBTQ <ul style="list-style-type: none">- Rights Through Resistance- Hate Crime	11
Evolution In Respect To Laws In India <ul style="list-style-type: none">- Progression	14
LGBTQ Movement and the Law <ul style="list-style-type: none">- Limitations and challenges	20
The Way Forward	23
Conclusion	27
Bibliography	28

Introduction

For a society to evolve, it must constantly change in accordance with the needs for development. Under International Law, the states are obligated to protect the human rights of each individual including civil, cultural, economic, political and social rights further referring to a collection of the following: the right to work, rights at a workplace; right to security; rights to an adequate standard of living; right to education; right to health and certain family and cultural rights.

“As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity. Where there is a tension between cultural attitudes and universal human rights, rights must carry the day,”¹

A society categorically structured between sex and gender prospects people as “male” or “female” on every level. In reality, the sexuality of humans is diverse in nature and can be fixed or fluid. LGBTQ+ may not have received its legal recognition all around the world but sure has made a relevant identity around the world and has additionally achieved legal rights in a few counties after years of battles.

Status In India:

A large number of protests against Section 377 were staged across India, which led to political activism across all parties to support its repeal. The Supreme Court Of India issued a verdict on 6 September 2018, in a unanimous ruling declaring Section 377 to be unconstitutional as it infringed the fundamental rights of autonomy, intimacy, and identity, thereby legalizing homosexuality in India.² However, combatting discrimination based on sexual orientation and gender identity is a task even in the 21st century with laws available to protect them.

¹ <https://www.un.org/press/en/2010/sgsm13311.doc.htm>

Statement Of Problem

In a society where the only acceptable orientation is heterosexuality and homosexuality is viewed as abnormal, LGBTQ individuals face numerous challenges. The goal of this hate crime is to instill fear in a community with a message. Moral, religious, and political beliefs of dominant groups are a few factors to reinforce homophobia on a larger scale.

Hypothesis

There is a need for separate laws in India to address the legal and social challenges LGBT individuals face on a daily basis. In order to protect LGBT rights as human rights, better implementation of laws is needed.

Data Collection

All the data collected for the research study is secondary and is thoroughly analysed. The data has been collected from several different articles, newspapers, thesis, blogs, etc. Methods of the data collection for the research also include a review of literature, the history of homosexuals, etc.

² *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*

Research Analysis

There is no quick fix that can solve all the problems affecting LGBT communities throughout the world. The next future action for LGBT activists is to encourage, promote and demand a proposition from the government for legislation that would permit LGBTQ couples to marry, adopt and inherit property from their spouses and/or the family. Even though the Union government left the legality of Section 377 to the judicial body in 2018, it has also stated to likely to oppose any same-sex marriage petition. It is unconstitutional to deny these basic rights solely based on a person's sexual orientation, as this violates the fundamental rights to equality and liberty, Article 14 and Article 19 respectively

Same-sex couples are deprived of social and legal recognition and of state benefits due to the denial of marriage rights to the LGBTQ+ community. Legislation recognizing same-sex marriage can be achieved through an amendment to the Special Marriage Act.

The core legal obligations of States with respect to protecting the human rights of LGBT people include obligations to:

- Protect individuals from homophobic and transphobic violence.
- Prevent torture and cruel, inhuman, and degrading treatment.
- Repeal laws criminalizing homosexuality and transgender people.
- Prohibit discrimination based on sexual orientation and gender identity.
- Safeguard freedom of expression, association, and peaceful assembly for all LGBT people.³

³ <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>

Civil rights remain a barrier for the LGBTQ+ community. In spite of homosexuality being decriminalised, still, the laws in India remain hostile and prejudicial towards the LGBT community. The boundless gap between the legislative and the judicial perception of the LGBTQ+ community restrains their development.

Limitations/Challenges

Primarily, a petition to assert the right of marriage to same-sex couples under the Hindu Marriage Act is still pending and the outcome remains uncertain in the Delhi High Court, further contributing to the current status of no provisions for civil partnerships for same-sex marriages

Marriage

Section 13(2)(ii) of the Hindu Marriage Act states that a wife is entitled to petition for divorce on the ground of rape, sodomy, or bestiality committed on her by the husband, the same is followed by the Special Marriage Act as well as Parsi Law - however, due to the judgment for amendment of Section 377 Indian Penal Code, the above-mentioned terms need to be redefined alongwith.

Family

- Adoption: It is undeniable that adoption is a complex issue and even heterosexual couples have a difficult time adopting a child considering the anti-trafficking laws. Nonetheless, at least a heterosexual couple can apply for adoption whereas, the act basically deprives same-sex couples of the right to adopt. While there are more than 20 million orphans and abandoned children in India, most of whom live in abysmally poor conditions, the law continues to prevent partners from adopting a child solely on the basis of their gender/sexual orientation.

Regulation 5(3) of the Adoption Regulation Act, 2017 stipulates that only couples who have been in a stable relationship for two years can adopt a child. Furthermore, the section explicitly refers to the couple as “wife” and “husband”.

- Surrogate: Surrogacy Regulation Bill 2019 outlines that “Indian Citizens who have been married for at least 5 years” are eligible to parent a surrogate child, thereby, legally forbidding the queers to parent through surrogacy.

Work:

The Employment Provident Fund Scheme, 1952, and Workmen’s Compensation Act, 1923 are a few of the certain economic legal benefits that the people only related either by blood or marriage enjoy. Even though they were drafted decades ago, their distinct explanation explicitly deprives the LGBTQ+ community of the said benefits as well.

Exploitation:

Laws regarding rape and harassment are currently based on a 'male-female' binary. The perpetrator can only be male while the victim can only be female.

Reference; Section 375 Rape, Section 354A Sexual Harassment, Section 345B Assault or use of criminal force to woman with intent to disrobe, Section 354C Voyeurism, Section 345D Stalking, Indian Penal Code.

History of LGBTQ In India

Homosexuality has always been a part of India’s ancient and mythological history. However, it took the system more than 80 years approximately to win the long battle for a legal entity. A law dating back to the nineteenth century became a tool to harass and exploit all those who didn't conform to the traditional binary of sexuality and gender.

Vedic-Age Era

In ancient India, homosexuality, or non-normative sexual identity was recognized as the third nature, or “tritiya prakriti” as per the Gay and Lesbian Vaishnava Association (GALVA)⁴

During the pilgrimage dynasty temples constructed had explicit depictions of queer couples. Devdutt Pattanaik, Mythologist described the illustration as “One invariably finds erotic images including those that modern law deems unnatural and society considers obscene.”

Mughal-Age Era

The first Mughal Emperor, Babur, has documented in his memoirs about a young man named Baburi, often as “Babur Nama” in his lovelorn strophes.

Auparashtika - transgender sexual activity, is widely discussed in Kamasutra to depict oral sexual gestures.

Rights Through Resistance

While gender-neutral harassment laws are necessary, the private and public sectors must also develop anti-discrimination policies and take action to eliminate prejudiced stereotypes based on homophobia and transphobia.

Transgender: The trans community has been subjected to exploitation, ostracization, exclusion, humiliation, and violence by both, society and authorities in power. A public information campaign⁵ designed by the former High Commissioner Navi Pillay was instituted in 2013 with a motive to raise awareness of transphobia adding to the violence and discrimination against the LGBTQ Community in order to promote respect and demand equality for the rights of LGBTQ identifiers.

⁴ *The evolution of the perception and acceptance of the LGBTQ+ community in India* BY CAMILLE-MAYA JAYANTHI LEMESL

Lesbian: Lesbianism has little if any room in India today and is considered a personal problem. A major challenge that presently confronts lesbians in India is the absence of not only a social identity but also that of a historic-cultural context. Patriarchal sexism conjointly with homophobia is a huge part of the LGBTQ community where the burden of supposed heterosexuality is forced upon them when a woman declares herself as lesbian or bisexual. It is a common belief that suggests they undergo 'corrective rapes' in which she sexually interacts with a man without her consent to treat the 'Disease of Homosexuality'.

Gay: Synonym with the lesser. As a result of representation, certain issues can lead to a shift in addressing the perspectives. This often steers to a gender-identity existential crisis.

- Bullying - The common thread of such incidents is that they are manifestations of deep-rooted prejudices and discriminatory attitudes that persist in these institutions.

from the university after being subjected to homophobic misconduct. He was filmed and blackmailed by unknown assailants who broke into his home and invaded his privacy thereby, disclosing his personal relationship with his partner. Later, the professor was found dead under cryptic circumstances when he raised his voice and sought justice in the court.

- ⁵ <https://www.icc-cpi.int/Pages/item.aspx?name=pr928>

⁶ *Moti @ Mohit vs State (Nct Of Delhi) on 31 October, 2011*

⁷ *SR Siras v. Aligarh Muslim University, High Court at Allahabad, India (1 April 2010)*

Evolution In Respect To Laws In India **2001 - 2009** **Naz Foundation V. Nct Of Delhi**

Lucknow police had detained men solely based on the suspicion of them being gays. In addition to these men being arrested, nine more men were arrested on the basis of them being associated with a non-profit that aimed to educate people about safe sexual practices and STD's.

After this incident, Naz Foundation alongwith Lawyers' Collective filed a petition in the High Court of Delhi challenging the fundamentally violating nature aligned with the constitutional validity of Section 377 Indian Penal Code.

After years of litigation, the High Court of Delhi decision came out in 2009 which concluded that Section 377 of the IPC imposed an unreasonable restriction on two adults engaging in consensual intercourse in private. Additionally stating that under the law, public health efforts to reduce the risk of transmission of HIV/AIDS were undermined because people were afraid of being prosecuted under this Section which further prevented an open discussion about sexuality and lifestyle.

2013

Suresh Kumar Koushal V. NAZ Foundation⁹

In light of India's history based on cultural tradition, several faith groups and individuals who value norms over anything sternly rejected the idea of decriminalising homosexual relationships. An 8-year-long battle had been fought for the community to reach where it had reached, to be able to rejoice this significant victory in this battle was tarnished when the Supreme Court, on 11th December 2013, overturned Delhi High Court's judgement and decriminalised Homosexuality.

This judgement by the Supreme Court was not received well and faced severe backlash from every nook and corner for neglecting the basic human rights of homosexuals.

Nonetheless, this judgment acting at the forefront of the LGBTQ movement rekindled the spirit of the citizens by bringing altogether a new wave of activism in India. As a result, we witnessed an upsurge of people coming in support of the movement.

2014

[National Legal Services Authority v Union of India](#)¹⁰

The question in limelight before the Supreme Court was whether hijras and transgender people deserved to be recognised as a third gender for the purposes of public health, education, employment, reservation, and other welfare schemes.

The court recognized that a conflict between one's birth gender and his or her identity is not necessarily pathological. This turned into a landmark judgement creating a status of 'third gender' for hijras or transgenders. After the judgment, transgender people could proudly identify themselves as transgender/third gender and no longer had to identify themselves as male or female.

- Sex reassignment surgery: This judgment was inclusive of transgenders changing their gender without having to undergo sex reassignment surgery.
- State governments took small steps to assist transgender people with health and housing policies.

⁸ WP(C) No.7455/2001

2017

K.S. Puttaswamy v Union of India¹¹

Justice K.S. Puttaswamy is the retired judge of the Karnataka High Court who challenged the government over the mandatory Aadhar system. As a result of this case, Indian legislation criminalizing same-sex relationships was put to a constitutional test. This led to constitutional challenges to a wide range of Indian legislation thereby turning it into a landmark judgment.

A nine-judge bench of the Supreme Court unanimously held that the right to privacy is part of the right to life and to personal liberty under the umbrella of Article 21 of the Indian Constitution. Individuals have a right to privacy, including the right to make their own decisions, the right to maintain their own bodily integrity, and the right to keep their information confidential.

Furthermore, this observation indicates that the impact of the law is not limited solely to prosecution or punishment, but can even include indirect effects, such as creating a hostile environment for LGBTQ+ communities.

However, [K Puttaswamy V. Union of India](#) case, (popularly called as Aadhar judgment) Justice Chandrachud's opinion featured a section titled "discordant notes." It basically dealt with two Supreme court judgments. The first was about the infamous case of [Additional District Magistrate, Jabalpur v S.S. Shukla](#) which upheld the denial of basic fundamental rights while the second part referred to the Koushal case rejecting the rhetoric of the "so-called" rights of the LGBTQ+ community.

2019

Navtej Singh Johar V. Union Of India¹²

Ultimately, Government officials stated that they would not interfere in the matter and would allow the court to decide it in its wisdom. Section 377 was alleged to violate the constitutional rights to privacy, freedom of expression, equality, dignity and protection against discrimination.

The Court explicitly overturned its 2013 judgement. Ultimately, the Supreme Court, in 2018, ruled that Section 377 is unconstitutional because it violates the fundamental rights of autonomy, intimacy, and identity, which legalizes homosexuality in India. A major point of emphasis was also that discrimination based on sexual orientation is unconstitutional because it's a natural phenomenon, as proved by scientific and biological evidence. They also elaborated on the issues of mental health, dignity, privacy, right to self-determination, and transgender issues.

Despite the fact that the Constitution prohibits discrimination, it only applies to the government and its agencies

Justice Indu Malhotra quoted "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries".

Progression

- In February 2014, the Indian Psychiatric Society [released a statement](#) saying homosexuality is not a disease, and that it did not recognise it as one.
- In April 2014, Health Minister Harsh Vardhan made an [unexpected comment](#) about equality, saying: "Everybody, including gays, has human rights. It is the job of the government to protect their rights."¹³

¹² WRIT PETITION (CRIMINAL) NO. 76 OF 2016

1. Inheritance: Himachal Pradesh High Court recognized the right of Sweetie(eunuch) to inherit the property of her deceased chela following the guru-chela parampara of the Hijra community in 2016 in Sweetie(eunuch) V. General Public.¹⁴ As per the court's decision, the appellant was recognized as a family of the deceased and legal heir.¹⁵
2. In 2000, the 172nd Law Commission Report recommended that both the perpetrator and victim of sexual offenses should be described neutrally. However, the recommendation was met with fierce criticism from activists who claimed it would ignore the reality of sexual violence in society, where women are in a much more disadvantageous position.
3. The Madras High Court passed an order in June 2021 to adopt the guidelines laid down by the court for the purpose of creating a conducive environment conducive to LGBTQ+ students in schools.¹⁶
 - 1) Ensure availability of gender-neutral restrooms for the gender-non-conforming student.
 - 2) Change of name and gender on academic records for a transgender person
 - 3) Inclusion of 'transgender' in application forms for admission, competitive exams, etc.
 - 4) Appointing counselors who are LGBTQ+ inclusive for staff and students to address grievances and provide solutions.
 - 5) Implement measures laid down with respect to health, education and social security for transgender persons.

¹³ Live Law <https://stories5629.rssing.com>

¹⁴ R.S.A. No. 17 of 2016

¹⁵ MANU/HP/1242/2016

4. In a landmark ruling in March 2021, the Kerala High Court declared that transgender people should not be refused entry to the National Cadet Corps (NCC) because of their identities.¹⁷

There have been basically two strands in the use of legislation as a tool for attaining LGBT rights. The first approach is to link up with transnational actors when the local movements are nascent or dispersed. If the local movement is consolidated enough to challenge the courts, then constitutional law and judicial interpretation should be used as the second measure.

LGBTQ Movement And The Law

The law is tasked with effectively implementing the fundamental rights of the Constitution of India by taking out the subject of liberty and dignity from the realm of majoritarian governments, in order to ensure that constitutional morality can be properly applied to protect, among other rights of 'discrete and insular' minorities.

Secondly, as explained by Justice DY Chandrachud, 'Constitutional morality requires that this Court must act as a counter-majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe'.

¹⁶ W.P.No.7284 of 2021

¹⁷ Hina Haneefa @Muhammed Ashif Alin v. State of Kera

Limitations To The Rights Of The LGBTQ Community

Originally, the laws were not framed with an intention to explicitly target homosexuals, just any sexual acts that were not for procreation. Over time, however, these laws came to be used more and more as an instrument of oppression against LGBT+ Indians. “The lack of a united narrative about homosexuality across India meant that there was no singular dissenting voice against the forced implementation of Section 377 in 1860.”

The Supreme Court's judgment only held that consensual homosexual sex cannot be considered a crime under the Indian Constitution, this narrowed the scope of the judgment. Needless to mention, by signaling its support for the LGBTQ community, the Court had a positive impact on the discourse about sexuality in public places. Moreover, establishing legal principles of equality - that a queer person is entitled to the full protection of the laws without discrimination by the state has laid the foundation for future challenges to other discriminatory laws.

Transgender Persons (Protection of Rights) Bill, 2019: With the intent of protecting the rights of transgender people, the Transgender Persons (Protection of Rights) Bill, 2019, was enacted to prevent discrimination against the transgender community in employment, education, health care and access to government and private establishments. While attempting to empower the community, the bill exposes them to institutional oppression and dehumanizes their bodies.

There is a discriminatory aspect of the bill, as it prescribes a punishment of only two years in the case of 'sexual abuse against transgender', while if the same type of offence had occurred against women the punishment would extend to seven years. Consequently, imposing different punishments for the same crime solely based on gender identity is inherently discriminatory, arbitrary, and in contravention of the equal protection clause.¹⁸

In its current form, the bill neglects the viciousness and atrocities transgenders face within their own families. Transgender individuals are barred from leaving their families and joining trans communities, infringing on their right to associate with any certain organisation/community.

“The Parliament has passed the Transgender Persons (Protection of Rights) Act, 2019 which is very problematic as it does not allow for self-determination of transgender status. The Act also does not offer the reservations in public employment and education as had been directed by an earlier Supreme Court judgment. The Act has been challenged in the Supreme Court and there is an urgent need to remedy its more draconian provisions.’

A God-fearing society attempted to disguise their unease by trying to show they treat trans as God, but the community only wants to be treated as humans.

The Context In Question:

Hijras, Aravanis, Kothis, Jogtas, and Shiva-Shaktis may or may not identify themselves as transgender females, or part of the gender-variant male communities.

In 2019, the Parliament passed the Transgender Persons (Protection of Rights) Act, which is problematic since it does not allow transgender people to determine their own gender identity. Furthermore, the Act does not provide reservations in matters of employment and education in accordance with a previous Supreme Court decision. The Act has been challenged in the Supreme Court and there is an urgent need to remedy its more draconian provisions.¹⁹

¹⁸ MANU/RH/1466/2017

In reference to Article 14, Article 15, Article 19, Article 21, and Article 29, the lack of laws for non Recognition of same-sex marriages, not allowing adoption, guardianship, surrogacy, IVF, not having access to safe and LGBT+ inclusive schools, colleges and workplaces are all violation of Constitutional Rights.

Similarly, advocates' dress code is governed by the binary of male and female. The Bar Council of India rules under Section 49 (I) (gg) of the Advocates Act stipulates forms of dresses or robes for “advocates” and “lady advocates”.

The Way Forward

Several views contend that same-sex marriages can be permitted after reinterpreting, adapting, or amending existing laws or by adopting gender-neutral language in the legislation.

In order to achieve compatibility for LGBTQ Community with the Special Marriage Act, 1954, Section-4(c) requires the following amendment;

- “the parties if ‘males’ and if ‘females’ must have attained the age of ‘twenty-one’ and ‘eighteen’ years respectively, for the purpose of marriage”, and to incorporate a provision that ‘Same-sex marriages are permitted
- the terms ‘Husband’ and ‘Wife’ should also be interpreted with respect to the LGBTQ+ people, in the Special Marriage Act, 1954.

By authorizing same-sex marriages, the Special Marriage Act, 1954, thus demonstrates its compliance with Article 15 of the Indian Constitution since it would otherwise be discriminatory toward same-sex couples, thereby violating Article 15. Human Dignity, Including the Right to Life and Freedom From Arbitrary Deprivations of Life and Politically Motivated Killings

¹⁹ W.p.10882/2014

A second strategy is to speak up for intersectional justice within the human rights discourse.

"Like racism and all forms of prejudice, bigotry against transgender people is a deadly carcinogen. We are pitted against each other in order to keep us from seeing each other as allies. Genuine bonds of solidarity can be forged between people who respect each other's differences and are willing to fight their enemy together. We are the class that does the work of the world and can revolutionize it. We can win true liberation." -Transgender Liberation: A movement whose time has come

Last but not least, mainstream social movements must acknowledge that among the voices that have been overlooked are those of queer formations not linked to sexual politics and sexual communities in LGBT historiography, since queer desires transcend LGBT identities.

The way exclusion of LGBT workers from the labour market can diminish their human capital is if they suffer discrimination in wages, which causes them to earn lower returns on their investments in human capital than those workers who do not face such discrimination. Investing may be less likely for LGBT people if they receive lower returns due to discrimination.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act or POSH Act only recognises women as victims of sexual harassment at the workplace. It automatically eliminates the possibility of LGBTQ+ people being victims of workplace sexual harassment. Changing laws does require social change, but a lack of societal readiness cannot be an excuse not to change laws. Oftentimes the law has to lead, and society must simply follow.

Lgbtq & Educational Institutes

LGBT+ adolescents face tremendous physical, mental, and emotional abuse. In a survey conducted by the United Nations cultural Agency on 400 LGBT+ youth in India, it was revealed that over 60% of LGBT+ youth faced bullying in middle school / high school, 43% reported incidents of being sexually harassed in school, with 70% suffering from anxiety and depression and shockingly 33% of them even drop out because of bullying altogether.

A critical link between economic outcomes, stigma, and exclusion is the educational and training process. In order to become more productive and achieve economic growth, young people need general human capital, which includes skills, abilities, knowledge, and health.

Currently, there is not any concrete anti-bullying legislation or policy regulating bullying and discrimination against LGBTQ individuals in India. The policy must address the homophobic and transphobic violence, including bullying which also aligns with the mandate for proper quality education for learning environments that are non-violent, safe, and inclusive.

In Delhi, the Directorate of Education (Lt Governor) has instituted a notification that a transgender child is included as a "child belonging to the disadvantaged group" as defined under Section 2(d) of the RTE Act. To ensure that schools are a safe places for LGBT+ students, it is imperative that other states take some of the same progressive steps.

The LGBT movement is undergoing a leadership transition, with long-serving leaders passing the baton to a new generation. Many major LGBT leaders are baby boomers who will need to leave a lasting legacy so that future leaders may build on their pioneering efforts.

Leaders of LGBT non-profits now and tomorrow require assistance throughout this continuing transformation so that their organisations may maintain their institutional vision, knowledge, personal networks, and historical context. At the same time, leadership investments are required to assist new and rising leaders in using their energy and fresh ideas to guarantee that their organisations may become even more successful and contribute to the overall vitality of the LGBT equality movement.



Conclusion

It is also important as a means of ending injustice. Whether or not a part of the queer committee, but mainly as citizens of the world, we have a duty to oppose injustice wherever we see it. No freedom till we are equals. The intersectional theory places language to the layers that make up each of us, identifies where they intersect, and illuminates how we experience the world as a result of the compounding effects of racial and gender discrimination. It is now widely applied within many social justice spaces to speak to the compounding impacts of racial and gender discrimination. By ignoring these intersectionalities, marginalized groups can be left behind even more. This would not only be unjust, but it would seriously undermine the credibility of the queer movement in the eyes of most of its members.

'I am what I am, so take me as I am' – Johann Wolfgang von Goethe

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