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RIGHTS OF LGBTQIA+ COMMUNITY IN INDIA: AN ANALYTICAL STUDY

ABSTRACT:

This research paper delves into the rights of the Lesbian, Gay, Bisexual, Transgender, and other marginalized sexual orientations and gender identities (LGBTQIA+) community in India. Historically, India has been characterized by a conservative societal framework, with deep-rooted prejudices against non-heteronormative individuals. However, recent legal and societal shifts have brought about significant changes in the landscape of LGBTQIA+ rights. This paper critically analyzes the historical context, legal developments, socio-cultural attitudes, and challenges faced by the LGBTQIA+ community in India. It explores the progress made in recognizing and protecting their rights, highlighting the persistent gaps and areas for improvement. By examining various dimensions of the issue, this paper aims to contribute to a deeper understanding of the status of LGBTQIA+ rights in India and provide insights for future advocacy and policy initiatives. By studying several aspects of the topic, this paper aims to contribute to a better understanding of the condition of LGBTQIA+ rights in India.

INTRODUCTION

The LGBTQIA+ group is one of the most marginalized minorities in the world, including India. Individuals who identify as LGBTQIA+ face discrimination and exclusion because of the stigma associated with their sexual orientation or gender identity. Before the advent of the British, historical sources in India were replete with references to members of the LGBTQIA+ community and their social position. However, with the establishment of the British Empire came the Penal Code of 1860, which included a particular provision to penalize crimes viewed against the order

of nature. But, as time passes, nothing remains constant! The Britishers were defeated, and the Indians gained control of their country. Still, the LGBTQIA+ community has a long way to go and many problems and barriers to face.

Although homosexuality is no longer a crime, Indian laws continue to be cold and biased toward the LGBT community in a variety of ways. The reason for this is that there is a significant gap between the legislative and judicial development of LGBT legislation in India.

WHAT IS LGBTQIA+ COMMUNITY?

"LGBT" is a word that stands for Lesbian, Gay, Bisexual, and Transgender; the "Q" in LGBTQ may refer to "questioning" as in still exploring one's sexuality or "queer," or both.

LGBTQIA+ is an abbreviation for Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, and Asexual.

They are the individuals who do not identify with cisgender heterosexual "ideals". In India, the LGBTQIA+ community comprises a unique social group known as the Hijras. They are culturally classified as "neither men nor women" or as guys who behave like women. Presently, they are referred to as the Third Gender.¹

HISTORICAL CONTEXT OF LGBTQIA+ COMMUNITY

Often, "LGBTQ+" is referred to be a recent phenomenon or an urban elite idea; nevertheless, Indian history and mythology reveal a different narrative entirely. According to famous mythologist Dr. Devdutta Pattanaik, in ancient India, there were over fifty terms denoting non-heterosexual gender and sexualities in Sanskrit, Prakrit, and Tamil, including napunsaka, kliba, kinnara, pedi, and pandaka. These allusions may be found in the Vedas, Itihasa, Puranas, Kama-shastra, Natya-shastra, Ayurveda, Jain Agamas, and Buddhist Pitakas.²

¹JURIS CENTER, <https://juriscentre.com/2023/10/13/lgbtq-rights-and-section-377-of-indian-penal-code-1860/> (last visited April 10, 2024)

² SUCHETA, Mapping the Progression of LGBTQ+ Rights in India- Important Laws and Judicial Pronouncements, SCC ONLINE (April 10, 2024, 10:05 P.M.) <https://www.sconline.com/blog/post/2023/06/18/mapping-the-progression-of-lgbtq-rights-in-india-important-laws-and-judicial-pronouncements/>

Hindu texts recognize the third gender. According to certain versions of the Maharashtra epic, various characters changed their gender, including Shikhandi, who was claimed to have been born female but subsequently identified as male and married to a woman. The Hijras revere the fertility goddess Bakhchara Mata as their patron saint. His two primary Sanskrit books on dharma and medicine, Nradasmti and Sushruta Samhita, declare homosexuality to be irreversible and prohibit gays from marrying opposite-sex partners.³

According to the Hindu classic Bhagwada Purana, Lord Shiva beheld Vishnu as Mohini and fell for him, resulting in the birth of Lord Ayyappa. According to the Valmiki Ramayana, King Bhagirath was born as a result of the marriage of his two mothers and the widows of King Dileep, who were blessed by Lord Shiva.⁴

LGBTQIA+ influence was not restricted to books; it also made its way into temple art. In Khajuraho's temples, there are pictures of ladies erotically embracing other women and males exhibiting their genitals to one another. Scholars have traditionally interpreted this as an admission that persons committed homosexual behavior.

The arrival of Christian Britishers marked a turning point. The British monarchs designated transgender people and other performers as Criminal Tribes. Another legal change occurred in 1860 with the introduction of a Penal Code, which included Section 377, which penalized "carnal intercourse against the order of nature". Experts argue that this colonial legislation was "largely formulated within the Judeo-Christian scheme of things." The assumption is that what is 'unnatural' in the Biblical paradigm must also be 'unnatural' in the Hindu paradigm.

EVOLUTION OF LGBTQIA+ RIGHTS

The British colonial government created Section 377 of the IPC, which criminalized any non-procreative sexual activity, before independence. The monarchy was not just geared against homosexuals, but also prohibited all other sorts of nontraditional sexual relations, even those

³ LAMVVERMA, Rights of the LGBT community in India, LEGAL SERVICE INDIA (April 16, 2024, 9:00 A.M.), <https://www.legalserviceindia.com/legal/article-9407-rights-of-the-lgbt-community-in-india.html>

⁴ DRISHTI IAS BLOG, <https://www.drishtiias.com/blog/lgbtqia-a-detailed-discussion>, (last visited April 17, 2024).

occurring within heterosexual unions. So this regulation was nothing more than an example of traditional Victorian morality, which had no place in a democratic society like India.

Though the LGBT rights movement dates back to the early 1990s, all important events since then may be examined in terms of the following key judgments and their consequences.

JUDICIAL PROCLAMATION

1. National Legal Service Authority vs. Union of India⁵

The Division Bench of the Supreme Court comprising of KSP Radhakrishnan and A.K. Sikri, JJ., in *National Legal Services Authority v. Union of India*, (2014) held the following-

- Aside from binary genders, hijras and eunuchs should be considered as "third gender" for the sake of protecting their rights under Part III of our Constitution and the legislation passed by Parliament and the State Legislature.
- Transgender people's freedom to choose their self-identified gender is likewise protected, and the Centre and State Governments are directed to offer legal recognition of their gender identification as male, female, or third gender.
- The Court instructed the Centre and State Governments to make efforts to treat them as Socially and Educationally Backward Classes of citizens, as well as to extend all forms of reservation in admission to educational institutions and public positions.
- The Centre and State Governments should seriously address the issues that hijras/transgenders face, such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, and so on, and any demand for Sex Reassignment Surgery to change one's gender is immoral and illegal.
- The central and state governments should take initiatives to raise public knowledge so that transgender people feel that they are a part of society and are not considered outcasts.

⁵ National Legal Service Authority vs. Union of India, (2014) 5 SCC 438.

2. **K.S. Puttaswamy v Union of India (2017)** ⁶

A historic decision rendered by the 9-Judge Constitution Bench of the Supreme Court in *K.S. Puttaswamy v. Union of India* addressed the issue of the LGBTQ+ community's rights and stated that the guarantee of constitutional rights does not depend on their exercise being favorably regarded by majoritarian opinion:

"Discrimination against an individual based on sexual orientation is deeply offensive to the individual's dignity and self-worth. Equality requires that each individual's sexual orientation be safeguarded equally in society. The right to privacy and the protection of sexual orientation are central to the fundamental rights protected by Articles 14, 15, and 21 of the Constitution.

3. **Navtej Singh Johar V. Union of India**⁷

- In *Navtej Singh Johar v. Union of India*, the 5-judge Constitution Bench, comprised of Dipak Misra, C.J., R.F. Nariman, A.M. Khanwilkar, Dr. D.Y. Chandrachud, and Indu Malhotra, JJ., held Section 377, Penal Code, 1860, to be unconstitutional insofar as it criminalized gay sex between consenting adults.
- The Bench overturned the 2-Judge Bench decision in *Suresh Kumar Koushal v. Naz Foundation*⁸, which had in turn overturned the judgment of a Division Bench of the Delhi High Court in *Naz Foundation v. State* ⁹(NCT of Delhi). In *Naz Foundation*, the Delhi High Court declared Section 377 a violation of Arts. 14, 15, and 21 of the Constitution insofar as it criminalized consensual sexual acts of adults in private. The court ruled that if voluntary carnal intercourse between a heterosexual couple does not constitute rape, it should not be classified as an unnatural act under Section 377, Penal Code, 1860.

⁶ *K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1.

⁷ *Navtej Singh Johar V. Union of India*, (2018) 10 SCC 1.

⁸ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

⁹ *Delhi High Court in Naz Foundation v. State*, 2009 SCC OnLine Del 1762.

- The word "against the order of nature" has not been defined. The non-consensual actions criminalized by the clause have previously been designated as penal crimes by clause 375 of the Penal Code and the POCSO Act. If the clause continues in the statute book in its current form, it will allow harassment and exploitation of the LGBT population to continue. It undermines both human dignity and citizens' fundamental rights to privacy and choice, no matter how modest. The right to privacy includes the right of all individuals, including the LGBT community, to express their sexual preferences. The Section fails the Trinity test of Arts. 14, 19, and 21. Freedom of choice cannot be suppressed or limited under the fear of criminal prosecution, nor can it be immobilized by the volatile position that constitutes majority opinion.

4. X v. Health & Family Welfare Department¹⁰

This decision in X v. Health & Family Welfare Department is significant because, while holding that a woman cannot be denied the right to a safe abortion solely because she is unmarried, the Supreme Court used the term "woman" in this judgment to include people other than cisgender women who may need access to safe medical termination of their pregnancies.

5. Shanavi Ponnusamy v. Ministry of Civil Aviation¹¹

In a writ petition filed by a transgender woman seeking direction to the respondents to consider her candidature for the post of cabin crew in Air India, the division bench of Dr. D.Y. Chandrachud and Hima Kohli, JJ., in Shanavi Ponnusamy v. Ministry of Civil Aviation, directed the Central Government to consult the National Council, to devise a policy framework in terms of which reasonable accommodation can be provided for transgender persons in seeking recourse to avenues of employment in establishments covered by the provisions of the Transgender Persons (Protection of Rights) Act, 2019. Further, it directed the Central Government to implement the provisions of the said Act in letter and spirit by formulating appropriate policies and providing clear guidance and

¹⁰ X v. Health & Family Welfare Department, 2022 SCC OnLine SC 1321.

¹¹ Shanavi Ponnusamy v. Ministry of Civil Aviation, 2022 SCC OnLine SC 1581.

enforceable standards to all other entities, including, those of the Union Government, State Governments, and establishments governed by the 2019 Act.

LAWS MADE BY THE LEGISLATURE

Transgender Persons (Protection of Rights) Act, 2019:

- **Key provisions of the bill:**
 - The Bill forbids discrimination against transgender people in areas like education, employment, health care, and access to services.
 - A certificate of identification must be acquired from the District Magistrate, who will issue it under the District Screening Committee's recommendations. The Act asks for the establishment of a National Council for Transgender People (NCT).
 - No transgender individual may be removed from their parents or immediate relatives based on being transgender.
 - The Act also attempts to grant transgender people access to healthcare facilities such as specialized HIV monitoring centers and sex reassignment surgery.
 - It also adds that the government would examine medical curricula to address transgender health concerns and provide comprehensive medical insurance plans for them.
 - It criminalizes: (i) begging, forced, or bonded labor; (ii) denial of access to a public place; (iii) denial of domicile in the home, village, etc.; and (iv) physical, sexual, verbal, emotional, and financial abuse.¹²

The Transgender Persons (Protection of Rights) Bill, 2019, was enacted to safeguard the rights of the transgender community by preventing discrimination against them in employment, education,

¹² DEISHTI IAS, <https://www.drishtias.com/to-the-points/Paper2/the-transgender-persons-protection-of-rights-act>, (last visited April 14, 2024.)

healthcare, and access to government or private businesses. However, in the guise of strengthening the community, the law exposes people to institutional rule while diminishing their bodies and identities. The trans community in India has passionately opposed the bill, alleging the following clauses as *violating their fundamental rights* and failing to comply with the NALSA judgment.

- The measure denies an individual the ability to determine his or her sexual orientation, which is an essential component of the right to privacy as stated in the NALSA decision. According to the bill, changing one's gender identification in papers is only possible after providing proof of sex reassignment surgery, which must be confirmed by the District Magistrate. This violates the Trans community's fundamental human right to autonomy and privacy, exposing them to additional persecution at the hands of authorities.¹³
- Another discriminatory component of the measure is that the punishment provided in the instance of 'sexual abuse against transgender' is only two years, although a comparable violation committed against women has a significant sentence of up to seven years. Thus, prescribing different degrees of punishment for the same sort of conduct solely based on gender identification is inherently discriminatory, arbitrary, and violates the equal protection provision.¹⁴
- The measure is also deserving of criticism since it ignores the violence and tragedies that transgender people face inside their own families. The legislation prohibits people from leaving their families and joining the transgender group, infringing on their right to association and freedom of movement. In the event of familial abuse, the trans community's sole option is to seek help from rehabilitation centers.¹⁵
- Although the measure promises to give "inclusive education and opportunities" to the transgender population, it does not outline a detailed method. There are no options for granting scholarships, reserving seats, modifying the curriculum to be LGBT+ inclusive, or guaranteeing safe inclusive schools and workplaces for the trans population.¹⁶

¹³ *Supra* note 02.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

GAPS & CHALLENGES

Same-sex marriage:

In India same-sex marriage is not legal but the relationship between same-sex persons is legal. In a country like India marriage has been the most important and strongest institution of Indian society regardless of religion. In India, Family law can be divided into main two categories:

1. Personal law and 2. Secular law but neither personal law nor secular law recognizes same-sex marriage. How ironic it is that the law allows same-sex couples to be in a relationship but does not recognize same-sex marriage.

The denial of marriage rights to LGBTQ+ individuals denies same-sex couples social and legal recognition, as well as the governmental advantages that married people get. However, it is important to note that the institution of marriage has historically been exclusionary to certain communities of people, and whenever any group of people has been included or excluded from the ability to marry, it has always been accompanied by a battle between public policy, religion, and social norms.

However, this is not an adequate reason to deny the whole LGBT+ group the right to marry simply because they have a different sexual preference than others. Aside from that, it raises another highly relevant question: whether the majority's view is so important in the eyes of the law that it may deprive an individual of personal autonomy and the fundamental right to his or her own life.

Adoption:

Since same-sex marriages are not legal in India, homosexual couples are not permitted to adopt children jointly.

According to regulation 5(3) of the Adoption Regulation Act, 2017 only couples who have been in a stable relationship for two years are eligible to adopt a child. The section also uses the terms "husband" and "wife," implying that same-sex couples do not have the right to adopt.

Protection against discrimination at the workplace:

Manish Kumar Giri Alias Sabi Giri Vs. Union of India and Ors. ¹⁷In this case, Sabi Giri (formerly known as Manish Kumar Gir) suffered from gender dysmorphia and was expelled from the navy after undergoing a sex change procedure. According to the military in defense, the current norms and regulations prohibit the sailor from continuing to work in the navy due to his gender change.

The issue was heard in the Delhi High Court, and the judge recommended that the Navy locate Giri for another career. Thus, even though Sabi had no proof that she was unable to do her work following her sex reassignment surgery, she was fired and instead offered a position as a data entry operator. Aside from that, the petitioner testified against the harassment she faced throughout her job, emphasizing the unpleasant facts regarding workplace discrimination and a lack of understanding about transgender rights.

Similarly, in the cases of Jacqueline Mary V. Superintendent of Police ¹⁸and G.Nagalakshmi V. Director General of Police¹⁹, petitioners identifying as females were removed from their positions on the grounds that a medical examination revealed that they had intersex variations and thus could not hold the post reserved only for females.

Protection against sexual harassment at the workplace:

The current legislation, the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, exclusively acknowledges women as victims of sexual harassment and ignores the fact that harassment may occur regardless of gender. That is, the offended individual might be a man, a transgender person, or any other member of the LGBTQIA+ community. Therefore, we need gender-neutral workplace harassment regulations.

However, there is another very crucial point that can be stated here, namely that "sexually colored remarks" or "unwelcome behavior" may have a different interpretation and scope in the LGBTQIA+ group. Given the prevalence of transphobia and homophobia, gender-neutral

¹⁷ Manish Kumar Giri Alias Sabi Giri Vs. Union of India and Ors, W.P.(C) 9535/2017.

¹⁸ Jacqueline Mary V. Superintendent of Police, W.P. No.587 of 2014.

¹⁹ G.Nagalakshmi V. Director General of Police, W.P. No. 15223 of 2014

harassment legislation must be backed by robust anti-discriminatory regulations to avoid their misuse against the LGBTQIA+ population.

CONCLUSION & SUGGESTIONS

To conclude, If we began rationalizing everything based on cultural beliefs, societal values, and public policy, there would have been no progressive laws established in our nation, and we would never have been able to remove the social ills of child marriage, Sati, dowry, and infanticide, among others.

Although the historic 2018 court verdict and the 2014 NALSA judgment were significant steps forward for LGBT+ rights groups in India. However, LGBT individuals in India are not treated equally and do not enjoy the same rights as heterosexual people. Furthermore, they continue to face violence and prejudice in every aspect of their lives. It is critical to educate people about LGBTQ rights. Human rights are natural rights that are inalienable and indestructible and are bestowed upon everyone from birth. It is critical that people understand that homosexuals are not sick, are not aliens, and that their sexual preference is completely natural.

As a result, the government must abandon its conservative bent and make meaningful efforts to end the stigma, prejudice, and abuse directed at LGBTQIA+ persons. It is past time for the government to enact new or change current laws governing marriage, adoption, guardianship, inheritance, educational institutions, employment, healthcare services, and other aspects of education, social security, and health for LGBT+ persons, with a specific emphasis on transgender individuals.

It will lead to more inclusivity and will help bring LGBTQIA+ into the mainstream of society, and it can go a long way in 'transforming our nation sustainably into an equal and dynamic knowledge society'.

At last, I will conclude what I wrote by emphasizing that unless and unless the government offers

the LGBTQIA+ people of India an equal status, the legitimate and fair battle for societal acceptance by LGBT+ will continue.