
EVOLUTION OF LEGAL AND FUNDAMENTAL RIGHTS AND THE BATTLE OF IDENTITY OF THE LGBTQ COMMUNITY

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ABSTRACT

Homophobia and transphobia are some of the evils of our Indian society which has been present from ages. Prior to some landmark constitutional judgments, the basic rights were denied to the LGBTQ community and their existence and identity were simply ignored by the society. This community has been ostracized and humiliated since centuries and the

constitutional judgments were the need of the hour. The LGBTQ community's fundamental rights have been affirmed and their existence and needs have been finally recognized by the courts. There is a change observed in the approach to view this community and there is a shift seen from their status as illegal, unnatural or sinful to natural, equal and legal.

The aim and objective behind this research paper are to explore the identities of the LGBTQ community and research about the evolution of their fundamental rights. The paper also seeks to look at the evolution of their culture and identity. The research method that is being used is the descriptive research method in which various judgements of the Supreme/high courts and their effect on the fundamental rights of the people of the LGBTQ community will be analyzed.

Introduction

A Human is considered as a human irrespective of the person's different backgrounds, race, religion gender etc. The word "Human" is inclusive of everyone who is born in this world excluding the animal kingdom. Human rights affirm the universal rights which are associated with being a human. The central idea behind the notion of human rights is equality of all human beings and every human being should live his/her/their life with respect and dignity. Every human being deserves all types of freedoms which let them be the master of their lives and decide whatever they want to do in their lifetime. Anything which goes against the notions of dignity and freedom leads to the violative practice of discrimination.

Just because of their specific gender, the people of the LGBTQ community have often been excluded from coming in the ambit of a "human" and as a result, they have faced discrimination and exploitation to a great extent. The social fabric of a country like India is not so inclusive of the LGBTQ community and the third gender is considered as being "unnatural" because it goes against the two specified genders, the male and female.

The LGBTQ Community consists of people who are gay, lesbian, transgender, bisexual, and queer. People who are gay are the male homosexuals who have sexual orientation for the male gender. The term lesbian is taken from the name of the Greek island, *Lesbos*. People who are lesbians are female homosexuals who have sexual orientation for the female gender. People who are bisexual have sexual orientation for male or female genders or even for all of the genders. Transgender people have a different gender identity which differs from their birth gender. The term queer acts as an umbrella for the people who are not heterosexual and are a part of the minority which is on the basis of their gender/sexuality. The LGBTQ Community also consists of subcultures, associations and organizations which are bound together by a common thread of culture, likeness and social movements. Very often, these communities celebrate pride, individuality, diversity and their sexuality. The word "pride" refers to the identity of the LGBTQ Community and their collective strength. Human sexuality can be seen as a complex phenomenon. Heterosexuality cannot always be expected out of humans, as the nature of sexuality is multidimensional.¹ Apart from the umbrella of the LGBTQ, there are some people who do not have any sexual orientation or sexual desires and this lack of sexual attraction is called asexuality. Demisexuality is the concept where the

¹ Kalra G et al, Gupta S, Bhugra D. Sexual variation in India: A view from the west. *Indian J Psychiatry*.:264–268 (2010).

person is sexually attracted to the person with whom they have a strong emotional bond. There are various other terms like these which shows the human sexuality is multidimensional.

There is shift seen in the status of LGBTQ entity from being crime, sin and pathology to a legal and justified status. Prior to the infamous judgements, the fundamental and legal rights related to the LGBTQ Community was blurred and this topic and their voices were often ignored. The homophobia and atrocities that this community faced was normalized which thus resulted in the LGBTQ community living their life in a cage.² In the recent times, the people belonging from the LGBTQ community have accepted themselves in the way they are and have decided to fight against homophobia and discrimination unlike before. The Indian society has treated homosexuality as a disease and an unnatural offence since ages and it was high time for the courts to intervene and quash the myths about homosexuality and guarantee them fundamental rights.

III Historical Background

Religion has played a very important role in shaping our society and thinking. There are some ancient texts which mention about homosexuality and the LGBTQ community, although these texts related to the morality of homosexuality are not specifically mentioned in the texts which are central to Hinduism. The Rigveda says “Vikriti Evam Prakriti” which means that anything that is unnatural is also natural. This implies that the Rigveda recognizes homosexuality which is placed similar to all types of universal diversities.

The Arthashastra by *Chanakya* also mentions about a lot of sexual activities, performed by either a man or a woman was to be punished with the lowest grade of fine. Sexual intercourse by homosexuals was not explicitly mentioned but whoever practiced it, was charged with a very minor offence. Some types of heterosexual activities were punished more severely.

Sexual intercourse between women who were non virgin also attracted a small fine. On the other hand, sexual intercourse between homosexual men could be done away with only by taking a bath with one's clothes, keeping a night's fast or by consuming five cow's products. The Baudhayana Dharmasutra mentions about ejaculation and says that if a man ejaculates in

² Pradhan PV et al, Ayyar KS Bagadia VN. Homosexuality: Treatment by behaviour modification. Indian J Psychiatry, 65-80 (1982)

any place other than a woman's vagina, then he is considered equivalent to a thief and also equivalent of murdering a brahman. To get purified for his deed, a man is expected to get the hair shaved of his head, body and beard and get his nails clipped on a full-moon or a new-moon day. He should also take a vow where he is not eating meat, sitting elsewhere other than floor and engaging in sexual activities for a year, a month or twenty-four, twelve, six or three days. So it can be clearly seen how Baudhayana Dharmasutra looks down upon homosexuality.

Kamasutra by *Vatsyayana*³ contains a complete chapter focusing on erotic homosexual acts. Historical evidence indicates that homosexuality was quite prevalent in pre-colonial India and subcontinent. Many scholars also believe that homosexuals were not treated in an inferior way before the advent of colonialism of 18th century.⁴

Incidents of homosexuality was also mentioned in Ramayana and Mahabharata. In Ramayana, when Lord Rama went for exile of fourteen years, many men and women came out of love and followed them. After finding out about this, Lord Rama asked the men and women to go back to their respective homes. When Lord Rama was finally returning back from exile, he saw that Hijras were sitting at a particular spot for a period of fourteen years and waiting for him. He was so happy with their determination that he said that Hijras would bless people in special occasions like marriage and childbirth. In the epic of Mahabharata, there is an incident when Arjuna goes into exile, he assumed the identity of a Hijra which was known as Brihannala. He also performed various ceremonial functions with his assumed identity of a Hijra.

³ Ratnpriya. *The Kamasutra of Vatsyayana: Representing Masculinity in the Kamashastriya Tradition*, Proceedings of the Indian History Congress, vol. 78, 184–191 (2017)

⁴ Goldman & Robert P. "Transsexualism, Gender, and Anxiety in Traditional India." *Journal of the American Oriental Society*, vol. 113, no. 3, 374–401 (1993)

Legal Evolution and its impact on Fundamental Rights

i. Legal Judgments

In the case of *Naz Foundation v. NCT of Delhi*⁵, the Delhi High court held that section 377⁶ of the Indian Penal Code, 1860 violates articles 14,15,19 and 21 which comes in the ambit of fundamental rights of the Indian constitution. Section 377 of IPC criminalized consensual acts of adults in private which stands violative of the fundamental rights. However, section 377 is still operative for sexual acts between minors. In the case of *National Legal Service Authority of India (NALSA) v. Union of India*, the Supreme Court gave recognition to the “third gender” which gave a gender status to the Hijra or transgender community. Prior to this judgement, there were only two genders that is male and female and the trans people had to accommodate themselves in these two genders only. Post this judgement, they could finally identify themselves as the “third gender” or transgender. The apex court also declared that the non-recognition of the transgender community with respect to a separate gender was violative of their fundamental rights under articles 14, 15, 16 and 21⁷ of the Indian Constitution. The court also stated that the conflict between one’s gender and their identity that they choose to carry is not a pathological problem. The treatment of abnormality should be done away with. The court also directed the central government to treat the people of the transgender community as a socially and economically backward class.

In the infamous judgement of *KS Puttaswamy v. Union of India*⁸, the apex court declared that the right to privacy is guaranteed and protected under article 21 that is the right to life in the Indian constitution hence granting it a status of a fundamental right. Justice DY Chandrachud also stated that a person’s sexual orientation also come under the scope of right to privacy.

In the infamous case of *Navtej Singh Johar v. Union of India*⁹, the Supreme Court decriminalized homosexuality and rendered section 377¹⁰ of the Indian Penal Code, 1860 as

⁵ Naz Foundation v. NCT of Delhi, (2009) 111 DRJ 1)

⁶ Indian Penal Code, 1860, Act No. 45 of 1860

⁷ INDIAN CONST. art 21

⁸ KS Puttaswamy v. Union of India, (2017) 10 S.C.C. 1

⁹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

¹⁰ *Supra Note 2*

unconstitutional as it violates the fundamental rights of the LGBTQ community by infringing the rights of identity, intimacy and autonomy. Section 377 was struck down in order to exclude consensual sexual acts between homosexual adults. The apex court also reasoned that section 377 is unclear and vague and there was a lack of intelligible differentia between what is natural and what is unnatural expression of sex. This section also infringes the freedom of expressing one's sexual identity that comes under freedom to expression guaranteed under article 19¹¹ of the constitution of India. The court further stated that sexual orientation comes under the ambit of identity of the self and if it is invalidated, it violates the right to life under article 21¹² of the Indian Constitution. The apex court also directed the central government to spread awareness in public related to LGBTQ issues and rights which will help in decreasing the social stigma which revolves around this community. The judges also spread light on issues related to dignity, mental health, privacy and right to self-determination of the LGBTQ community. The court elaborated on the fundamental rights and it as follows:

a) *The right to Equality:* Article 14¹³ of the Indian constitution directs everyone to treat all citizens equally and renders them equal before law. However, it this article also has some reasonable distinction which needs to be made out between people. It also states that this differentiation ought to be based on intelligible differentia which refers to “difference capable of being understood”. It should also have a rational nexus with the object sought to be achieved. The apex court in this case ruled that there was no intelligible differentia between individuals who engage in sexual activities which are natural and which are unnatural.

b) *The right against discrimination:* Discrimination against any citizen of India is prohibited by article 15¹⁴ of the Indian constitution and a person cannot be discrimination on the basis of race, religion, sex, caste etc. Previously, this article was interpreted in a way which made people believe the discrimination can be practiced on the grounds which are not mentioned in this article. In the Navtej Johar case, the apex court dissented this narrow interpretation and stated that any ground which is indirectly or directly involved with the role of sex will be considered as discrimination. The court increased the grounds of discrimination to include sexual orientation and it was held that section 377 IPC was discriminatory under article 15 of the Indian Constitution.

¹¹ *Supra Note 3.*

¹² *Supra Note 3*

¹³ *Supra Note 3*

¹⁴ *Supra Note 3*

c) *The right to freedom of speech and expression:* Article 19¹⁵ of the Indian constitution guarantees the right of freedom of speech and expression to the citizens and this article also comes with reasonable restrictions and one of them is harming public interest or decency. The apex court stated that consensual sexual intercourse between two adults in private do not have the potential to harm public decency. Thus, section 377 IPC does not qualify as a reasonable restriction on a person's right to freedom of speech and expression. The right to privacy is given a place in article 21 of the Indian constitution which is the right to life and personal liberty. The apex court over many years has interpreted this right to life to incorporate the right to live with dignity, the right to autonomy and the right to privacy, the court noticed that section 377 IPC was in violative of all of these rights.

Indu Malhotra J in this judgment stated that the history of India owes an apology to the members of LGBTQ community and their families for the delay in providing them relief and redressal for the violation, humiliation and ostracism faced by them through ages. The LGBTQ community was forced to live a life full of fear, shame and reprisal and this was due to the failure of humanity to see homosexuality as a normal condition and a part of the multidimensional nature of sexuality.

ii. Legislation

The Transgender persons (protection of rights) bill, 2019 was enacted in order to safeguard the rights of the trans community by prohibiting their discrimination related to education, employment, healthcare, access to private or government institutions. However, this bill faced a lot of opposition and had some serious contentions.

a) *No provision with respect to reservations:* As affirmed in the case of *National Legal Service Authority of India (NALSA) v. Union of India*, the court directed the state to make reservations for the trans community and treat them as socially and economically backward class. However, this bill did not have any provisions related to reservations.

b) *The process of certification:* This act demanded that a transgender person should get a certificate of identity which will act as their proof of identity in order to create a 'self-

¹⁵ *Supra Note 3*

perceived' identity which again defeated the tenets of National Legal Service Authority of India (NALSA) judgment.

c) *No serious penalties*: This act gives lesser punishment to the crimes against the trans community, just the imprisonment ranging from 6 months to 2 years. The act seems ignorant of transmisogyny.

iii. Government Plan

The Ministry of Health and Family Welfare in February 2017 released a resource material which will be used as a part of countrywide adolescent peer-education plan called "Sathiya". This resource material focused on health issues. It also mentions about homosexuality and says that it is normal for adolescents and teenagers to fall in love and it is equally normal to fall in love with a person of same sex along with the opposite sex. The adolescents should understand that relationships work on mutual consent, understanding, trust, communication and dignity. Respect for others and your loved one should always be maintained and it is completely fine to talk about your feelings.

Conclusion

In a country like India, homophobia and transphobia are still prevalent and the LGBTQ community has been ostracized, humiliated, and ignored for ages. It is a sigh of relief that in the recent times, there is a shift seen from homosexuality as a crime or sin to a legal identity. The courts have also tried to broadly interpret the culture and demands of the LGBTQ community. We can see a range of case laws starting from Naz Foundation case to the Navtej Singh Johar case. Homophobia or transphobia will not be done away with unless the people adopt a broad mentality and an inclusive attitude for the LGBTQ community. The normalization of same sex or homosexual relationships and sexual acts is also an important step towards an egalitarian and happy society. The depiction of the LGBTQ community in movies and books which is often very humiliating and non-inclusive also is an indirect cause of spreading homophobia. The way in which the LGBTQ community is seen and depicted is absolutely disgraceful. Apart from preventing homophobia and transphobia in the front, these indirect causes need to be rectified too. Some other problems which are faced by the LGBTQ community which includes economic, social, mental, emotional and physical violence against them. The crime rate is also high and most cases related to this community go unreported. The lack of support from the society, family and peers also lead to the misery of this community.

There are many countries including India who have decriminalized homosexuality, however there are some nations which are still orthodox in matters related to homosexuality and hence they are a little behind in the path of equality for all. But the change can be seen, if a country like India with its complex history, culture and society can bring such change, a bigger change is coming soon.

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