
SEXUAL ASSAULT ON LGBTQ COMMUNITY

Priyam Singh, Amity Law School, Noida

CHAPTER 1

INTRODUCTION

The Lesbian, gay, bisexual, and transgender, gender diverse, intersex, queer, asexual, and questioning (LGBTIQA+), or simply LGBT, refers to a large coalition of organisations that are varied in terms of gender, sexual orientation, race/ethnic origin, and socioeconomic position. The groups included by this broadly used umbrella word deal with particular challenges related to gender identity and sexual orientation. The LGBT community symbolizes the range of sexual orientations, gender identities, and romantic relationships, and variety, self-acceptance, bravery, and empathy are humanitarian qualities. The Hijra community, often known as the transgender group, has its origins in India. Once venerated and regarded as heavenly messengers, members of this group were asked for their blessings before important life events like marriage and delivery. The epithet Hijra is widely used as a disparaging insult and the population is now seen as beggars. Understanding the phrase LGBTIQA+ in its fullness depends on having a general understanding of sexual orientation and gender identity. There are several acronyms and words used to describe LGBTIQA+ in both developed and developing nations. The following list includes a wide range of terminology and dialects associated to them:

- Sex;
- Bodies;
- Gender;
- Sexuality;
- Sexual arousal;
- Experiences;

- Classifications used in law and medicine.¹

The diversity of people's lived experiences must be acknowledged, and it is important to understand that the aforementioned factors may apply differently and at various points throughout a person's life. ² One may contend that LGBT groups come together as a result of the emphasis on sex, gender, and sexuality diversity. The many words used to describe LGBTIQ+ fall into the following categories:

- Physical attributes, gender, and gender identities;
- Sexual preferences;
- Social attitudes and problems.

The unquestionable reality that everyone is entitled to all the rights and freedoms enumerated in this Declaration, without difference of any sort, as stated in the first Art. of the Universal Declaration of Human Rights. We shall get closer to realizing a fair, pluralistic, and democratic society if Section 377² is repealed, which is now being contested in the Delhi HC.

The Indian courts heard from the LGBT Voices for the first time when the Delhi HC ruled in favour of gays. The conclusion of the case that law has no business in the bedroom of consenting individuals engaged in an activity that causes no harm to anyone is what surprises most people about the Delhi HC's ruling in *Naz Foundation v. Union of India*³ notwithstanding the commotion. The SC of India made the decision to hand the ball to a majoritarian Parliament while being the keeper and guardian of everyone's fundamental rights, including minorities.⁴ While the LGBT community continues to battle for basic rights, many gays have lost heart and gone back into the closet. While the LGBT movement continues to fight for fundamental rights, many gays have given up and gone back into the closet.

1.1 Complications faced by the LGBTQ Community:

Even though we may pride ourselves on being an advanced and sophisticated age, it is heartbreaking to witness the injustices suffered by members of the LGBTQ Community in

¹ India and the evolution of LGBTQIA+ Rights, *available at*: <https://thelawexpress.com/india-and-the-evolution-of-lgbtqia-rights> (Last Visited on September 30, 2022)

² S.377: "Unnatural Offences: whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine. Explanation: penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

³ *Naz Foundation v. Union of India*, 160 (2009) DLT 277 (129)

⁴ *Suresh Kumar Kaushal v. Naz Foundation*, (2014) 1 SCC 1

many settings. Some of the frequent issues they deal with are:

- In schools, universities, and other settings, LGBTQ children experience significant bullying as well as discrimination, according to a 2018 UNESCO report. It frequently takes people years to overcome the irreparable scars left in their lives by this act of bullying and prejudice;
- A reward is typically placed for someone's secret honour killings if they identify as LGBTQ or are confirmed to belong to it. Such honour murders have claimed the lives of several people recently;
- Non-acceptance of LGBTQ people is not just a problem in rural areas; it is also a problem in urban families. Because urban families are more concerned with maintaining their social standing than with their obligations to their children, they frequently ignore these obligations and evict LGBTQ children from their homes;
- People who identify as LGBTQ are frequently excluded from society, which makes them depressed.⁵

CHAPTER 2

INDIAN LEGAL FRAMEWORK

2.1 Introduction:

The fundamental principles that comprise the four cardinal pillars of our Const. are individual autonomy, equality, and liberty without discrimination, as well as respect for one's privacy and identity. These ideals separate some segments of society from the rest of society and force them to live in the confines of prejudiced beliefs, rigid social norms, parochial mindsets, and stereotypes. "The basic spirit of our Const. is to provide every subject of our nation an equal chance to develop as a human being, whether he is a member of the majority or the minority, regardless of color, caste, sex, religion, community, or financial condition."⁶ The state is required to ensure that no person will be harmed. In his examination of the first 50 years of the Indian Const.'s implementation, Granville Austin identified three key strands: "preserving the institution and spirit of democracy, safeguarding national unity and integrity,

⁵"Rachit Sharma, Rights of LGBTQ in India and the Struggle for Societal Acceptance, 4 (3) IJLMH Page 18 - 32 (2021), DOI: <http://doi.one/10.1732/IJLMH.26695>"

⁶*Supra* note 5

and encouraging social progress. The Strands are tightly connected and mutually dependant in what he wonderfully calls a seamless web."⁷ Furthermore, social changes cannot be implemented unless it is guaranteed that every nation's population may fully realise their potential. The Const. was created for the Indian people even though it was created by the Constituent Assembly. Because of this, it is given by the people to themselves, as stated in the phrase we the People at the beginning. India has previously voted against resolutions that attempted to shield people from abuse and discrimination because of their sexual orientation or gender identity. The abstention was concerning since it is clear from the Const. that it protects everyone from violence and prejudice. The term basic rights, often known as human rights, refer to the virtual gift that this Const. bestows on common people. Therefore, it is the duty of the state to make sure that no one is harmed.

The male-female divide has wreaked havoc on the LGBTIQA+ population in heteronormative cultures. They share a level with holy rights while being a minority. However, because of their unique sexual orientation and gender identity, members of the LGBTIQA+ community are the target of sexual assaults and sexual exploitation that represents a significant break from the traditional approach of legal equality. The relationship between the law and the public has been altered by non-normative sexual orientations and gender identities. In light of this, it is important to quickly recap the many discussions and disputes surrounding the law and how it relates to gender and sexual identities. These observations aim to highlight the structural problems with the legal attempts to control gender and sexual orientation. One could ask why sexual orientation and gender identity are discussed given that each individual's sexual orientation and gender identity are different. Whether a person is cisgender or transgender has nothing to do with whether they are gay, lesbian, bisexual, or straight. Despite their distinctions, gender identity and sexual orientation are intricately linked in politics and culture. The social policing of gender norms usually involves the same person or group engaging in both gender identity and sexual orientation discrimination. In many cultures, lesbians and transgender women, for instance, are seen as defying socially constructed expectations of what it means to be a woman. Lesbians and transgender people both violate gender standards, despite the fact that lesbians do so through their sexual orientation and transgender people through their gender identification. LGBT concerns and intersex issues commonly overlap. Much like LGBT individuals, intersex persons experience prejudice because their bodies do not conform to traditional norms for what it means to be a man or a woman. They challenge traditional

⁷*Id.*

expectations of manhood and womanhood, after all. As a result, intersex issues are routinely taken into account alongside LGBT issues by activists for human rights. The abbreviations LGBTI and SOGISC, where SC stands for sex characteristics, are becoming very popular.⁸ In a landmark ruling,⁹ the SC acknowledged that transgender people have basic rights under Art. 14, 15 and 18.¹⁰ Among the most significant rights protected by the Indian Const. are those outlined in Art. 16, 19 and 21.¹¹ The Court also acknowledged the basic rights guaranteed by the Indian Const. and human rights to the transgender population. It stated that in light of Art. 15, every civil and criminal legislation that does not acknowledge the third gender would be discriminatory. Due to India's particular recognition of transgender individuals, there is a question in this case about whether lesbians, gay men, and bisexual people's rights are taken into consideration. "However, Justice Radhakrishnan and A.K. Sikri mentioned in their decision in points 19 and 20 by including the definitions of gender identity and sexual orientation, where gender identity refers to the term in which each person felt internal and individual expression of gender, which may or may not correspond with the sex assigned to them at birth. Thus, it describes a person's self-definition as a male, woman, transgender, or another specified category. The term sexual orientation, on the other hand, describes a person who develops a strong physical, romantic, and emotional connection to another person. The Court defined sex to encompass a person's sexual orientation and gender identity. In accordance with the Yogyakarta principles,¹² the judgement instructed the Central and State Governments to take proactive measures to guarantee that social welfare, public health, and basic rights were not violated. The LGBTQA community was relieved that their human rights had been preserved despite their modest numbers, but the practical situation remained the same. This was followed by the SC's decision in *Navtej Johar v. Union of India*,¹³ which read down Section 377 of the IPC to decriminalise consensual sexual relationships between adults of the same gender. There were no laws prohibiting same-sex relationships in India prior to British occupation."¹⁴

⁸A simple introduction to rights of LGBTQ Person in India, *available at*: <https://www.legalserviceindia.com/legal/Art.-6912-a-simple-introduction-to-rights-of-lgbtq-person-in-india.html> (Last Visited on October 01, 2022)

⁹*National Legal Service Authority v. Union of India*, W.P. (C) 400 of 2012

¹⁰The Const. of India, art. 14, 15 & 18

¹¹*Id.*, art. 16, 19 & 21

¹² Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, INTERNATIONAL COMMISSION OF JURISTS.

¹³*Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321

¹⁴*Supra* note 12

In fact, as a part of the range of human sexuality and sensual desire, certain Hindu traditions enthusiastically embraced homosexuality alongside heterosexuality. But during their time in power in India, the British criminalized homosexuality by Section 377, which was modelled after the 1553 Buggery Act that forbade homosexuality in England. Since then, the LGBTIQ+ group has experienced persecution from the government and the general public, as well as mockery, denial of fundamental rights, a feeling of gender identity, and harassment. They were often criticised for their social morals, public decency, and vulgarity. The community endured shame and dishonour in its efforts to forge a way and coexist in society. The LGBTQA population was vulnerable to abuse simply because there was a legislation in place that made same-sex relationships illegal, voluntary or not. With this ruling, the SC has expanded the scope of LGBTIQ+ rights in India and reaffirmed the community's legal status. Although NALSA was issued over five years ago, Navtej Johar is a relatively recent ruling that is still awaiting legal advances on the matter of further civil rights for the LGBT+ community.¹⁵ Writing a statute defining the specific framework for transgender individuals to exercise their rights was the most important legal initiative after NALSA. "The Rights of Transgender Bill, 2014 was introduced and adopted by the Rajya Sabha and then forwarded to the Lok Sabha for consideration after the Ministry of Social Justice, in consultation with the trans activism, formed an expert committee to make recommendations in furtherance of the judicial mandate in the NALSA decision. The definition of transgender under the bill was broad."¹⁶

The Transgender Persons (Protection of Rights) Law was a new bill for the transgender population that was introduced in 2016 with the speaker's approval. The later Bill had many flaws, received harsh criticism from the transgender community, attorneys, advocates, NGOs, students, and other activists, and failed to enact the demands specified in the NALSA ruling. The failure of the Bill is threefold: first, it fails to recognise the diversity within the transgender community, which includes lesbians, gay men, bisexuals, transgender people, queers, asexual people, jogappas, hijras, aravanis, and people with other sociocultural gender identities. By defining a transgender person as someone who is neither exclusively male nor exclusively female or as a combination of the two, it maintains the binary of male and female. About 55 proposals

¹⁵Geetanjali Misra (2009) Decriminalising homosexuality in India, *Reproductive Health Matters*, 17:34, 20-28, DOI: 10.1016/S0968-8080(09)34478-X

¹⁶"All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include trans-men & trans-women (whether they have undergone sex reassignment surgery or hormonal treatment or laser therapy, etc.), gender queers and a number of socio-cultural identities, such as kinnars, hijras, aravanis, jogtas, etc."

were put out when the standing committee was established. But they were all plainly turned down. The Bill was preserved in its entirety. "It was once more introduced in the Lok Sabha on July 19, 2019, the 17th Lok Sabha passed it on August 5, 2019, the Rajya Sabha passed it on November 26, 2019, or Const. Day and the President of India gave his assent on December 5, 2019. The Transgender Persons (Protection of Rights) Bill has now been enacted into law with the goal of safeguarding transgender people's rights, welfare, and other relevant issues.¹⁷The debate in parliament did not call for changes to the criminal and civil laws to include the third gender as a protected class, nor did it acknowledge the instances of sexual assault and other forms of violence committed against the community at the behest of governmental organisations and other members of society. To do honour to the LGBTIQ+ community's fight, it is crucial to point out the gaps in our legal framework for LGBTIQ+ inclusion and urge on their closure in light of the aforementioned debate."¹⁸

2.2 Provisions of Transgender Persons (Protection of Rights) Act, 2019:¹⁹

It is the first Act in India to outline transgender people's rights. The Act also addresses unfair treatment or discrimination against the right to residence, the right to free movement, the right to education, and the right to work in public or private enterprises. According to an application and a certificate of identification granted by the District Magistrate, the Act acknowledged a transgender person's identity. Parents must submit the application on behalf of a minor. The certificate is granted by DM regarding his identity and grants the transgender person the ability to use it as identification documentation. "With the issuance of this certificate, a transgender person will need to submit an application to the District Magistrate together with the certificate that was issued by the CMO, and the District Magistrate will then issue a new certificate". As long as the person's Act rights are unaffected by the change in gender or the amended certificate that is produced, that is. The relevant government has also included elements in this Act that would work for the welfare of transgender persons, such as protection and rehabilitation. The Government shall engage in cultural and recreational events as well as take action for their rescue, protection, welfare, and promotion. Additionally, this Act establishes a non-discrimination system in the workplace; every company must offer transsexual people all necessary amenities. If a right is violated, the institution must appoint a

¹⁷ Aniruddha Dutta, *Contradictory Tendencies: The SC's NALSA Judgment on Transgender Recognition and Rights*, 5 JILS 235 (2017).

¹⁸ *Id.*

¹⁹ The Transgender Persons (Protection of Rights) Act, 2019, Act 40 of 2019 (India)

complaint officer to take complaints. Every transgender person has the right to live freely and in accordance with his or her own preferences, and no transgender kid will be taken away from the family without a court order. The relevant government will also cover transgender people's health, social security, and education. According to this law, transgender persons must be given equal access to sports activities and education at government-funded institutions. Plans and programmes must be developed by the government for their subsistence. Most significantly, the relevant Government should offer medical facilities, counselling prior to and following surgery, and supply of medical expenses for such person's sex reassignment surgery. The government shall establish distinct human immunodeficiency centres in accordance with the directive issued by the relevant authorities, i.e., the National AIDS control organisation.

Additionally, a National Council for Transgender People will be established. The council will be made up of a Union Minister who will serve as chairperson, a state minister as vice chairperson, members, and representatives from various offices, including HRD, Home Affairs, the Ministry of Welfare, etc. All members must work for the Government of India and must have a rank of at least Joint Secretary. One delegate from each of the four areas may be chosen by the central government. "The five representatives of the transgender community from each state, union territory, and region are to be nominated by the relevant government, along with five representatives from NGO's who work for them. The positions are to be filled for a period of three years. The National Council will carry out a number of tasks to address the issues or concerns of transgender people, develop policies and programmes, and assess and oversee the implementation of policies intended to ensure the equality of the transgender community. According to the Act of Chapter VIII, offences and penalties, anyone who prevents a transgender person from entering a public space or forces them to leave their home or place of residence, or who otherwise endangers their life by abusing them, etc., faces a minimum sentence of six months in jail and a maximum of two years in prison as well as a fine. In a nutshell, it does not recognise the third gender, their self-identity, and their right to self-determination in law; the Act does not make provisions for the LGBTQA community's reservation as a socially and educationally backward class for employment and education to ensure adequate representation of the marginalised community; nor do the provisions set forth the with respect to health care, legal awareness, or welfare programmes among the community and thereby maintains the stature of the status quo. This Act specifically refers to transgender individuals rather than lesbian, gay, or bisexual people. The punishment for their beggarly behaviour and the punishment for the rape of a transgender person, as specified in the IPC

under sections 375 and 376, are not specified in this Act."²⁰ The marriage, property, inheritance, and adoption rights of transgender individuals are not addressed in this Act. Less severe penalties are outlined under the Act in the event of an infraction.

2.3 Sexual Orientation and the Const.:

2.3.1 Art. 14:

The Court determined that it was unConst.al to treat the transgender population differently based only on their sexual orientation. By taking an individualistic stance, the SC emphasised its anti-majoritarian position and demonstrated its adherence to Const.al norms. The Court took into account the two-part test of (i) an understandable difference and (ii) a reasonable connection between the difference and the goal of the provision.²¹ After the 2013 amendment, the Court found that Section 375 of the IPC and POSCO adequately serve the purpose of Section 377, which was to protect women and children from carnal intercourse. The incidental result is that even consensual sexual acts, which do not harm women or children, are criminalised, which only targets members of the LGBTQA community who engage in such sexual activity. It is obviously arbitrary that the clause makes no distinction between consenting and non-consensual sexual behaviour. Additionally, all forms of homosexual behaviour are prohibited, although only a limited number of heterosexual behaviours that go against the laws of nature are, according to Section 377, which calls for unequal treatment. "The Court decided as such. Section 377 IPC puts the LGBT people to societal disgrace and dereliction and is, thus, plainly arbitrary, since it has become an abominable tool for the harassment of the LGBT community by exposing them to discrimination and unequal treatment, the court said."²²

2.3.2 Art. 15:

The Court decided that sexual orientation is included in the definition of sex under Art. 15 and that any discrimination based solely on this basis violates Art. 15 when determining the Constitutionality of Section 377 IPC. The LGBT community is entitled to protection at the state's request just like any other group of citizens. According to J. Chandrachud, Section 377 fosters cultural morality that views some relationships as being outside nature's order and silences and stigmatises the LGBT population. Sex, as stated in Art. 15, pertains to an

²⁰*Supra* note 5

²¹ E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3

²²*Supra* note 5

individual's sexual identity and character as well as to his or her biological traits, the court said. As a sexual minority, the LGBT community has experienced unjustified and unfair hostile discrimination. It is entitled to the same safeguards that Art. 15 provides. It doesn't matter if the LGBT community makes up a tiny portion of the population and that less than 200 people have been charged under Section 377 in the past 150 years.

2.3.3 Art. 19:

The Art. 19, protected right to freedom of speech is violated by Section 377, according to the unanimous ruling of the Const.al bench. The court noted that homosexuality and sexual orientation are biological traits that are innate in every person and are therefore beyond a person's control. "The community is afraid to come out of the closet and express their gender identity and sexual orientation because of the harassment. They do not express and cultivate their relationships way heterosexuals do, which has an impact on both their mental and physical health."²³ On the grounds of public decency, morality, and order, the community's private, consenting sexual actions cannot be included by the purview of reasonable limits under Art. 19(2) since they do not damage or injure any other members of the society. The freedom to choose a partner is an element of the right to intimacy, and J. Chandrachud further stated that the criminalization of consenting same-sex relationships under Section 377 amounts to the denial of this right.

2.3.4 Art. 21:

"The right to privacy has already been elevated by the court from a legal right to a basic right covered by Art. 21. Furthermore, any restriction that violates the guaranteed right to privacy which includes the right to sexual privacy is unlawful. The Court acknowledged that criminal prosecution under Section 377 restricts the LGBT community's freedom to engage in consensual sexual activity and the basic right of homosexuals to a decent life that is guaranteed under Art. 21."²⁴

2.4 Position of International Law on Homosexuality and India's Position in UN Resolution:

World opinion on homosexuality is split. It is interesting to observe how attitudes regarding natural sex inclinations of a human being are influenced by religion teachings.

²³*Id.*

²⁴*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

Homosexuality is illegal in 81 nations, including Bangladesh and Pakistan. In Europe, the situation is somewhat different from that in developing nations. A fundamental right that is a part of the right to life is the right to have sex. A nation or legislative body should not attempt to outlaw the right to sex since doing so is considered to be cruel. Human rights include LGBT rights.²⁵ The United Nations Organization consistently takes a progressive stance on LGBT rights. French and Dutch members initially proposed a resolution in favour of LGBT rights at the General Assembly in 2008. It featured a denunciation of disrespectful behaviours such as harassment, assault, discrimination, and prejudice based on sexual orientation and gender identity.²⁶ On June 26, 2014, the United Nations Human Rights Council adopted an odd resolution titled Protection of Family. This Resolution requested a panel discussion on the subject of safeguarding the family and requested that the High Commissioner for Human Rights produce a report on the situation of the family. However, because family is not defined in the resolution, it might be used as a justification to block the rights of gay couples, single parents, and other sorts of families in future UN discussions²⁷, although discussions on LGBT rights have been on the UN agenda for over 20 years, decriminalising homosexuality and transsexuality is still a long way off. A resolution on Human rights, sexual orientation, and gender identity was approved by the UN Human Rights Council at its 27th session on September 24, 2014. According to Preambular Paragraph 3 of this resolution, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms, significance must be attached to national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. However, the phrase does not absolutely emphasise decriminalisation. Furthermore, it emphasises the historical, cultural, and religious origins of States, which exempts States from having to abolish or modify either their criminal laws or their laws against discrimination. In this context, it is also significant to note that India did not participate in the voting process for the 24 September 2014 UN Human Rights Council resolution on Human Rights, Sexual Orientation and Gender Identities."²⁸

²⁵The Global Divide on Homosexuality, *available at*: <https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/> (Last Visited on October 05, 2022)

²⁶*Id.*

²⁷*Id.*

²⁸Rights of LGBT Community: An Overview, *available at*: <https://lawcorner.in/rights-lgbt-community/> (Last Visited on October 05, 2022)

CHAPTER 3

JUDICIAL APPROACH

3.1 Year - 2009:²⁹

In July 2001, police in Lucknow attacked a park and imprisoned a few persons on the suspicion that they were homosexuals. They were later charged under section 377 of the Indian Penal Code. In an effort to increase public knowledge of STDs and healthy sexual practises, the police apprehended nine further persons associated with the Bharosa Trust, a non-governmental organisation that distributed pamphlets to gays with information on safe sex. After these individuals were denied bail, they were charged with conducting a prostitution ring. According to Gupta, the incidents in Lucknow demonstrate that even though "Section 377 cannot and is not being used to prosecute sexual acts in private, it adds a criminal element to the daily lives of homosexual men and places them under the scrutiny of the law and a constant threat of moral terrorism. In 2001, the Delhi High Court accepted a petition from the Naz Foundation, a non-governmental organisation that has focused on HIV/AIDS, sexual education, and health since 1994. The case challenged the constitutionality of IPC section 377. The petitioner asserts that Section 377 of the IPC breaches their basic rights to life, liberty, privacy, and human dignity, as well as their rights to health, equality, and freedom of expression. In addition, it was asserted that Section 377 hindered public health programmes intended at reducing the risk of transmission of STDs such as HIV/AIDS since people feared being punished for discussing their sexual orientation and lifestyle in public. In 2009, the Delhi High Court held that Section 377 of the Indian Penal Code arbitrarily restricted the freedom of two consenting adults to engage in sexual behaviour, even in secret. Therefore, it was a blatant violation of their Art. 14, 15, 19, and 21-guaranteed basic rights. Sexual minorities around the nation instantly voiced their ecstatic approval of the decision, while religious organisations criticised it passionately."³⁰

3.2 Year 2013:³¹

Just as the "LGBTQ+ community was about to breathe a sigh of relief, a number of people and faith-based organisations flatly rejected the idea of decriminalising homosexual

²⁹*NAZ Foundation v. Govt. of NCT of Delhi*, W.P. (C) 7455 OF 2001

³⁰*Id.*

³¹*Suresh Kumar Kaushal v. Naz Foundation*, (2014) 1 SCC 1

relationships as held by the Delhi HC in *Naz Foundation Govt. V. NCT Of Delhi*, 2009, citing India's rich history steeped in ethics and tradition"³². To petition the Indian SC to reconsider the constitutionality of Section 377, they filed an appeal. On December 11, 2013, a division bench of Supreme Court Justices GS Singhvi and SJ Mukhopadhaya overruled the Delhi High Court's verdict and restored homosexuality as a felony. The court concluded that lesbian, gay, bisexual, and transgender (LGBT+) individuals are not entitled to Constitutional protection due to their minute minority status. It was also said that Section 377 of the IPC is completely legal because it does not include any unconstitutional provision. The good news was that this ruling did not put a stop to the LGBT movement in India, but rather sparked a new surge of action. The Supreme Court's backward decision to deny gays' fundamental human rights was widely criticised. Consequently, India's public dialogue on LGBT rights increased, resulting in the formation of a substantial movement.

3.3 Year 2014:³³

In this case, the Hon'ble SC had to decide if it was necessary to recognise the hijra and transgender communities as a third gender for public health, education, employment, reservations, and other welfare programmes. In this important decision, the SC gave transgender people, called hijras, the status of third gender. Before the ruling, transgender people had to say they were either male or female. Now, they can say with confidence that they are transgender or Third Gender. Also, the decision laid the groundwork for making sure that transgender people have a number of basic human rights, which can be summed up as follows:

- "The SC said that not recognising their identities broke Articles 14, 15, 16, and 21 of the Indian Constitution;
- The SC also told the Indian government that people who say they are Third Gender belong to a group that is economically and socially disadvantaged and should get reservations because of this. Based on the ruling, the third gender would be considered as an OBC, which would give them the right to reservations for government jobs and schools. It also said that the government should make policies for the transgender community that are in line with Articles 15(2) and 16(4) to make sure that everyone has the same chances in education and work;

³²*Supra* note 31

³³*National Legal Service Authority v. Union of India*, W.P. (C) 400 of 2012

- The court also said that a difference between a person's gender at birth and how they identify themselves now is not always a sign of something wrong. So, instead of trying to fix the difference, the focus should be on helping people deal with their sadness about it. Simply put, this shows that the court knew there was a difference between the biological and gender parts of sex. The court said that a person's gender attributes are their self-image or their deep emotional or psychological sense of their sexual identity and character. This is not limited to the binary sense of male and female, but can be anywhere on a wide spectrum. The court said that biological traits include chromosomes, genitalia, and other secondary sexual traits."³⁴

Transgender people can now change their gender without having to go through SRS. They also have a right under the Constitution to call themselves a third gender and register that identity. A lot of state governments also made small changes to laws about housing and health to help the transgender community. But the Transgender Persons Bill, 2018, has done a lot of damage to this decision.

3.4 Year 2017:³⁵

In the "Suresh Kumar Koushal v. Naz Foundation case, when the Naz Foundation told the Supreme Court that Section 377 of the IPC violated the right to privacy, this argument didn't carry much weight because the right to privacy wasn't a set legal principle. Then, in 2017, the Puttaswamy Judgment focused almost entirely on the right to privacy. It said that the right to privacy was a fundamental right under Art. 21 because it was a key part of the right to life. But this case is also related to LGBT rights because Justice Chandrachud rejected the court's rhetorical opinion in the Suresh Kumar Koushal case and wrote that sexual orientation is also covered by the right to privacy in his opinion in the Puttaswamy case under the heading dissonant notes. Also, under Section 377, a third party could file a lawsuit against the partners who did sodomy on their own, which would be a violation of their Fundamental Rights to personal freedom and privacy. The Puttaswamy decision notes also criticised the minimis hypothesis principle used in the Suresh Kumar Koushal decision. They said that the very small number of LGBT+ people cannot be used as a reason to deny them the most basic fundamental

³⁴*Supra* note 33

³⁵*Justice K.S. Puttaswamy (Retd.) v. Union of India*, W.P. (C) 494 OF 2012

rights, and that limiting fundamental rights in this way cannot be justified even if only a small number of people are treated badly."³⁶

3.5 Year 2018:³⁷

In the Suresh Kumar Koushal Case, when the Hon. SC overturned the Delhi HC's 2013 decision, gay people were once again seen as criminals for having consensual sexual activity. When well-known people like "hotelier Keshav Suri, actress Ritu Dalmia, dancer Navtej Singh Johar, and many others came forward and challenged the Constitutional validity of Section 377 of the IPC, the number of LGBT rights protests in India went up". The Supreme Court thought about the different petitions about the issue and decided to send it to a larger bench. The government then said that it would not get involved in the case and would let the SC make a decision based on its own best judgement. The petitioners said that "Section 377 violated their Constitutional rights to equality, freedom of speech, privacy, and protection from discrimination". The five-judge panel made a decision on September 6, 2018, which was unanimously held to be:

- Section 377(1) is against the law when it comes to consenting adult sexual activity because it goes against basic rights to privacy, independence, and identity. So, being gay is no longer against the law;
- Section 377 isn't clear and doesn't make a clear difference between natural and unnatural things;
- It also limits the right to free speech that is protected by Article 19 of the Indian Constitution, which says that people have the right to talk about their sexual orientation;
- A person's right to life is violated when their sexual orientation is not taken into account, because it is an important part of who they are;
- The fact that they are only a small part of the population can't be used to deny them basic rights;
- The Koushal decision was also harshly criticised by the court, which called it unreasonable, arbitrary, and clearly illegal;

³⁶*Supra* note 35

³⁷*Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321

- It was also made clear that discrimination based on sexual orientation is against the law, since sexual orientation is a natural thing, as shown by scientific and biological facts;
- The SC also told the govt. to educate people about LGBT rights and get rid of bias against them. The judges talked more about transgender people, their mental health, their right to dignity, their right to privacy, and their right to choose for themselves.

CHAPTER 4

SEXUAL ASSAULT ON LGBTQ+ COMMUNITY

4.1 Introduction:

Sexual assault affects every group and group of people, including LGBTQ people. Lesbian, gay, and bisexual people are just as likely as or more likely to be sexually abused than heterosexual people. Nearly one in ten LGBTQ people who have survived intimate partner violence (IPV) are thought to have been sexually assaulted by their partners. Studies show that more than half of bisexual and transgender women will be sexually assaulted at some point in their lives. As a group, LGBTQ people have higher rates of poverty, discrimination, and being left out, which makes us more likely to be sexually assaulted. We also see more violence motivated by hate, which often takes the form of sexual assault. Society's over sexualization of LGBTQ people and its stigmatization of our relationships can also lead to internalized homophobia and shame, which can lead to violence in close relationships. But as a community, we rarely talk about how sexual violence affects us or what our needs are in terms of preventing sexual assault and taking care of and supporting survivors. Researchers have found many times that:

- "As opposed to 35 percent of straight women, 44 percent of lesbians and 61 percent of bisexual women report being raped, physically assaulted, or stalked by an intimate partner;
- Rape, physical abuse, or stalking by an intimate partner occurs in 26% of homosexual men and 37% of bisexual men, compared to 29% of straight males;
- In comparison to heterosexual women (17%) and lesbians (13%), bisexual women (46%) are more likely to have experienced sexual assault;

- Compared to 9 percent of straight women, 22% of bisexual women had been sexually assaulted by an intimate partner;
- Compared to 21% of straight men, 40% of homosexual men and 47% of bisexual men had suffered sexual violence other than rape."

The highest rates of sexual assault are experienced by transgender persons and bisexual women within the LGBTQ community. Both of these communities are prone to early sexual assault, frequently in infancy. The police, hospitals, shelters, and rape crisis centers are all places that are meant to help LGBTQ survivors of sexual assault, but they often refuse to use them because of who they are and how they are treated because of who they are. A recent study by the Swasti Health Resource Center of 12 COs in five Indian states found that he was right. Homosexual men who get help from their peers are much safer than those who live with their parents, most of the time without coming out. The goal of the study was to find out more about the needs and types of people who ask COs for help. We must all work together to stop the high number of sexual assaults in the LGBTQ community. If someone tells you they've been sexually attacked, remember to believe them, tell them it wasn't their fault, keep their story private (unless the situation requires it), and don't ask them for more information than they want to give.

4.2 Need for inclusion of LGBTQ Community under the POSH Act:

People who identify as transgender are among the most frequently targeted and are particularly vulnerable to physical and psychological abuse. The Guardian did a poll in 2019 and found that 70% of LGBT (lesbian, gay, bisexual, and transgender) people have been sexually harassed at work. In 2014, the World Bank released a report called *The Economic Cost of Homophobia and the Exclusion of LGBT People: A Case Study of India*. It was shown that homophobia and keeping LGBT people out of the workforce decreases GDP by 1.7%. 56% of LGBT people who worked in white-collar jobs said they were treated badly. According to the 2016 Indian LGBT Workplace Climate Survey, 87% of Indian LGBT respondents do not have access to formal LGBT Employee Resource Groups, and more than half of those surveyed could be fired for being LGBT. The poll also looked at the atmosphere at work. 40% of the respondents had experienced harassment, and among them, 3% had endured the anguish of homophobic remarks, it was discovered. According to an NHRC report on transgender rights, around 92% of transgender people are denied the ability to engage in any type of economic activity, and even those who are eligible are denied jobs. Additionally, approximately 18% of

transgender people experience physical assault. According to a number of research, transgender persons choose to conceal their identity at work since it lowers their risk of harassment and prejudice. Pinder and Harlos noted that many times, employees resisted speaking out against mistreatment or choose not to reveal their sexual orientation. This is a result of their positions of weakness inside organisations. Transgender persons are subjected to prejudice that begins in their own families. Families may serve as a source of assistance as well as prejudice. In a study of 345 transgender persons residing in North America, Fuller and Riggs discovered that those who experienced more gender discrimination from their family also reported more psychological discomfort. This prejudice towards transgender persons originates in their own families and eventually spreads to society. People who are already distressed often avoid discriminating jobs or choose to keep quiet while they are there. The experiences of transgender persons at work, however, are not well studied. Through a thorough analysis of the literature from the fields of business, management, and more general social science disciplines from 1985 to 2015, McFadden discovered that there is a dearth of study on the experiences of transgender persons at work. Only 18 of the 263 journal publications examined transgender persons, it was discovered. Therefore, there is a pressing need to research and record the experiences of marginalised populations at work in order to advocate for change. According to Bina Agarwal, the secret to social and legal transformation is bargaining power. Groups with more bargaining power in the State, markets, and homes are effective in enforcing social and legal reforms. Better study and recording of transgender employees' work experiences can strengthen their bargaining power by demonstrating the clear-cut discrimination and exploitation they have experienced, which will pave the way for legislative and regulatory measures to safeguard transgender persons.

4.3 Time for India to consider Gender Neutral Rape Laws:

India's 2013 rape legislation amendments broadened the definition of rape while continuing to exclude males as victims. However, sexual assault is all too rampant in the LGBTQ and transgender communities, who are still unprotected by the legal system. According to section 375 of the IPC, rape is defined. After the Delhi gang rape in December 2012, it was most recently changed in 2013. Following discussions with the Justice Verma Commission (JVC), Parliament broadened the definition of rape to encompass offences committed against a person using digital, anal, or physical items. The JVC did discuss the potential for a rape legislation that is gender-neutral. There are two angles from which to view

gender neutrality. The first is: Are male victims of sexual assault possible? The second question is more controversial: Are female offenders of sexual assault possible?

The majority of the committee members believed that incorporating women as rapists would result in the harassment of an already oppressed minority, despite some committee members supporting the idea of males as victims. Senior advocate Rebecca John stated that historically and statistically, we need the unique position of women. The idea was to introduce a parallel segment to address the requirements of transsexual individuals. I think that eventually legislation may be gender-neutral, but at this point, statistically speaking given the enormous numbers, it was necessary to have the current rule in place. "The question of gender-neutral rape legislation was not brought up only by the JVC. In May 1996, the Delhi HC ruled in *Sudesh Jhaku v. KCJ*,³⁸ a case brought by the mother of a six-year-old girl, that women who sexually assault men or other women should be liable for conviction as conventional rapists, adding that men who are sexually assaulted shall have the same protection as female victims. However, the court stated that the Law Commission should provide recommendations for a course of action."³⁹

When the SC heard a case submitted by the gender rights organisation Sakshi in 1999, it also asked the Law Commission to examine the viability of broadening the definition of rape. And in March 2000, the 172nd Law Commission,⁴⁰ report recommended ungendered rape laws, including the addition of a new section that would deal with impermissible sexual contact, the deletion of section 377 of the IPC (which deals with impermissible sexual offences), and the enhancement of the penalty for section 509 of the IPC (which offends a woman's modesty). The report stated that we have also recommended various changes in the CRPC, and in the IEA, in order to plug the loopholes in procedural provisions. Several women's rights activists, including women's rights attorney Flavia Agnes, criticised the report for potentially opening a line of harassment against women who had historically borne the brunt of sexual violence. However, some, including lawyer Rishi Malhotra, drew attention to a gap. Men who are sexually violated have no legal recourse. This will prevent males from coming forward when they are actually personal assault victims, he claimed. Malhotra petitioned the SC in 2018

³⁸*Smt. Sudesh Jhaku v. K.C.J. & Ors*, 1998 CriLJ 2428

³⁹*Supra* note 37

⁴⁰Law Commission of India, 172nd Report on Review of Rape Laws, (March, 2000)

with the claim that males were not covered by laws prohibiting sexual harassment, rape, and stalking. The petition was denied by the Supreme Court.

4.4 The Missing Perspective of LGBTQ+ People:

The POCSO 2013 acknowledges that sexual assault can happen to both boys and girls. In reality, 2007 research by the women and child development ministry discovered that 53% of boys and 47% of girls of the children who reported abuse were male. According to experts, the LGBTQ+ community's perspective has been lacking in the discussion of gender-neutral sexual assault laws for adults, including sexual violence against queer individuals. For an LGBTQ+ individual, violence and violations are a part of everyday existence. Although the law is frequently used against these communities, Saurabh Kirpal, an attorney and trustee of the Naz Foundation, an NGO that works on HIV/AIDS and sexual health, said that laws need to change in order to take into account gender fluidity and the existence of a wide range of people who may not conform to the established gender structures. Not only is the legislation silent on this, it also denies that LGBTQ+ individuals even exist. Male rapes are not recognised by our legislation. Only women are recognised as victims of some laws, such as rape, sexual harassment, and stalking. Section 377 was repealed by the SC in September 2018 to make it illegal for males to engage in consenting sexual activity. But the section still holds true when two males engage in non-consensual sexual assault against one another. However, unlike rape statutes, it is the complainant's responsibility to establish that the sexual attack was not voluntary. According to attorney Anand Grover, the presumption under section 375 [the rape legislation] transfers the weight of proof onto the accused to establish the act was consenting. There is no such assumption under Section 377. According to Grover, Section 377 completely disregards gay and transgender women and exclusively addresses male on male, non-consensual sexual conduct. Due to their authority under Section 375 in response to a rape complaint, the police are not obligated to file a FIR pursuant to Section 377.⁴¹

CHAPTER 5

CONCLUSION AND SUGGESTIONS

5.1 Conclusion:

The community's existence in public is difficult since Section 377 IPC still contains

⁴¹*Supra* note 21

laws that reflect Victorian beliefs. The community has endured sexual assault, violation, and exploitation on an unrepairable scale for decades while remaining in the closet. Both the legislative and the executive branch have fallen short of their duty to safeguard this group against institutional ideology promoted by the police and the public's view of their immoral lifestyle. Compared to those who identify as straight, the LGBTQA group has long been a disadvantaged and vulnerable segment of society. Homophobia, or the fear or hate of homosexuality, is related to this (the fear or hatred of homosexuality). Even though human rights have come a long way in many places, LGBT rights are still fighting for acceptance around the world. Since sexual orientation wasn't included in the 1948 Universal Declaration of Human Rights, some people think that LGBT rights are a problem. It does say, though, that everyone has the right to all of the rights and freedoms in this declaration without regard to any kind of discrimination.

People are becoming more open about their sexual orientation and getting together to fight for their rights. LGBT rights are becoming more widely known thanks to the work of these groups and their allies, and some governments are starting to pass laws against discrimination and in support of LGBT rights. Powerful international human rights groups like Amnesty International and Human Rights Watch have kept up the good work. In the coming years, the most important things for LGBT rights around the world will be to end discrimination based on sexual orientation, make sure that hate crimes and hate speech are protected by the law, make sure that everyone has the same rights and privileges (including marriage, common-law partnerships, medical decision-making, wills and estates, parenting, and adoption), and fight homophobia and heterosexism.

There are difficulties when enforcing laws against sexual assault if either a man or a woman might be the victim or the perpetrator. This is especially evident when transgender and intersex persons are the victims of violence. India implemented the Transgender Persons (Protection of Rights) Act in December of 2019 despite a harsh assessment from the consultative committee, massive criticism, and demonstrations from its transgender population. The Act establishes a legal framework distinct from India's IPC for transgender individuals. No matter how serious the offence, abusing transgender individuals carries six months to two years in prison sentence. The punishment for raping a cisgender woman ranges from 10 years to life in jail; in egregious cases, like the 2012 Delhi gangrape case, the perpetrators are executed.

The SC heard a writ petition on October 13, 2020, requesting equal protection for transgender individuals against sexual assault. The Centre was given notice by the panel of judges that included Justices A S Bopanna and V Ramasubramanian. The matter is still pending. Sangama produced a study for Kerala's government in 2015. Sixty percent of transgender people who were interviewed reported having been the victim of sexual harassment or assault. Five percent of the 5,000 transgender people National Aids Control Organization (NACO) questioned in 2015 had suffered sexual assault in the previous year. Kanmani Ray LR, a law student and transgender rights advocate at Delhi University, said that when discussing gender neutrality, one must be aware of the many power disparities inside the system. Ray draws attention to the prejudice that transgender people face in society at large. As demonstrated by Kiran Gawli, one of five transgender women incarcerated amid 2000 male convicts at Nagpur Central Jail, transgender women are frequently held in male jails. Ray said that in her experience, cisgender women frequently commit acts of violence against transgender women just as frequently as cisgender males do. Women frequently lash out at transgender women using the same facilities in public spaces like the ladies room in a train or metro, according to Ray. The same is true for women who work in law enforcement, as well as historically, in hospitals, where transgender persons frequently fear discrimination and violence.

5.2 Suggestions:

After doing the study, the researcher discovered that although our nation protects the rights of its inhabitants, a small segment of the Indian population that identifies as LGBT has been ignored. The following suggestions might be made for acknowledging the role that people and institutions can play in light of the topic outlined above:

- Assist the LGBT community's most marginalised members, including transgender persons and people of color and low income;
- Work together on interdisciplinary projects that address LGBT issues impacting people of color and those with low income;
- Involve foundation staff in educating the public about issues affecting LGBT people with low incomes and LGBT people of color, particularly those involving transgender people;
- It is required by law for schools and teacher preparation programmes to cover LGBT issues and concerns;
- Make LGBT concerns a focal point of any work on racial and economic justice;

- Speak up for LGBT racial and economic justice initiatives with nonprofit partners;
- By covering LGBT problems and fostering a climate of tolerance and freedom for minorities, the media must assume its responsibility in helping to transform society's perceptions;
- Legal funds must be established to handle LGBT-related public interest litigation;
- The federal and state governments should set up initiatives to help companies foster workplace climates that are more accepting of LGBT people;
- The domestic violence legislation must be changed to encompass non-spousal and parental abuse in order to combat both domestic and public violence;
- Police changes must be announced and put into action. To overcome their societal preconceptions and learn how to treat sexual minorities with the same courtesy and humanity as the general population, police officers at all levels should participate in courses that will increase their awareness of the issues. Additionally, while dealing with sexual minorities, transparency should be used;
- When referring to gay males, lesbians, and bisexual people, avoid using pathologizing or stigmatising terms (such as sexual deviant or sexual inversion);
- The LGBT community needs to educate themselves more. During trips to NGOs, many students are shown to have dropped out of school, to be undereducated, or to not be taking their studies seriously. Many of them work in professions like fashion design, barbering, and other similar vocations. Few choose prostitution as a quick and easy means of making money. All of this ultimately results in societal hostility, scorn, and rejection as a result of the inability to change the thinking of the general populace.