

ROLE OF THE JUDICIARY IN THE PROTECTION OF LGBTQ+ RIGHTS

Kreya Parekh*

ABSTRACT

The paper presents an assessment of the pivotal role of the Judiciary in protecting the rights of the LGBTQ IA+ community, with emphasis on the legal landscape of India. The paper begins with the historical context of the community's acceptance followed by the constitutional articles governing LGBTQ IA+ rights in India, including Article 14(Right to Equality), Article 15(Prohibition of Discrimination), and Article 19(Right to Freedom) and analyses their implications for legal protection. A critical analysis of landmark judicial decisions, such as the Naz Foundation case and the subsequent Suresh Kumar shaping policy outcomes concerning LGBTQ+ rights. Additionally, the paper explores other significant cases like the NALSA judgment and Navtej Singh Johar Vs Union of India, showing the judiciary's pivotal role in interpreting laws and shaping policies. Challenges faced by LGBTQ+ individuals, including societal discrimination, lack of access to essential resources, and the persistence of conversion therapy, are comprehensively addressed. Furthermore, the paper provides a comparative analysis of global attitudes towards LGBTQ+ rights, highlighting contrasting approaches and emerging trends in different countries. The conclusion underscores the importance of continued judicial engagement, legislative reforms, and societal awareness in promoting LGBTQ+ rights and fostering inclusivity. It emphasizes the need for concerted efforts to eliminate prejudice, promote education, and advocate for policy changes that uphold the principles of equality and non-discrimination for all individuals, regardless of sexual orientation or gender identity. In essence, this paper serves as a comprehensive resource for understanding the complex interplay between the judiciary, legal frameworks, and societal dynamics in the protection of LGBTQ+ rights, with implications for future research, advocacy, and policy initiatives.

INTRODUCTION

Modern human civilization is witnessing societal changes and evolving towards greater inclusivity. These changes led to discussions about various issues and differing opinions about

*BA LLB, SECOND YEAR, PRAVIN GANDHI COLLEGE OF LAW, MUMBAI.

topics that were kept in the private sphere. The ongoing journey of LGBTQ+ acceptance remains gradual.

The term LGBTQ AI+ stands for lesbian, gay, bisexual, transgender, queer, asexual, intersex and all other genders, as the list is inexhaustible.¹ It represents a wide range of gender identities that fall outside of traditional gender norms and heterosexuality.

Lesbian

A lesbian is a woman who is attracted to other women. Some of these women may prefer to identify as "gay".²

Gay

A person who is gay is attracted to people of the same sex. The word "gay" can be used for men and women.

Bisexual

These people can feel attracted to both men and women. The type of people they're attracted to may change over time.

Transgender

These are people who feel the sex they were assigned at birth doesn't match the gender they feel they truly are inside.

Queer or Questioning

This is a broad label for sexual and gender minorities. A person who identifies as "queer" or "questioning" may also belong to one of the other groups. Or, they may feel like none of the other groups are a perfect fit.³

¹ Gabriel, J. (n.d.). Research Guides: LGBTQ+ Resources at Harvard (and beyond): Terminology. [online] guides.library.harvard.edu. Available at: <https://guides.library.harvard.edu/c.php?g=1188828&p=8694904> [Accessed 20 Mar. 2024]. Time Viewed: 23:38 P.m.

² Default. (n.d.). What Does 'LGBTQ' Mean? [online] Available at: <https://www.wkhs.com/health-resources/wk-health-library/medical-procedures-tests-care-and-management/neurological/spine/what-does-lgbtq-mean#:~:text=LGBTQ%20is%20an%20acronym%20that> [Accessed 31 Mar. 2024]. Time Viewed: 12:09 P.M.

³ Default. (n.d.). What Does 'LGBTQ' Mean? [online] [Accessed 31 Mar. 2024]. Time Viewed: 12:09 P.M.

HISTORICAL BACKGROUND

Ancient texts like Rig Veda and Kamasutra⁴, as well as relics of temples like Khujrao temple⁵, depict architecture portraying homosexuality. This suggests that people in the earlier times embraced homosexuality and this is not a recent development.

Section 377 of the Indian Penal Code was introduced in 1871 by British rule.⁶ This act criminalized homosexuality and punished them with imprisonment for life. British rulers introduced such laws because of a "Victorian, Christian puritanical concept of sex"⁷ It now stands decriminalized.⁸

On September 6th, the five-judge Bench partially struck down Section 377 of the Indian Penal Code, decriminalizing same-sex relations between consenting adults. LGBT individuals are now legally allowed to engage in consensual intercourse.⁹

In 2006, Human Rights published a report that section 377 was used to harass homosexuals and HIV/ AIDS prevention activists¹⁰

ARTICLES GOVERNING LGBTQ COMMUNITY

Art 14: Right To Equality

This Article states that all people are equal within the eyes of the law and ought to be treated the same irrespective of their caste, creed, gender, or sexual orientation.

In the case of Naz Foundation v. Govt. of NCT of Delhi¹¹, it has been submitted on behalf of the petitioner that Section 377 IPC's legislative objective of penalizing "unnatural sexual acts" has no rational nexus to the classification created between procreative and non-procreative sexual acts and is thus violative of Article 14 of the Constitution of India.

⁴ Human Rights Campaign (2011). Stances of Faiths on LGBTQ Issues: Hinduism. [online] Human Rights Campaign. Time Viewed: 23:40.P.M

⁵ Ramadurai, C. (n.d.). India's Temples of Sex. [online] www.bbc.com.

⁶ J. Venkatesan (2012). IPC 377 Was Imposed by British rulers: AG. The Hindu. [online] 22 Mar..

⁷ Wong, T. (2021). 377: the British Colonial Law That Left an anti-LGBTQ Legacy in Asia. BBC News. [online] 28 Jun..

⁸ TIMESOFINDIA COM / Updated: (2018). Supreme Court Decriminalises Section 377: All You Need to Know | India News - Times of India. [online]

⁹ Supreme Court Observer. (n.d.). Decriminalisation of Section 377: 5 Must Reads. [online]

¹⁰ Human Rights Watch. (2006). 'The Hall of Shame'. [online].

¹¹ Naz Foundation vs. Government of NCT and Ors. (02.07.2009 - DELHC) AIR BOM R 58, (2009)

Art 15: Prohibition Of Discrimination

This article disallows separation in any way random. It secures the citizens from discrimination on grounds like caste, sex, etc. The state can, however, discriminate on special provisions for backward classes, scheduled classes, women, and children for their benefit. This is with reference to positive discrimination which is part of the constitutionally sanctioned power of the state.¹²

Art 19: Right To Freedom

This article monitors the threats of free expression, they can express and hold their opinions without interference. This shows us how people are constitutionally entitled to have their own opinions irrespective of whether they reconfirm the government's ideologies or not. It shows us how this is a key ingredient that upholds the democratic nature of our state and had been violated until the abrogation of tartiflette of the Indian Penal Code.

LANDMARK CASES

Naz Foundation Vs. Government of NCT and Ors.¹³

This was the first case for the autonomy of the queer community. Since 1994, the Naz Foundation (India) Trust¹⁴, often known as Naz India, has been a non-governmental organization (NGO) established in New Delhi that focuses on HIV and sexual health concerns. Naz India has developed throughout time to employ a comprehensive strategy that combines care and prevention in the fight against HIV.

Section 377 clearly states, "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with¹⁵ [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

According to this act, consensual sex can only be performed by people of the opposite gender. Naz Foundation has been against this section since 2001 as it curtailed the rights of Htolth, the

¹² www.springhouselaw.com. (2022). What is positive discrimination? [online] Available at:

¹³ Naz Foundation vs Government Of Nct Of Delhi And Others on 2 July, 2009, AIR 2014 SUPREME COURT 563, 2014 AIR SCW 78

¹⁴ Naz Foundation. (n.d.). Naz Foundation. [online] Available at: <https://www.nazindia.org/>.

¹⁵ Subs. by Act 26 of 1955, s. 117 and the Sch., for "transportation for life" (w.e.f. 1-1-1956).

Right to Privacy, the right to equality, and many other rights. This is because punishing any citizen of India on the basis of their private affairs is not mandated within the constitution and hence was against the letter and spirit of the document.¹⁶ The 2-judge bench ruled that “treating of consensual sex between two adults as a crime is violative of Fundamental Rights as granted by the constitution.”¹⁷

National Legal Services Authority (NALSA) VS. Union of India (2014)¹⁸

This was an important case for the rights of the transgender community. In this case, it was questioned that those people who recognize themselves as a “third gender”—those who are neither male nor female, what their rights and protection in the legal system. In this case (also known as NALSA the judgment) distinction was made between biological sex (something that you are born as) and psychological sex (something that you identify as) and they gave psychological sex more importance. In this case, Transgender was recognized and got “The Right of Self-Recognition”

Navtej Singh Johar and Ors. Vs. Union of India (UOI) and Ors.¹⁹

In this landmark case, homosexuality was decriminalized. This was a 5-judge bench including Justice D.Y. Chandrachud. Let us understand this case with the help of articles of the constitution. Referring to Art 14, the bench stated that “criminalizing sex between two consenting adults just because they are homosexual has not Rational Nexus as well as Intelligible Differentia.”

The Madras High Court ruling prohibited any attempt to medically “cure” or change the sexual orientation of LGBTQIA+ (lesbian, gay, bisexual, transgender, queer, intersex, asexual or of any other orientation) people.

GLOBAL COMPARISON

Worldwide, seven in 10 people declared themselves to be heterosexual. According to a global survey conducted in 2021, percent of respondents from 27 countries declared to be sexually

¹⁶ Team, N.I.C. (2024). Fundamental Rights - Article 12 to 35 of Indian Constitution. [online] NEXT IAS.

¹⁷ Naz Foundation vs Government Of Nct Of Delhi And Others on 2 July, 2009, AIR 2014 SUPREME COURT 563, 2014 AIR SCW 78

¹⁸ National Legal Services Authority vs Union Of India & Ors on 15 April, 2014

¹⁹ Navtej Singh Johar vs Union Of India Ministry Of Law And ... on 6 September, 2018 AIR 2018 SUPREME COURT 4321

attracted only to people of the opposite sex. Five percent of interviewees, instead, stated to be we homosexual, while some four percent were bisexuals

These statistics clearly show us how to sever not the majority, of people, are identifying themselves with genders that belong to the LGBTQIA+ community. Such census clearly highlights the urgent need for people belonging to the community to get equal recognition, platform, and opportunities on the global forum in order to help embrace uniqueness and diversity among nations. However, statistics such as the number of countries that criminalize homosexuality as of 2022 is 68.²⁰, is a grave reminder that orthodox, stereo, typical, and backward mentalities prevail on an international scale and in policy-mak-nation-state sales. Denouncing LGBTQ+ rights frequently demonstrates a commitment to conventional gender and sexual norms and beliefs. Maintaining established societal institutions is usually the first priority for orthodox viewpoints, and they oppose any changes that go against these standards, such as accepting people of different gender identities and sexual orientations.

This also shows us how countries violate humanitarian treaties such as the United Nations Declaration of Human Rights which has been designed and ratified by several of the mentioned countries in order to bolster and uphold the integrity of people across the world regardless of their differences.

Russia's Supreme Court has moved to classify the "international LGBT social movement" as an extremist organization in the latest global move against LGBTQ+ inclusivity. This shows its radical approach to the topic and lack of inclusiveness and liberalization within Russian society. It also shows us the dangerously polarized government that is at the helm of one of the most economically advanced states on earth. This poses a serious threat to humanity worldwide and can eventually lead to rebellion and even revolution amongst the masses which would cause social anarchy. Even though it is at tiff with almost every nation its greater motive for this move could be Russian diplomacy. This is because, due to recent sanctions imposed by the West upon Russia the its Ukrainian invasion, the motive of Russian politics seems to be targeted towards defying the norms and standards set by the global north. This also shows us how innocent people have been discriminated against on a large scale in the name of global politics.

²⁰ Varrella, S. (2021). *Countries that criminalize homosexuality 2021*. [online] Statista.

This shows us a more progressive and open-minded approach towards the topic at hand. It also shows us how certain countries are willing to be flexible enough in order to accept and even cherish such differences within their populations and their tendency to disregard global security, peace, and fraternity. Moreover, in 2020, Iceland, Norway, the Netherlands, Sweden, and Canada were the most accepting countries.²¹ This furthers this statement about their increased acceptance of LGBTQ+ people and their rights.

Protection of LGBTQ is progressive as maintaining human rights is made evident by support for LGBTQ+ rights. Like everyone else, LGBTQ+ people have the right to live sans violence, harassment, and discrimination. The need to defend fundamental rights for each member of society is emphasized by progressive principles.

CONCLUSION

Contrary to a decade ago, there are more queer people in the public attention and a growing number of people accepting an extensive range of sexual identities. Legislative progress has unquestionably been accomplished, with the decriminalization of homosexuality being the most notable example. Yet, the LGBTQIA group has to face numerous obstacles including social estrangement, exclusion from initial products and services, and the psychological toll of societal deterioration. However, indications of progress emerged, including the Delhi High Court's historic 2009 verdict in *Naz Foundation V. Government of NCT of Delhi*, which set the groundwork for decriminalization. However, a reversal in 2013 lowered expedients, only to be diffused by the Supreme Court's significant 2018 decision.²² These milestones indicate a road forward.

To create a truly inclusive society, prejudice must be eliminated and awareness promoted via education. Policy changes promoting equal rights, affordable healthcare, and domestic acceptability might hit roadblocks.

Article 15 of the Indian Constitution serves as an oasis of hope, promising equality and protection from discrimination on a variety of grounds, including sex.²³ Unfortunately, the LGBTQIA community in India has faced significant challenges in transforming this indigenous

²¹ Flores, A.R. (2021). *Social Acceptance of LGBT People in 174 Countries*. [online] Williams Institute

²² Roodra, H. (n.d.). *Login | MMA | SVKM's Narsee Monjee Institute of Management Studies - Mumbai*. [online] svkm.mapmyaccess.com.

²³ Roodra, H. (n.d.). *Login | MMA | SVKM's Narsee Monjee Institute of Management Studies - Mumbai*. [online] svkm.mapmyaccess.com.

commitment into reality. To be overtly homophobic in public discourse is now risky, with public figures and political identities facing increased backlash.²⁴

The analysis of the paper regarding the protection of LGBTQ rights can be understood by understanding the system of Structure, Sy, stem, and Institution.²⁵

Firstly, examining the structural dimension reveals the foundational legal frameworks that shape the judiciary's approach to LGBTQ+ rights. Historical legacies, such as colonial-era laws criminalizing same-sex relations, have influenced legal structures, while landmark judgments like the partial decriminalization of homosexuality underscore the judiciary's capacity to challenge discriminatory statutes and promote equality.

Second, the systemic dynamics draw emphasis on how the court, other governmental branches, and societal norms interact to shape the discussion around LGBTQ+ rights. Court rulings, like those in the Naz Foundation and Navtej Singh Johar cases, highlight how the court is cognizant of larger social developments and plays a role in fostering LGBTQ+ equality within the legal system. These rulings also reflect changing public views and legal interpretations.

Lastly, a key component of the defense of LGBTQ+ rights is the institutional role of the court. Courts perform the role of arbiters of justice, interpreting legislation, resolving conflicts, and defending the basic liberties guaranteed by the Constitution. The judiciary's ability to acknowledge and defend the rights of oppressed people is exemplified by landmark decisions, such as those pertaining to transgender rights, which serve as a crucial protection for LGBTQ+ equality.

The laws clearly show that the judiciary and India in totality need to accustom itself to the evolving changes and try accepting LGBTQIA individuals. Clearly, there is a lack of adequate protection and justice for them legally and socially, which should not be ignored just because they constitute a minority section. People need to be educated about this topic and awareness needs to be spread in order for individuals to become more accepting. As we tread ahead changing customs and practices, so should our mindset.

²⁴ Teal, J. and Conover-Williams, M. (2016). Homophobia without Homophobes: Deconstructing the Public Discourses of 21st Century Queer Sexualities in the United States. *Humboldt Journal of Social Relations*, [online] 38, pp.12–27

²⁵ Kim, S.C. (2005). Relationship between System, Structure and Institution

Yet, given the political and religious climate of our country, a severe judgment would lead to riots and polarization, therefore giving parliament the reigns to introduce and implement a new law could be considered a strategic move.

