

# Judicial Pronouncements on LGBT

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## Introduction

“Never be bullied into silence, never allows yourself to be made a victim, accept no one’s definition of your life; define yourself.” - Harvey Fierstein<sup>1</sup> Hinduism since ancient time accepted homosexuality as natural Hinduism acknowledges a third gender. In one of the world-famous epic, Mahabharata, there is mention of “shikhandi, who is born female but living as male, making him as a shield Arjuna defeated Bhishma Pitamah and Bhishma knowing the birth secret of shikhandi, dropped his arms.

The Naradasmurti and the Sushruta Samhita, two important scriptures from ancient India declare homosexuality to be unchangeable and forbids homosexuals from marrying a partner of the opposite sex. The Naradasmruti listed fourteen types panda (men who are important with women) The Kama Sutra, a Sanskrit text on human sexual behavior, uses the term Tritiya-prakriti to define men with homosexual desires. In the same manner, the Kama Sutra describe lesbians (savinini, who engage in aggressive love making with other women), bisexuals (referred to as kami or paksha), transgender and intersex people.<sup>2</sup>

The LGBT means Lesbians, Gay, Bisexual and Transgender. They are also mentioned as “Third Gender” (TG) or “transgender” (T). The British rule in India criminalized sex (for both heterosexual and homosexuals) under Section 377 of the Indian Penal Code, 1860.

Sec.377 Unnatural Offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, women or animal, shall be punished with imprisonment for life a term which may extend to ten years and shall also be liable to fine. <sup>3</sup>

The intention behind the introduction of section 377 has to police control the body of the colonial subjects. In colonial Victorian era morality, these subjects were seen as erotically perverse and in need of the imposition.<sup>4</sup>

In furtherance of the object in 1871, the British labeled the hijra population as a “criminal tribe”.<sup>5</sup>

Originally the Act was applicable in North India. In 1876, it was extended to the Bengal Presidency and other areas, and in 1911 to Madras Presidency. Finally, the Criminal Tribes Act, 1924 incorporated all earlier enactments since 1870.

The Transgender Persons (Protection of Rights) Bill, 2019 defines Transgender Persons as those, “whose gender does not match the gender assigned to that person at birth and includes transmen or transwomen, person with intersex variations, gender-queers, and persons having socio cultured identities such as Kinnar, hijras, aravani and jogta.”

On 26<sup>th</sup> January, 1950 the Constitution of India came into effect. On 6<sup>th</sup> September, 2018, the Apex Court ruled unanimously that Section 377 was unconstitutional.<sup>6</sup>

In other words, it simply means that the LGBT people suffered violation of their human and personal rights for sixty-eight years. During there sixty-eight dark years, there are countless incidents of harassment of LGBT groups by the people and authorities under the law.

The execution and discrimination of LGBT persons result in:

- a) Dropping out of school
- b) Leaving/expelling from home and family
- c) Ignored in society
- d) Lacking family support

- e) Attempt suicide
- f) Facing exploitation

In 1994 the very first challenge given to Section 377. The NGO filed a PIL in the Delhi High Court for decriminalizing this provision. The facts were that after observing homosexuality in the Tihar Jail the workers of the NGO wanted to distribute condom among the male inmates. The then superintendent of Tihar Jail Kiran Bedi disapproved this as according to her, this would have encouraged homosexuality. This petition was dismissed in 2001.<sup>7</sup>

#### **Constitutional Provisions**

There are approximately 4.8 million transgender people in India as per 2011 census. Since Independence, the LGBT people are deprived from the following Constitutional Rights:

#### **Right to Equality under Article 14**

The Right to Equality under Article 14 requires equal treatment of all citizens before law. While it allows for a distinction to be drawn between different categories of individuals, it also mandates that such a distinction must be based on intelligible differentia and must have a rational nexus with the object sought to be achieved.

#### **Right against discrimination under Article 15**

Article 15 prevents the State from discrimination against any citizens only on the ground of sex, religion, race, caste or place of birth.

#### **Right to Freedom of speech and expression Article 19**

The six freedoms conferred on citizens by Article 19 not only to promote intellectual self-expression by, and social intercourse amongst citizens but also the preservation of the spirit of unity by encouraging free movement throughout India as well as the development of personality and pursuit of gainful activity, so as to increase national productivity.

#### **Right to Privacy under Article 21**

The Supreme Court has interpreted Article 21 to include the right to live with dignity, the right to privacy, and the right to autonomy. The Supreme Court found Section 377 of IPC to be in violation of these Constitutional rights.

#### **Legal Development, Cases under IPC after Independence**

A) The harassment of LGBT people is not new. An early sentence found in a case of 1884. A Court in North India commended the police's desire to check these disgusting practices in a case of prosecution of a hijra.

a). In *Fazal Rub Chaudhary vs State of Bihar*, the accused also charged for committing an unnatural offence.<sup>8</sup>

b). In *Chitranjan Dass*, the Supreme Court having regard to his loss of service and other consequences to his career let him off with a sentence of two months imprisonment.<sup>9</sup> c). In *Charanjit Singh* case, a truck driver sentenced to one year's imprisonment and a fine of Rs. 500.<sup>10</sup>

d). In *Brother John Antony vs State*, the petitioner, a sub-warden of a Boarding Home was alleged to have committed unnatural offence with the inmates.<sup>11</sup>

B) Delhi High Court Judgement In *Naz Foundation vs Government of NCT of Delhi*, the High Court declared Section 377 of IPC and other legal prohibitions against private, adult consensual and non-commercial same sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution.

Though it is decision of Delhi High Court, it was not confined to the Jurisdiction of Delhi, but it was applicable throughout India as per a provision ruling of the Supreme Court of India.<sup>12</sup>

Irrespective of the judgement, there have been incidents of harassment of LGBT groups by the government authorities. C). Governments view and future development

The Ministry of Home Affairs expressed its opposition to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as being immoral on 23<sup>rd</sup> February, 2012. On 28 February, 2012, the Central Government reversed its sentence, asserting that there was no legal error in decriminalizing homosexual activity. J.G.S.Singhvi and J.S.J. Mukhopadhaya pulled up the center and asked it not to make a mockery of the system.<sup>13</sup> In Suresh Kumar Kaushal vs Naz Foundation,<sup>14</sup> the Supreme Court overturned the Delhi High Court case Naz Foundation vs Government of NCT of Delhi and reinstated Section 377 of the IPC. On 28<sup>th</sup> January 2014, the Supreme Court dismissed the review petition filed by the Central Government, the Naz Foundation and several others against its earlier judgment. On 18 December 2015, Shashi Tharoor, M.P. introduced a Bill for the repeal of Section 377 but it was rejected in the House by a vote of 71-24.

### **Judicial Pronouncement**

On 6 September, 2018 the Supreme Court of India unanimously ruled that Section 377 is unconstitutional in Navtej Singh Johar vs Union of India.<sup>15</sup>

The petitioner Navtej Singh Johar, Dancer, Sunil Mehra, Journalist, Ritu Dalmia chef, Aman Nath, Hotelier, Keshav Suri, hotelier, and Ayesha Kapoor, business-man. The petitioners argued that they had all been directly aggrieved because of Section 377, alleging it to be a direct violation of Fundamental rights. The Court found that the criminalization of sexual acts between consenting adults violated the right to equality guaranteed by the Constitution of India. The Court ruled that LGBT people in India are entitled to all Constitutional rights, including the liberties protected by the Constitution of India. It held that the choice of whom to partner, the ability to find fulfilment in sexual intrinsic to the constitutional protection and sexual orientation. The judgement also made note that LGBT community is entitled to equal citizenship and protection of law of discrimination.

### **Conclusion**

After a year of this landmark judgement, it is necessary to see the changes in the Society. All over India, the LGBT community held pride parade. Same sex people approaching the Courts all over India asking for protection. The clamor is for civil and political rights. The right to adoption, buying medical insurance for year partner, to visit your partner in a hospital and make medical decisions. The other big step is anti-discrimination in the work place. Corporate India also needs to make it clear that they will not discriminate in matters of hiring and promotion. The same-sex people's single mother need surrogacy right in 2011, a Haryana Court legally recognized a same-sex marriage involving two women. On April 15, 2014, the Supreme Court declared transgender people a Socially and economically backward class entitled to reservation in education and job and directed government accordingly. On the basis of Government document such as voter ID Cards, passport and bank forms, have started providing a third gender option along with male(M) and female(F), others(O), third gender(TG), transgender(T). In 2013, activist S. Swapna and Gopi Shanker Madurai demanded reservation and to appear for examinations conducted by TN PSC, UPSC, SSC, and Bank exams. On 24<sup>th</sup> April, 2015, the Rajya Sabha unanimously passed the Rights of Transgender persons Bills, 2014 and gave 2% reservation in Government jobs, legal aid, pensions, unemployment allowances etc.

On 22<sup>nd</sup> April,2019, the Madras High Court upheld the marriage rights of Transgender women. There are various laws passed by the various States in India for LGBT people. They are proving themselves in various walks of life. The judicial recognition of their rights will certainly bring a change in society also.I would like to conclude this paper with a quote Jasan Collins, first openlyGay athlete in United States:

“Openness may not completely disarm prejudice, but its good place to start.”

**Reference:**

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- 5) Criminal Tribes Act, 1871
- 6) Navtej Singh Johar v. Union of India
- 7) NGO-AIDS BhedbhavVirodhAbhiyan(ABVA)
- 8) 1983, Cr.L.J. 632 (SC)
- 9) 1975, Cr.L.J. 30 (SC)
- 10) 1986, Cr.L.J. 173 (H&P)
- 11) 1992, Cr.L.J. 1352 (Madras)
- 12) Kusum Ingots vs Union of India (2004) 6 SCC 254
- 13) The Indian Express, 28<sup>th</sup> February, 2012, indianexpress.com
- 14) Civil Appeal No.10972 of 2013
- 15) WP (Cri) No. 76 of 2016

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