

LGBTQIA+ Rights: Progress And Challenges In India.

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Abstract:

This paper provides a comprehensive overview of the significant progress made in LGBTQIA+ rights within India, while also highlighting the ongoing challenges and obstacles faced by the community. It examines the historical context, recent legal milestones, social dynamics, and the road ahead for achieving full equality and acceptance.

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I. Introduction

After extensive global advocacy and protests, multiple countries, including India, have legally recognized third-gender individuals and homosexuals as equal citizens. The Preamble to the Constitution of India ensures social, economic, and political justice for all residents without discrimination. In September 2018, the Supreme Court of India delivered a landmark verdict¹ by revisiting Section 377 of the Indian Penal Code, thereby legalizing consensual same-sex relationships. This ruling is celebrated for its expansive interpretation of constitutional rights and the empowerment it provides to the LGBTQIA+ community. However, discrimination and marginalization persist, particularly for transgender individuals, who face significant barriers in healthcare, education, and employment. They are frequently denied fundamental rights and dignity. Therefore, it is essential to reassess the rights of LGBTQIA+ communities, address their challenges, and work towards greater inclusivity.

II. Lgbtq+ In Indian History: A Deeper Understanding.

LGBTQ+ identities are often seen as a modern or urban concept, but Indian history and mythology tell a different story. According to mythologist Dr. Devdutt Pattanaik claims that more than fifty names, including *napunsaka*, *kliba*, *kinnara*, *pedi*, and *pandaka*, were used in ancient Sanskrit, Prakrit, and Tamil to refer to several non-heterosexual genders and sexualities. The Vedas, Itihasas, Puranas, Kama-shastra, Natya-shastra, Ayurveda, Jain Agamas, and Buddhist Pitakas all include these allusions.

For instance, the Mahabharata, written by Ved Vyasa, features a significant character named Shikhandi, who was "neither a man nor a woman." Shikhandi was born with female genitalia but was raised as a son and trained in warfare by their father, King Dhrupad. Shikhandi's role was crucial in the Pandavas' victory in the epic war. Other stories, like Arjun living as Brihannala, Lord Shiva transforming into a Gopi to join Lord Krishna's Raas-Leela, and the tale of Budh, who marries Ila—a man who becomes a woman—also highlight themes of genderfluidity and queerness.

Hinduism, being less monastic, generally accepted transgender individuals in society, often as entertainers or temple servants, though they were not part of the mainstream. The Dharmashastras emphasized heterosexual marriage and procreation but acknowledged other forms of sexual expression, including homosexual acts, imposing fines and penance without outright condemning them. Historically, India has had a diverse and generally liberal attitude towards various forms of sexual expression, including homosexuality.

The Kamasutra, for instance, mentions that lesbians, called *Swarinis*, often married and raised children together. It also refers to *tritiya prakriti*, or the "third nature," describing people who don't fit into the traditional categories of men or women. Pali literature, such as the Vinaya Pitaka, mentions *pandakas*, who didn't fit into either the male or female sections of Buddhist monasteries.

LGBTQ+ influences are evident not only in texts but also in temple art, such as the temples of Khajuraho, which depict women embracing other women erotically and men displaying their genitals to one another—interpreted as an acknowledgment of homosexual acts. In medieval times, the transgender community was supported by both Muslim and Hindu rulers, serving as entertainers in royal courts and being invited to bless weddings and childbirths.

However, when the British, followers of Christianity, came to India, they declared transgender individuals and entertainers as "Criminal Tribes" and introduced Section 377 in the Penal Code in 1860, criminalizing "carnal intercourse against the order of nature." Experts suggest that this colonial law was based on Judeo-Christian beliefs, imposing those values onto the Hindu cultural context.

III. The Development Of Lgbtqia+ Acknowledgement In India.

Lesbian, gay, bisexual, transgender, queer, intersex, and asexual people are collectively referred to as LGBTQIA+. The "+" stands for an extensive number of additional personalities that are still developing and gaining recognition. As time passes, the acronym changes, usually incorporating words like pansexual and non-binary.

- Lesbian: Pertaining to homosexual women or female homosexuality.
- Gay: A person who is homosexual, typically referring to a man.
- Bisexual: Romantic or sexual attraction toward both males and females, or to more than one gender.
- Transgender: Individuals whose gender identity or expression differs from the sex they were assigned at birth.
- Queer: An umbrella term for people who are not heterosexual or cisgender, including those questioning their sexual or gender identity.
- Intersex: Refers to conditions where there is a discrepancy between external and internal genitalia (testes and ovaries). The older term for this condition is hermaphroditism.
- Asexual: The lack of sexual attraction to others or a low interest in sexual activity.

The struggle for LGBTQIA+ rights in India has traversed significant historical milestones. During the colonial era, the introduction of Section 377 of the Indian Penal Code in 1861 criminalized "carnal intercourse against the order of nature," creating a lasting barrier for LGBTQIA+ rights. The early 1990s saw the first signs of recognition and activism, marked by the *All-India Hijra Conference in 1981* and the publication of "*Less Than Gay*" by the AIDS Bhedbhav Virodhi Andolan in 1991. The 2000s witnessed pivotal legal battles, beginning with the Naz Foundation's 2001 PIL against Section 377, leading to the 2009 Delhi High Court ruling that decriminalized consensual homosexual acts. However, the Supreme Court reversed this decision in 2013.

LGBTQ+ rights made great strides in the 2010s, as evidenced by the 2014 NALSA² ruling that recognized transgender individuals as a "*third gender*," the 2018 Supreme Court decision that decriminalized same-sex relationships³, and the 2019 Transgender Persons (Protection of Rights) Act that protected their rights. After same-sex, live-in partnerships were recognized by the Uttarakhand High Court in 2020⁴, the Bombay High Court upheld gender self-identification in 2021⁵, and the Supreme Court expanded the definition of family to include same-sex couples in 2022⁶, legal safeguards continued to develop. The Supreme Court, however, decided in 2023 (*Supriya Chakraborty & Abhay Dang v. Union of India*)⁷ that it lacked the power to legalize same-sex marriage and thereby granted state legislatures and Parliament this right.

IV. Challenges Faced By LGBTQIA+ Communities In India.

LGBTQIA+ individuals often endure multiple forms of oppression, including racism, sexism, poverty, and other systemic issues, in addition to homophobia and transphobia. These overlapping forms of discrimination can severely impact their mental health. Due to their marginalized status, they frequently lack access to essential resources such as healthcare, legal support, and educational opportunities.

Impact of Family Reactions on LGBTQIA+ Youth : Many LGBTQIA+ children and adolescents are afraid to discuss their feelings with their parents due to fear of negative reactions. Without family support in a society governed by strict social and cultural norms around education, careers, and marriage, their mental and physical well-being can suffer significantly.

Unheard Voices: While the voices of LGBTQIA+ individuals in urban areas may be amplified through online platforms and in public spaces, those in rural areas often repress their feelings due to a lack of exposure, comfort, and internet access. Refusing to conform to societal expectations, such as marriage, can lead to increased instances of physical violence.

Homelessness: Many LGBTQIA+ youth who are homeless have either been kicked out by their families for their sexual orientation or gender identity or have run away to escape abusive situations. They are deprived of education and social support during their most formative years, often leading them to engage in risky sexual

activities and drug use due to financial instability. Additionally, derogatory labels and social ostracism further hinder their efforts to gain recognition and acceptance.

Social Exclusion: Social settings, including school uniforms, dress codes, travel access points (such as ticket booking forms, security screening, and bathrooms), are often designed with a bias toward one gender. LGBTQIA+ individuals frequently have to navigate their gender identity in public spaces, which can be distressing and alienating.

Limited Employment Opportunities: Securing a job can be challenging for transgender individuals and those who don't fit into traditional gender categories. This is often due to difficulties in getting official documents, like school records, that match their gender identity. Additionally, some jobs have discriminatory rules or gender-based restrictions that further reduce their chances of being hired.

V. What Steps Should Be Taken Next?

Supportive Policies and Laws: The government should create and enforce policies and laws that protect LGBTQIA+ individuals from discrimination, hate crimes, and violence, including safeguarding the rights of transgender people and ensuring they have access to appropriate healthcare.

Encouraging Acceptance in Parenting: Parents significantly influence societal attitudes. By accepting their children's identities, parents can help build a more inclusive society that celebrates diversity and recognizes each person's uniqueness.

Creating Inclusive Spaces: Establishing open and accessible spaces for LGBTQIA+ youth to connect and share experiences is crucial. Platforms like Gaysi and Galaxy are examples of such spaces. Supporting initiatives like Pride Month and Pride Parades through these platforms is also important.

Promoting Equal Treatment: LGBTQIA+ individuals should be recognized as normal members of society, not as outsiders or those with disorders. Their sexual orientation is a natural part of human diversity. They deserve equal treatment and, once fully integrated as equals, will contribute significantly to societal progress.

Rights Entitled To LGBTQIA+ Individuals.

- Right to adoption.
- Right to surrogacy.
- Protection against housing discrimination.
- Right to marry.
- Protection against sexual harassment in the workplace.
- Protection against discrimination in educational institutions.
- Right to guardianship.
- Protection against workplace discrimination.
- Recognition of LGBTQIA+ identity and self-perception.
- Right to maternity benefits.
- Right to serve in the armed forces.

VI. How Can Laws Improve?

Laws related to LGBTQIA+ rights in India can be improved in several key ways to promote greater equality, protection, and inclusion for the community:

- a) **Marriage Equality:** Currently, same-sex marriage is not legally recognized in India. Laws can be reformed to allow same-sex couples the right to marry and enjoy the same legal benefits as heterosexual couples, such as inheritance rights, tax benefits, and spousal healthcare.
- b) **Anti-Discrimination Laws:** There is a need for comprehensive anti-discrimination legislation that explicitly protects LGBTQIA+ individuals from discrimination in areas such as employment, housing, education, and healthcare. Such laws should ensure equal opportunities and safeguard against bias based on gender identity or sexual orientation.
- c) **Adoption and Parenting Rights:** Legal frameworks can be expanded to allow LGBTQIA+ individuals and couples to adopt children and have equal rights as parents. At present, adoption laws in India are restrictive and do not fully support LGBTQIA+ individuals, particularly in the case of same-sex couples.
- d) **Healthcare Rights :** Laws must ensure equitable access to healthcare for LGBTQIA+ individuals, particularly transgender individuals. Gender-affirming healthcare, mental health services, and HIV/AIDS treatment should be covered under public healthcare systems, free from discrimination.
- e) **Protection from Violence and Hate Crimes:** Strengthening legal protections against hate crimes targeting LGBTQIA+ individuals is crucial. Laws can be revised to address and penalize violence, harassment, and hate speech aimed at the community, both online and offline.

- f) **Gender Recognition and Legal Identity:** The legal process for gender recognition for transgender and non-binary individuals should be streamlined and made more accessible. Simplifying the process of changing gender markers on official documents without invasive medical requirements would provide greater autonomy.
- g) **Inclusion in Education:** Introducing inclusive curricula that teach about gender diversity, sexual orientation, and LGBTQIA+ history in schools can help foster understanding from a young age. Laws can mandate that educational institutions adopt inclusive policies and prevent discrimination or bullying based on gender or sexual orientation.
- h) **Affirmative Action Policies:** Similar to reservations or affirmative action policies in place for other marginalized communities, laws can introduce policies that ensure equitable opportunities for LGBTQIA+ individuals in education, government jobs, and other sectors to counter systemic exclusion.
- i) **Gender-Sensitive Workspaces:** Labour laws can be updated to mandate gender-neutral restrooms, policies against workplace harassment based on sexual orientation or gender identity, and inclusive employee benefits for LGBTQIA+ employees.
- j) **Public Awareness and Accountability:** Laws can also mandate government-funded campaigns to raise awareness about LGBTQIA+ rights and counter stigma. Additionally, a legal framework for accountability and redressal mechanisms for violations of LGBTQIA+ rights is needed to ensure that the law is effectively enforced.

By addressing these areas, India can build a more inclusive legal framework that supports the dignity and rights of LGBTQIA+ individuals, enabling them to fully participate in society on an equal footing.

VII. Key Central Legislation.

a) **Transgender Persons (Protection of Rights) Bill, 2019:-** The Indian government introduced the Transgender Persons (Protection of Rights) Bill, 2016, in response to the Supreme Court's decision in *National Legal Services Authority v. Union of India*⁸, with the goal of safeguarding the rights of transgender individuals under Part III of the Constitution. However, the 2016 Bill lapsed with the dissolution of the Sixteenth Lok Sabha, leading to the introduction of the Transgender Persons (Protection of Rights) Bill, 2019, which later became the Act of 2019. Section 2(k) of the Act defines a 'Transgender Person' as someone whose gender identity does not align with the gender assigned at birth. This definition includes trans men, trans women (regardless of whether they have undergone Sex Reassignment Surgery, hormone therapy, or other treatments), individuals with intersex variations, genderqueer persons, and those with socio-cultural identities such as kinner, hijra, aravani, and jogta.

Chapters II to VI of the Act outline measures against discrimination, recognize transgender identities, and detail government welfare provisions, obligations, and social security, as well as education and health provisions for transgender individuals. Chapter VII addresses the constitution of the National Council for Transgender Persons, and Chapter VIII lists offenses against transgender individuals and the corresponding penalties.

b) **Mental Healthcare Act, 2017 :-** In the *Navtej Singh case*, the Supreme Court ruled that when the Mental Healthcare Act, 2017, is interpreted in conjunction with Sections 3 and 21(1)(a) of the Act, it redefines mental illness, dispelling outdated misconceptions about same-sex couples. The court determined that the 2017 Act's definition of mental illness explicitly excludes homosexuality, thereby eliminating the stigma previously associated with same-sex relationships.

c) **The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:-** The Act was established to protect women from sexual harassment in the workplace. Section 2(a) defines an "aggrieved woman" as:

- (i) In relation to a workplace, any woman, regardless of age or employment status, who claims to have been subjected to sexual harassment by the respondent.
- (ii) In relation to a dwelling place or house, any woman, regardless of age, who is employed in that dwelling place or house.

Section 2(n) of the Act specifies that "sexual harassment" encompasses one or more of the following unwelcome acts or behaviors, whether directly or indirectly:

- (i) Physical contact and advances.
- (ii) A demand or request for sexual favors.
- (iii) Making sexually colored remarks.
- (iv) Showing pornography.

(v) Any other unwelcome physical, verbal, or non-verbal conduct of a sexual nature.

In *Union of India v. Mudrika Singh*, the Supreme Court ruled that the right to be free from sexual harassment is a fundamental right under Article 21 of the Indian Constitution. The Court emphasized that the Sexual Harassment of Women at Workplace Act, 2013, is a landmark law that should not be misused for trivial matters.

VIII. Case Laws

Naz Foundation Govt. v. NCT of Delhi (2009):

The *Naz Foundation v. Government of NCT Delhi*, commonly known as the Naz Judgment, is a landmark 2009 ruling by the Delhi High Court. In this judgment, the court declared Section 377 of the Indian Penal Code unconstitutional for the first time. The Naz Foundation, a Delhi-based NGO, filed a Public Interest Litigation (PIL) in the Delhi High Court, challenging the constitutionality of Section 377. The organization has been at the forefront of the movement to decriminalize homosexuality. In 2009, they achieved a significant victory when the court ruled that Section 377 violated Articles 14, 15, and 16 of the Indian Constitution.

NALSA JUDGEMENT, 2014:

In 2013, things took a bad turn for rights in India, especially for LGBTQIA rights, when the Supreme Court re-criminalized homosexuality in the *Suresh Kumar Koushal vs Union of*

India case. However, this setback didn't last long, as the Supreme Court soon delivered the *National Legal Services Authority vs Union of India (NALSA) judgement*.

For the first time, transgender people were officially recognized as citizens of India, with all Fundamental Rights given to them, and they were identified as the Third Gender. This case remains a key moment for transgender rights in India. The court also provided clear guidelines that every state must follow to help integrate transgender people into society and address the challenges they face.

Puttaswamy Judgement, 2017:

The *Justice (Retd) K S Puttaswamy vs Union of India* case, commonly known as the Puttaswamy judgement, is important because it recognized the Right to Privacy as a fundamental right. It expanded Article 21 of the Indian Constitution, which protects the Right to Life and Liberty, to also include the Right to Privacy. This Right to Privacy was recognized for everyone, regardless of gender or sex. For members of the LGBTQIA community, this recognition gives them autonomy and protects them from government interference in choosing their partners. Because of this, the Puttaswamy judgement, along with the NALSA judgement, paved the way for the decriminalization of Section 377 in 2018.

Navtej Johar, 2018:

The *Navtej Singh Johar v Union of India* case, often called the Navtej Johar judgement, is the landmark decision that decriminalized homosexuality in India. This Supreme Court ruling came after several Public Interest Litigations filed by different LGBTQIA+ groups. The Court decided to strike down Section 377 as it applied to consensual sex between adults, but kept the part of the law that deals with non-consensual acts involving children or animals. The Supreme Court also ruled that Section 377 violated Articles 14, 15, 16, and 19(1)(a) of the Indian Constitution. It recognized that everyone, regardless of gender identity or sexual orientation, has the right to live with dignity and privacy without government interference.

Arun Kumar Judgement ,2019:

The *Arun Kumar v Inspector General of Registration, Tamil Nadu* case is a decision from the Madras High Court that broadened the definition of "bride" under the Hindu Marriage Act, 1955 to include trans women. Previously, the law only mentioned men and women, but this judgement allows trans women to be recognized as brides as well. The decision builds on the idea of self-identification from the NALSA judgement, which allows people to identify as any gender without needing official confirmation. It states that if someone identifies as a trans woman, they have the right to do so. This case, along with others, helps expand marriage rights for the LGBTQIA+ community.

IX. Conclusion

To sum up, while progress has been made in LGBTQIA rights in India, there are still many challenges that need to be addressed. It is important to continue advocating for equal rights and acceptance for all individuals, regardless of their sexual orientation or gender identity. By working together and supporting one another, we

can create a more inclusive and equitable society for everyone.

Bibliography

- [1] <https://Newsletter.Sscbs.Du.Ac.In/A-Brief-History-Of-Lgbtq-In-India/>
- [2] https://En.Wikipedia.Org/Wiki/Homosexuality_In_India
- [3] <https://Blog.Ipleaders.In/Evolution-Of-Lgbt-Rights-In-India-And-Taking-The-Narrative-Forward-Living-Free-And-Equal/>
- [4] <https://Universalinstitutions.Com/What-Are-The-Main-Challenges-Facing-The-Lgbtq-Community-In-Terms-Of-Social-Justice-And-How-Can-They-Be-Addressed/>
- [5] <https://Articles.Manupatra.Com/Article-Details/Legal-Progression-Social-Implications-Case-Comment-On-Supriyo-Chakraborty-Anr-V-Union-Of-India>
- [6] <https://Timesofindia.Indiatimes.Com/Life-Style/Relationships/Love-Sex/Legal-Challenges-Faced-By-Lgbtq-Couples-In-India-Progress-And-Remaining-Hurdles/Articleshow/110137735.Cms>
- [7] <https://Www.TnpscThervupetta.Gam.Com/Articles-Detail/Lgbtq-Rights-In-India-%E2%80%93-Part-1?Cat=Gk-Articles>
- [8] https://En.Wikipedia.Org/Wiki/Lgbtq_Rights_In_India#Transgender_Rights
- [9] [https://En.Wikipedia.Org/Wiki/Transgender_Persons_\(Protection_Of_Rights\)_Act,_20_19](https://En.Wikipedia.Org/Wiki/Transgender_Persons_(Protection_Of_Rights)_Act,_20_19)
- [10] <https://Indiakanon.Org/Doc/193543132/>