LEGAL SPHERE OF LGBTQIA+ COMMUNITY IN INDIA

R Vasanth & Prasanna S, Government Law College, Trichy, Tamil Nadu.

ABSTRACT

"Sexual orientation and gender identity are the essential aspects of human beings and should not at any time lead to discrimination or abuse” as stated by the United Nations. The LGBTQIA+ communities have lived through many struggles at different stages and at different times. For many years in India, homosexuality and its hang on were considered a sin by Indian society and most religions in India have proposed the same. In the case of Navtej Singh, 2018, it was ruled that Section 377 does not apply to consensual homosexual acts. Though the judiciary decriminalises consensual homosexual activities, the community did not enjoy substantial legal rights or social status till now. This paper is aimed at examining the present status of the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (LGBTQIA+) community in India and their social perspective.

KEYWORDS: LGBTQIA+, LGBT, Homosexual, Transgender, Religion, Personal Identity.
INTRODUCTION

Human being is a social animal and human sexuality is complex. LGBTQIA+ is an abbreviation that stands for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and some other. The gamp abbreviation LGBTQIA+ encompasses a complex and paradoxical set of identities and collective actors. The adoption of the distinction between yearning, behaviour and identity acknowledges the multi-pronged nature of sexuality. The transformation of the understanding of homosexuality from sin, crime and disease to a normal variant of human sexuality occurred in the current era. The new transformation was also based on studies that documented a high prevalence of homosexual feelings and behaviour in men and women, its universality across traditions temporally and spatially. The universality of homosexuality is difficult to gauge for many reasons, including the associated taint and social repression. Many countries have decriminalised homosexual behaviour in the recent past and some have recognised LGBTQIA+ people’s civil unions and marriages. The understanding of this issue in India has been changing in line with global behaviour in recent times. The Constitution of India states that all are equal in equal circumstances. The Indian Penal Code had imposed guilty on homosexuality by section 377. The Supreme Court of India decriminalizes the consensual homosexual act in section 377 in September 2018. In this paper, we are going to analyse and discuss the following sections.

OBJECTIVE OF STUDY

The study of this paper aims at the following objects:

➢ To study the religion’s approach on LGBTQIA+ Community in India.
➢ To analyse how codified law plays its role in issues related to LGBTQIA+ Community.
➢ To probe the present status of the LGBTQIA+ Community in India.

METHODOLOGY

The methodology of this research paper is based on non-doctrinal research. This paper broadly used an exploratory research technic based on past pieces of literature from respective journals, reports from government authorities and extensive academic literature on the LGBTQIA+
community. For the research, secondary data are relied upon. The research design of this paper is descriptive, describing the effect of various determinants of emotional intelligence of society in the LGBTQIA+ community.

LITERATE REVIEW
1. Homosexuality is characterized by sexual orientation of same sex attraction. People who are homosexual, particularly males are known as ‘gay’, females are known as ‘lesbians’. Homosexual marriages sometimes referred to as same-sex marriage; refer to marriage between two people of same sex [1].
2. The National Human Rights Commission recognizes sexual health and well-being as an integral part of human rights, with its roots in the right to health [2].
3. People's Union for Civil Liberties report on LGBT Community issue stated that, though sexual minorities have always existed in Indian society, their issues have never been seriously articulated [3].
4. Societal discrimination and harassment negatively impact the mental health of LGBT people. Internationally, rates of suicide attempts amongst youth who engage in consensual same-sex conduct have been variously reported as between three and seven times higher than for youth who identified as heterosexual and the rates are similar for adults also (Mahon, Claire. 2009) [4].
5. People's Union for Democratic Rights report states that, sexuality is also policed by non-state actors such as political groups, Khap panchayats, or even families that often adopt criminal means with impunity against those perceived as transgressing the boundaries of acceptable behaviour. Familial opposition to inter-caste, inter-religious marriages and homosexual marriages resulting in the murder of young couples in the name of “honour” is a common phenomenon [5].
6. Khubchandani, Jagdish and Raman Kumar states that ‘Section 377 of The Indian Penal Code, 1860 criminalises ‘acts against the order of nature and has often been used to harass, threaten and blackmail the community. This makes it not only difficult for LGBTQIA+ people to express their sexuality freely but creates an environment of isolation, stigma and fear which scars the self-esteem and dignity of individuals, with a detrimental effect on their overall well-being’ [6].
7. Section 377 of The Indian Penal Code, 1860 does not distinguish between consensual and coercive sex. Therefore, cases of abuse and voluntary sex between two consenting adults may be
prosecuted under this provision. This would violate the constitutionally protected right to privacy under the expanded definition of the right to life (Wintermute, Robert. 2011) [7].

8. Alok Gupta observes that the Indian courts need to recognise that they cannot permit the state to continue to demean the existence of people with same-sex desires in this country. Section 377 with its broader shadow of criminality is the biggest affront to the dignity and humanity of a substantial minority of Indian citizens [8].

SYNOPSIS OF LGBTQIA+ COMMUNITY IN INDIA

- Religious perspective on LGBTQIA+ Community

Religion plays a distinct role in shaping Indian customs and traditions. Among the religious denominations, the social acceptance of LGBTQIA+ community is quite discouraging and explicitly forbids the homosexuality. Attitude towards the homosexuality should not be determined only by religious beliefs; it must be conceived under the Constitution. Denial of self-expression is an absolute injustice to the LGBTQIA+ community.

- LGBTQIA+ people and the codified laws in India

Until 1860 homosexuals were punished by local and religious laws. Homosexuality was a crime in India. Section 377 of The Indian Penal Code, 1860 contemplates it as an unnatural offence and against the order of nature. The notion that any non-reproductive sexual act is "against the order of nature" is out-dated, has no place in modern society and most importantly has no scientific basis.

- Legal and Social Status of LGBTQIA+ Community in India

The Constitutional struggle for the rights of LGBTQIA+ community took place in various forms from 2001 to 2018. Though Hon’ble Supreme court decriminalises consensual sexual intercourse between members of the same sex, the community did not enjoy substantial legal right till now. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by LGBTQIA+ people.
STATISTICAL ANALYSIS OF UNNATURAL SEXUAL CRIME

The following tables help us in the better understanding of analysis of unnatural sexual crimes in India. Based on the National crime Records Bureau Reports, cases of unnatural sexual offences from the year 2016-2019 were analysed in table 1 and juveniles reporting in unnatural sexual offences were discussed in table 2. Similarly, table 3 provides for cases reported under Protection of Children from Sexual Offences Act, 2016 (hereinafter POCSO Act) read with Unnatural Sexual Offences in India

Unnatural sexual crimes reported in India.

*Table 1 – Unnatural sexual crimes in India in Last Four Years

As per table 1, Unnatural sexual crimes reported were 2395 cases in 2016 and 1299 in 2017 and then the reported cases increased to 1395 in 2018 and in 2019 it was reported 1029. The National criminal records bureau does not specify the type of unnatural sexual offences reported. But it is evident from the table that in some way the unnatural crimes are continued even after the Supreme Court judgement in 2018.
Juveniles accused of unnatural sexual offences

*Table 2 – Juveniles accused of unnatural sexual offences

From table 2, Juveniles accused of unnatural sexual offences reported were 178 cases in 2016 in India and it decreased to 148 in 2017, to 135 in 2018 and to 86 in 2019. This table shows that the incidence of juvenile in unnatural sexual offences under the age of 18 continues to decrease.

Offences POCSO Act read with Unnatural sexual offences

*Table 3 – POCSO Act r/w Unnatural sexual offences.
From table 3, offences under POCSO Act read with Unnatural sexual offences were reported 152 cases in 2017 all around India and decreased to 41 in 2018 and further decreased to 36 in 2019. This table shows that the incidence of unnatural sexual offences against the juveniles continues to decrease. The rate of unnatural sexual offences against the juvenile was dropped from 10% in 2017 to less than 4% in 2019.

**DISCUSSION**

**Religious perspective on LGBTQIA+ Community in India**

Religion plays a distinct role in shaping Indian customs and traditions. Ancient Indian religious texts have mixed and different opinions about LGBTQIA+. Although restrictions on the morality of homosexuality have not been explicitly mentioned in the religious texts centred on Hinduism, India's largest religion, it has taken various positions on the subject. It takes mixed stand ranging from supporting their existence to complete hostility. The ancient Indian text Kamasutra, written by Vatsyana, dedicated a complete chapter on erotic homosexual behaviour. Some Hindu gods are shown to be falling on the LGBTQIA+ streams. On the other side, some Hindu texts such as Manusmriti, Vide Atri Smriti, Vide Baudhayana Dharma sutra, and Vide Apastambha Dharma sutra treat homosexuality as a sin and punishable one. Christian denominations have a wide range of views on homosexuality, from its complete condemnation to its full acceptance in India.

Most of the Indian Christian communities welcome people who are attracted to the same sex, but they preach homosexual acts as sinful [10]. All major Islamic schools deny homosexuality. Islam regards homosexual desires as an unnatural sexual crime and their sexual relations as a violation of the natural purpose of sexual activity. Islamic teachings and Qur'an condemns same-sex attraction. The discourse on homosexualism in Islam has primarily condemned gay sexuality (activities only between men) but silent on lesbian orientation and there is no punishment for the lesbians, because it is not an offence (Gina) [11].
Though Islam completely opposes homosexuality, the prevalence of polygamy is quite normal in Islam. Traditional Zoroastrians believe that the homosexuality is a form of demon worship and sinful. The sacred scripture of the Zoroastrianism (Avesta) explicates that those engaging in sodomy could be killed. Zoroastrianism strongly forbids the anal intercourse of man with man (sodomy) which is considered as the explosion of evil power and there is no mention of homosexual activities among women. The main reason for homosexual behaviour is both biological and anthropological cause. The biological cause is linked with hormone and genetic change. The anthropological cause which plays a role in developing homosexual or different sexual orientation includes changing lifestyle of migrant workers, the system of bondage, and lack of formal sex education and so on. In a study conducted by American researchers in India, 8 to 25 people out of 1000 have undergone a biological transformation to become homosexuals [9]. The religious belief constitutes to be a pertinent factor in opposition of social acceptance of homosexuality and same sex marriage of LGBTQIA+ community. Despite those beliefs, the public opinion on acceptance of homosexuality has been changing. Gender identity and sexual orientation has to be looked beyond religion. This understanding is increasing in modern India. In many countries there has been an increasing acceptance of LGBTQIA+. The 2019 survey of Pew Research [13] centre shows that while majorities in 16 of the 34 counties surveyed say homosexuality should be accepted. In India, 37% of those surveyed say homosexuality should be accepted whereas 37% saying that it should be discouraged and remain has no opinion. The attitude towards the LGBTQIA+ community should not be set on by the religious beliefs; it must be contrived by the Constitution. The denial of self-expression, social acceptance and individuality is outright injustice to the LGBTQIA+ community.

LGBTQIA+ people and the codified laws in India

Until 1860 homosexuals were punished by local and religious laws. The Indian Penal Code, 1860 was introduced by the British, who considers homosexuality as a crime. Section 375 of Indian Penal Code provides for rape and Section 377 provides for unnatural offences affecting the human body. According to section 375 only women can be subjected to rape. However, under Section 377, all persons can be punished without any distinction between men and women for unnatural
sexual offences. It is important to note that the view of amended and enlarged definition of rape in section 375 is that the sexual act of anal intercourse by a man with a woman is also the rape. In such cases, the accused may be punished both under Sections 376 and 377 for rape and unnatural offences. An act against consent is required if a person is to be punished under section 375. Consent is immaterial in section 377. Whoever (anyone) voluntarily has carnal intercourse against the order of nature with any man, woman and animal shall be punished under section 377. It is based on ethical standards and traditional Judo-Christian moral, which treat gender as purely functional, i.e., for reproduction, thus creating a classification between reproductive and non-reproductive sex and treats non reproductive sex as against the order of nature.

It is the Constitution of India that is supreme and while discussing the offences referred to in section 377, it is said to violate the fundamental rights, article 14 and 21 guaranteed under the Constitution. Article 14 provides for equal rights to all citizens. Although Article 14 allows classification, two conditions must be met. The classification must be established based on a rational distinction, and there must be a rational relationship by law for which purpose the distinction is to be achieved. The classification made under section 377 does not meet any of the conditions. Section 377 classifies actions based on whether they are consistent with or against the order of nature. The notion that any non-reproductive sexual act is "against the order of nature" is out-dated, has no place in modern society and, most importantly, has no scientific basis. The court in Lohana Vasantlal Devchand case (1968) [12] observed that section 377 violates one’s right to health by affecting the psychological well-being of homosexuals and hindering successful public health interventions. And in the case of Gowrishankara Swamigalu (2009) [15] the court held that Section 377 encroaches on one’s right to life and personal liberty because it does not prescribe any practice that is reasonable or just.

**Legal and Social status of LGBTQIA+ Community in India.**

The first case questioning the constitutional validity of Section 377 was filed in Delhi High Court in Naz Foundation case, 2001 [16]. The court held that section 377 of The Indian Penal Code which criminalises the homosexuality, is designed to be too broad and violates article 14 of the Constitution. However, challenging this High Court Judgement, in Suresh Kumar Kausal case
(2013) [17], the Supreme Court overturned the Delhi High Court’s ruling of section 377 IPC as unconstitutional and held it to be constitutional. The court observed that section 377 defines a specific offence and prescribes its sentence, so it should not be declared in violation of articles 14 and 15. Finally, the Indian Judiciary decriminalizes the consensual homosexuals act under the unnatural offences specified under Sec. 377 in the Navtej Singh case (2018) [18]. The court unanimously declared that, it is constitutionally invalid, "making it criminal for consensual sexual intercourse between members of the same sex”. The verdict was hailed as a major decision for LGBTQIA+ rights in India. The court found that criminalizing consensual sexual acts among adults violates the right to equality guaranteed by the Constitution of India. In the same way, Transgender people were struggled to get recognition for their gender identity. Only in 2014, the status of the third gender was given to Transgender people. National Legal Services Commission (Nalsar case) is a landmark decision of the Supreme Court of India declaring transgender people to be 'third sex', ensuring that the fundamental rights enshrined in the Constitution of India apply equally to them. The LGBTQIA+ people in India have every constitutional right, including the freedoms protected by the Indian Constitution. The choice of a sexual partner, the ability to satisfy sexual intimacy and the right not to be discriminated against are inherent in the constitutional protection of sexual orientation.

Though the Hon’ble Supreme Court decriminalises homosexual activity, the community still faces stigma from the society. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by LGBTQIA+ people. It is the society needs to change, not the LGBTQIA+ community. Ignorance is no justification for normalising discrimination against the LGBTQIA+ community.

In various cases the court also recognised that there’s an absence of a specific law to protect the interests of the LGBTQIA+ community. Till the legislature comes up with an enactment, the LGBTQIA+ community cannot be left in a vulnerable atmosphere where there is no guarantee for their protection and safety. It is the responsibility of the constitutional courts to fill the vacuum with necessary directions to ensure protection of such community from harassment sourced from stigma and prejudices. The legislature must acknowledge its responsibility to make laws to “eradicate social discrimination against the LGBTQIA+” community. The Madras High Court has
directed some guidelines to be followed for the protection of LGBTQIA+ community in 2021. It directs

- The Ministry of Social Justice & Empowerment (MSJE), to enlist Non-Governmental Organisations (NGOs), including community-based groups having sufficient expertise in handling the issues faced by the LGBTQIA+ community. Any person who faces an issue for the reason of their belongings to the LGBTQIA+ community may approach any of the enlisted NGOs for safeguarding and protecting their rights.

- The problems faced by LGBTQIA+ community shall be addressed with the best-suited method depending on the facts and circumstances of each case as it be counselling, monetary support, legal assistance with the support of District Legal Services Authority, or to coordinate with law enforcement agencies about the offences committed against them. This guidelines should be followed at pan India level

**CONCLUSION**

Society is not only changing but also evolving. We need to run with a secure society. Although Indian society has long been a conservative society, the actual problem is not the fact that the law does not recognizes a relationship among LGBTQIA+ community, but the sanction that is accorded by the society is not available. It is for this reason the change must be take place at a societal level and when it is complemented by a law, there will be a remarkable change in the outlook of the society by recognizing the same sex relationship. We need to understand that the people from LGBTQIA+ community are also human beings with sexual emotion. The choice of a sexual partner, the ability to satisfy sexual intimacy and the right not to be discriminated against are inherent in the constitutional protection of sexual orientation.
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