



EMBRACING HOMOPHILIA- THE INTERFACE OF CONSTITUTIONAL MORALITY AND SOCIAL STIGMA

By Alisha Sharma

From Amity Law School, Noida

ABSTRACT

“Gender identity is one of the most fundamental aspects of life which refers to a person’s intrinsic sense of being male, female or transgender or transsexual person.”- Justice Radhakrishnan

The Constitution of India guarantees the right to equality, freedom of expression, and right to life. The fundamental and human rights which flow from the cumulative effect of these rights are inclusion of sexual minorities in the definition of gender wherein discrimination is barred on the basis of sex, the freedom of sexual expression in private between consenting adults, and the right to privacy and dignity. The LGBTQ community is subjected to humiliation and discrimination owing to social stigma. Even though studies have proven that homosexual and transgender persons have a different gender identity and orientation due to psychological and biological reasons, a major section of society considers the sexual minorities to be suffering from a disorder or that their behaviour is acquired and can be corrected. Section 377 of the Indian Penal Code which criminalised consensual same-sex relations was struck down by the Supreme Court of India in 2018. Even though the draconian law has ceased to exist, the stigma has been perpetuated. The judiciary in its landmark verdict of 2018 interpreted the constitution with exceptional consideration and progressive approach to ensure that the

*sexual minorities are included in the society as much as heterosexual and cisgender persons. The provision that criminalised unnatural offences against the order of nature was enacted during the colonial era and reflected the Britisher’s sense of morality as observed by the Supreme Court. Moreover, the society that we live in is dynamic and ever-changing, the morals and culture are continuously evolving which requires the law to facilitate such changes. The gay pride movement started in the 1970s and gave the individuals suffering from conflicts of gender identity and orientation to unite for their rights. Relying on the legal maxim, *casante ratiōne legis cessat et ipsa lex*, the Apex Court rightly established the foundation for the protection of LGBTQ rights. However., the battle of constitutional morality and social stigma remains. This research paper traces the struggles of sexual minorities, scrutinises the concepts of constitutional morality, and studies the roots of social stigma. It also analyses the effect of social stigma on sexual minorities as well as the aftereffects of the landmark judgment with a view to promote LGBTQ rights while studying the international legal and social stance.*

Keywords: Sexual minorities, LGBTQ, rights, morality, stigma

INTRODUCTION

In a world where most cultures are apprehensive and indecisive on the legal status of homosexuals and other sexual minorities, India in 2018 changed the world for the survivors of those who were discriminated against and secluded from the society because of their sexual identity. The Indian Legal System envisaged the provision criminalising homosexuality under section



377 of the India Penal Code which was struck down in the year 2018 in the judgment of *Navtej Singh Johar & Ors. v. Union of India*.¹ The provision criminalised carnal intercourse against the order of nature and described it as an “unnatural offence” irrespective of whether the act is consensual or non-consensual.² However, society has still not come to terms with the consequences that follow from the decriminalising same-sex relations. The country which is considered the epitome of traditions and moral values still considers the subject of sexual orientation and identify it as a taboo. Resultantly, homosexuals, and other sexual minorities still struggle to receive acceptance and equal treatment in society. It is pertinent to understand that decriminalising homosexuality is not just to separate stigmatised notions from the legal framework rather, it is conducive to achieving the objective of the Constitution and keeping its spirit alive. The Supreme Court addressed that the foundation of section 377 was obsolete and not at par with the dynamism that is expected from an evolving society wherein the citizens have a right to determine and express their identity.

The fact that an entire community’s identity was subject to legal scrutiny is certainly problematic on the macroscopic level but, what transpires at the microscopic level is far more complex at both psychological levels and legal grounds. The reason for such taboo

in our country is that a vast majority still believes that homosexual behaviour is an acquired behavioural pattern that is heavily influenced due to the accessibility to western culture. However, various researchers and psychologists have studied and observed that homosexuality is indeed innate. A study which was scheduled for presentation at the annual meeting of the American Society of Human Genetics in Baltimore, Maryland suggested that certain chemical modifications of the human genome can modify gene activity without affecting the DNA sequence, these chemical modifications could have a vital influence on the sexual orientation of an individual.³

The first monumental step internationally towards recognising the LGBTQ community can be traced back to 1970 which marked the commencement of the gay pride movement. Later in 1973, the American Psychiatric Association decided to strike off homosexuality from the list of mental illnesses which marked the first stage of diminishing the stigma associated with homosexuality implying that such sexual orientation is a mental disorder as opposed to a naturally occurring behaviour due to psychobiological factors. The movement was followed by significant developments towards the rights of the LGBTQ community internationally.⁴ It is crucial to analyse the international and national stance on the issue due to the fact that psycho-biological factors

¹ (2018) 10 S.C.C. 1

² Section 377, Indian Penal Code, 1860

³ Michael Balter, *Homosexuality may be caused by Chemical Modifications to DNA*, SCIENCEMAG, (Sep. 22, 2020, 10:07 PM), <https://www.sciencemag.org/news/2015/10/homosexuality-may-be-caused-chemical-modifications-dna>

⁴ Joey Hadden, *50 years of Pride: A visual history of the victories, setbacks and celebrations that have*

defined LGBTQ Americans since the very first Pride March, BUSINESS INSIDER, (Sep. 22, 2020, 10:12 PM),

<https://www.businessinsider.in/international/news/50-years-of-pride-a-visual-history-of-the-victories-setbacks-and-celebrations-that-have-defined-lgbtq-americans-since-the-very-first-pride-march/slidelist/76675485.cms>



affect all mankind alike, the gay pride movement which transcended borders to help the community get the respect it deserves is an international movement which strives to protect human rights of all sexual minorities. The Apex Court in this landmark judgment has recognised the role of international instruments and judicial pronouncements whilst analysing and interpreting constitutional morality.

DISORDER OR STIGMA- ROLE OF RELIGION, CULTURE, AND PSYCHOBIOLOGY

There exists a plethora of theories around the reasons which contribute towards homosexual behaviour. The studies suggest that homosexual behaviour is an orientation more than preference through empirical and scientific researches. Even though ample evidence exists in support of this thought of school, society's approach has been narrow-minded whereby homosexuality is considered a sin on account of religious texts which believe that homosexuality is an unnatural and adopted trait.⁵ Science and research have debunked these myths by citing practical reasons and contributing factors such as early childhood experiences, genetic factors, social behaviour, observation, environment, and psychological factors.

The social stigma around homosexuality has its roots embedded in history and religious texts. In fact, the law as we know today has

evolved from the religious texts which were considered the moral code of conduct in absence of law. The Holy Bible considers homosexual behaviour unacceptable, a combined reading of the Genesis 19:1-11, Leviticus 18:22, Leviticus 20:13 and Judges 19:16-24 etc. indicate that religious beliefs view homosexuality as a taboo. Similarly, according to Sharia law or Islamic law, homosexuality is considered a sin. In addition to this, within the Sunni Islamic law, male homosexuality traditionally attracted the death penalty. However, homosexuality of females lacks adequate commentary by contemporary and medieval scholars hence, the penalties attracted by women in this context are also not subject to exhaustive discussion in contrast to male homosexuality. Indian history, however, was tolerant and familiar to this orientation which is also reflected in the texts of the ancient and medieval India such as the *Kamasutra* and *Krittivasa Ramayan*. In the mythological tale of *Mahabharata*, the character of Shikhandi was portrayed as a person who was born as a woman but was raised as a man, in certain versions of the tale, Shikhandi eventually evolves into a man. Furthermore, the women devotees of Goddess Yellamma incorporate male mannerisms and consider the Goddess both their husband and their mother in southern India which points in the direction that Indian religious beliefs are tolerant of non-binary gender identity.⁶ The views of the Bible were introduced to the Indian legal system during the colonial era when section

⁵ Bishop Gene Robinson, Jeff Krehely, and Sally Steenland, *What are religious texts really saying about gay and transgender rights*, CENTRE FOR AMERICAN PROGRESS, (August 29, 2020, 6:01 PM), <https://www.americanprogress.org/issues/religion/news/2010/12/08/8822/what-are-religious-texts-really-saying-about-gay-and-transgender-rights/>

⁶ Andrew Weller, *Non-Binary Gender Constructions in Asian Religions*, DISCUSSION AT THE DESMOND TUTU CENTRE FOR PEACE, RECONCILIATION AND GLOBAL JUSTICE 2017, (Oct 21, 2020, 11:30 PM), <https://www.desmondtutucenter.org/2017/03/01/non-binary-gender-constructions-in-asian-religions/>



377, the first provision prohibiting same-sex relations or relations against the order of nature were enacted in 1860.⁷ Religion and faith do not exist in a vacuum, it is passed on from generations and lives through the society that follows them. Hence, a plausible inference would be that religious views have a vital role to play in how society perceives homosexual behaviour. The stigma associated with sexual orientations have been shaped by years of following the religious texts that condemn homosexuality even after the society has evolved and novel ideas such as the role of psycho-biology has emerged as a relevant factor, the discussion of what causes one to exhibit homosexual behaviour sparks up polarised debates. The society is divided among two views, where one group believes that behavioural neuroscience shapes one's sexual identity, the other group believes it is a matter of preference over orientation. A section of society also rejects the ideology completely and considers homosexuality a result of mental disorders which causes an individual to recognise themselves as a part of the LGBTQ Community. The Supreme Court in its landmark judgment which decriminalised homosexuality held that the Mental Healthcare Act, 2017 by virtue of section 3 provides that mental illness shall not be determined on deviation from parameters set by the society on moral, social, cultural, occupation, and political or religious grounds. Hence, a bare perusal of the

provisions contained in the Mental Healthcare Act, 2017 implies that homosexuality does not fall within the ambit of mental illness. In order to emphasise the legislative intent of the Parliament, the provisions enlisted in the Act are given an overriding effect which is enshrined under section 120. The American Psychiatric Association has also declared that homosexuality is a natural tendency.⁸

A significant portion of this society, even though a minority, falls in the category of people who are in a constant struggle of streamlining their internal identity with their physical attributes and standards set by the society. A study suggests that the biological system a person is born with may not always be in congruence with their perception of themselves which may cause them to either be transgender or exhibit trans-sexual behaviour. This tendency comes naturally to them and contrary to popular belief is not just an acquired behavioural pattern. Expecting such individuals to conform to the conceived normalcy is in fact going against the order of nature.⁹ Fairly recent research has also confirmed that same-sex behaviour is not a choice or a preference rather a combined result of genetics and other biological influences.¹⁰ It can now be understood why LGBTQ rights have attracted the importance and attention they have now. It is due to the preconceived notions of a society that a person's identity is detrimental to their

⁷ Michael Bronski, *Does Religion Condemn Homosexuality?*, RELIGION DISPATCHES, (Sep 23, 2020, 11:12 AM), <https://religiondispatches.org/does-religion-condemn-homosexuality/>

⁸ Robert L. Kinney, III, *Homosexuality and scientific evidence: on suspect anecdotes, antiquated data, and broad generalizations*, 82 LINACRE QUARTERLY, 364, 364-365 (2015)

⁹ Richard C. Friedman, Jennifer Downey, *Homosexuality*, 331 NEJM, 923, 923-927 (1994)

¹⁰ Sara Reardon, *Massive study finds no single genetic cause of same-sex sexual behaviour*, SCIENTIFIC AMERICAN, (Sep 20, 2020, 1:14 PM), <https://www.scientificamerican.com/article/massive-study-finds-no-single-genetic-cause-of-same-sex-sexual-behavior/>



fundamental rights. The fact that social stigma is a major hindrance in the exercise of fundamental rights is confirmed in a study that reveals that people who believe that sexual orientation is determined through genetics and psychology were found to be more supportive of equal human rights and dignity to the LGBTQ community.¹¹

JURISPRUDENCE OF SECTION 377 AND ITS IMPACT ON SOCIETY

Section 377 of the Indian Penal Code criminalised unnatural offences which constitute “voluntary carnal intercourse against the order of nature with any man, woman or animal”. The jurisprudential basis of such law was hollow as criminal liability was imposed based on not on one’s behaviour, but their sexual orientation and gender identity. A voluntary act that transpires between two consenting individuals and does not harm a third party shall not have been considered a crime as it is a matter of individual autonomy. As observed by the Supreme Court of India in *Navtej Singh Johar v. Union of India*¹², such a provision authorised the State to interfere with an individual’s privacy and that such power is arbitrary because it allowed to punish an individual based on the majoritarian idea of immorality.

India is a home to diverse demographic profile and resultantly, various cultures and belief systems co-exist in the country. When

ethnographic studies were conducted, it was observed that sexual practices in Hinduism and Buddhism in the southern part of India recognise non-binary genders as their religious beliefs cause them to think of themselves as neither strictly a man nor a woman, in fact, the Government of India acknowledges their identity as a third gender.¹³ The third gender was granted legal sanction by the Supreme Court in 2014¹⁴ however, on the contrary, the law that imposed ban on consensual private conduct of the LGBTQ community continued to prevail. This implies that even though the society was acquainted with the existence of the LGBTQ community, an unsupportive and inconsistent legal regimen could have possibly caused the community to remain closeted and be discriminated against. The despotic provision not only hindered the privacy and autonomy of the sexual minorities but also created a socio-legal environment that magnified stigma.¹⁵

HISTORY OF SECTION 377

In 1884 the first-ever case under section 377 of the Indian Penal Code, 1860 was reported in the matter of *Queen Empress v. Khairati*.¹⁶ The case was initiated *suo moto* against a person, Khairati who was referred by the police as eunuch, for cross-dressing and singing in a group of women. The court in this case scrutinised private details of the person and their sexual conduct in a private

¹¹ Jane P. Sheldon, Carla A. Pfeffer, Toby Epstein Jayaratne, Merle Feldbaum, Elizabeth M. Petty, *Beliefs about the Etiology of Homosexuality and about the Ramifications of Discovering Its Possible Genetic Origin*, 52 J. Homosex., 111, 136-140 (2007)

¹² (2018) 10 SCC 1 (India)

¹³ Andrew Weller, *Non-Binary Gender Constructions in Asian Religions*, DISCUSSION AT THE DESMOND TUTU CENTRE FOR PEACE, RECONCILIATION AND GLOBAL JUSTICE 2017,

(Oct 21, 2020, 11:30 PM), <https://www.desmondtutucenter.org/2017/03/01/non-binary-gender-constructions-in-asian-religions/>

¹⁴ *NALSA v. Union of India* (2014) 5 SCC 438 (India)

¹⁵ Sanchita Srivastava, Purnima Singh, *Psychosocial Roots of Stigma of Homosexuality and Its Impact on the Lives of Sexual Minorities in India*, 3 OPEN JOURNAL OF SOCIAL SCIENCES 128, 134-140 (2015)

¹⁶ I.L.R. (1884) 6 All 204 (India)



space was labelled misconduct. Medical examinations were conducted and the court observed that the accused showed signs of the habitual sodomite. Even though the accused was acquitted on account of uncertainties surrounding the cause of action by the ironically named Justice Straight, the Police were lauded for keeping a check on the occurrence of unnatural offences between consulting adults and called homosexual conduct “disgusting practices.”

The moot concern, in this case, is not the question of guilt or innocence of an individual with non-conventional gender identity, rather it is the harassment that such individuals go through during the legal process of ascertaining guilt or innocence in offences of such sensitive nature. The first reported case of section 377 wherein a detailed medical examination was conducted, gives an insight into how social stigma forces an individual with a conflicting gender and biological identity towards the violation of their personal body, integrity, and dignity.¹⁷

As has been discussed earlier, transgenders are individuals who identify themselves as a member of a different gender from the one they biologically possess. In the above-mentioned case, Khairati was evidently an individual who challenged the conventional thought process of society regarding gender identity and sexual orientation by being born a man but identifying as a woman. The society has been oscillating between two points regarding the stigma- where on one end the gender and sexual identity of an

individual, if uncommon to the society is considered disgusting and a detestable crime, and on the other end, the conflict of gender and sexual orientation is considered a mental illness. This black and white approach, devoid of sensitivity, and understanding speaks volumes about the collective mindset of the society. A certain percentage of society still views the LGBTQ community in the light of these two possibilities exclusively because the stigma that is rooted so deeply for centuries, cannot cease to exist in a matter of years. Section 377 of the Indian Penal Code, 1860 continued to interfere with the fundamental rights of the LGBTQ community long after it had come into force. Following the trail of various cases reported after Khairati's case such as *Lohana Vasantlal Devchand v. State*¹⁸, *Calvin Francis v. Orissa*¹⁹ and *Fazal Rab Choudhary v. State of Bihar*²⁰, it can be observed that the criteria of what constitutes unnatural offences changed from non-procreative to imitative and finally to perversity through years.

It was in 2008 that the Delhi High Court was moved in the case of *Naz Foundation v. Government of NCT of Delhi and Ors.*²¹ to decide the constitutionality of the law prohibiting homosexual conduct between consenting adults. The Naz Foundation's case was the kickstart to this movement whereby a writ petition was filed as a Public Interest Litigation to challenge the constitutional validity of section 377 on the grounds that the levelling of charges under section 377 against adults engaging in a

¹⁷ NANCY NICOL, ADRIAN JUUUKO, RICHARD LUSIMBO, NICK J. MULE, SUSAN URSEL, AMAR WAHAB, PHYLLIS WAUGH, ENVISIONING GLOBAL LGBT HUMAN RIGHTS: NEOCOLONIALISM, NEOLIBERALISM,

RESISTANCE AND HOPE, (University of London Press, 2018)

¹⁸ A.I.R. 1968 Guj 252 (India)

¹⁹ 1992 (2) Crimes 455 (India)

²⁰ A.I.R. 1983 SC 323

²¹ (2010) Cri LJ 94



consensual union is violative of fundamental rights guaranteed under Articles 14, 15, 19 and 21. The Naz Foundation and The Lawyers Collective ensured that the public is aware of each development that was taking place by organising meetings wherein each stage of the litigation was discussed. In the span of the subsequent seven years, the discussions served a pivotal role for creating awareness on the subject of homosexuality and the right of transgender persons. The transition from endeavours to ensure equal treatment to a highly political and polarised issue was steady, lengthy but ultimately catalysed preparation of the ground for a major breakthrough. During the course of litigation, an interesting turn of events was the conflict between the statements of the Ministry of Home Affairs and the Ministry of Health and Family Welfare. The Ministry of Home Affairs of India filed an affidavit validating section 377 and stated that the law and society function in harmony. Section 377, a criminal offence is indicative of the moral conduct that the society expects and it addressed the society's perception during the time of its enactment. In order to emphasise on this note, the Ministry also commented that the Indian society has always condemned homosexual behaviour by comparing the set of Indian morals and values with that of the United Kingdom and the United States of America.²² On the other hand, the Ministry of Health and Family Welfare affirmed the affidavit filed by the National Aids Control Organisation (NACO) which stated that NACO strives to prevent the spread of HIV/AIDS and has undertaken various measures in the same direction. According to NACO, a significant step is to recognise,

promote and protect the rights of sexual minorities as they are more susceptible to contract the virus owing to the lack of decision-making power to protect themselves from HIV/AIDS. Homosexual males are a part of the high-risk groups according to the Organisation. A startling point in NACO's submission was that this high-risk group was unwilling to admit their homosexuality because of the fear of law which had kept their active cases of infection hidden and restricted their access to availing health facilities which are otherwise available to all citizens.

The relevance of religious context in this regard is imperative to understand that the stance of the Ministry of Home Affairs suffered an inherent flaw whereby it completely disregarded the fact that the law was enacted in the rule of colonial government by Lord Macaulay. The British governors had enforced laws that did not reflect the values of Indian society but were in alignment with their religion and values. The British system had stringent laws with respect to sodomy since as early as 1290 wherein the punishment for committing the offence mentioned under section 377 of the Indian Penal Code was that the accused shall be burnt alive. As civil societies evolved, the punishment for unnatural offences became hanging as per the provisions of the Buggery Act of 1533. Queen Elizabeth, I re-enacted the Act of 1533 in 1563 which marked the commencement of the law which criminalised sodomy in the British Colonies. Interestingly, the nation from where the law emerged eventually repealed the provisions in 1967 after the recommendations of the Wolfenden Committee's report.²³ However,

²² Naz Foundation v. NCT of Delhi (2010) Cri LJ 94

²³ Steven Dryden, *A short history of LGBT rights in the UK*, BRITISH LIBRARY, (Aug 28, 2020, 9:20 PM),



the countries that adopted this law continued to enforce it. The stance of the Ministry of Home Affairs was that criminal offences are made considering the cumulative effect of society's morals and political ideologies. This clearly indicates that the offence does not germinate from the place of rationality or inclusiveness but that of the society's standards of right and wrong which overlooked the struggles of sexual minorities. By inclusiveness, one refers to a society wherein the perspectives and rights of all groups and communities of a society are considered before disregarding their rights altogether. The relevant questions pertinent to the law governing unnatural offences and infringement of fundamental rights were addressed by the petitioners extensively- whether gender and sexual orientation are analogous under Article 15, whether Article 14 and Article 19 are violated due to retention of section 377, whether dignity and privacy guaranteed under Article 21 are compromised due to criminalisation of behaviour exhibited by LGBTQ community. However, another moot issue was whether morality could be a ground to hinder the exercise of fundamental rights.

The Delhi High Court through its judgment not only declared that section 377 to the extent of consensual acts, is violative of fundamental rights but also recognised the role of society when it comes to manifesting inclusiveness in its true form, where no minority is deprived of a life of equality and dignity.

CONSTITUTIONAL MORALS VIS-À-VIS STIGMA

Where the aftermath of the Naz Foundation case was celebrated by the community, the judgement was not embraced in good spirits by a certain section of society. Before the Supreme Court of India finally decriminalised section 377, the Supreme Court had reversed the judgment of Delhi High Court in *Suresh Kumar Koushal v. Naz Foundation*²⁴. One of the main issues, in this case, was also regarding the conflict of constitutional morality and public morality. Needless to say, the question of public morality is not moral de facto, public morality as a façade covering the social stigma associated with the sexual minorities and their rights. The Supreme Court opined that a law cannot be held to be unconstitutional if its application affects only a small fraction of the population. The unreasonableness of this verdict is self-explanatory, social stigma outweighed the constitutional morality which is the essence of this democracy.

For years, the advocates of LGBTQ rights have stressed how perpetuating this taboo and stigma is not only detrimental to their fundamental rights but also isolates them socially and adversely affects their mental health. It is not the act in such cases that is criminalised, it is the identity of an entire community. At the surface level, the enforcement of this provision overlooked the humanistic aspect of law. It has been observed that an uncooperative law and social standards are at the root level of perpetuating stigma against homosexuals and transgender people. Several other factors such as the negative attitude of heterosexuals,

<https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk>

²⁴ (2014) 1 SCC 1 (India)



non-acceptance from family, confusing this innate and natural behaviour with a curable disorder are some other factors that only add to the everyday battles of the sexual minorities.²⁵ Hence, in order to ensure an accommodating society, it was only conducive that consensual acts that sexual minorities indulged in were decriminalised.

The landmark judgment which marked the victory of sexual minorities after years of struggle was passed on January 8, 2018. In *Navtej Singh Johar & Ors. v. Union of India*²⁶ the conflict between constitutional morality and social stigma was extensively discussed.

The 5-judge bench interpreted the spirit of the constitution in its intended essence which is to manifest a society that is based on principles of Fraternity and inclusiveness where fundamental and constitutional rights are exercised by all citizens alike. The soul of a democracy lies in rule of law, where the constitutional features triumph over other external sources such as the standards set by the society constituting a certain majority.

The Supreme Court's take on Constitutional Morality can be broadly analysed under the following heads:

- Equality
- Freedom of Expression
- Right to Life
- Majoritarianism and Rule of Law

EQUALITY

It was highlighted that criminalising consensual acts which sexual minorities engage in, is violative of the fundamental rights which guarantee equality. Sexual

expression and intimacy between adults of sexual minorities shall be treated as regular expressions, akin to those that heterosexuals engage in. There is no clear demarcation of what separates natural and unnatural carnal intercourse as mentioned in section 377. Therefore, in the absence of intelligible differentia, expressions of a minority cannot be criminalised only because they are against the norms of normalcy. Even though the provision was prima facie unharmed, the criminalisation of certain sexual orientation indirectly substantiates stigma. It is because of this stigma that the LGBTQ community faces discrimination in the workplace and their right to equality is undermined. The Apex Court also pointed out that with changing times, the interpretation of Article 14 has become a substantive part of the structure of the Constitution along with liberty and dignity. It is imperative that equal rights are considered taking the evolution of society and its needs into account especially when those, who are deprived of their fundamental right to equality are those who constitute a certain minority. Further, Articles 15 and 16 prohibit discrimination on the basis of sex, however, in this case, the fact that the interpretation of gender is limited to binary genders defeats the purpose of Articles 15 and 16. It is due to the criminalisation of private conduct of sexual minorities that homophobic attitudes are nurtured in the society rendering the basic rights of this community futile, this itself is unequal treatment.

FREEDOM OF EXPRESSION

Article 19(1)(a) guarantees the freedom of expression which implies that sexual

²⁵ Sanchita Srivastava, Purnima Singh, *Psychosocial Roots of Stigma of Homosexuality and Its Impact on the Lives of Sexual Minorities in India*, 3 OPEN

JOURNAL OF SOCIAL SCIENCES 128, 134-140 (2015)

²⁶ (2018) 10 SCC 1 (India)



expressions of consenting adults in a private space are included in the ambit of Article 19. Criminalising their way of expression, which comes naturally to them and is beyond their control is unreasonable and has caused the community to stay in a closet. This concealment of identity hinders their freedom of expression and robs their ability to experience fulfilling relationships.

RIGHT TO LIFE

Article 21 of the Constitution is what gives life to the fundamental rights. The right to life and personal liberty implies that a citizen shall have the right to choose their partner and not compromise on the dignity for having a different sexual orientation than what public morality approves of. The Apex Court recognised sexuality as a fundamental experience to realise the meaning of life. Having the liberty to choose and determine sexual orientation denotes sovereignty which is the essence of dignity. The State shall not dictate the legality of one's sexuality and criminalise forms of expression that are not procreative or reproductive.

The right to life in this case can be understood from two facets- dignity and privacy. The five-judge bench of the Supreme Court held that having acceptance, respect, and recognition from society while embracing individuality and identity are conducive to human dignity. The LGBTQ community's right to live with dignity strengthens and helps achieve fraternity which reflects the spirit of the Constitution through the Preamble.

The right to privacy is another facet that the sexual minorities were deprived of. The right to sexual privacy was observed as a natural right that is complementary to dignity. The Supreme Court acknowledged that the sexual

minorities were subjected to humiliation and harassment in public places which obstructed them from enjoying public spaces according to their liking and terms. To address this issue, the Hon'ble Court held that the extent of the right to privacy needs to be widened. The right to sexual orientation is inseparable from privacy as it is an inherent trait. Therefore, decisional privacy, spatial privacy, and privacy of choice are within the sphere of the right to privacy. The denial of any of these rights infringes the community's right to "entitlement to full citizenship."

In the context of the Right to life, the Supreme Court also observed that the right to sexual intimacy, sexual freedom, sexual health has also been fettered due to the criminalising the conduct of the LGBTQ community. Another noteworthy interpretation is including the right to choose partners and "right to union and love, not only by marriage but by companionship in every sense, sexual, mental and emotional, even between same-sex."

The manner in which the Highest Court of Law in the country has addressed the complexity and layers has left no stone unturned. The Supreme Court of India has showcased how the law is a reflection of society. The humanistic and progressive approach adopted in this case is a testament that our Constitution is a living document, evolving and adapting to the needs and thought process of the society.

MAJORITARIANISM AND RULE OF LAW



The *Suresh Koushal case*²⁷ was based on the rationales of majoritarianism and rule by law. Rule by law implies empowering State to exercise arbitrary power in the guise of law. The *Suresh Koushal judgment*²⁸ stated that if a law causes only a minority to be deprived of their fundamental rights, the law shall prevail. This rationale was dissected, scrutinised, and held unconstitutional in the final verdict of the Supreme Court²⁹. It was held that in order to ensure a society founded on fraternity and inclusiveness if fundamental rights are infringed by law, fundamental rights shall prevail over the principals of the morality of the majority, irrespective of the proportion of the population affected. The Constitutional morals are guided by principles which protect diversity holistically and rule of law. Section 377 was distinguished from rule of law as it placed State's interference over a pedestal while overlooking fair treatment of all citizens.

POST-JUDGMENT DEVELOPMENTS

The HIV and AIDS (Prevention and Control) Act, 2017 came into effect after this judgment. Section 17 of the Act specifically provides that the Central and State Governments shall endeavour to devise strategies to educate all age groups about HIV and AIDS in a manner that does not attach stigma to the issue and is gender sensitive. Additionally, section 22 states that promoting healthy practices and strategies to reduce HIV transmission shall not be prohibited by law. Such practices include propelling awareness on the safety measures and counselling services to prevent HIV. NACO's findings as observed in the *Naz*

*Foundation case*³⁰, indicate that sexual minorities are at a greater risk due to the stigma attached to their gender identity and sexual orientation, and these provisions which help with destigmatising the issue bring us one step closer to an inclusive atmosphere where healthcare is accessible to all. Apart from this, the Transgender Persons (Protection of Rights) Act, 2019 is a holistic legislation that is aimed at protecting and granting a legal sanction to the rights of the third gender. The cumulative effect of these progressive laws and decriminalisation of consensual acts which fell within the ambit of section 377 were expected to uphold constitutional morality, however, such expectations have still not come to fruition.

Clearly, the question of LGBTQ rights has been accurately addressed by the Supreme Court. However, a recent study conducted in India during 2019 shows that a vast majority has still not been able to accommodate the ideas of a contemporary society which causes a high rate of unacceptance of sexual minorities. As a trickle-down effect, this unacceptance and stigma continue to alienate this community and takes a toll on their mental health. In fact, homosexual females, bisexuals, transgender persons, and queers have not been a subject of research or studies related to stigma and discrimination in the last decade as much as homosexual males. Another ambiguous factor is that the existing surveys and researches do not include semiurban and rural or remote areas. This lack of research blurs the factual matrix and reality of the stigma faced by the collective community of sexual minorities. Even after the decriminalisation of section 377, the community lacks health equity due to the

²⁷ (2014) 1 SCC 1 (India)

²⁸ (2014) 1 SCC 1 (India)

²⁹ (2018) 10 SCC 1 (India)

³⁰ (2010) Cri LJ 94



stigma.³¹ A plausible inference from this study is that constitutional morality is yet to take the forefront and the inclusivity of this community is a far-fetched reality until the social stigma prevails.

TRANSCENDING BOUNDARIES- HUMAN RIGHTS AND INTERNATIONAL PERSPECTIVE

The picture is quite similar in other countries which is a fact as disturbing as it gets. The popular notion in India is that the west is more welcoming to homosexual behavioural patterns or is more tolerant of the LGBTQ community. However, several research and studies indicate in the opposite direction. Southern African regions have observed marginalisation of the sexual minorities from society due to social stigma which renders them more vulnerable to HIV and mental health issues. A prominent contribution of the stigma is that the community experiences this vulnerability at a humongous global level and owing to the emotional vulnerability, sexual minorities often indulge in substance use as a coping mechanism. There exists a direct link between social stigma and diseases which must be analysed from a sociological and political perspective in order to ensure LGBTQ human rights.³² In the Netherlands, it has been observed that Transgender persons not only experience alienation from

society in general, they also suffer post-transition stigma at the workplace and are at a greater risk of attempting suicide.³³

The findings of a study from Yale University's mental health unit are also aligned with the aforementioned inferences—stigma results in addictions, mental health issues, and greater susceptibility to HIV.³⁴ The point of focus here is that Lesotho is a country wherein LGBTQ rights are not recognised whereas the United States of America has recently developed their legal position in favour of LGBTQ rights and the Netherlands has been progressive in their approach for quite a long time. However, the pattern of social marginalisation and stigma are similar in all three cases irrespective of the legal position.

At the international level, the Universal Declaration of Human Rights (UDHR) has given rise to a tiff between global standards and the fundamentals of sovereign states. This dispute has compromised attempts at the international level to protect human rights. In order to reconcile the clashing factors, the treaty drafters suggested the addition of limitation clauses. Numerous international and region-specific treaties pertaining to human rights grant discretion to the state of limiting free exercise of these rights on grounds of public order, national interests,

³¹ Jagruti R. Wandrekar, Advaita S. Nigudkar, *What do we know about LGBTQIA+ Mental Health in India? A Review of Research from 2009 to 2019*, 2 JOURNAL OF PSYCHOSEXUAL HEALTH 26, 28-35 (2020)

³² Carmen H. Logie, Amaya Perez-Brumer, Tampose Mothopeng, Maya Latif, Amelia Ranotsi, Stefan D. Baral, *Conceptualizing LGBT Stigma and Associated HIV Vulnerabilities Among LGBT Persons in Lesotho*, AIDS BEHAV. 1, 1-11 (2020)

³³ Maria J.A. Verbeek, Mark A. Hommes, Sarah E. Stutterheim, Jacques J.D.M. van Lankveld, Arjan E.R.

Bos, *Experiences with stigmatization among transgender individuals after transition: A qualitative study in the Netherlands*, 21 INTERNATIONAL JOURNAL OF TRANSGENDER HEALTH 220, 224-228 (2020)

³⁴ Gus Cairns, *Stigma and negativity from within the community increases HIV risk-taking by gay men*, AIDS MAP, (Sep 17, 2020, 5:34 PM), <https://www.aidsmap.com/news/apr-2020/stigma-and-negativity-within-community-increases-hiv-risk-taking-gay-men>



fundamental rights and morals. The scope of limitation clauses has thus become a grey area in the subject of human rights specifically where LGBTQ rights are concerned.³⁵ In the application of supranational laws, the interpretation of morals is open-ended which has hindered the achievement of the true purpose of supranational treaties and instruments. It has been studied that these limitations on moral grounds are focused on sexual identities and orientations³⁶ in order to establish State control over subjects of sexuality which shall be unfettered rights of an individual as long as they are consensual. The freedom of sexual expression has been recognised in the 1990s is an intrinsic part of human rights which catalysed the LGBT rights movement. The recognition of sexual minorities and their rights gained momentum internationally which visibly indicates the gravitas of the human nature involved in the matter that transcends boundaries. Steadily the movement became a matter of national importance to each sovereign state which culminated in Governments amending laws in support of the LGBTQ community. The United Nations and other international instruments stressed on the subject of sexual autonomy and health to the extent that certain officials at the high level of United Nations (Navanethem Pillay and Ban Ki-moon) raised their voice in unison in support of LGBTQ rights. However, the applicability of limitation clauses impeded the pace of greater acceptance of sexual minorities which is within the ambit of human rights. Intertextual morality is a matter of consideration in cases of valid application of moral limitations. The Doctrine of

Intertextual morality refers to the creation of a delicate equilibrium of the supranational instrument at play and the State's constitutional morals. This offers a tripartite interaction wherein a citizen is interacting with the constitution and establishes an international relationship as well. In addition to this, intertextual morality ensures that the dynamism of sexual orientations and gender definitions are not overlooked on account of rigid constitutional or codified structures. In the *Navtej Singh Johar case*³⁷, the Supreme Court acknowledged that International developments in the law and the country's commitment to International covenants cannot be overlooked in matters involving morals which are bound to evolve in a dynamic and progressive society. Hence, the reliance on the international position of law is justified while interpreting LGBTQ rights.

In *Obergefell v. Hodges*,³⁸ the Apex Court of the United States recognised same-sex marriages in all the 50 states and held that their marriage shall not be considered differently from that of heterosexual unions and that same-sex couples are entitled to similar rights and obligations. However, despite the fact that the institution of marriage was made accessible to the sexual minorities, the judgment received overwhelming critique, while the human rights activists rejoiced, a certain school of thought called the decision flawed claiming that the country's democracy is at risk. The reason for this backlash was that the judiciary overturned the constitutional provisions. The ones against the ruling were advocates of religious beliefs and their measures fell within the sphere of "religious freedom

³⁵ Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing "Morals" in Human Rights Law*, 59 HARVARD ILJ 197, 198-199 (2018)

³⁶ *Ibid.*

³⁷ (2018) 10 SCC 1

³⁸ 576 U.S. 644 (2015)



restoration acts” which boils down to the conflict of constitutional values and stigma. Furthermore, a serious lacuna still remained unaddressed- protection of social marginalisation and discrimination. For instance, even though same-sex marriage is recognised in Texas, same-sex couples or homosexual individuals could be denied to rent an apartment which amounts to discrimination on the basis of orientation.³⁹ On June 15, 2020, the Supreme Court of the United States held that sexual orientation and gender identity fall within the scope of sex, and the laws which prohibit discrimination based on sex also prohibit discrimination based on gender identity and sexual orientation.⁴⁰ The judgment is monumental as it has affirmed LGBTQ rights nationwide. Prior to this ruling, the protection of LGBTQ rights was available through fragmented local laws, and approximately 50% of LGBTQ adults in the country were residents of states in which LGBTQ rights and protection did not exist.⁴¹

Countries like Canada have been an advocate of LGBTQ rights and is one of the few countries to legalise same-sex marriages. In *Re: Same-sex Marriage*⁴² the Supreme Court of Canada recognised that constitutional morals and interpretation are subject to changes according to the ideologies of modern society. Similarly, in the United

Kingdom, LGBTQ rights have been recognised since the 1970s, and recently in 2013, same-sex marriages were also legalised. In New Zealand, the current ruling party ensures a ban on conversion therapy which is a process of altering one’s sexual orientation, if elected to power again.⁴³

The question of morality and stigma still persists due to the varied religious beliefs and values of each sovereign state. Where a number of countries have been welcoming and accepting of the community and its rights, over 70 countries are still unsupportive of the rights of sexual minorities. Unfortunately, certain states also permit the defence of gay-panic to date. The term refers to the justification presented in case a heterosexual person is charged with a crime against a person belonging to sexual minorities. The defence clause is recognised and used to minimise the penalty or sentence. Homophobia, transphobia, and orthodox belief systems add to the already sensitive issue.⁴⁴ The recent pandemic has shed light on the harsh reality and struggles of the sexual minorities. In Panama, the condition wherein women and men were required to remain in quarantine on alternate days, transgender individuals were harassed irrespective of when they stepped outdoors. Religious leaders believe that the pandemic is a payback to the divine for immoral conduct

³⁹ Omar G. Encarnacion, *The Real Reason the United States Lags on LGBTQ Rights*, FOREIGN POLICY, (Sep 21, 2020, 9:47 AM), <https://foreignpolicy.com/2020/06/19/the-real-reason-the-united-states-lags-on-lgbtq-rights/>

⁴⁰ *Bostock v. Clayton County* 590 US ___ (2020) (United States of America)

⁴¹ Omar G. Encarnacion, *The Real Reason the United States Lags on LGBTQ Rights*, FOREIGN POLICY, (Sep 21, 2020, 9:47 AM), <https://foreignpolicy.com/2020/06/19/the-real-reason-the-united-states-lags-on-lgbtq-rights/>

⁴² (2004) 3 SCR 698

⁴³ *New Zealand ruling party vows to ban efforts to alter sexual orientation*, REUTERS, (Oct 6, 2020 1:11 PM), <https://in.reuters.com/article/us-newzealand-election-lgbt/new-zealand-ruling-party-vows-to-ban-efforts-to-alter-sexual-orientation-idUSKBN26Q0F9>

⁴⁴ Nicholas D. Michalski, Narina Nunez, *when is “gay panic” accepted? Exploring juror characteristics and case type as predictors of a successful gay panic defense*, JOURNAL OF INTERPERSONAL VIOLENCE (2020)



that has caused the sexual minorities to be scapegoated as in Ukraine and Senegal. In Japan, transgender individuals are sterilised to be eligible for legal documents that indicate their gender identity. The Russian gay propaganda law silences the advocates of LGBTQ rights as it criminalises public messages that support or spread awareness about sexual minorities.⁴⁵

Despite the international instruments, constitutional morality, and human rights are in place, the social stigma prevails at the global level. Even though the decriminalisation of section 377 in India was a celebrated development, the worrisome notions of morality and acceptability deepen the foundation of stigma internationally. The LGBTQ rights are inseparable from human rights and in order to ensure the unbiased exercise of human rights and achieve the absolute vision of an inclusive society, the collective conscience has a long way to go.

THE AFTERMATH

The striking down of section 377 was celebrated nationwide, especially by the youth who referred to the judgment as “the victory of love.” Recently, our country completed two years of decriminalising homosexuality, and yet, the LGBTQ community still fights the same battles. The 2018 verdict was elaborative and even though it decriminalised unnatural offences exclusively, the judgment emphasised humanistic aspects and addressed the social

evils prevailing against all sexual minorities. Homosexual persons started to feel more confident about their identity and sexual orientation but the alienation persists. The LGBTQ community combats inequality at almost the same level. The only relief that homosexual males have received is that the law does not consider them a criminal anymore, the society is yet to adapt to the modern realities. Homosexual females and transgender people continue to face humiliation and harassment under the existing laws. LGBTQ wellness advocates and psychologists believe that there exists a gap in the free and fair rights of sexual minorities. Decriminalisation of private conduct does not ensue recognition of non-binary gender unions, the alleviation of discrimination at the workplace, and acceptance from family members. The lack of social reforms and awareness continues to haunt sexual minorities. The community is at a greater risk of developing mental health issues that remain unaddressed.⁴⁶

On the brighter side, the judiciary and government are steadily working towards securing LGBTQ rights. On October 2, 2020, the State Government of Karnataka intimated the Karnataka High Court of its proposal to include transgenders in one of the categories under “Other Backward Classes”. The proposal is in consultation with the Karnataka Commission for Backward Classes on the subject of recruitment.⁴⁷ A recently filed PIL before the Supreme Court

⁴⁵ Graeme Reid, *A Global Report Card for IDAHOBIT*, HUMAN RIGHTS WATCH, (Aug 28, 2020 6:54 PM), <https://www.hrw.org/news/2020/05/18/global-report-card-lgbtq-rights-idahobit>

⁴⁶ *Two years since article 377 annulment, LGBTQ community still battling prejudice*, THE HINDU, (Sep 15, 2020, 4:56 AM),

<https://www.thehindu.com/news/national/two-years-since-article-377-annulment-lgbtq-community-still-battling-prejudice/article32534479.ece>

⁴⁷ Rintu Mariam Biju, *We propose to consider transgenders as one of the categories in OBCs for purpose of recruitment: State Govt tells Karnataka HC*, BAR AND BENCH, (Oct 3, 2020 8:34 AM), <https://www.barandbench.com/news/litigation/propos>



of India seeks to secure equal protection for the transgender community from sexual offences.⁴⁸ In *Chinmayee Jena v. State of Odisha and Ors.*⁴⁹, the High Court of Orissa allowed the writ of habeas corpus when the live-in partner of a transgender man was forcibly separated by the family. The High Court opined “that love knows no bounds and is beyond gender” while interpreting the psyche of the family which was unaccepting of the relationship. Certainly, the Court’s judgement aimed at striking the perfect balance between social issues, morality, and the humanistic aspect of LGBTQ rights is commendable. In *Madhu Bala v. State of Uttarakhand and Ors.*⁵⁰ the High Court of Uttarakhand recognised the right of same-sex couples to live together irrespective of the fact that they are not married.

CONCLUSION AND SUGGESTIONS

Section 377 which criminalised unnatural offences was flawed in its very conception because the defining lines of constituents of natural and unnatural were never clear. Emanating from British colonial rule, the law was aimed at punishing those with conflicted gender identity and orientation. The legal maxim *cessante racione legis cessat et ipsa lex* was of little importance to the society which had nurtured a culture of tolerance instead of protection to the sexual minorities. Undoubtedly, the Supreme Court’s verdict of reading down section 377 of the Indian Penal Code is a triumph of the constitution’s spirit

over majoritarianism and social stigma. The reliance on international legal position is a testimony that our constitution is progressing with the country and its dynamic moral values. In order to alleviate the stigma, several human rights activists, mental health experts, the legislation, and the judiciary have stressed upon the psychobiological aspect of gender identity and sexual orientation which was earlier conceived as a mental disorder. However, the majority is yet to accept this reality. In a society that is divided into starkly dichotomous views, sexual minorities suffer discrimination, humiliation, harassment, and restriction on the free exercise of fundamental rights which are otherwise guaranteed to citizens who confine into the compartmentalised societal norms. Ignorance, religious beliefs, and orthodox opinions continue to haunt the LGBTQ community. Though the law views them as humans, society still considers the subject a taboo leading to unacceptance from family, harassment at the workplace, isolation from society impairing their ability to form fulfilling relationships, and most importantly, restricted access to health services, physical and mental. The citizens of this country are not equipped to handle the way forward after the striking down of the draconian section 377. According to UNESCO’s research focused specifically on India, the LGBTQ community does not have equal access to education owing to bullying and harassment at educational institutes.⁵¹

e-to-consider-transgenders-categories-in-obcs-purpose-of-recruitment-state-govt-tells-karnataka-hc

⁴⁸ Debayan Roy, *PIL in Supreme Court seeks equal protection against sexual offences for transgender community*, BAR AND BENCH, (Sep 30, 2020, 3:02 PM), <https://www.barandbench.com/news/litigation/pil->

supreme-court-equal-protection-sexual-offences-transgender-community

⁴⁹ 2020 SCC OnLine Ori 602 (India)

⁵⁰ 2020 SCC OnLine Utt 276 (India)

⁵¹ Priya Menon, *LGBT bullying in school takes heavy toll, reveals UNESCO report*, THE TIMES OF INDIA, (Aug 30, 2020, 7:46 PM), <https://timesofindia.indiatimes.com/india/lgbt->



To create an amiable and understanding living environment for the community, the youth needs to be sensitised to sexual minorities. The institutions need to adopt infrastructure and culture which is inclusive of the LGBTQ youth- gender-neutral uniforms, accessibility to washrooms, and educational workshops are among the few measures an education institution can incorporate to promote and protect the LGBTQ youth. Securing accurate identity documents is another challenge for the youth as well as the parents which shall be eased in such cases.

For creating a friendly workplace, the corporates and their human resource departments shall include policies that are aimed at promoting equality. Another important aspect of human rights is the freedom of choosing a partner and the legalisation of same-sex unions. The laws need to be supportive in order to provide legal sanction to same-sex marriages so as to ensure equality and dignity in the personal relationships of the sexual minorities.

However, the elephant in the room-ignorance of society needs to be addressed, by educating them and spreading awareness. It is the people in a civilisation that make a society what it is, culture does not stay in a vacuum, it is propagated through generations. The longer such culture exists, the more difficult it is to uproot it. Awareness campaigns, workshops, and sessions with a psychologist at places of public interaction can prove to be effective. It is imperative that the struggles of the LGBTQ community are discussed at public forums in order to promote and protect their rights while simultaneously educating and sensitising the society towards sexual minorities. The

discussion at public platforms is necessary to disassociate taboo with the subject. The ninth Secretary-General of United Nations, Antonio Guterres has also urged sovereign states to promote equality and rights of the community and stated, "I appeal to all governments and societies to promote the values of tolerance and respect for diversity, and to build a world where no one has to be afraid because of their sexual orientation and gender identity." The violation of human rights of the LGBTQ community is a global issue and its significance has amplified manifold recently. With supportive laws, an understanding environment, and consideration of intertextual morality, we are bound to secure equal human rights and a life of dignity for the sexual minorities at both national and international levels.

[bullying-in-schools-takes-heavy-toll-reveals-unesco-report/articleshow/69718451.cms](http://www.supremoamicus.org/bullying-in-schools-takes-heavy-toll-reveals-unesco-report/articleshow/69718451.cms)