
“LGBTQ Community: Do Constitutional Rights apply for them?”

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INTRODUCTION

One of the most debated topic for the past few years is LGBTQ community and their rights. They are often neglected from the society and living an isolated life and are treating them as untouchables. This community is one of the peculiar community who stands and fights for their rights for over a period of years without anyone’s support or media support. Ultimately, they achieved what they desired for – S. 377 of the Indian Penal Code, 1860 was abolished.

BACKDROP OF LGBTQ RIGHTS MOVEMENT IN INDIA

The LGBTQ community and struggle for their rights came to limelight in India when the case of *Naz Foundation v. Govt. NCT of Delhi*¹ was brought before the Delhi High Court. It is in this case, where for the first time S. 377 and its constitutional validity was challenged before the Court and the judgment was in favour of them. The Court dictated that it is apparent S. 377 is in violation of Art. 14, 15, 19 and 21 of the Constitution of India. But the same was appealed in the case of *Suresh Kumar Kaushal v. Naz Foundation*² in which the Apex Court over ruled the judgment rendered by Delhi High Court and stated S. 277 is constitutional. This judgment was widely criticized and ignited a fire on the human rights activists and LGBTQ community. In the end, the case of *Navtej Singh Johar v. Union of India*³ is the landmark and recent case in this aspect. The Apex Court delivered a judgment which surprised everyone and said S. 377 is partially unconstitutional. The essence of the judgment is the Court stated S. 377 violates the fundamental rights of privacy of LGBTQ community.

FUNDAMENTAL RIGHTS AND LGBTQ COMMUNITY

i. Right to equality

Article 14 of the Indian Constitution provides for equality and equal before law. The Apex Court considered the LGBTQ Community as the same citizens of India and wished to grant equal status to them. So the result was abolition of S. 377 of IPC. But in reality, even now the LGBTQ community is fighting and struggling to achieve equal status like the rest of citizens of India. They are also have all rights to live a dignified life, but the irony is mainstream society is not ready to include them. They are discriminated in all sectors. LGBTQ Community is a vulnerable group in the nation and are still violated and discriminated. Justice Nariman while delivering judgment in

¹ 160 Delhi Law Times 277.

² (2014) 1 SCC 1

³ (2018) 10 SCC 1

Navtej Singh Johar case stated that the LGBTQ Community are entitled to equal protection of equal laws and they are entitled to be treated in society as human beings without any kind of stigma attached to any of them⁴.

ii. Right to freedom of speech and expression

S. 377 does not come under the reasonable restriction for an individual's freedom of speech and expression in Article 19. In fact, the Supreme Court observed that the consensual carnal intercourse among the adults in a private space does not affect or injure to the decency and morality of the public at large⁵.

iii. Right against exploitation

It is cent percent sure that the LGBTQ Community is one of the most exploited community in the nation. They are exploited almost everywhere. One instance is some people harassing transgender people sexually and other means. The terrifying horrible part is the exploitation against the LGBTQ Community starts in their home. In some homes, corrective rapes (to convert them to heterosexuality) has been adopted against them by their own family members. Both the gay men and lesbian women are victim of these kinds of rapes. These kind of exploitation does not even come to the purview of the society. The society and the family is not ready to accept that they too have feelings. A stricter and strong punishment against exploitation of LGBTQ Community has to be implemented.

iv. Right to freedom of religion

Freedom of religion is one of the key fundamental rights enshrined in the Constitution of India. But the sad side is such a right has not been extended to the LGBTQ Community. The religious communities are still not ready to accept them stating that these are against their religious books. No one change what is stated in the religious books. But as days passed with the evolution of advancements in the society, the minds of religious leaders can be changed by themselves alone. It is hard to notice these people entering into the religious places and worshipping the God of their choice. Undoubtedly, the accepted religious choices can bring a drastic change in their lives. They are not even granted with any sort of liberty in religion. It can be said that they are living in a religion of their own.

v. Cultural and Educational Rights

Education are often denied to the children and students who are of LGBTQ. Once the fellow students got to know about the identity of

⁴ Sensitive, give awareness training on plight of LGBTQ: Supreme Court to Centre, Retrieved from <https://www.newindianexpress.com/>

⁵ India: Supreme Court Recognizes Rights of the LGBT Community, Retrieved from <https://www.mondaq.com/>

such a child, their life at school or colleges is pathetic thereafter. They are bullied by the other students, are often subjected to discrimination in their study place. Their rights are violated and no more safe study environment prevails. The fear of all these discriminations lead to either drop outs from school or not getting admitted in schools. The school and college students has to be taught about the inclusive school environment which includes LGBTQ children also, they are not suffering from any kind of disease, in fact this is some kind of variations or changes in their chromosomes. This is part of nature and they should be ready to accept such students. In this regard, parents of other children has also to be educated, because the parents often fear LGBTQ children would change their children to LGBTQ.

vi. Right to Constitutional remedies

The last fundamental right which is for the citizens of India is right to approach the competent authority when their rights are being violated. In reality, does the LGBTQ Community approach judiciary whenever their rights are being violated? The answer is negative. They are the people whose rights are violated almost every day in their life. If that is the case, they should have been approached the courts to get their rights back. One time, they approached the court with full-fledged force till the Apex Court and they got the S. 377 of IPC scrapped. Just like this, they have to get the next step in approaching the judiciary to get their things done. They are entitled to all the fundamental rights and human rights as enjoyed by other citizens of India. If the law makers or the Government is not ready to offer these rights to them, they are at the liberty to approach the doors of the judiciary which are always open for them.

FUTURE OF LGBTQ COMMUNITY

- i. At the International level, every year May 17 is celebrated as International Day against Homophobia, Transphobia and Biphobia. This day has been initiated with a sole motive to address the discrimination and violence faced by LGBTQ Community to the policymakers at the International level⁶.
- ii. India has not yet made all the rights to be availed by the LGBTQ Community. A lot changes has to be made in the Indian legislations. Maternity leave has to be provided to them. Equal pay for equal work policy has not been applied to them till now. In addition, they also have the natural human desire of growing a baby. Artificial modes of getting a baby has to be made possible for them. In this regard, the Surrogacy Bill of 2019 has also to be amended to include LGBTQ couples to get a baby by altruistic mode of surrogacy.

⁶ International day against Homophobia, Transphobia and Biphobia, Retrieved from <https://www.who.int/>

- iii. The implementation of the rights of LGBTQ community has to be done at earliest. It is been more than two years since the struck down of S. 377, but not much changes has been made in the country. The main reason is the weak enforcement by the Indian Government. The judiciary can give the verdict alone and can direct the appropriate authority to implement the same. So, the complete implementation lies in the executive. The LGBTQ Community are still not accepted in the family and society. The scenario has to change and this lies only in the hands of the executive (Indian Government).
- iv. Awareness campaigns are crucial and urgent for the better future of inclusive societal life of the LGBTQ Community. The vital point to be considered in this aspect is that they should be educated regarding they are also entitled to education and job opportunities. It is hard to change a deep rooted conscience of their minds. But society can try to change their conception about the LGBTQ Community. The corporate world are reviewing their policies thereby granting an inclusive work place environment for the LGBTQ Community. It is the responsibility of the appropriate Governments to provide awareness campaigns about them. More specifically, in the *Navtej Singh Johar* case itself the Hon'ble Supreme Court directed the Central Government to initiate programmes which will curb the societal stigma which has been associated with LGBTQ Community.

CONCLUSION

The oppressive S. 377 of IPC is no more against the freedom and rights of the LGBTQ community. At the first instance, the societal perception about the LGBTQ community have to change and include them as fellow citizens of the nation. Indian laws need to be changed in this regard. Earlier, LGBTQ Community has been portrayed as suffering from mental illness. But now, the definition of mental illness has been changed to depict that homosexuality is no more considered as mental illness which is really a success to be celebrated by the LGBTQ Community. The rest of the world is changing a lot in this aspect. Several nations around the world are granting almost all the rights which are enjoyed by the citizens of their nation. India has to learn from other nations and International organizations and have to amend the suitable legislations thereby including their rights and freedoms. A separate legislation in this regard would be really a welcoming step. Only the first step of a long road has been taken by the Indian nation. It is of sure India has to travel a long to bring an inclusive society for LGBTQ Community just like the other citizens of the nation.