

**ANALYSING THE LEGAL STATUS OF LGBT IN INDIA AND TAKING THE
NARRATIVE FORWARD: LIVING FREE AND EQUAL**

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ABSTRACT

This research paper will help you understand about the human sexuality and talks about the various types of gender identities currently evolving in the Indian society. The emergence of legal status and rights of the LGBTQIA community has been mainly derived from the precedence and doctrines followed in the highest courts of the United States and its consequences can be seen in alleviating the conditions of the community all over the world. The experience of having an exclusive or nearly exclusive erotic preference for people of the same sex in fantasies and, typically, through the realisation of sexual intimacy with people of the same sex, is referred to as "homosexuality." It can be thought of in terms of identity, behaviour, and desire. The emotional reaction to same-sex attraction is homosexual desire. When people who are the same sex interact sexually, it is considered homosexual behaviour. The assumption of a self-label known as "homosexual identity" signifies the recognition of the predominance of homosexual desire and behaviour in one's self-composition. Contrary to homosexual identity, homosexual orientation is an affective state that is largely characterised by same-sex erotic desire that is uncontrollable and unaffected by historical or social construction. Homosexuals mainly fear to share their identities due to homophobia and discrimination that they will face. This deals with the various laws and legislations and court rulings which have favoured the betterment of the community in INDIA.

Keywords: Homosexuals, LGBT, Equality, Sexual Orientation, Sexuality

INTRODUCTION

What is human sexuality?

Who you have sex with or how often you have sex are not indicators of your sexuality. Your sexual feelings, thoughts, attractions, and behaviours toward other people are all part of your sexuality. Other people can pique your interest in a physical, sexual, or emotional way, and all of those things are aspects of your sexuality. Your sexual orientation is a unique and deeply personal aspect of who you are. It may be a tremendously liberating, thrilling, and fulfilling experience to discover your sexuality. There are many types of sexuality in the present and it is not necessary to fit into a certain type to fit in the society. In the present society most of the people are attracted to opposite sex, like boys are attracted to girls and girls are to boys, these people can be termed as heterosexual i.e. have interest in opposite gender. But many people are attracted to same sex people like girls may find their other female friends attractive and in a way of physical love and attraction. Terms like 'lesbian' and 'gay' are used for homosexuals where lesbian refers to women attracted physically to other women and gay refers to men attracted to same sex. But nowadays the term gay is used more commonly. Bisexual means a person who is attracted to both men and women. It is much more complicated than gay and lesbian. This feeling depends on who they meet. Sometimes they have feelings for both the gender but are involved in sexual activities only with opposite gender.

Understanding LGBTQIA identities

There are many types of sexualities present and it is difficult for anyone to find what group he belongs to as his feelings may change from time to time depending on places, the people he meets, his own experiences about sexual life. However in order to study these sexualities it has been classified into certain groups. It is not necessary for anyone to entirely fit in these groups. They are not exhaustive. We use the acronym LGBTQIA to refer to the new categories of people whose sexuality is different from the prevalent type. L stands for lesbian, G for gay, B for bisexual, T sometimes is called transgender or transsexual, Q stands for queer or sometimes questioning, I stands for intersex, A stands

for asexual or agender. Queer or questioning means someone who is not sure of their identity and does not mould himself into the given gender identity. Intersex is a general word used to describe a variety of naturally occurring physical differences that do not neatly fit into the traditional classifications of male or female. "Differences in chromosome compositions, hormone concentrations, and outward and internal traits are only a few examples of intersex variations. The sex traits of many visibly intersex people are altered by doctors in infancy and early childhood so that they resemble society's ideal of what a normal body should look like"¹. Although intersex people are rather numerous, there hasn't been much space for public discussion of intersex concerns due to society's denial of their existence. The term "hermaphrodite," which has been used in the past to characterise intersex individuals, is archaic and unreliable. Asexual means someone who is not attracted to any gender in a physical or sexual way.

even though all these types of identities cannot be completely included in these few terms and there is a complete possibility in the future for the expansion of these terms. Few years back the term LGBT was used and later LGBTQ. These terms are ever evolving and cannot be fixed.

The +in LGBTQIA+

The plus sign at the end of the LGBTQIA include other communities also because there are many people who don't identify themselves with the above given groups as it is difficult for a person to identify them with the same. There are many other kinds of sexualities mentioned below

1. Bigender: a person with two genders having the characteristics of both the masculine and feminine part is termed as bigender.
2. Cisgender: the gender or sexuality assigned to a person at birth for the society.
3. Demisexual: a person who is sexually attracted only when there is an emotional bond between the two and they feel the sexual attraction and affection very rarely. Also they don't have too much interest in sexual activity as compared to the emotional attraction.
4. Sapiosexual: a person who is attracted to intelligent and smart people containing wisdom and other similar qualities.
5. Pansexual: When someone criticises you for being gay, it's important to terms used to describe persons who desire people of all sexes and genders romantically, sexually, or affectionately. overlaps partly with polysexuality and bisexuality (not to be confused with polyamory). converse with someone about it.
6. Non binary: a gender identity and experience that transcends the male/female gender dichotomy and embraces the entire universe of expressions and ways of being that resonate for an individual. "It could be a deliberate effort to create new, unrestricted conceptions of self within the world or an active opposition to conventional gender norms. There may be crossover between various ideas and identities like gender expansive and gender non-conforming for certain persons who identify as non-binary"².
7. Multisexual: a general word used to explain attraction to different genders. Bisexual, polysexual, omnisexual, and other sexual preferences can be included. Some people interchangeably use the aforementioned words, while others place significant weight on their small variances.

Despite recent improvements, LGBTQ individuals in this country continue to face discrimination at employment, harassment, and termination. You have legal rights if you've experienced discrimination in hiring, firing, promotions, perks, or working conditions because of your sexual orientation, gender identity, or gender expression. The legal environment and the development of social views and

¹ Orel, N.A. and Fruhauf, C.A., 2015. *The lives of LGBT older adults: Understanding challenges and resilience* (p. 256). American Psychological Association.

² Averett, P., Moore, A. and Price, L., 2014. Virginity definitions and meaning among the LGBT community. *Journal of Gay & Lesbian Social Services*, 26(3), pp.259-278.

attitudes about a person's sexual orientation, gender identity, and gender expression have improved during the past twenty years. However, there is still clear and pervasive gender prejudice against members of the LGBTQ community in all spheres of public and private life, such as housing, employment, academic possibilities, purchasing power, and chances to meaningfully engage in societal decision-making. Despite recent improvements, LGBTQ individuals in this country continue to face discrimination at employment, harassment, and termination. You have legal rights if you've experienced discrimination in hiring, firing, promotions, perks, or working conditions because of your sexual orientation, gender identity, or gender expression. The legal environment and the development of social views and attitudes about a person's sexual orientation, gender identity, and gender expression have improved during the past twenty years. However, there is still clear and pervasive gender prejudice against members of the LGBTQ community in all spheres of public and private life, such as housing, employment, academic possibilities, purchasing power, and chances to meaningfully engage in societal decision-making.

Sexuality and mental health

Against gay, bisexual, and other men who have sex with men, homophobia, stigma (negative and typically unfair views), and discrimination (unfairly treating a person or group of people) still exist and can have a severe impact on the health and well-being of this population. The physical and mental health of gay, bisexual, and other men who have sex with men, as well as their ability to access medical care and the standard of care they may receive, can all be impacted by these unfavourable attitudes and behaviours. To promote the health of homosexual and bisexual men throughout their lifetimes, such impediments to health must be addressed at several levels of society, including health care settings, workplaces, and schools. Some people may have negative attitudes toward gay, bisexual, and other men who have sex with men. These attitudes can lead to rejection by friends and family, discriminatory acts and violence, and laws and policies with negative consequences.

Legal rights of LGBT in INDIA

Homosexuality has been in India since ancient times. Many hindu scriptures have various homosexual characters and visuals contained in it. Homosexuality has been prevalent in India from long back and it is not even considered inferior in any way since past. There are temples present in India who have carvings depicting same sex relationships. According to survey done there are about 2.5 million gays in India. "Around 3% of the Indian population identify themselves as homosexual and 9% identify as bisexual"³. But this is only those who have self declared them with the government and it reflects only a small number of population as many have hidden their identity due to fear of rejection and discrimination as our Indian society is still homophobic where people cant come out as homosexual.

Historical background

LGBT rights struggle against a two-hundred-year-old British legislation that made gay acts illegal because they violated nature's order. Article 377 of the Indian penal code,1860 is a prohibited offence. The first book on homosexuality, titled "The World of Homosexuality," was published in 1977 and was based on complete acceptance rather than tolerance and sympathy. "The first all-INDIA hijra conference, which drew 50,000 participants from all over the nation, was held in Agra in 1981. As a third gender, hijras received formal voting rights in 1994. The first petition against section 377 filed by AIDS Bhedbhav Andolan was also dismissed that year. LGBT rights struggle against a two-hundred-year-old British legislation that made gay acts illegal because they violated nature's order. The first all-India hijra conference, which drew 50,000 participants from all over the nation, was held in Agra in 1981"⁴.

³ Rao, T.S. and Jacob, K.S., 2012. Homosexuality and India. *Indian journal of psychiatry*, 54(1), p.1.

⁴ Misra, G., 2009. Decriminalising homosexuality in India. *Reproductive Health Matters*, 17(34), pp.20-28.

LGBT rights campaigns oppose a law from the 200s that criminalised homosexuality. The first ever pride march in South Asia was held in Calcutta in 1999. Following that, the Naz Foundation petitioned the Delhi High Court for justice against these laws that harm their sense of pride, respect for their community, rights, and freedom in India.

HOMOSEXUALITY - LEGAL STATUS IN INDIA

Article 377 of the Indian penal code

This act prohibits any kind of unnatural sexual intercourse and provides punishment for it. According to this unnatural intercourse includes sexual intercourse which is against the order of nature like man to animal or between same sex like man to man or woman to woman. The punishment can be life imprisonment which extend upto 10 years with or without penalty. After 150 years of this section it no longer exists without any reasonable grounds as no one can stop people from determining their sexuality and asking them to adhere to adjust the general types of genders. The supreme court ruled it unconstitutional on 6 september 2018. Every person is free to enjoy their sexuality in India as long as it is not forceful or without consent. Homosexuality is a part of the human sexuality and every person has the right to be free to choose or express his sexuality.

Article 14 and 15 of the Indian constitution

Article 14 concerns about the right to equality and equal protection. Article 15 prohibits any kind of discrimination against anyone based on their sex and sexuality. Gender based discrimination is not at all accepted. the state shall not discriminate any person on the ground of his gender. In the case of *Navtej singh johar v. union of India*, the supreme court held that Indian constitution cannot discriminate any person on the basis of sexual orientation or in short sex.

Under **article 19(1)(a)** of the Indian constitution every person has the right to freedom of speech and expression and thus everyone has the right to express their own sexual identity as long as it is not harming social order or causing harm to any person.

Also under **article 21** of the Indian constitution which protects life and liberty of a person, everyone has the right to privacy and integrity with gender and sexuality matters.

VARIOUS CASE LAWS

1. *National legal services authority v. union of India 2014*

In this case, supreme court of India held that the people belonging to LGBT community will be given all due rights and be treated under the third gender (economically and socially backward class). No person of such category can be denied any basic rights as it will be violation of the article 14,15,16 and 21 of the constitution of India. There would be various laws and legislations framed for the betterment of this community. E.g providing reservations in education and government jobs.

2. *Naz foundation government v. NCT of Delhi 2009*

The Delhi high court in this case held that section 377 of the Indian penal code is unreasonable and affects the rights of people and thus declared it unconstitutional, not legalized and unreasonable. Homosexual act cannot be considered as criminal offence as everybody is free to enjoy their rights and maintain dignity over sexuality under article 15 of the Indian constitution.

TRANSGENDER RIGHTS IN INDIA

Transgender persons (protection of rights) bill, 2019 was introduced by the parliament and approved by the cabinet of India . According to the proposed legislation, transgender people are those “whose gender does not correspond to the gender assigned to that person at birth and includes transmen or transwomen, persons with intersex variations, gender-queers, and persons

having socio-cultural identities such as kinnar, hijras, aravani, and jogta”⁵. An individual would have the freedom to identify as male, female, or transgender. However, transgender individuals must provide documentation of sex reassignment surgery and appear before a district magistrate to have their gender identification verified. “In nine different industries, including employment, healthcare, and education, the measure outlaws discrimination against transgender persons”⁶. Transgender advocates, however, criticised the measure for being absent on a genuine remedy or mechanism to integrate transgender individuals into public areas and enhance the quality of life.

Recognition of Same sex marriages

Same sex marriages are not recognised in INDIA and also such couples are not given the same rights as a normal heterosexual couple in legal and domestic cases. Even the families of the couple do not support it and threaten them. It may also be based on the region and the culture prevalent. There are at present various petitions in the courts of India but it would still take long to bring this change in the Indian society.

How can homosexuality be included in the mainstream?

There are various efforts taken by the government to make homosexuality inclusive and protect the rights of such people. It is important to make laws which are inclusive of all genders and do not discriminate. Making marriage laws which talk about same sex marriages, adoptions related to such couples, surrogacy, etc or amending the current law would work. But laws are not enough, the Indian society needs to understand that homosexuality is as normal as heterosexuality and accept it. Bollywood plays an important role by creating awareness about these topics in its movies. Television and various mass media such as social media have been a great importance in including such people in the mainstream.

CONCLUSION

Homosexuality is one of the many biological phenomena that are normal and inherent in a person and are governed by neurological and biological elements is sexual orientation. According to the theory put forth by scientists studying sexuality, a person has little to no control over the people they find attractive. A breach of the fundamental right to freedom of expression would result from any discrimination based on a person's sexual orientation. The Supreme Court further ordered the government to take all necessary steps to effectively inform the public that homosexuality is not a crime, to raise awareness of the LGBT community and end the stigma it faces, as well as to regularly train police officers on the subject. The Indian government has even passed laws to include LGBT in the Indian army as well.

Social norms, customs, cultures, or traditions cannot ever be a legal justification to prevent one person from exercising his or her fundamental rights under the constitution, according to the universal law of human rights. It would not have been possible to pass progressive legislation in our nation or get rid of social ills like child marriage, Sati, dowry, infanticide, etc. if we began explaining everything in terms of cultural beliefs, societal values, and public policy. Therefore, it is imperative that the government put aside its conservatism and take decisive action to end the stigma, discrimination, and abuse that surround LGBTQIA+ individuals. The government must create new laws or change current ones regarding marriage, adoption, guardianship, educational institutions, employment, healthcare and inheritance immediately.

⁵ Whittle, S., 2012. *Respect and equality: Transsexual and transgender rights*. Routledge-Cavendish.

⁶ Harrison, B.F. and Michelson, M.R., 2019. Gender, masculinity threat, and support for transgender rights: An experimental study. *Sex Roles*, 80(1), pp.63-75