

Homosexuality In India – LGBT rights for equality

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Abstract

This research paper analyses the present status of the lesbian, gay, bisexual, transgender (LGBT) community and attempts to uncover and identify the issues, which are either ongoing or have not been put forward in the Law making process for homosexuals. The author also draws insights from the laws pertaining to homosexuals from around the world and compares it to the present status of contemporary laws in India. She tries to uncover the wrongful inheritance of the current laws from the British colonial era, its present day impact on the legal and societal aspects for the homosexuals in India.

Introduction

Contrary to our social beliefs, sexuality and gender doesn't exist in binary. A person can have sexual orientation towards opposite sex and sometimes towards same sex. When meeting a person for the first time it is usually not the person's education, religion or ethnicity that we first notice, but if the person is a man or a woman. The word homosexuals literally means as 'of the same sex, being a hybrid of the Greek prefix homo meaning 'same' and Latin root meaning 'sex'. Lesbian, Gay, Bisexual and Transgender people are often referred as with the abbreviation of LGBT.

They can be defined as following:

- Lesbian – a woman having sexual orientation towards other women.
- Gay – a man having sexual orientation towards other men.
- Bisexual – a person who is attracted to both men and women.
- Transgender – a person who undergoes medical procedures to become a member of the opposite sex

Homosexuals encounter the very basic problem of identity crises as LGBT population is neither protected nor recognized in the Indian society. This is further fostered in India by the law, as the homosexual acts remain punishable by life imprisonment.

The area of LGBT and intersex issues is a vast and culturally complex and this article cannot cover each and this article can only give a broad and general orientation on the issues in our society and law for LGBT community. For many people, the sensitive nature of the subject makes them unable or unwilling to speak about issues facing LGBT and intersex persons, nationally or internationally. Regardless of the sensitivity of the topic it is imperative that these must be discussed and brought

forward so that respective laws are be corrected which have been unfair to the LGBT community so far.

Historical Background

Homosexuality is not a new phenomenon. Even instances of homosexuality are available in Hindu Mythology.⁸ The literature drawn from Hindu, Buddhist, Muslim, and modern fiction also testifies the presence of same-sex love in various forms. Ancient texts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads and Puranas refer to homosexuality. Also, there are reports that same-sex activities are common among sannyasins, who cannot marry.

Thus instances of homosexuality are available in historical and mythological texts world over and India is not an exception to this.

The Cultural residues of homosexuality can be seen even today in a small village Angaar in Gujarat where amongst the Kutchi community a ritualistic transgender marriage is performed during the time of Holi festival. This wedding, which is being celebrated every year, for the past 150 years, is unusual because Ishaak, the bridegroom and Ishakali the bride are both men.

Thus the history is filled with evidences proving the existence of homosexuality in past. Whereas in the past 10 years world over, for the lesbian and gay rights, we find that the legal initiatives have shifted from the right to be privately sexual, that is the right to have same-sex relationships at all, to the right to be individual civic subjects, protected from discrimination in the work place and in the provision of services, toward the right to have relationships given status by the law.

Legal Status of Homosexuals in India

Section 377 of the Indian Penal Code (1860) relates to Unnatural Offences and includes homosexuality within its domain. In India this Law relating to homosexuality was adopted from the British penal code dating to 19th century. Section 377 states:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

Similarly section 292 of IPC refers to obscenity and there is ample scope to include homosexuality under this section. Also section 294 of Indian Penal Code, which penalizes any kind of "obscene behavior in public", is also used against gay men. It is important to note here that in England the offence of homosexuality between consenting partners has been abolished by the Sexual Offenders Act 1967 (that is in the country of origin of this law) whereas in India, the consent is quiet immaterial for constituting an offence as defined under this section.

Thus in India it is primarily section 377, which explains and defines unnatural offences. It is this section, which makes Homosexuality illegal with life imprisonment or with imprisonment for ten years with fine.

Challenges of LGBT people

Laws affecting lesbian, gay, bisexual, and transgender (LGBT) people vary greatly by country or territory; everything from the legal recognition of same-sex marriage to the death penalty as punishment for same-sex romantic/sexual activity or identity. Laws that affect LGBT people include, but are not limited to, the following: laws concerning the recognition of same-sex relationships, including same-sex marriage, civil unions, domestic partnerships, etc laws concerning LGBT parenting, including adoption by LGBT people.

After the economic liberalization of the early 1990s, Indian companies adopted many trends to become the forefront of global competitiveness. Today, Indian companies have to deal various dimensions of the dynamic workforce, and gender diversity is a significant variable in this regard. The main challenge of LGBT professionals in the workplace today is that they are discouraged to disclose their sexual orientation in the workplace. If their sexual orientation is made public in the workplace then their contribution is not appreciated by their superiors Therefore now the senior management is faced with the task of handling this issue by inculcating workplace practices that challenge the mindset of the workforce, thus fostering a safe and open environment for LGBT professionals.

India does not recognize same-sex marriage or civil unions. Additionally, it does not possess a unified marriage law. Every Indian citizen has the right to choose which civil code will apply to them based on their community or religion. Although marriage is legislated at the federal level, the existence of multiple marriage laws complicates the issue. The following acts cover India's marriage laws: *Indian Christian Marriage Act of 1872, Special Marriage Act of 1954, Hindu Marriage Act of 1955, Parsi Marriage Act of 1936, Anand Marriage Act of 1909, Muslim Personal Law (Shariat) Application Act of 1937*. None of these codified marriage acts explicitly defines marriage as between a man and a woman. Neither do these acts explicitly prohibit same-sex unions. As of 2017, a draft of a Uniform Civil Code that would legalize same-sex marriage nationwide has been proposed.

Indian Constitution and LGBT

Preamble to the Constitution mandates Justice - social, economic, and political equality of status. Preamble to the Constitution mandates Justice - social, economic, and political equality of status. Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 21 ensures right to privacy and personal dignity to all the citizens. Even

though transgender (Third gender)¹ has been addressed to some extent in the Indian Laws, but no such effort has been put forwards when it comes to the rights of lesbian, gay and bisexuals. Rather than including them in these laws, the section 377 has made homosexuality illegal in India with life imprisonment or with imprisonment for ten years with fine.

It is the birthright of every Indian citizen to enjoy the constitutional rights entitled to them and protected by the law in every aspect of their existence as a human being. However, when it comes to the rights of LGBT people the protection given by Indian constitution is not sufficient because it doesn't recognize the same-sex union between two individuals to be valid or to be even considered worth including the constitutional laws. There is so far no such progressive changes have taken place which can be considered as even slightly inclined towards protecting the LGBT community. Rather homosexuals remain to this date as victims of unfair treatment, violence and discrimination from different forms in state and society.

Conclusion

All the above arguments in favor and in against homosexuality suggest that Indians are not ignorant about homosexual events around the world and its legalization but still they have some reservation about homosexual relations. Indian society, by and large, disapproves homosexuality and justifies it as a criminal offence even when adults indulge in private. It is high time for the Legislature, Executive, Judiciary and Society at large that they cannot demean the existence of people with same sex desires. They also need to acknowledge that by legalizing homosexual relations they will not permit a mere sexual activity but will also decriminalize the lives of citizens who are connected to such sexual act. Finally it can be said that if laws are supposed to represent socially acceptable dos and don'ts, then a new mindset is the need of the hour. Otherwise, normal human beings will continue to suffer inhuman exploitation just because nature has nourished them with the need to be different.

¹ *National Legal Service Authority vs Union of India and others*