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Pride and Prejudice: The Legal Landscape of LGBTQ⁺ Rights in India

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INTRODUCTION:

“All human beings are born free and equal in dignity and rights.”^[1]

- Article 1, UDHR

India’s strength lies in its diversity – of languages, culture, beliefs, traditions and identities. But for a long time, the voices of LGBTQ+ community- lesbian, gay, bisexual, transgender, queer or beyond were pushed to the margins, silenced and unheard by the colonial-era laws and social prejudice. They were denied basic rights and dignity in the society. But in recent years, there has been noticeable shift in the legal landscape. Legal reforms and landmark court rulings have challenged long-held biases faced by LGBTQ+ community. This blog explores the legal milestones, landmark judgements, the rights available to LGBTQ+ individuals and ongoing challenges in India.

DECODING LGBTQ+: FUNDAMENTAL TERMS

- **“Lesbian”**: a woman who is emotionally and physically oriented towards another woman.^[2]
- **“Gay”**: a person who is emotionally and physically oriented to the person within the same gender.^[3]
- **“Bi-sexual”**: a person who is emotionally and physically oriented to people with more than one sex, gender or gender identity.^[4]
- **“Transgender”**: a person whose expression of gender is different than his sex assigned at birth.^[5]
- **“Queer”**: a person having non-binary or gender-fluid identities.^[6]

The '+' in 'LGBTQ+' signifies that the above list is not exhaustive it includes other categories as well like Pansexual, asexual, Intersex etc. ^[7]

TRACING THE PAST: Section 377(IPC)

Section 377 of The Indian Penal Code was introduced during the British Rule in 1861. This section criminalized “carnal intercourse against the order of nature.” ^[8] It punished same-sex marriages and was used to target and silence same-sex relationships. Though it was rarely enforced, its mere presence labelled LGBTQ+ individuals as unnatural or criminal.

Over time, activists began challenging this outdated law. Initial legal effort came from the Naz Foundation in 2001, which led to a notable judgement by Delhi High Court in 2009 that decriminalized consensual same-sex relations ^[9]. Despite that, the relief was quickly overshadowed. The Supreme Court, in Suresh Kumar Koushal's case, ^[10] invalidated Delhi High Court's decision and re-established Section 377 in 2013. This setback incited protests throughout the nation, led to various legal actions and enhanced the drive for transformation.

THE TURNING POINT: NAVTEJ SINGH JOHAR v. UOI (2018)

In 2018, The Supreme Court delivered a landmark ruling in the case of Navtej Singh Johar v. Union of India. ^[11] This case was brought forth by a diverse group of individuals, including a dancer, a journalist, and an LGBTQ+ activist, who argued that Section 377 was violative their fundamental rights of equality, freedom and privacy. The Supreme Court read down the part of Section 377 that criminalized consensual same-sex relationships. The court not just decriminalized homosexuality, it upheld the principles of equality, dignity, privacy and individual autonomy of LGBTQ+ individuals. It also acknowledged the immense trauma and discrimination faced by LGBTQ+ community for decades.

LGBTQ+ RIGHTS IN INDIA:

1. CONSTITUTIONAL RIGHTS:

- **Right to Equality (Article 14):** The Supreme Court made it clear that treating LGBTQ+ people as “second-class” or criminals just because who they are and denying them equal rights goes against the core idea of equality. This guarantees right to equality to the LGBTQ+ community.
- **Right against Discrimination (Article 15):** Even though Article 15 does not directly mention sexual orientation, the court said that discrimination based on someone's

identity- like being a gay or transgender, falls under “discrimination based on sex” which is unconstitutional.

- **Freedom of Expression (Article 19):** Article 19 grants people, freedom to express- not just through words, but also by embracing one’s identity in private life- through love, dress, or self-affirmation. LGBTQ+ individuals have right of expression which is protected by Indian Constitution. ^[12]
- **Right to Life and Personal Liberty (Article 21):** The Supreme Court in Puttaswamy’s case, ^[13] ruled that right to privacy is a fundamental right. Elaborating further, the court later in Navtej Johar said that love, identity and freedom to live with dignity are deeply personal- and the state has no place in policing such matters.

2. TRANSGENDER RIGHTS:

- The Supreme Court, in NALSA v. UOI ^[14], recognized transgender people including hijras and eunuchs as “third-gender”. It affirmed that transgender individuals are entitled to fundamental rights under Article 14, 15, 16, 19 and 21.
- Building on NALSA’s case, Transgender Persons (Protection of Rights) Act, 2019 was enacted to recognize self-identified genders, grant reservations in education and government jobs, implement welfare measures for them including medical care and outlining punishments (6months to 2 years) for offences like forced eviction, denial of services, physical or emotional abuse. ^[15]

CIVIL RIGHTS STILL DENIED:

Decriminalization of Section 377 was a major win and landmark rulings like Navtej Johar and NALSA granted LGBTQ+ community, their fundamental rights. But beyond that, many civil rights are still out of reach for them. Like;

- **No Legal Recognition of Same-Sex Marriages:** The Supreme Court in 2023, while hearing petitions for same-sex marriage recognition (Supriyo v. UOI), ruled that right to marry was not a fundamental right and left it to the legislature to decide. ^[16]
- **No Legal Right of Adoption and Parenthood:** LGBTQ+ can adopt as single parents but joint adoption by same-sex couples is not legally permitted. The Central Adoption Resource Authority doesn’t allow seme-sex couples to register as adoptive couples.

CONCLUSION:

India's journey towards LGBTQ+ rights has seen bold activism, landmark court rulings, and long-overdue progress - from decriminalizing homosexuality to recognizing transgender identities. But changing laws isn't enough to erase deep-rooted stigma or close the gaps in civil rights. True progress happens when these individuals feel safe, respected at work and protected by law in their daily lives. For which, we need awareness, inclusive policies, and genuine support by the society. Equality, dignity and freedom must be lived realities for all, not just promises on paper.

REFERENCES:

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9. Naz Foundation vs. Government of Nct of Delhi and Others, 2009 111 DRJ 1.
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