

DE JURE NEXUS LAW JOURNAL

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THE JOURNEY OF LGBTQIA+ COMMUNITY IN INDIA
(through various judgements given over the years)

Society needs to change, not the LGBTQIA+ couples- Madras High Court

“Ignorance is no justification for normalising any form of discrimination.” – said by Justice Anand Venkatesh of the Madras High Court while issuing guidelines for the protection of the LGBTQIA+ community.

LGBTQIA+:

L- Lesbian meaning a woman who is sexually attracted to women.

G- Gay meaning a man who is sexually or romantically attracted to men.

B- Bisexual meaning someone who is sexually attracted to both men and women.

T- Transgender referring to people whose gender identity, expression or behaviour is different from those typically associated with their assigned sex and birth.

Q- Queer, this is an umbrella term for those who wish to not categorise sex, sexuality or gender.

I-Intersex referring to a person who is born with reproductive or sexual anatomy that does not fit the typical male or female anatomy.

A-Asexual referring to a person who does not feel any sexual attraction.

+ any others who do not recognise themselves in any of the above categories.

Difficulties faced by LGBTQIA+ Community in India:

1. No legal recognition for their marriage.

Same sex marriages are not legally recognized in India.

2. Inadequate services of the healthcare system.

Criminalisation of homosexuality leads to discrimination and results in LGBTQ people getting poor or inadequate access to services within the healthcare system.

3. Deprived in Rights.

The rights enjoyed by opposite sex couples are not enjoyed by the same sex couples.

4. Discrimination:

Lesbian, gay, bisexual and transgender people suffer from social as well as economic inequalities due to the discrimination they face.

The LGBT community in our society are not only considered inferior but are also tortured physically. Most of this begins from their own homes. They are humiliated and rejected in their childhood, called by insulting names in their schools, colleges and neighbourhood. Many people consider the people of this community to be having a disease. People take their children to the hospitals to cure their children where there are even given electric shocks among other things so that they become heterosexual from being homosexual. They are also sexually assaulted. Their own family members rape them.

According to **Section 377 of the IPC**, homosexual acts were a criminal offence. The police for a long time have misused this law and have often committed atrocities on the people of the LGBT community. This community has since a long time been subjected to unacceptance in the family, ill treatment in the society, blackmail, violence, sexual harassment, rape, and have been considered a criminal, being dragged to the police stations and kept there, for something very natural and in which no fault is there of theirs. A section of our society is continuously being treated inhumanly like this.

IPC Section 377:

Penal Code, 1860 was drafted by Lord Macaulay and was introduced in 1861 in British India. Chapter XVI of the IPC is “Of Offences Affecting the Human Body”. Within this chapter, Section 377 is there as a sub-category titled “**Of Unnatural Offences**” and reads as:

‘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.’

This was a very strange law. The word ‘unnatural’ was there in the law itself. It taught you how you should think about yourself. This law was brought by the Britishers who changed their law about 50 years ago but we, in India were following it till 2018.

Why are LGBTQIA+ rights important?

1. Everyone should feel proud of who they are and who they love.
2. Bringing an end to homophobia and transphobia will save lives.
3. By embracing LGBTQIA+ people and understanding their identities, we can learn how to remove many of the limitations imposed by gender stereotypes.
4. People belonging to the LGBTQIA+ community, especially transgender and gender non-conforming people, are often at risk of economic and social exclusion.

LGBTQIA+ Pride Month:

- Every year in **June**, the world celebrates Pride Month in honor of those members of this community who have been through various obstacles in life and have come a long way. It also showcases how far their rights have come, and what all is yet to achieve.
- **Global Pride day** every year is celebrated on **June 28**. Colourful parades, concerts, and marches are held across the world to celebrate this day.

History:

The **1969 Stonewall Riots** worked as a catalyst for the Pride movement.

Earlier, American Constitution had banned homosexuality and the police would often raid queer bars and harass their community in one of the bars. Greenwich Village’s Stonewall Inn was one such target of the New York Police. But, on June 28, 1969, tired of daily atrocities, the entire queer community fought back and gave a befitting reply to those in power. The protest went on for several days and support poured in from various corners of the world. This fight

brought a revolutionary change in the world. In the very same year, the first official Pride parade was carried out to mark the anniversary of Stonewall Riots and since then, it became a tradition.

Alan Turing was a British mathematician and logician who made major contributions to mathematics, computer science, artificial intelligence, etc. He was instrumental in cracking intercepted code messages that enabled the Allies to defeat Germany in many crucial engagements in the war. In March 1952, he was convicted of ‘gross indecency’-that is to say, homosexuality, a crime in Britain at that time. He accepted chemical castration treatment as an alternative to prison and so was sentenced to 12 months of hormone therapy. Afterwards, he was discovered dead in his bed, poisoned by cyanide. The official verdict was suicide but his death is often attributed to the hormone treatment he received at the hands of the authorities following his trial for being gay.

Madras High Court Judgment: (7th June, 2021)

Ms. S. Sushma and Anr. Vs. Commissioner of Police and others

Background:

The case was related to a Madurai based lesbian couple who chose to live as a married couple. Facing resistance from their families, they fled to Chennai and took refuge in an NGO. As the police continued to visit them for interrogation, following complaints lodged by their parents, the two, apprehending threat to their safety and security, moved the Madras High Court to restrain cops from harassing them.

The Writ Petition filed under Article 226 of the Constitution of India, brought to light an important issue requiring de-stigmatisation and acceptance in the eyes of the society.

Orders by Justice N. Anand Venkatesh¹:

1. He ordered that the Ministry of Social Justice and Empowerment (MSJE) has to upload the details of NGOs including community based groups which have sufficient expertise in handling the issues faced by the LGBTQIA+ community, along with their addresses,

contact details and services provided by them on its website within eight weeks and revise the information periodically.

1. 2021 SCC OnLine Mad 2096

2. Any person who faces any issue because he/she belongs to the LGBTQIA+ community could approach any of the enlisted NGOs for selter and safeguarding their rights.
3. NGOs, in consultation with MSJE, should maintain confidential records of such persons who approached them and the **aggregate data be submitted to the Ministry bi-annually.**
4. Making it clear that the victims should be provided need-based relief, the court said that the NGOs should also coordinate with the police with respect to offences committed against them.
5. The judge made it clear that whenever the police receives missing complaints of people belonging to the LGBTQIA+ community who are above 18 years of age, from their parents or relatives, such complaints should be closed after obtaining statements from the couple concerned that they were residing together on their own will. He also ordered that the consenting adults should not be subjected to any kind of harassment.
6. Impressing upon the need for the society to accept the LGBTQIA+ community, he said: “The voice of this community is now getting louder and stronger and the society can no more turn a deaf ear.”
7. Further, the Madras High Court suggested a ban on health professionals attempting to medically cure or change the sexual orientation of LGBTQIA+ people to heterosexual or the gender identity of transgender people to cisgender.
8. The court also directed National Medical Commission, Indian Psychiatric Society and the Rehabilitation Council of India to take action including withdrawal of license to practice of professionals involved in any form or method of conversion therapy of LGBTQIA+ community members.
9. The judge referred to the Canadian biologist Bruce Bagemihl’s book titled ‘Biological Exuberance: Animal Homosexuality and Natural Diversity’ in which same sex behaviour had been documented in over 450 species of animals worldwide.
10. The Court also suggested that at regular intervals: awareness programs to be conducted on steps to be taken for protection from and prevention of offences against the LGBTQIA+ community for judicial officers, police, public servants, helthcare

professionals, etc and conducting sensitization about the legal rights of these people to promote non discrimination.

The judgment has put the responsibility on the society to get rid of their prejudices against the LGBTQIA+ community by asking the Union and the State Governments to take up the required measures to reduce prejudice and by recommending a list of sensitization programmes to create awareness.¹

Other significant and landmark judgments that paved the way for LGBTQIA+ Rights in India:

1. NAZ Judgement²: (2nd July, 2009)

NAZ Foundation v. Government of NCT of Delhi

NAZ Foundation is an NGO which has been working in the field of HIV/AIDS intervention and prevention involving interaction with such sections of the society as are vulnerable to contacting the disease including **gay community** or individuals who are described as '**men who have sex with men (MSM)**'. It has been at the forefront in the battle of decriminalization of Section 377 IPC and in fighting for the rights and just treatment of the LGBTQIA+ community.

This NGO filed a **writ petition in the Delhi High Court as a PIL** to challenge the constitutional validity of Section 377 IPC. (But, this was not the first petition that they had filed.

In 2001, Naz Foundation had for the first time filed a writ petition in the Delhi High Court for the same which was dismissed by the Court in 2004 on the ground that it could not hear an academic challenge to the constitutionality of the legislation and that the petitioners has no locus standi in the matter. Then, Naz Foundation appealed to the Supreme Court which held that the matter should be heard and ordered the Delhi High Court to do the same.)

Thus, the question raised in this case was should we remove Section 377.

The Court dealt with this question from two angles:

(i) Article 21: Protection of right to life and personal liberty.

The Court said that Right to Life cannot be enjoyed without dignity and privacy.

1. Available at www.livelaw.in (last accessed on 23/07/2021)

2. 2009 SCC OnLine Del 1762

(ii) Right to Equality.

(a) **Article 14:** The State shall not deny to any person 'equality before law' and 'equal protection of law'.

Section 377 is violative of this article as it does unreasonable discrimination towards homosexuals as a class by criminalizing their consensual sex.

(b) **Article 15:** Prohibition of discrimination on grounds of religion, race, caste, sex, and place of birth.

Here, the word 'sex' does not only mean biological sex but also sexual orientation.

The Delhi High Court, with Chief Justice Ajit Prakash Shah and Justice S. Muralidhar on the bench, declared that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults (above 18 years of age) in private, is violative of Articles 14, 15 and 21 of the Constitution of India. They also said that this clarification will hold until the Parliament chooses to amend the law.

**2. Suresh Kumar Koushal and another v. Naz Foundation and others:
(11th December, 2013)**

In this case, a **review petition** was filed against the above stated case as a result of which a 2 judge bench of the **Supreme Court of India** consisting of **Justice G.S. Singhvi and Justice S.J. Mukhopadhyaya** overturned the Delhi High Court judgement and reinstated Section 377 IPC.

Mainly two arguments were raised in this case:

- (i) Homosexuality is a criminal offence which can only be decriminalised by the Parliament and cannot be interfered with by the Courts.
- (ii) Right to Privacy cannot be extended to such an extent that an offence can be committed under it. Thus, Right to Privacy will not cover homosexual acts.

Further, the Court said that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring Section 377 IPC as ultra vires of Articles 14, 15 and 21 of the Constitution of India.

Many international organisations declared this judgement as a step backward for India. Further, after the 2009 Naz Judgement, many people who started disclosing their identities and started to freely express their sexual orientation were seen as criminals and were targeted.

3. **NALSA Judgement**¹: (April 15th, 2014)

National Legal Services Authority versus Union of India and others

Members of the Transgender (TG) Community which include hijras, eunuchs, etc. and kinnars filed a **writ petition** seeking legal declaration of their right to choose their gender identity other than the one assigned to them (male or female) at the time of birth. More so, when such person has undergone surgical procedure (Sex Reassignment Surgery (SRS)) to change sex.

In this case, this loophole came to be known that all our Indian laws focus on binary genders i.e. male and female, and rights of the transgender community are protected by no provision. That's why the transgender community is discriminated. Since TGs are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country.

The Supreme Court of India, dealing with this loophole, recognised multi facet rights of the transgender community as:

- (i) It said that rights of all 'persons' are protected under **Article 14** of the Constitution of India whether it be men, women or transgenders.
- (ii) Gender based discrimination is prohibited under **Articles 15 and 16** of the Constitution of India. So, if any discrimination is being done on the basis of sexual orientation, then, it is violative of Articles 15 and 16.

Article 16: Equality of opportunity in matters of public employment or government service.

1. 2014 SCC OnLine SC 328

- (iii) **Citizen's right to freedom of speech and expression under Article 19(1)(a)** of the Constitution of India would include one's right to expression of his self-identified gender. Further, it was held that Privacy, Self Identity, Autonomy and

Personal Integrity are fundamental rights guaranteed to members of the TG community under Article 19(1)(a).

- (iv) Right to live with dignity as guaranteed by **Article 21** of the Constitution of India includes right to choose one's gender identity and its legal recognition. Also, self determination of gender is an integral part of personal autonomy and self expression and falls within the realm of personal liberty guaranteed under Article 21.

The two judge bench of the Supreme Court of India consisting of Justices K.S.P. Radhakrishnan and A.K. Sikri identified TGs as third gender and said that psychological and not biological test to be applied to transsexuals. They directed the Centre and State governments to take steps to treat TGs as Socially and Educationally Backward Classes of citizens.

Some Important Terms to Understand:

Gender identity refers to an individual's self identification as a man, woman, transgender or other identified category.

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person.

Personal autonomy is the one which includes both the negative right of not being subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in.

4. Justice K.S. Puttaswamy (Retired) and Anr. vs Union of India and others: (24th August, 2017)

It was affirmed in this case that **Right to Privacy is a fundamental right under Article 21 of the Constitution of India**. Also, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III of the Constitution of India.

9 judge bench was constituted for the case. **Justice D.Y. Chandrachud** authored this judgement. He said that there is a responsibility upon the Supreme Court of India to rectify the mistake it made in the case of Suresh Kumar Koushal vs Naz Foundation. Therefore, he said that:

- (i) “A miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders” (as observed in the Suresh Kumar Koushal Case) is not a sustainable basis for denying the right to privacy. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.
- (ii) Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected at an even platform.
- (iii) **The right to privacy and sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution of India.**

This case paved the way for the decriminalization of Section 377 IPC in 2018.

5. Navtej Singh Johar and others v. Union of India¹ through Secretary, Ministry of Law and Justice: (6th September, 2018)

De-criminalized all consensual sex among adults in private including homosexual sex and overruled the judgement given in Suresh Kumar Koushal case in 2013.

Writ petitions were filed for declaring ‘right to sexuality’, ‘right to sexual autonomy’, and ‘right to choice of a sexual partner’ to be part of the right to life guaranteed under Article 21 of the Constitution of India and further to declare Section 377 of the Indian Penal Code (IPC) to be unconstitutional.

1. 2018 SCC OnLine SC 1350

This case had a **5 Judge Constitutional Bench of the Supreme Court of India** consisting of former CJI Dipak Mishra, Justice Indu Malhotra, Justice A.M. Khanwilkar, Justice Rohinton Nariman and most importantly Justice D.Y. Chandrachud (who applied the same logic as he did in the above mentioned case).

- (i) Taking support of **Article 14** of the Constitution of India, the Supreme Court said that to criminalise the sexual acts of two consenting adults in private only because they are homosexual, is neither any valid intelligible differentia nor any rational

nexus. Such traditional norms which are based on the ambiguous and subjective norms such as morality, etc. should be given away with.

- (ii) In contention of **Article 15**, the Court said that the approach of the Delhi High Court during the Naz Judgement in 2009, that 'sex' in this article includes biological sex as well as sexual orientation was the appropriate approach which reflects our improved understanding.
- (iii) With regard to Article 19, the Court reaffirmed the NALSA Judgement of 2014, which was also affirmed in the Puttaswamy case, stating that, gender identity and sexual orientation are integral to one's personality and are a basic aspect of self-determination, dignity and freedom.
- (iv) Homosexuality and bisexuality are natural variants of human sexuality. LGBT persons have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons are entitled to their privacy, dignity and autonomy, without fear of persecution. Such choices must be protected under **Article 21**.
- (v) Dissolution of moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity and is founded on a vision of an inclusive society which accommodates plural ways of life.

It was finally declared by the Supreme Court of India that Section 377 of the IPC insofar as it criminalises consensual sexual acts of adults (i.e persons who are above 18 years of age who are competent to consent and such consent is free consent) in private, is violative of Articles 14, 15, 19 and 21 of the Constitution of India.

Transgender Persons (Protection of Rights) Act¹, 2019: (5th December, 2019)

An Act to provide for the protection of rights of transgender persons and their welfare as:

1. **Prohibiting discrimination** and unfair treatment towards TGs in educational establishments, employment, healthcare services, etc.,
2. **Recognition of identity** of transgender persons legally by making an application to the District Magistrate.
3. **Welfare measures** by the government such as taking steps to secure full and effective participation of TGs and their inclusion in the society, promote and protect the rights

and interests of TGs, their rescue, protection and rehabilitation and formulating welfare schemes and programmes which are TG sensitive, non stigmatising and non discriminatory.

4. Formulation of the **National Council for Transgender Persons** to:

- (a) Advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons and to monitor and evaluate their impact.
- (b) Review and coordinate the activities of all the departments of the Government and other governmental and non governmental organisations which are dealing with matters relating to TGs.
- (c) Redress the grievances of TGs

5. Offences and penalties

LGBTQIA+ community and other allies have been fighting to get equal rights, to start families, to get married, adopt children, fight discrimination, hate speech and the right to simply exist as they are. There is still a long way to go before people of this community meet full-fledged acceptance in the society as we have seen that even after the decriminalisation of Section 377 IPC in 2018, the Madurai based lesbian couple had to appeal to the Court for their protection and security.

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1. Availabe at <https://socialjustice.nic.in> (Last accessed on 23/07/2021)