

# Homophobic India And Queer Community: A Comprehensive Study On Discrimination In Public Sphere, Judiciary And Army

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## Abstract

The landmark judgement of Navtej Singh Johar vs Union of India which decriminalized Section 377, sent a ray of hope and faith across the LGBTQIA+ community. The Supreme Court, on 6<sup>th</sup> September 2018, declared the law unconstitutional and concluded that the sexual orientation of a person is natural and hence decriminalized all sorts of consensual sex among individuals including homosexual sex. Although the change in the perspective of the state towards the queer community was a positive one, it has been noticed how Article 15 of the constitution, is still violated against them. This paper seeks to examine the lack of social recognition of queer community even after the court's judgement, in public sphere, with special emphasis on Indian Army, Judiciary and public healthcare facilities, and how the community's problems still remain unaddressed.

**Keywords:** Section 377, Queer Movements, Transgenders, Army, Judiciary, Healthcare]

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## I. Introduction

The term "Homophobia" was coined by George Weinberg that was first published in Screw on May 5<sup>th</sup> 1969, followed by Time a few months later (Grimes, 2017). It encompasses a range of negative attitudes and dogmatism towards homosexuality or people who identify themselves as gays, lesbians or bisexuals. Homophobia also takes the form of demarcation, discourteousness and even violence.

Homosexuality in India has been a subject of discussion from old times to 21st century. In the early times, Hinduism has handed ample of erudite sources talking about LGBTQ life in Ancient India. The Kama Sutra dedicates a complete chapter describing a wide range of genders and relations as well as homosexual practices.

However, with the emergence of Mughal conglomerate in India, Homosexuality began to be viewed from another perspective. From the Islamic viewpoint, homosexuality is a forbidden action; a major sin and anyone who partakes in it is considered a defiant menial to Allah that will acquire His displeasure and disapprobation<sup>1</sup>. Therefore, the Fatwa-e-Alamgiri of the Mughal Empire mandated a set of punishments or corrections for homosexuality which included 50 lashes for a slave, 100 for a free infidel or death by stropping for a muslim.<sup>2</sup>

## II. Implementation Of Section 377 And Emergence Of LGBTQ Activism In 1990s-

In 1861, the British Raj replaced Fatwa-e-Alamgiri with 1862 Indian Penal Code, Section 377 covering homosexuality. Drafted by Thomas Babington Macaulay, the law criminalized any form of sexual activity "Against the Order of Nature", punishable by Law and carries a life judgement.

Since then, members of the LGBTQ+ community faced lots of torture and importunity ranging from police brutality and gang rape, to gays and lesbians beaten to death.

To fight this archaic law, several associations have been formed since early 1990s to fight prejudices against Homosexuality and to create an open and vibrant space for LGBTQ activism in India. India's first ever kick which demanded rights for gay individualities and repeal of Section 377 began in 1992 which was held by AIDS Bhedbhav Virodhi Andolan (ABVA) in Delhi. Two years later, in 1994, members of ABVA wanted to distribute condoms in Tihar Jail to the captures, but Kiran Bedi, then Inspector General of Police, did not grant

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<sup>1</sup> Islam's Clear Position on Homosexuality ,Australian National Imams Council, 2018

<sup>2</sup> Baillier, Neil B.E. (1875). "A digest of the Moohummudan law".

them authorization by arguing that this would lead to the belief that Homosexual relations are current in Bihar, and vacuity of condoms would encourage the practice.

### **III. Timeline Of Cases Beginning From 2001 That Lead To The Decriminalization Of Section 377 In 2018**

- 1. Attempt to repeal Section 377 by Naz Foundation India Trust (2001)-** Naz Foundation is a non-governmental association which was established in 1994 by Anjali Gopalan, that primarily focuses on sexual health of individuals and HIV/AIDS. It is known for being at the van of the battle against Section 377 of Indian Penal Code that discriminates individuals on the basis of their sexual exposure. The foundation, joined up with Lawyers Collective (a non - governmental organization in India, which promotes human rights), filed a solicitation in Delhi High Court to not repeal Section 377 but exclude consensual sex among adult individuals. The petition challenged Section 377 on the basis that it violates the abecedarian rights of an individual that are guaranteed by the Indian constitution. However, the petition was rejected by the Delhi High court on the grounds that the Foundation was not personally affected by Section 377 and had no locus standi in the case. The Naz Foundation along with Lawyers Collective asked the Supreme Court of India to review the redundancy of the petition, and the latter instructed the Delhi High Court to hear the case again, since the grounds of dismissal were not valid.
- 2. Decriminalization of homosexuality by Delhi High Court (2009)-** The 2009 Judgement of Delhi High Court finding that the Section 377 of the Indian Penal Code criminalizing same- sex activity is unconstitutional. This case was brought up by the Naz Foundation. (Trust, 2009). After the judgement, various appeals were made to the Supreme Court by religious groups, challenging the High Court's authority to change a law. Hence, in 2012, the Supreme Court found the High Court's decision as fairly unsustainable and capsized the decision. A two-judge bench, comprising Justice G S Singhvi and Justice S J Mukhopadhaya observed that the high court had overlooked the fact that a "minuscule fraction of the country's population constitutes LGBT," and that in over 150 years less than 200 people were prosecuted for committing an offence under the section. The Supreme Court then recommended the Parliament to address the matter because only they had the power to amend the being laws. (Abbas-Bin-Mohd, 2022).
- 3. Decriminalization of Section 377 by Supreme Court (2018)-** Navtej Singh Johar vs Union of India 2018, is a corner decision of Supreme Court of India where it ruled out that consensual gay sex is not a crime saying sexual orientation is natural and people have no control on it. All the five judges- CJI Dipak Mishra, Justice Rohinton F Nariman, AM Khanwilkar, DY Chandrachud, and Indu Malhotra inked the verdict and therefore, homosexuality gets legal approval and recognition.

### **IV. Discrimination Against Queer Community Post Decriminalization Of Homosexuality**

Although the Supreme Court interdicted homosexuality in India on 6<sup>th</sup> September 2018, it refused to grant legal recognition for queer marriages in India under Special Marriage Act, saying it is within Parliament's dimension to change the law and hence declared there is 'no qualified right to marriage' and queer couples can't claim it as a fundamental right under the constitution.

There are still numerous challenges and demarcations faced by the LGBTQ community in India. My research focuses on how members of the queer community are discerned and bashed in public spheres of society including Judiciary and Army.

**Discrimination in Indian Judiciary-** Although the Indian Judiciary advocates homosexuality, it can be seen how Saurabh Kirpal's sexual orientation is coming in his way to become the Judge of Delhi High Court. Saurabh Kirpal is an elderly advocate in Delhi High Court and LGBTQ rights activist. His name has been supported by the collegium of Supreme Court to be elevated to the post of judge in Delhi High Court. He could have become India's first openly gay judge, a corner for LGBTQ rights in India, if his names would have been approved. As per the constitution, Indian judges are appointed after the formal approval of the Central Government.

The Government led by PM Narendra Modi was supposed to authorize his name in 2018, but the decision was remitted by the collegium thrice. The government flagged Kirpal's mate Nicolas Germain Bachmann as a implicit threat to India's security because of his foreign origin. Bachmann is a European and works at the Swiss Federal Department of Foreign Affairs in New Delhi.

However, Kiral dismissed all the claims and believed it was rather his sexual exposure that was an obstacle in the way of his appointment.

**Discrimination in Army-** Indian Army is believed to be intolerant towards LGBTQ rights and its members. After the decriminalization of Section 377 in 2018, former Army Chief General, Late Bipin Rawat, during a press conference in 2019, said that "LGBTQ issues are not respectable in the army, Indian Army was neither modernized nor Westernized but Conservative when it came to matters such as homosexuality", which stirred a

controversy all over the nation. The Army believes that allowing homosexuality will break the fabric that binds it together and effects its teamwork spirit and hence, it can still charge its dogfaces under Section 45 (unbecoming conduct) of the Army Act. (Gurung, 2019)

Critically -acclaimed Indian Filmmaker Onir wanted to direct a movie inspired by a gay army major who abnegated and came out in a blaze of hype, but despite the country's democratic status, the military stopped it being made. The movie "I Am" combined four stories examining same- sex relationships and other impermissible subjects similar as sperm donation and child abuse. (Indian Army blocks film on gay soldiers, 2022)

It was named as the Best Hindi Film in the 2012 National awards, but even then, the satellite channels declined to broadcast it.

#### **V. Discrimination Faced In Public Healthcare Facilities-**

It has been seen that LGBTQIA+ community are more prone to face discrimination in healthcare facilities in India as well. Discrimination in Public hospitals is unequivocal, whereas discrimination in private hospitals was subtle. Most of the doctors and healthcare officers are not acclimatized about the requirements of LGBTQ patients and treated them as homogenous patients. Moreover, the Trust Hospitals with religious confederations do not have LGBTQ inclusive policies. Almost half of the interviewed mental health professionals believed that homosexuality is a mental health issue. Majority of the professionals related homosexuality to environmental factors like child abuse, early sexual exploration, and lack of exposure to the contrary sex. (Ranade K, 2015)

Even Indian Literature suggests that Indian medical authors do not necessarily endorse the idea of different sexuality. Some of the microbiology books link HIV and other STIs with homosexual acts, and classify Hijras grounded on the wrong ideas of the “castrated genitalia” and the association of lesbianism with masculine-type excessive sexual desires, jealousy, and homicides. (TG, 2014)

#### **VI. Conclusion-**

This concludes that the decriminalization of homosexuality by the Indian Judiciary assured the queer communities a dignified life, and also led to their acceptance in society, however, it is apparent that the community still faces discrimination in every sphere. Even the Supreme Court has refused to authorize same-sex marriages and adoption rights for the LGBTQ community. Hence, there is a dire need for an anti-discriminatory law in India that would help the community to have productive lives and relationships. There must be more provisions made to empower and support other members of the community in addition to homosexuals for a greater acceptance for the LGBTQ community.

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