

LGBTQ rights and the role of civil society in repealing of the laws in India: section 377

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Abstract

LGBT (Lesbian, gay, bisexual, and transgender) defines the distinct group within the culture of gay. Since the 1990s, the initialism, as well as some of its common variants, functions are used as an Umbrella term for sexuality and gender identity. At the same time, it may also refer to anyone who is non-heterosexual or non-cisgender, instead of exclusively to the people who are lesbian, gay, bisexual, or transgender. To give recognition of this include a popular variant is added i.e. LGBTQ and the letter Q for those who identify as queer or are questioning their sexual or gender identity. Despite the various developments and advances in our country, people are still being fired, harassed, and targeted at work because they are LGBTQ. They are more likely to experience discrimination and exclusion from mainstream social, economic and political life. Therefore, various civil society group or organizations plays a very important role in promoting the rights of the LGBTQ in society. Hence this paper tries to find out the challenges faced by the LGBTQ in society and also to find out the role of civil society in promoting their rights toward society.

Keywords: Discrimination, civil society, heterosexual, non-cisgender

Introduction:

“You don’t fall in love with the gender. You fall in love with the person”

Andy Biersack

People who are bisexual or transgender have been traditionally left out of, or underrepresented in various research studies and health initiatives. It is now considered a standard to include these two groups along with gay men and lesbians. According to researchers Susan Cochran and Vickie Mays, sexual orientation includes the following dimensions:

- I. Sexual attraction
- II. Sexual behavior
- III. Sexual fantasies
- IV. Emotional, social, and lifestyle preferences
- V. Self-identification

There is also a tremendous ethnic diversity among the communities of lesbian, gay and bisexual and they contribute to the different perceptions of the term “gay”.

Heterosexual refers to the people who have feelings for the opposite gender: men who are attracted to women, and women who are attracted to men.

Homosexual or gay refers to people whose sexual feelings are mostly for the same gender: men attracted to men and women who are attracted to women.

Lesbian refers to women who are homosexual.

Bisexual or “bi” refers to people whose sexual feelings are for both genders.

Transgender is an umbrella term that encompasses a diversity of gender expression including drag queens and kings, bi genders, crossdressers, transgenderists and transsexuals.

Bigender refers to people who define themselves as having the behavioral, cultural or psychological characteristics associated with both the male and female genders.

Transgenderist describes someone who is gender variant or transgresses gender norms as part of their lifestyle or identity.

(Source: SAMHSA’s National Clearinghouse for Alcohol and Drug Information)

History of LGBTQ in India:

Chapter Purushayita also mentions svairini, a self-willed and independent woman engaged in sexual activities with other women. The book also references men who are attracted to the same gender. Therefore, this text refers to these individuals as Tritiya-prakriti or the third nature.

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The fluidity of gender, for humans and yakshas, is an acknowledged concept in ancient India. Queerness can be traced back to Indian history, from ancient epics and scriptures to medieval prose, poetry, art and architecture.

Chapter nine of Kama sutra by Vatsyayana talked about the oral sex and acts termed Auparashtika, homosexuality and sexual activities among transgender persons.

Other literature in Hindu mythology mentions same-sex love but disapproves of them. Regardless, it proves the presence of homosexuality in those times.

Certain Sufi poetries also exhibit homoerotic or same-sex references. For instance, Sufi Saint Bulleh Shah had pre-modern notions of sexuality and religion and portrayed them in his own writings. His poems exhibited the fluidity of his sexuality and his love for his murshid, Shah Inayat.

Besides these literary evidences, Indian history has full of virtual traces of homosexuality in India. These records exist as art, paintings, sculptures throughout the country. For e.g.: The Khajuraho temple sculptures (950 to 1050 AD) etc. these sculptures stand as an assertion of the sexual fluidity of men, women and the third gender. Thirteenth-century Sun temple in Konark eastern Orissa exhibits similar imageries. Images of Buddhist caves at Ajanta and Ellora also portrays men and women engaging in lovemaking with same sex.

Civil society organizations can be a vanguard of progress for the LGBTQ community. When individuals coalesce for common causes, particularly those challenging the status quo, the voice of civil society organizations are louder, their actions stronger, and their shared resources multiplied. Despite the growing number of laws and policies impeding LGBTI advocacy, activists and organizations successfully challenge these trends. Although the government has targeted various organizations that work on contested issues, like rights of migrants, women, and members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) communities. At the same time civil society organizations (CSOs) advocating for LGBTI rights continue to face monumental challenges when attempting to exercise their fundamental rights to peacefully assemble and associate.

The human rights of lesbian, gay, bisexual, transgender and intersex people (LGBTI) are coming into sharper focus around the world with important advances in many countries in recent years, including the adoption of new legal protections. The LGBTQ movement in India is quite old, but has unfortunately it has not been able to become a cohesive and comprehensive movement. While the constitution of India prohibits discrimination, but India does not have a comprehensive anti-discrimination code. There are many civil society groups or Non-Governmental Organizations (NGOs) who are sometimes working for the upliftment of the rights of the LGBTQ.

Ancient India is full of stories of LGBT+ people. Awadh (present day Lucknow) had a ruler who would live as different gender and take on different sexual partners. Late 19th century Bengali novels detailed lesbian relationships. At the same time Sufi Muslim books described romances between two men. Even the Kama Sutra had advice for consensual homosexual intercourse. Even further back, it was around 3102 BCE that homosexuality become recognized as “tritiya-prakriti” a separate and third gender. Puri and Tanjore constructed between the 6th and 14th centuries have graphic images of same-sex intercourse on its walls. It was this diversity of attitudes that meant there was no united resistance to the anti-sodomy laws the British began imposing. The lack of a united narrative about homosexuality across India meant that there was no singular dissenting voice against the forced implementation of section 377 in 1860. Section 377, not only deals with homosexuals but also punishes heterosexuals couples engaged in sodomy i.e.; if a married couple engages in ‘Anal Intercourse’ instead of ‘Normal Intercourse’, then both husband and wife will be considered guilty, if the wife concentrated for anal intercourse but, if she did not, then the husband alone will be considered guilty under Section 377 IPC. During the 157 years of section 377 the LGBT+community of India suffered terrible atrocities. There were countless of blackmail, police brutality and gang rape and murder of gay men, and lesbian women beaten to death.

In 2003 the Indian Government refused to decriminalize homosexuality, claiming it would open the floodgates of delinquent behavior. After challenging the section 377 in 2013 supreme court by arguing LGBT+people were only a “minuscule minority” seeking so called rights”, a couple lesbian attempted suicide by writing a note that “we have left this world to live with each other. The world did not allow us to stay together.” At last the overruling of section 377 marked a day of long-awaited celebration and somber remembrance for LGBT+Indian.

About Civil society organizations:

In 1992, ABVA (AIDS BHEDVAO VIRODHI ANDOLAN), a non-funded group for the first time filed public litigations against the constitutional violation of section 377 in Delhi High Court. In August 1994, ABVA organized the first ever protest demonstration demanding ‘gay rights’ outside the Delhi police headquarters. The existence of Section 377 was immensely hindering the process of raising awareness around sexual health and HIV/AIDS as it created stigma and fear amongst the individuals of queer community (Baset 2018). The event of receiving international funding for HIV/AIDS paved the way for creation of various NGOs interested in working in the domain of sexuality (Menon 2007).

In 1994, the National Conference on Women’s Movement in Triupati was the first historic meeting in the context of the National women’s movement conferences, which provided a safe space for those who wanted to converse about their sexuality. And for the first time, “sexuality” was included as a full-fledged workshop theme of a conference with “Lesbianism” as a subtheme of the workshop.

In 1999, CALERI (Campaign for Lesbian Rights) was established which played an important role in the significant shift in what had so far been male dominated queer politics. On 2nd July 1999, the first pride parade was celebrated in Kolkata which was

then known as ‘the first friendship walk’ and this one the oldest pride marches in South Asia started by only 15 participants paving the way for millions to join the movement later.

Objectives:

1. To analysis the role of the civil society organizations in repealing the laws relating to LGBTQ.
2. To find out the challenges faced by LGBTQ community in the society
3. To study some important judgments regarding the LGBTQ community rights (section 377)

Limitations of the study:

The study is limited only to the study of some civil society organizations of India. Here we will be mostly dependent upon the section of 377 for addressing the issue of LGBTQ community in the society.

IV. Significance of the study:

The study on LGBTQ community is significant as these people constitute the vulnerable, ignorant and neglected in the society. It is also important to study the working of civil society groups in addressing the importance of LGBTQ community in the society. It is expected this study would help in further policy formulation and undertake required approaches for a more inclusive environment for LGBTQ community.

Methodology:

The research is descriptive and analytical in nature. The research is based on mainly on secondary sources. Regarding the secondary sources data has been collected from Newspaper, articles, books, reports and various websites.

Review of literature:

Robert M. Baird and M.Katherine Baird in their article it has written about the causes of homosexuality, disputes about the role of the court should play gays and the military and religious attitudes towards homosexuality¹.

Michel Foucault in his book “The History of Sexuality” examines the emergence of sexuality as a discursive object and separate sphere of life and argues that the notion that every individual has sexuality is relatively recent development in Western societies.²

Ruth Vanita has written a book viz; “Queering India: same –sex love and Eroticism in Indian culture and society. In this book she focuses on pre-colonial, colonial and post-colonial gay and lesbian life in India to provide a comprehensive look at a much neglected topic. She has also given some examples of same sex couples here in her book.³

Ram Ahuja in his book “Society in India “tries to discover the complexities of and within the Indian society. It mainly looks at the complex structure from the historical, political, religious and philosophical point of view to know the contemporary Indian society.⁴

Sherry Joseph has written in her book “social work practice and men who have sex with men” has showed how the lives of men who have sex with men are very stressful in their efforts to fit into an environment that is predominantly homophobic, heterosexist, heterocentrist and where heterosexuality is the prescribed norm.⁵

Warren Blumenfeld in his book “Looking at Gay and restraint life” has defined the reasonable behavior, reasonable lifestyle and reasonable sexuality and their status in the society.⁶

In the Article “Homosexuality and Indian Civil society: Regarding Mahesh Dattani after decriminalization of section -377” argues that a proper medium indeed necessary to provide communication in a social space that would treat homosexuality as normal rather than critical in society.⁷

The book “ Alternate Sexualities in India : The Construction of Queer Culture” by Ana Garcia Arroyo has grounded in the commitment to a more open and tolerant society, be it in the entire planet-freedom to love-freedom to choose other forms of expressing human sexuality as a great collective task of creating a fairer world.⁸

¹ Baird, Robert M. & Baird, M. Katherine (1995) ”Homosexuality Debating the Issues”, Prometheus Books, Amenerst, New York

² Foucault, Michael, ‘History of Sexuality’, publisher; penguin Books, (2006) ISBN- 10-0140137343.

³ Vanita, Ruth (2001)” Queering India: Same–sex love and Eroticism in Indian Culture and society”, Routledge; Taylor & Francis Group, New York, London

⁴ Ahuja, Ram (1999),” Society in India: concepts, Theories and Recent Theory”, Rawat Pubns, New Delhi. ISBN- 978-81-7033-545-0

⁵ Joseph, Sherry, (2005)” Social Work practice And Men who have sex with men”, Saga Publication, India pvt.Ltd, first edition. ISBN-10-0761933514

⁶ Blumenfeld, Warren (1988) “ Looking at Gay and restraint life” , Philosophical Library, New York

⁷ “Homosexuality and Indian civil society: Regarding Mahesh Dattani after decriminalization of section-377 “(2020) by Bhaskar Lama in Indian Journal of Gender Studies, Sage Journal

⁸ Arroya, Ana Garca (2011), ‘ Alternate Sexualites in India: The construction of Queer culture”, Booksway Publisher, ISBN-10-930145756

Findings and Discussion:

The LGBT movement, although young in India, has brought about some important changes in the life of LGBTQ community, particularly in the life of transgender people. In the year of 1994, it is the right to vote had given to the transgender community but on November 12, 2009, election authorities given independent identity to transgender community in the voter list. Before this declaration transgender community was not given the chance to put "0" i.e." Others "option in the electoral rolls. But after this declaration that chance was given to the transgender community. On April 15, 2014, the Supreme Court of India had given a landmark judgment on transgender or Hijra community which declared transgender people the "third gender", affirmed that fundamental rights granted under the constitution of India will be equally applicable to them and gave them the right to self-declaration as male and female by their own consent. After that recognition, in many states of India like in Chhattisgarh, in West Bengal transgender had get various important positions in the administrative departments of Government. As a result, more and more people are now expressing their feelings in the society freely, they can freely move in the society. On the 3rd February, 2016, Supreme Court of India agreed to re-examine section 377 of Indian Penal Code while accepting a petition. Furthermore, on 10th January 2018, the Supreme Court of India has decided to reconsider its decision of 2013, which criminalized the gay sex.

Naz Foundation vs. Govt of NCT of Delhi (2009) : it is a landmark Indian case decided by a two-judge bench of the Delhi High Court, which resulted in treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by constitution of India. This is the first non-governmental organization (Naz Foundation) which challenged the constitutionality of article 377 under articles 14, 15, 19 and 21 of the Indian Constitution. Therefore from this discussion we can realized that role of civil society is incredible for granting equal status to LGBTQ community in the society along with the other communities of India.⁹

Workplace equality index for LGBTQ community (IWEI) announced in India recently:

After completing the two years of Supreme Court's decision on decriminalized homosexuality, employment for the LGBTQ community is gaining the acceptance in private sectors along with the government sectors.

➤ THE IWEI publicized as the country's first extensive benchmarking tool for employers to measure their progress on LGBT inclusion at the workplace showed 65 private companies sharing data on their diversity and inclusion practices.

➤ The index also released nine areas including policies and benefits, employee lifecycle, employee network group, allies and role models, senior leadership, monitoring, procurement, community engagement and other additional work.

In India, companies have become more open to LGBTQ employees since 2018; after the country's highest court effectively abolished a colonial-era law that criminalized same-sex relations. Now people are recognizing that inclusion is fundamental to a company's bottom line-

➤ The top leaders at Godrej led by Nisaba Godrej, managing director of consumer products, frequently talks about LGBTQ issues in town hall meetings, through internal communications and on other platforms.

➤ The Mahindra Group has also created a spectrum of diversity goals, which was a big driver behind the creation of its new LGBTQ policy.

Despite these inclusions of LGBTQ in various companies but in reality they are still not getting adequate rights –

- Just 38% of companies have a clearly stated commitment to LGBT+ inclusion in India.
- Only just over half (52%) provide LGBT+inclusion diversity training.
- Less than half (41%) provide a specific benefits and support to their LGBT+employees
- Only just over a quarter (28%) has an LGBT+ employee's network in India.¹⁰

Summary and Suggestions:

Here come some suggestions, which would create a society where everyone will be treated equally irrespective of their caste, sex and race-

➤ Apart from the legal safeguard, the most important thing is social acceptance of the LGBTQ people. People's attitudes towards LGBTQ community should change, without which legal safeguards cannot function effectively.

➤ There is also need to bring some changes in the process we socialized our children. From the beginning the concept of binary sex i.e. male and female is imprinted in our mind. Children are taught in the same line through various agents of socialization, such as school, family, media, therefore they do not get an opportunity to have an alternative scientific view on varied gender identity and sexual diversity. So there is needed to be changes in the socialization process.

➤ Another important step should be taken by the medical science. Rather than focusing only on reproduction with regard to human sexuality, it should also focus on other and varied facts of human sexuality. This would help in removing the notion of homosexuality being a disease and also will help in preventing various barbaric medical practices for curing homosexual.

➤ Various civil society organizations or non-governmental organization (NGO) should be formed in the society who will do protect and develop the interest of LGBTQ community.

Conclusion:

As a democratic country India has to minister the aspirations of all sects of people whether its majority or its minority. Democracy does not allow any deprivation of any community because all sects are same to the state. The LGBT movement is a movement who demands equal status along with the other communities in the society. But when section 377 criminalized the same sex relationship then many civil society organizations had come to protest against the repealing of this section 377. They

⁹ <https://en.m.wikipedia.org/wiki>, retrieved on 12/12/21

¹⁰ <https://www.shrm.org/resourcesandtools/hr-topic/global-hr/pages/india-inclusion-lgbtq-employees.aspx>,retrived on 18/12/2021

mainly tried to eradicate discriminations from the society which get faced from earlier. So, they are demanding justice from the state for a considerable period. Therefore, after repealing section 377 the situation is far better now where a person is born with his or her sexual preferences. It is not something a person holds control over. While the constitution provides the right and safeguards the individuality of each and every being of this country, dissolving article 377 was a breakthrough in restoring the faith of such individuals in the constitution. Being a democratic country, developing and progressive country, India has to look forward to progressiveness. This responsibility lies in the common people along with the civil society. The role of civil society is not only the medium to fulfill the demands and repealing the laws rather object of these civil society organizations is to give momentums to the process of social development. In future, we hope through the civil society along with Governments role, India will take off to reach her another station of progressiveness by giving equal status to all the communities of the society irrespective of their caste, race, and color.

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