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Sexual orientation vis-à-vis human dignity in Indian society: An analysis

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Abstract

Sexual orientation, as an inherent aspect of personal identity, plays a crucial role in shaping the experience of dignity and equality within any society. In India, evolving legal frameworks and increasing social awareness have contributed to a gradual shift in attitudes toward sexual minorities. However, despite landmark judicial interventions affirming the rights and dignity of LGBTQ+ individuals, societal acceptance remains uneven. This study analyzes the relationship between sexual orientation and human dignity in the Indian socio-cultural context. It examines legal developments, constitutional protections, and prevailing social perceptions to understand how they collectively influence the lived realities of individuals with diverse sexual orientations. The analysis highlights persistent challenges such as stigma, discrimination, and limited institutional support. It concludes by emphasizing the need for inclusive policies, sensitization, and community engagement to ensure that dignity becomes a lived experience for all individuals, irrespective of sexual orientation.

Keywords: Sexual Orientation, Human Dignity, Indian Society, LGBTQ+, Constitutional Rights, Social Acceptance

Introduction

Human dignity is something intrinsic to the human existence. Dignity comes attached to a human being as soon as they are born. Historically, the term is associated with 'high status' or 'royalty' ^[1] but gradually it started getting attached to human beings intrinsically thus making this idea a universal one which is common to people across the world. The idea of human dignity finds the force of law by its induction in Universal Declaration of Human Rights, whereby it declares that "All human beings are born free and equal in dignity and rights" ^[2] irrespective of their nationality, colour, creed, gender etc. ^[3].

Human dignity is an individualistic notion that finds less dominant expression in countries where community values are cherished and tends to influence the legal values ^[4]. Dignity, in my view, is also closely related to what kind of political regime it is being defined in and the level of development a nation has reached in its social values. This is equally true of any other concept. However, much efforts have been made to universalize the concept of dignity and make it uniform all across the nations defying all boundaries. This has been of course done by the adoption of Universal Declaration of Human Rights, 1948 and dignity made an intrinsic part of human existence and thus a human right. This international recognition has contributed much to the progressive realization of many rights as a part of Human rights. Due to global inter-dependence various nations have come to recognize the concept of intrinsic human dignity and have been trying to realize this notion. As Martha Nussbaum says:

"In the case of dignity, the notion of respect is a particularly important relative, and the political principles themselves illuminate what we take human dignity (or its absence) to mean. But the basic idea is that some living conditions deliver to people a life that is worthy of the human dignity that they possess, and others do not. In the latter circumstances, they retain dignity, but it is like a promissory note whose claims have not been met" ^[5].

¹ Emmaline Soken-Huberty, 'What is Human Dignity? Common Definitions', Human Rights Careers at <https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/> (last accessed 13 November 2020)

² Universal Declaration of Human Rights, 1948, Article 1

³ Supra n. 2

⁴ Mattson, David J., and Susan G. Clark. "Human Dignity in Concept and Practice." Policy Sciences, vol. 44, no. 4, 2011, pp. 303-319.

⁵ Martha C Nussbaum, "Creating Capabilities: The Human Development Approach and Its Implementation." Hypatia, vol. 24, no. 3, 2009, pp. 211-215

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Human Dignity in India

India has incorporated the concept of human dignity into its Constitution, both as a part of its preamble and as one of the fundamental rights. In the preamble it reads as “...to promote among them all FRATERNITY assuring the dignity of the individual...” this clearly shows that dignity of an individual is assured to be not breached when there is promotion of feeling of brotherhood among the people of a society. What this means is that human dignity in Indian Constitution has not parted completely from social harmony and brotherhood. India finds its manifestation of human dignity in the common brotherhood of the people. This implies that a breach of feeling of brotherhood may also lead to breach of human dignity because it is the society that would ensure that an individual's dignity is intact in the competing interests of the society^[6]. A conducive environment of fraternity is very important for the realization of individual's dignity. Moreover, *Article 21* states, that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. *Article 21* prima facie does not ensure human dignity as one of the fundamental rights on its reading, however, it's into the interpretation of the word ‘life’ that we find how intrinsically human dignity is entrenched in the Indian Constitution. A life without dignity has been considered as no life at all, by the Judicial interpretations in various cases. With the interpretation of dignity as an intrinsic part of life, the judiciary went on to realize various other socio- economic rights, like right to livelihood, right to housing etc. that would make life dignified^[7]. In the guise of right to life and by a very liberal interpretation of word ‘life’ to mean dignified life the courts in India have ensured that development of dignity of an individual is facilitated by the society. Justice A. K. Sikri cited, Justice Aharon Barak, who was the chief Justice of the Israel court and who, in his book, *Human Dignity: The Constitutional Value and the Constitutional Right* has beautifully described the constitutional aspect of human dignity as:

“Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right”^[8].

Human dignity has been ensured time and again by the Supreme Court of India through various articles in the Constitution. Life and liberty are just another aspect of ensuring human dignity while equality and freedom are yet another aspect which ensures human dignity under the constitution. Human dignity has become the means to realize various rights under the constitution and yet it is a goal itself.

Abolition of Section 377

We have been until now generally talking about how the concept of human dignity has developed in the legal system in India and how broadly has it been interpreted by the Constitutional court of the country. In line with this the Supreme court has passed a historic judgement whereby once again it kept individual dignity at the forefront of human existence and made sure that the society and its values fall in line with the constitutional values. The SC decriminalized section 377 of the Indian Penal Code, 1890 which read 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. Explanation- Penetration is Sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The section was initially constitutionally challenged in *Naz Foundation v. Government of NCT of Delhi & others*,^[9] and the Delhi High Court declared the section unconstitutional while the same judgement was overruled by a two-judge bench of the Supreme court in *Suresh Kumar Kaushal & another v. Naz Foundation and others*,^[10] taking a narrow view of *article 21*. The case then came before a five-judges bench wherein the court finally partially struck down section 377 in its application to the extent “it criminalizes homosexual sex and transgender sex between consenting adults.”

The judgement advocates that the majoritarian social morality in a country with constitutional principles should be always preceded by the constitutional morality. Justice DY Chandrachud observed how the constitutional morality is different from social morality in these words:

“The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of society is determined by popular perceptions existent in society. The continuance of certain symbols, labels, names, or body shapes determine the notions, sentiments and mental attitudes of the people towards individuals and things. Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. It assumes that citizens would respect the vision of the framers of the Constitution and would conduct themselves in a way which furthers that vision. Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundations of a democracy, without which any nation will crack under its fissures”^[11].

It's the constitutional morality that has to be given precedence over the prevailing social morality because the principles of equality, liberty, freedom etc., which constitute the constitutional morality have been adopted by the nation at its independence to realize the goals of creating a society that would be just and equal and only in such a society that an individual can thrive and outgrow all its limitations and reach its self-realization. Sexual identity lies at core of one's

⁶ Navtej Johar v. Union of India, (2018) 10 SCC 1

⁷ Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180; Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, AIR 1997 SC 152; Shantisar Builders v. Narayan Totame, AIR 1990 SC 630

⁸ Common Cause A Regd Society v. Union of India & Another., LNIND 2018 SC 87

⁹ (2009) 111 DRJ 1

¹⁰ (2014) 1 SCC 1

¹¹ Supra n. 6

development as an individual. It is only after we have identified ourselves as who we are in the physical world that we start the journey within towards our self-realization. It is the duty of every individual towards other and the society constituted by these individuals towards the individual that they refrain from hindering the personal growth of a person. However, the pre-supposed notions and the stereotypes created by the society place limitations on the possibilities of an individual. It is in realization of these possibilities that 'fraternity' enshrined in the constitution supports via human dignity. Dr. B.R. Ambedkar in the constituent assembly remarked on how all the constitutional principles rely on each for their realization:

"These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. ...Without fraternity, liberty equality could not become a natural course of things"^[12].

The Supreme court observed in this case that the promotion of constitutional morality is as much a responsibility of the citizens as it is of the state or other constitutional institutions^[13]. Thus, collective harmony leads to active realization of individual rights. When we talk about any right guaranteed by the Constitution of India, the morality attached to it has to always be constitutional morality and not the so called 'popular morality' or the social morality. The society, as it is today, must change itself and bring itself in synchronization with the needs of the citizens for its development. If we at any instance, allow the social morality to supersede the constitutional morality we may end being a society filled with chaos and uncertainty as to what aims it wants to achieve for itself. There must be, and for the matter of fact there are, certain ideals a nation/society wants to achieve and so it should work in that direction. Pursuing the goals of the Indian Constitution is always about trying to achieve a point where the social morality of its citizens falls in line with the constitutional morality of the Constitution.

It has been long that we have kept neglecting the claims of any other gender other than the traditional male and female stereotypes in our society. We closed our eyes to any other type of people and the need for their individual growth. These claims to see the light of the day by the *National Legal Services Authority v. Union of India*^[14] (NALSA) judgement of the Supreme Court of India wherein the rights of the transgenders have been constitutionally recognized and an effort has been made to acknowledge that there is a third gender that exists among ourselves and is equally entitled to everything in the society as the so called male and female genders. The court recognized in the NALSA judgement "that sexual orientation and gender identity is an integral part of the transgenders personality and is one of the basic aspects of self-determination, dignity and freedom". Another aspect of human dignity has been recognized as a right to privacy in *Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and others*^[15] which and thus the

court in the present case took note that not recognizing the sexual autonomy of the LGBTQAI+ community also infringes upon their right to privacy.

This is largely how the Supreme Court has tried to bring into the main stream the rights and identity of the people of the LGBTQAI+ community and given them the chance to assert their sexual orientation freely in the society. While all the above discussions are nothing but literary and legal nuances in the judgement, these rights had been already recognized by many countries in the past, India has just updated itself with the moving international legal order on individual rights. It was always just a matter of time when anyone oppressed under the British era section 377 would have raised their voice and it did happen in fact. The matter does not end here rather the real struggle starts here. However, historic the judgement may seem but this was not the hardest battle to be won because having a legal recognition is not something that could ensure the societal recognition. That goes without saying that of course now you hold a right to assert your right legally and this can scare a handful of those who fear the law. But the 'fraternity' that we were talking about was not this few handfuls of people rather the rest of the people left. Here comes the role of the society to nurture an individual and it is right and the role of the positive action of the state to help the people of the LGBTQAI+ community to pursue their rights actively.

Let us first look at how the social morality, even though has been tried by the Supreme Court to be brought under the constitutional morality, supersedes the constitutional in practical life. First, the mere legal pronouncement by the Supreme Court will not help in any way in removing the general stigma prevailing among the people in the society. The situation on the ground is still the same. Yes, such people cannot be arrested anymore under the law but in this case societal sanction would turn out to be more effective than the legal protection afforded by the law. Second, let us say that most people may choose to ignore such community and stay neutral to what happens to them. This can be very dangerous in a democracy because that would create a divide in the society and thus create a vacuum between the LGBTQAI+ community and the rest, segregating them from the main stream society and thus would technically will not be violating anyone's right but would create a dent on the social fabric of the country attacking on its very foundational principle, of fraternity, on which this right was provided to the people. So, even though on papers the constitutionality has won the battle, on the ground the battle has just begun. We have a society that refrains from talking about even the traditional sexual choices and freedoms lest the LGBTQAI+ community. Even in the LGBTQAI+ community at least the transgenders have been acknowledged by the society to a very large extent, howsoever stigmatized that may be, but the lesbian and gay community is something that has still remained abandoned at large in the eyes of the society because to an extent it is considered that being a transgender is something that a person did not choose for themselves however, being a gay or a lesbian is something that is still seen at large as a disease that can be cured by some medication^[16]. So what

¹² Constituent Assembly Debates, 'Volume XI' (25th November 1949)

¹³ *Navtej Johar v. Union of India*, (2018) 10 SCC 1

¹⁴ (2014) 5 SCC 438

¹⁵ (2017) 10 SCC 1

¹⁶ (--) Homosexuality not an illness: Indian Psychiatric Society, at <https://www.thehindu.com/news/national/homosexuality-not-an-illness->

has really happened is that homosexuality has been decriminalized and not destigmatized from the society. Thus, constitutional morality prevails only for the satisfaction of those judges who gave the unanimous judgement and for a handful of activists in support of this decriminalization. These arguments do not mean that I intend to say decriminalization or no decriminalization the situation is same. Of course, decriminalization has opened the gates for the individual dignity to at least assert itself and find a way to fight for its social acceptance but to say in a judgement the battle has been won would be wrong without any doubt. We can rightly say that the battle has begun.

Now after looking at what can be societal implication, we should ask ourselves that what are the instruments are present as of now, or even proposed for ensuring that the human dignity vis-à-vis sexual orientation, that has been judicially upheld can be pursued and realized? Have we made enough arrangements in the system for the LGBTQAI+ community to comfortably at least start pursuing their social, economic and political rights as a community? What should be the role of the state in taking any affirmative action and ensuring that the judgement of the Supreme court is implemented in its spirit? Or is it just now the burden of those who initiated the fight, to keep fighting for themselves till the realization of their last of rights given to them under the Constitution. To answer these questions first, there is no active state participation by the state in either destigmatizing the narratives around the LGBTQAI+ community or to facilitate these individuals to pursue anything for themselves. There are hardly just NGO's that pursue the rights of LGBTQAI+ people. These communities have still got no recognition from the state instrumentalities or in any formal setup even after two years of the judgement. Nowhere on the forms you are still asked, if you are a gay or lesbian or anything other than male or female. The only things added is the mention of the third gender where the term third gender is shredded in ambiguities.

The legal step towards realizing the rights of the transgender community is the Transgender Persons (Protection of Rights) Act, 2019. It was passed in November 2019. The act defines the transgenders and ensures their right to education, employment and all other such rights^[17]. The bill however, has been largely criticized by the transgender community and activists on many grounds one of which is that it makes it compulsory for a person to obtain a certificate of being a transgender whereas the male and female gender classifications do not require any such certificate to prove their sex. Also, there is no provision for any sort of legal protection in form of any reservation, at least initially to bring the LGBTQAI+ community into the main stream^[18].

So far, this is all that has been really done towards equality, liberty, and freedom of the LGBTQAI+ community. They have been given the right but not the means to realize these rights and thus in this context arise the need to look towards

our legal texts that how effective they really are? Providing one with the rights and not giving them the means to realize those rights is equally denial of those rights^[19].

Even after section 377 being decriminalized from the statute book and talks at length about human dignity no one is even ready talk about same sex marriages. The government has made its stand clear that the 'Indian culture' does not support these types of unions^[20]. The LGBTQAI+ community has emerged out as a whole lot of newly instituted citizens whose rights and duties and every other sphere of their existence, just like any other citizens of this country, needs to be regulated by law, be it social, economic or political rights. The recognition that such couples exist and stay together has been given by the courts in India but their union to be recognized as a marriage is still frowned upon^[21]. What does that mean? Does that mean that such people either never get the right to marry or they marry in the traditional set patterns? The questions in this regard are complex and need to be addressed in the light of the judgement passed by the Hon'ble Supreme Court of India in this regard.

Right to Marry vis-à-vis Human Dignity

The matter has been heard and decided by the Hon'ble Supreme Court of India in *Supriyo @Supriya Chakraborty & Anr. v Union of India*^[22]. The primary issues that the court answered were related to the right to marry of the LGBTQAI+ community, their status under marriage laws, and whether the Supreme Court has the right to declare a law on this matter. The petitioners under this case primarily challenged Section 4(c) of the *Special Marriage Act, 1954* which gives recognition to marriage primarily between heterosexual couples. The petitioners relied on decisions of the Hon'ble Supreme Court^[23] which gave recognition to non-binary gender identities and argued that not recognising the heterosexual marriages would be a negation of right to equality and human dignity^[24]. However, to much disappointment the Hon'ble Supreme court of India refused to recognise the same-sex marriage and it also refused to interfere with the domain of the legislature with respect to making any law for the union of the homosexual couples or for that matter LGBTQAI+ community.

As briefly mentioned earlier, for a right to be realised it is important that the ancillary rights necessary for the realisation of the primary right must be first in place^[25]. By not recognising the right to marriage of the same-sex couples, the Hon'ble Supreme Court of India has closed the gates for the budding human dignity that was a result of long societal struggle and legal battle.

Conclusion

I would like to conclude making a point that for any change to settle down in any society, it needs the acceptance of the

indian-psychiatric-society/article24401307.ece (last accessed 23 September 2025)

¹⁷ The Hindu Net Desk, The Transgender Persons Bill Explained, at <https://www.thehindu.com/news/national/watch-all-about-the-transgender-persons-bill/article30122229.ece> (last accessed 10 October 2025); (-) Transgender Persons (Protection of Rights) Bill, 2019 at <https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019> (last accessed 10 October 2025)

¹⁸ Ibid

¹⁹ Martha C. Nussbaum, "Creating Capabilities: The Human Development Approach" Harvard University Press, 2011, pp. 237

²⁰ (-) India grapples with legality of same-sex marriage, at <https://www.dw.com/en/india-same-sex-marriage-homosexuality/a-55324279> (last accessed 16 October 2025)

²¹ Williams, Reginald. "Same-Sex Marriage and Equality." *Ethical Theory and Moral Practice*, vol. 14, no. 5, 2011, pp. 589–595

²² 2023 INSC 920

²³ NALSA v Union of India (2014) 5 SCC 438; Navtej Singh Johar v Union of India (2018) 10 SCC 1

²⁴ Plea for Marriage Equality, SUPREME COURT OBSERVER, <https://www.scobserver.in/cases/plea-for-marriage-equality/> (last visited 29 September 2025)

²⁵ Supra n. 19

people of the society. However the courts may interpret the rights considering human dignity if it does not go down well within the society where it has been interpreted, it will certainly be of little help to them for those the change is proposed. Similar is the case with homosexuality in India, no doubt that the idea is progressive and needs to be made sure that it has the legal backing but one needs to understand that the law has limits as to till where it can be seen to be regulated. The moment it goes off the eyes of the regulating authorities it is by and large at the hand of the people, especially laws like these. The decision of the Supreme court to abolish homosexuality is just a step towards the destination, much of the journey is remaining. The decision might help to stop police and public harassments by and large but one cannot be sure that there will be public acceptance, not to mention that there will be contempt in varied forms that one might not be able to complain of in the eyes of the law. The need of the situation is to instil public acceptance in the society by government interventions at community level, say making such sensitive information a part of course curriculum, and for the private individuals who without any hypocrisy can take forward the cause of making people aware of the humane side of the issue.

Moreover, with the recent judgement negating the right to marry of the same-sex couples the Supreme Court of India has taken a regressive stand from its earlier liberal interpretations. This is not the first time that the Hon'ble Supreme Court of India had the chance to legislate on a matter of public interest in absence of any legislation but it can be observed that it is seldom that the Supreme court has hesitated in grabbing the opportunity to uphold human dignity and public interest. There are a series of cases, from *Vishakha v State of Rajasthan* ^[26] to *Anoop Barnawal* ^[27], where the Supreme Court has made sure that justice is not denied in absence of required legislations. But for this issue, the Supreme Court has conveniently relieved itself of the burden of taking any stand against the 'popular morality.' The legislature can for once fail to meet the constitutional principles because they can be schooled by the people of India through the political measures but the Courts can not fail the constitutional principles for they are seated for guarding the same under all circumstance and they must ensure that the people of India, when they come to them, are ensured their basic rights and all the ancillary rights necessary to enjoy their basic rights.

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²⁶ AIR 1997 SC 3011

²⁷ 2023 (6) SC 1