

LGBT Community: Recognition and Protection of Their Rights in India

Abdul Zabbar Akhan

LL.M, Research Scholar & Advocate

ABSTRACT

Different religions have seen homosexuality as a sin, and India has imposed numerous severe punishments for it. LGBT (Lesbian, Gay, Bisexual and Transgenders) communities have long lived in human civilization, not just in India but also around the globe. However, they have always been viewed as embarrassing situations that should be kept private. They face harassment, assault, and mockery in India because of their sexual orientation, and they are more likely to encounter intolerance, prejudice, harassment, and violent threats. However, the world has recently experienced a virtual shift in this area. One of the ongoing battles is getting LGBT rights recognized as a basic human right. One of the ongoing battles is getting LGBT rights recognized as a basic human right. One of the basic structures of the Indian constitution is found in Articles 14, 15, and 21. In a nation like India, moral principles greatly affect the law. The Indian Supreme Court held in *Navtej Singh Johar v. Union of India* that Section 377 of the Indian Penal Code is unconstitutional since it infringes on the fundamental liberties of intimacy, autonomy, and identity and decriminalizes homosexuality. Even while same-sex couples can now live together and manage their personal lives without fear of reprisals, yet they are still frequently not treated equally. So, the fight for equality continues as there is a long battle waiting ahead.

keywords: LGBT, Homosexuality, Unconstitutional, Sexual Orientation, Intolerance, Prejudice, Harassment.

I. INTRODUCTION

The LGBT communities are made up of people who identify as Lesbian, Gay, Bisexual, and Transgender. Men who have a sexual attraction to exclusively other men are traditionally referred to as gay. Only women who have a sexual attraction to other women are referred to as lesbians. Bisexual people are those who find attraction in both men and

women, while the term "transgender" refers to someone whose sense of personal identity and gender does not match their natal sex. The LGBT community was formerly referred to as the Gay community, however, the term Gay only applies to men. As a result, this community was designated as the LGBT community later in the mid-1980s.

The concept of homosexuality is not new in India. It should be regarded that homosexuality is also found in pre-colonial societies. In India within Manusmriti, same-sex activity or Lesbianism was treated as a serious offence and also for it a lot of serious punishment was provided there. Not only within Manusmriti but also amongst Muslims, the Shariat law treats same-sex activity as a serious offence and also provides several punishments for it. Thus, in several religions, several punishments were provided for homosexual offences in India. Although sexual minorities have continuously existed in India sometimes in varied

forms, like culturally sanctioned (such as hijra, kothi, tritiyaprakrity and so on) and alternative times in invisibility or silence, their problems were never been seriously articulated. In that time, such issues were solely restricted to the society only.

During the Mughal Empire in India, the LGBT community had significant roles in the judiciary and numerous sectors of governance. However, when colonial control was instituted on the Indian subcontinent in the 19th century, the situation for the LGBT minority significantly deteriorated. Through a number of legislations, the British government made the LGBT community illegal. And now they live as sex workers, beggars and also they are humiliated.

However, the LGBT community in India raised a number of issues against the infringement of their human rights during the 19th century through a number of civil society organizations. Lesbian, Gay, and Bisexual concerns initially came to the attention of the general public with the establishment of the magazine "Bombay Dost" and the "Shaki" lesbian collective in Old Delhi. The LGBT community rights movement has since become louder and more well-spoken.

When discussing their rights, it should be remembered that LGBT rights are human rights. Individuals are meant to be protected by human rights from threats, violence, and discrimination. The LGBT community is currently persecuted, raped, and murdered solely for their sexual orientation and gender expression in India. In order to prevent discrimination in families, public spaces, workplaces, and educational institutions as well as other societal ills, the government and other civil groups must safeguard these minority communities.

II. DIFFICULTIES AND CHALLENGES FACED BY LGBT COMMUNITY IN INDIA

The LGBT community has a lot of challenges to face in the current society, which solely accepts heterosexuality and views homosexuality as deviant. They are exposed to violence virtually daily because it is a part of their daily lives. Due to their sexual orientation, they are more susceptible to intolerance, prejudice, harassment, and violence threats.

In India, the LGBT community experiences discrimination, abuse, and sometimes torture. According to a 2016 LGBT Workplace Survey, 40% or more of LGBT individuals in India have suffered workplace harassment because of their gender or sexual identity. Many members of the LGBT community are frequently compelled to conceal their sexual orientation out of concern for potential discrimination or job loss. Bullying and harassment of LGBT teenagers occur in educational institutions like schools, colleges, and universities. Even parents of normal kids forbid them from interacting with LGBT kids. Due to these factors, LGBT kids run a significant risk of developing physical and mental issues as they grow up and eventually isolate themselves from friends and family. To cope with stress, they can get hooked on drugs or alcohol. Due to this, they are targets of hate crimes. Homosexuality is regarded as a crime in many nations, and offenders are frequently sentenced to prison or fined. Additionally, it is against the law and regarded as a sin in several personal laws. Discrimination, unemployment, a lack of educational opportunities, homelessness, a lack of access to health care, including facilities for HIV care and cleanliness, depression, alcohol and drug misuse, and issues with marriage and adoption are the main issues that the LGBT population faces. The lives of LGBT individuals are more negatively impacted by exclusion and prejudice. The following things happened as a result:

- school dropouts;
- leaving home and family;
- Being disregarded by society,

- Lack of parental support,
- Suicide endeavour.

All people have the right to access fundamental rights and human rights, but the state has not passed any legislation specifically protecting or promoting LGBT people's rights or giving them access to meaningful justice.

III. INTERNATIONAL LEGAL POSITION ON THE LGBT RIGHTS

The entire world is split into two poles when it comes to the rights of the LGBT community. Approximately 81 nations have made homosexuality a crime. Engaging voluntarily in homosexual practices is also considered as a capital offence in the United Arab Emirates, Iran, Sudan, Yemen, and 12 states in Nigeria. Moreover, Homosexual behaviour carries severe punishments in Bangladesh, Kenya, Namibia, Tanzania, Uganda, and Zimbabwe, which may include public whipping and other types of corporal punishment. In Europe, the situation is somewhat different from that in developing nations. A fundamental right that is a part of the right to life is the right to have sex. A nation or legislative body should not attempt to outlaw the right to sex since doing so is considered to be cruel. Human rights include LGBT rights.

The United Nations Organization (U.N.O) always takes a progressive stance on the rights of the LGBT community. French and Dutch members initially proposed a resolution in favour of LGBT rights at the General Assembly in 2008. It featured a denunciation of disrespectful behaviours such as harassment, violence, discrimination, and prejudice based on sexual orientation and gender identity.

A unique resolution on "protection of family" was adopted by the United Nations Human Rights on June 26, 2014. However, the term "family" has not been defined in the resolution, it could be used as a justification to block the rights of gay couples, single parents, and other sorts of families in future UN negotiations. The idea of a family shouldn't just apply to heterosexual households. There are single-parent families, homosexual families, and homosexual families with adopted children. The resolution's vague definition of "family" makes it likely that it would be used to directly violate the rights of LGBT people who want to have families of their own.

IV. THE ROLE OF THE INDIAN CONSTITUTION IN THE PROTECTION OF LGBT RIGHTS:

The Bill of Rights in the American Constitution served as the inspiration for the concept of essential rights in the Indian Constitution. The preamble of the Indian Constitution guarantees equality of position and social, economic, and political justice. As a result, the Indian Constitution is sex-blind, and the fundamentals of equality are predicated on the declaration that a person's sexual orientation is unimportant.

❖ Right to Equality:

According to Article 14 of the Indian Constitution, "the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India". The term "any person" in this context refers to every human being without exception based on caste, creed, religion, sex, or any other category.

According to the ruling in the case of National Legal Service Authority v. Union of India, Article 14 of the Indian Constitution does not limit the term "person" and its application to only males or females. As a result, the meaning of the word "person" was expanded. Transgender people are considered "persons" and are therefore entitled to legal protection under the law in all areas of State activity, including work, healthcare, and education, as well as the same civil and citizenship rights as any other citizen of this nation

enjoy. The transgender community is covered by the Indian Constitution; therefore, they have access to all of the rights that are granted by that document.

❖ **Equality of Opportunity and Right against Discrimination:**

Article 15 of the Constitution of India lays down the Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State is prohibited from discriminating against any person solely on the basis of their religion, race, caste, sex, or place of birth.

(2) No citizen will be subject, on lodging the basis of religion, race, caste, sex, or any combination of these factors, to any disability, liability, restriction, or condition with respect to -

(a) access to stores, public restaurants, hotels, and palaces of public amusement; or

(b) the use of wells, tanks, bathing ghats, highways, and public resorts that are completely or partially maintained with state funds or intended for general public use.

The Supreme Court of India declared that discrimination based on sexual orientation is prohibited by the Indian Constitution in the case of *Navtej Singh Johar v. Union of India*. Similar to this, the Supreme Court ruled in *National Legal Services Authority v. Union of India* that discrimination based on gender identification is unconstitutional. Despite these constitutional interpretations, no legislation prohibiting discrimination in the workplace based on sexual orientation has been passed because Article 15 only applies to state or government-sponsored discrimination. However, on February 4, 2021, the Allahabad High Court decided that violating the *Navtej Singh Johar v. Union of India* Supreme Court decision by firing and discriminating against someone based on their sexual orientation is illegal.

❖ **Right to life and Personal Liberty**

The Indian Constitution's Article 21, which protects the rights to life and personal freedom, is its core. According to Article 21 of the Indian Constitution, "No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law." One of the most fundamental rights is the right to life, which neither the State nor any other entity has the power to restrict or revoke.

The right to select one's own identity is one of the most crucial rights under this article to live with dignity, it was declared in the case of *R. Coelho v. State of Tamil Nadu*. One of the most significant provisions of Article 21 of the Indian Constitution is the right to a life of dignity for transgender people. They need full rights to be precise and live their lives without fear. Recognition of gender identification gives them the popularity of their right to dignity, and non-recognition violates the same. Additionally, their protection is protected under the right to reputation.

❖ **Right against Exploitation**

Human trafficking and begging are two examples of depraved behaviour that are prohibited and punishable under Article 23 of the Indian Constitution. Everyone has a right to non-public growth, which can only be protected when a person has a right against exploitation, which fosters a free atmosphere. Since they engage in prostitution and other immoral activities and are typically stigmatized by society, LGBT individuals are the biggest victims of exploitation. The purpose of this Article is to safeguard a person's independence of identity by avoiding male exploitation of other males.

V. THE ROLE OF THE LEGISLATURE IN PROTECTING OF LGBT RIGHTS IN INDIA

The results of the constitutional provisions are the different legislations that are passed by the legislature. But even though they do not define the LGBT group specifically, these laws are discussed below.

The **Clauses Act of 1897's** definition of the term "person" employs considerably broader language. Any organization, association, or group of people, whether or not it is incorporated, is included in the definition of someone under the Act. Even though Section 13 of the Act states that phrases importing the masculine gender shall be construed to include females, this provision is itself subject to the statutory directive that this can only be the case unless there is something objectionable in the subject or context.

The **Citizenship Act of 1955** does not explicitly imply that obtaining citizenship is contingent on having a specific sex or gender identity. One must be an Indian citizen in order to vote (be an elector). The Indian committee has made special steps to register transgender people as voters.

The main tool for preventing the trafficking of women and children for prostitution is the **Immoral Traffic Prevention Act (ITPA)**, which was passed in 1956 and revised in 1986. The scope and breadth of the Act were expanded with the amendment of 1986 to include both male and female sex workers as well as those whose gender identity was ambiguous. As a result, the ITPA made both male and hijra sex workers criminal subjects, and it gave authorities a reason to arrest the community of transgender sex workers.

The "sex" or "gender" of a person to be registered in case of birth or death is not mentioned anywhere in the **Registration of Births and Deaths Act, 1969**. The Act is not gender-specific. The Act's provisions do not appear to dictate that birth or death certificates must include a person's sex or gender information where that information is relevant. It's possible that such a requirement was incorporated into the formats for such certificates that are specified in the Rules produced in accordance with the Act by the States.

The UGC Regulation on Curbing the Menace of Ragging in **Higher Educational Institutions (Third Amendment), 2016** forbids discrimination, bullying, and ragging against students based on their sexual orientation or gender identity.

The Indian Armed Forces do not allow openly serving LGBT individuals. A bill to alter the **Army Act of 1950, the Navy Act of 1957, and the Air Force Act of 1950** was presented to the Indian Parliament by Member of Parliament Jagdambika Pal in December 2018 in order to permit the LGBT community to serve in the armed forces. The Lok Sabha did not vote on the bill.

The **Transgender Persons (Protection of Rights) Act**, which was adopted in 2019, forbids discrimination against LGBT individuals in educational institutions and services, employment, healthcare services, and access to "any goods, accommodations, services, facilities, benefits, privileges or opportunities dedicated to the use of the general public or customarily available to the public," the right to movement, and the right to "reside, purchase, rent or otherwise occupy any property". Some members of the LGBT community have expressed concerns about the certification process as well as the difficulties of getting one. However, there have been protests by members of the LGBT community against the legislation, with assertions that it harms rather than benefits the transgender population. The certification option was mentioned by protesters, but they objected to the requirement that transgender people register with the government in order to receive official recognition. They also highlighted the underlying injustice in the stark variations in penalties for the same crimes, including sexual abuse against a cisgender or transgender person.

VI. THE ROLE OF THE VARIOUS STATE GOVERNMENTS IN PROTECTION OF LGBT RIGHTS IN INDIA

In the case of *National Legal Services Authority v. Union of India*, the Indian Supreme Court ruled that the government must implement proper LGBT policies in accordance with Articles 15(2) and 16(4) to guarantee equality of opportunity in employment and education. The court also ruled that the third gender

must be classified as an OBC in order to receive the benefit of reservation for jobs in government agencies and educational institutions.

The Supreme Court of India further ordered the government to raise public awareness about LGBT rights and to do away with the stigma associated with the LGBT community in the case of *Navtej Singh Johar v. Union of India*. The judges went into more detail on the issues relating to transgender people, mental health, dignity, privacy, and the right to self-determination.

As a result of these rulings, a few state governments in India have taken steps to recognize, support, and defend the rights of LGBT people. The following list of state government initiatives is briefly discussed: The first states in India to implement a transgender welfare policy were Tamil Nadu and Kerala. In accordance with the policy, transgender people have access to free housing, free sex reassignment surgery (SRS) in government hospitals (only for male-to-female), various citizenship documents, admission to government colleges with full scholarships for higher studies, and additional sources of income through the creation of self-help groups (for savings) and the launch of income-generation programmes (IGP).

The state of Odisha implemented welfare benefits for transgender individuals in July 2016, providing them with the same benefits as those who are below the poverty line, through the implementation of the Odisha Department of Social Security. The goal was to raise their general economic and social standing.

The adoption of pension plans for transgender people was announced by N. Chandrababu Naidu, who was the chief minister of Andhra Pradesh at the time, on November 28, 2017. The policy was approved by the Andhra Cabinet on December 16, 2017. The State Government will pay each transgender person above the age of 18 a sum of Rs1,500 per month for social security pensions, in accordance with the provisions of the policy.

The Assam Social Welfare Department released a draft "transgender policy" at the beginning of 2019 with a number of goals, including granting transgender people access to educational institutions, giving homeless people shelter and sanitation, promoting awareness, and issuing self-identification identity cards. A "Transgender Welfare Board" was established by the Maharashtra government in February 2019 to carry out health programs and offer formal education and career possibilities to transgender persons. The board offers free housing and scholarships as well as skill development programs to assist transgender people in finding employment.

The Bihar Government announced the establishment of a transgender welfare board in July 2019. The body would look into and report on the social and legal difficulties transgender individuals in the state experience, as well as offer financial aid of up to Rs. 150000 for sex reassignment surgery. Additionally, those who deny transgender people housing or access to medical facilities might face prison sentences of up to two years.

VII. JUDICIAL ROLE IN THE PROMOTION AND PROTECTION OF THE LGBT COMMUNITY IN INDIA

The sixth of September 2018 was a unique day for the LGBT community. On that day, something extraordinary occurred that "blew life within the constitutionality" in the deceased LGBT community members. On that day, the Supreme Court of India issued a landmark decision decriminalizing homosexuality by substantially repealing Section 377 of the Indian Penal Code, which the British colonial government had imposed prior to India's independence and which had criminalized homosexuality. The legal campaign to repeal this antiquated rule, which had been used to harass and take advantage of the LGBT population, lasted more than 70 years. The LGBT community in India celebrated their win over the

200-year-old law from the British era that made homosexuality a crime. Although the LGBT rights movement dates back to the early 1990s, all significant advancements since then are included in the following discussion:

In the case of *Naz Foundation v. NCT of Delhi*, an NGO Naz Foundation filed a writ petition before the Delhi High Court in 2001 challenging the constitutional validity of Section 377 of IPC. Finally, the Delhi High Court ruled in 2009 that Section 377 of the IPC imposed an unjustified restriction on two adults having consenting sexual relations in a private setting. As a result, it was a clear infringement of their fundamental rights, which are guaranteed by the Indian Constitution under Articles 14, 15, 19, and 21.

The Delhi High Court's ruling was overturned and homosexuality was once again made a crime by the Indian Supreme Court on December 11, 2013, in the case of *Suresh Kumar Koushal v. Naz Foundation*. Section 377 of the Indian Penal Code, according to Justice Singhvi and Justice S.J Mukhopadhaya, is valid and does not violate the constitution. They left it up to the competent legislature to decide whether it is desirable and legal to remove the Section from the law or to modify it to permit consensual sexual activity between two adults of the same sex in private.

The Supreme Court had to decide upon the question of whether the hijra and transgender community needed to be recognized as a third gender for the purposes of public health, education, employment, reservations, and other welfare programs in the case of *National Legal Services Authority v. Union of India*. Finally, the Supreme Court of India established the status of "third gender" for hijras or transgender people and ruled that failure to recognize their identities violated Articles 14, 15, 16, and 21 of the Indian Constitution.

In the case of *K Puttaswamy v. Union of India*, the Indian Supreme Court ruled that Article 21 of the Indian Constitution recognizes the right to privacy as an inherent fundamental right and that right extends to cover sexual orientation as well. sparked confidence among the LGBT community that Section 377 would soon be repealed by the Court.

In *Navtej Singh Johar v. Union of India*, the Supreme Court of India unanimously ruled that Section 377 of the Indian Penal Code is unconstitutional because it violates the fundamental rights to intimacy, autonomy, and identity and decriminalizes homosexuality. Additionally, Section 377 of the IPC is ambiguous and fails to distinguish between what is "natural" and what is "unnatural" in a way that is understandable to the average person. It also restricts the right to express one's sexual identity, which is guaranteed by Article 19 of the Indian Constitution.

VIII. CONCLUSION:

Homosexuality is not a mental illness. It is equally organic as heterosexuality. There is no power over it in the human mind. In India, the condition for LGBT people is the worst. They experience abuse, assault, and mockery. All around the world, the UN resolutions have had a good effect. Human rights are indestructible and inalienable, and these natural rights are bestowed upon man at birth. The Indian government needs to let go of its conservatism and adopt proactive measures for the welfare of sexual minorities. For the LGBT community, the Supreme Court's decision to decriminalize section 377 of the IPC was a crucial turning point. Despite the fact that homosexuality is no longer a crime, India's laws continue to be discriminatory and antagonistic in a number of ways to the LGBT population. The reason for this is that there is a significant disconnect between the judicial and legislative evolution of LGBT laws in India. Therefore, even though the Supreme Court of India laid the foundation for the LGBT community to receive a slew of fundamental human rights through the precedent-setting rulings in *National Legal*

Services Authority v. Union of India, Navtej Singh Johar v. UOI, and Justice K.S. Puttaswamy v. Union of India, the legislature has been unable to keep up with the most recent developments. While same-sex couples now have the freedom to live together and manage their personal lives without fear of retaliation, they are still not treated equally in many situations. Therefore, it is crucial to continue the discourse and discuss the many laws that still discriminate against LGBT people. It consists of anti-discriminatory laws that forbid same-sex unions and deny rights to adoption, surrogacy, and other practices. As a result, the war for equality goes on because it will be a tough one.

REFERENCES

1. Denton, Michael P. "Social Work Practice with the LGBTQ+ Community", Social Work Practice with the LGBTQ+ Community, 2022
2. Tanweer A, "LGBT Rights in India" 2IJLMH 1-7 (2018)
3. *Navtej Singh Johar v. UOI* AIR 2018 SC 4321
4. *Legal Services Authority v. Union of India* (2014) 5 SCC 438
5. *K Puttaswamy v. Union of India* 7 (2017) 10 SCC 1.
6. Singh, V. (2011). History of Homosexuality in India. In G. D. P. (Ed.), Asian Homosexuality (pp. 17-29). Springer, Dordrecht.
7. Dasgupta, S. (2013). Homosexuality in Ancient India: An Exploration of Indian Sources. Journal of LGBT History.
8. Bose, A. (2021). Supreme Court Summons Centre Over Ban on LGBT Blood Donation. The Quint. <https://www.thequint.com/news/india/supreme-court-summons-centre-over-ban-on-lgbt-blood-donation>
9. Government of India (2019). The Transgender Persons (Protection of Rights) Bill, 2019. Ministry of Social Justice and Empowerment. [https://socialjustice.nic.in/sites/default/files/The Transgender Persons Protection of Rights Bill 2019.](https://socialjustice.nic.in/sites/default/files/The%20Transgender%20Persons%20Protection%20of%20Rights%20Bill%202019.pdf)
10. The Transgender Person (Protection of Rights) Act, No. 40, Acts of Parliament, 2019 (India)
11. Aparup Khatua et al., Tweeting in Support of LGBT? A Deep Learning Approach, CODS-COMAD'19, (January 2019).
12. Not my fault I was born gay: 19-year-old commits suicide over homophobia, India Today Web Desk, July 10. 19, 2019,
13. Delhi HC declines to entertain PIL on the protection of sex workers, LGBT members during lockdown, The Indian Express, May 11, 2020, [https://www.newindianexpress.com/cities/delhi/2020/may/11/delhi-hc declinesto-entertain-pil-on-protection-of-sex-workers-lgbt-members-during-lockdown 2141984. html.](https://www.newindianexpress.com/cities/delhi/2020/may/11/delhi-hc-declines-to-entertain-pil-on-protection-of-sex-workers-lgbt-members-during-lockdown-2141984.html)
14. Gaurangi Gyanesh Singh, Legal imaginations and legal realities: Reviewing Gender-based violence against LGBTQ Individuals post the 2019 Navtej Singh Johar Judgment, 4 International Journal of Social Science and Economic Research, (2019).
15. Tiwari, S. K., Changing Dimensions of Unnatural Offences, 20 Journal of Current Science, (2019).
16. Sakshi Tomar, "Case Comment: Navtej Singh Johar & Ors. Vs. Union of India & Ors.", 5 Pen Acclaims Publishers, (2019)
17. LGBT history in India -Wikipedia
18. Indian Penal Code 1861 (Act 45 of 1860)

19. M.Rahaman, “ Homosexuality Muslim Cultures and Modernity” (Palgrave Macmillan, U.K, London,2014)
20. the UNO Charter.