



# RIGHTS OF LGBTs IN INDIA: A NEW PERSPECTIVE

Dr. Tanuja Panda  
Lecturer ,P.M Law College,Keonjhar  
Odisha

**ABSTRACT:** The LGBT communities all around the world have been in a constant battle against the discrimination they face on a daily basis. They are segregated from the mainstream of the society and failed to find their identity with any other sex categories.

However, in the recent years they are trying to organize themselves to fight out their concern. Yet they are continues to be ostracized. People in the LGBT community are fighting for equal rights and acceptance. Trans people especially, face a lot of difficulty in finding acceptance.

The constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labour.

The problem of transgender is more critical compared to other sex. The Supreme Court in the case of “National Legal Services Authority Vs Union of India” declared transgender people to be the third gender. The case affirms that fundamental rights guaranteed in the constitution will be equally applicable to transgender people and entitled to maintain their self-identity as a separate gender.

The constitution affirms equality in all spheres of life but the moot question is whether it is being applied to the LGBTs. In this article it is an attempt is made to analyses the rights of LGBTs in India.

**Key Words:** LGBT, Transgender, Constitutional Protection, Gender Justice.

**Introduction:** India moves towards the most liberal era it has ever seen with economic, educational and social developments however on the contrary, the Indian social psyche with regard to certain issues that are still in the fetters of age old moral beliefs. The rights of LGBT people are one of the those transformations that one hopes a country in the 21<sup>st</sup> century would witness.

The ‘LGBT’ acronym stands for lesbian, gay, bisexual and transgender. A lesbian is a woman attracted to another woman. Gay is used to denote men who are attracted to other men. Bisexual means that a person is attracted to more than one gender.

A transgender person is some one whose gender identity differs from the one they were assigned at birth. In India, transgender people include hijras / Kinnars (eunuchs), shiv – shaktis, jogappas, sakhi, jogtas, Anadhis etc. there are many who donot belong to any of the groups but are transgender persons individually. This means the individual is uncertain of his or her sex orientation. They are constitute the marginalized section of the society in India. They face many challenges in the social, economic and political life. These people are not getting proper nourishment both in the family as well as in the society. They were excluded from the mainstreams of our social milieu. They failed to participate in social and cultural life. Political participation and decision – making process have been out of their reach. Seldom does a skilled individual from this community get into employment. Sometimes they are forced to leave their jobs due to undignified behavior from their colleague. By which they are forced to take up begging and involve to get earn through sex approach. Transgender people have difficulty in exercising their basic human rights and remained mostly segregated from the society. They often face harassment, violence, denial of services and receive unfair treatment. They are subjected to different kinds of exploitation. They do not have right to have sex. Sexual activity between two persons of the same sex is defined as unnatural offence in Indian Penal Code. Section 377 of penal law prohibits sex with same gender and attracts penal provision until recent times. Since the beginning of the human civilization transgender are included as a part of the society. To enjoy the freedom of sex they have to transform sex with the help of science and technology. It is just an expensive matter and not possible for many to reap the benefit of developed technology. Thus such categories of persons are vulnerable to enjoy equal status and their socialization fall in the domain of human rights jurisprudence. In recent times there is vast change in our social order. In this article an attempt is made to analyze the rights of LGBTs in India.

### CONSTITUTIONAL PROVISIONS:

The Constitution of India mandates justice – social, economic and political and equality in status. Thus the first and foremost right that they have designed is the right to equality in status. Thus the first and fore most right that they have designed is the right to equality under Article 14. It provides equality before law and equal protection of the law. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 21 ensures right to privacy and personal dignity to all the citizens. Articles 23 prohibits trafficking in human beings as beggars and other similar forms of forced labour and any contravention of these provisions shall be an offence punishable in accordance with the law. The constitution also guarantees political rights and other benefits to every citizen. But, the LGBT community continues to be ostracized. The constitution affirms equality in all spheres, but the moot question is whether it is being applied to transgender ?

Universal Declaration of Human Rights has secured the protection of human rights are the birth rights and non – transferable. Human rights are basic rights and freedoms which are guaranteed to a human by virtue of him being a human which can neither be created nor can be abrogated by any Government,

it includes the right to life, liberty, equality, dignity and freedom of thought and expression. Therefore, LGBT community is also eligible to protect them as human beings.

## JUDICIAL TREND AND RIGHTS OF LGBTQ

Homosexuality is not a disease or mental illness that need to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality. Section 377 of the Indian Penal Code, a figment of colonial creation, has criminalized "unnatural sexual acts" since its application as law in 1862. Homosexuality falls within such acts and may attract punitive measures. In the previous century, legislatures and judiciaries across the globe have upheld laws criminalizing homosexuality and transgender behavior, justifying them on grounds of public decency and morality. With the advent of the contemporary epoch, the movement against the repressive and oppressive nature of section 377 grew exponentially and reached its culmination in Naz Foundation V. Government of NCT of Delhi<sup>1</sup>, Wherein the Delhi High Court recognized the anachronism associated with section 377 and interpreted it to exclude sexual acts between consenting adults, thus decriminalizing homosexuality. After Naz Foundation case a Special Leave Petition was filed before the Supreme Court of India challenging the orders of the Delhi High Court and remanded the case back to the Delhi High Court for a decision on the merits of the case.

In 2<sup>nd</sup> July 2009, the Delhi High Court annulled the law that criminalized adult homosexual relations, ending an eight year old legal battle for gay rights. In National Legal Service Authority Vs. Union of India, Supreme Court held that apart from binary gender, Hijras, eunuchs, be treated as "Third gender" for the purpose of safeguarding their rights under part - III of the constitution<sup>2</sup>. Again in Mr. Suresh Kumar Koushal and another<sup>3</sup>, the Supreme Court held against the Delhi High Court judgment, which decriminalized consensual sex between adults under Section 377. Such deprivation secludes LGBTQ from the very fabric of Indian Civil Society. Recently the Supreme Court held that, Section 377 is partially unconstitutional and upheld the rights of transgender community.

In the landmark decision of National Legal Service Authority Case, Supreme Court has recognized the rights of the transgender relying on Articles 14, 15, 16, 19 & 21 of the Indian Constitution. Transgender person's right to decide their self – identified gender is also upheld by the court. It has directed the centre and state government to grant recognition of their gender identity such as male, female or as third gender. Article 14 deals with right to equality use the term person which does not restrict itself to binary term. Article 15 signifies that state shall not discriminate against any citizen on the ground of sex with regard to access to shops, public restaurant, hotels and places of public entertainment. Article 16 states that there shall be equality of opportunities for all citizens in matters relating to employment of any office. Gender identity is at the core of one's personal identity. Therefore, it will have to be protected under Article 19. The Supreme Court also went on to that self – determination of gender is an integral part of personal autonomy and self expression falling within Article 21 of the Indian Constitution<sup>4</sup>.

The recent landmark decision of the Supreme Court in Navtej Singh Johar Vs. Union of India<sup>5</sup>, partially struck down Section 377 of the Indian Penal Code (IPC) and recognized the rights of transgender people. It was held that it inflicts a stigma on members of the LGBTQI community. The

court found that Section 377 violates the right of members of the LGBTQI community to dignity, identity and privacy, all covered under Article 21 of the Constitution. It violates the right to the freedom of expression under Article 19 (1) (a). However, Section 377 of the IPC has not entirely been struck down. It still covers bestiality and non – consensual intercourse. It has set a mile stone in the arena of doctrine of equality and protective justice.

## CONCLUSION AND SUGGESTIONS :

The family is treated as sanctuary, a place of heavenly adobe – where individual seek love, affection, safety and shelter. But it not so happen in case of transgender. They are subjected to torture and violence even by their parents and family members. They are facing drastic forms of challenges in the institution, where they are places in for care and nourishment. However, the judiciary and the administration have made visible efforts to transform the living status of transgender community. The people of transgender community mostly remained socially marginalized and deprived of basic rights now got new hope for community living. The recent judgment of Supreme Court sets a miles stone in the arena of protective justice.

The biggest challenge is the parochial attitude and societal resistance to include transgender as a normal part of daily lives. There is discrimination against transgender embedded in both state action and civil society.

There is high need to the attitude of police administration. They must show their friendly attitude and provide protection against any kind of torture and social apathy.

India has made considerable progress in recognizing the rights of transgender people in recent years. They are entitled the right to vote, right to hold property, right to marry and find family of his/her choice and other rights. But, there is vast gap between the law and its implementation.

Therefore, often they are subjected to ridicule and deprivation of individual rights in India. The parliament is ready to pass special law for transgender to end discrimination and provide protection. Large scale sensitization is needed starting from the school level education to state administration to feel that, LGBT people not as an aberration, but an integral component of societal life. The stake holders must devise means to end all kinds of discrimination.

As far as my knowledge goes neither the legislature nor the judiciary will be able to handle the situation. We have to go beyond this and look into the social, cultural, religious and economic aspects and there should be the change of perception public notions and our mindset may to a great extent work as a positive force. It is time that “we the people of India” must realize that every individual in this country has equal rights and privileges, and follow the policy of our own culture, “Live and Let Live”.

References

1. Naz Foundation Vs. Govt. of NCT of Delhi (2009) 160 DLT 27; W.P(C) No. 7455/2001 of 2009 (Delhi H.C)
2. National Legal Service Authority V. Union of India writ petition (Civil) No.400 of 2012
3. Mr. Suresh Kumar Koushal and another Vs. Naz Foundation and another, Civil Appeal No. 10972 of 2013
4. <http://jurio.org/wp-content/uploads/2017/03/Madhana-B>
5. Navtej Singh Johar V. Union of India, <https://www.livelaw.in/navtej-johar-v-union-of-india-key-highlights>