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# **NEED FOR GREATER PROTECTION AGAINST DISCRIMINATION FOR LGBTQIA+ IN INDIA UNDER THE INDIAN CONSTITUTION**

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## **ABSTRACT**

The LGBTQIA+ community is composed of individuals just like ourselves. It is the government's responsibility to ensure that every citizen's fundamental rights are safeguarded, regardless of their sexual inclinations. However, because there is no explicit anti-discriminatory code, it is frequently neglected. Critics frequently assert that the LGBTQIA+ community never existed in India. Surprisingly, if we examine historical data, we may discover several references to homosexual and transsexual acts. In this article, the history of the LGBTQIA+ community in India is discussed, as well as the LGBTQIA+ community's constitutional status in India. In light of this, it goes on to analyse several judgments handed down by the Indian courts.

## INTRODUCTION

“If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.”<sup>1</sup>

Customs have a big effect on Indian legislation. After Section 377 of the Indian Penal Code was decriminalised, many opponents said that India was mimicking Western society. However, we can uncover evidence of LGBTQIA+ people even before the colonial period if we go far enough back in time. Textual and pictorial evidence of gay and transexual behaviour and its prevalence previous to British control may be found in religious literature, sculptures, paintings, and art dating back hundreds of years. During their colonial rule in India, the British colonials shaped Indians' attitudes toward LGBTQIA+ people by passing the Indian Penal Code, which criminalised homosexuality.

### Definition of LGBTQIA+

“Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, and Asexual/Aromantic/Agender” are the full forms of the acronym “LGBTQIA+.”<sup>2</sup>

Lesbian denotes a woman who is attracted to other women, Gay denotes a guy who is attracted to other men; the term "gay" is also used to denote all homosexuals, Bisexual denotes a person who is attracted to both men and women, any person who identifies as a gender other than the one assigned to him or her at birth is referred to as Transgender, Queer or Questioning refers to anyone who is still unsure about their gender identity and sexual orientation, Intersex refers to anyone with a reproductive anatomy that isn't typical of a male or female and a gender identity that isn't usual, Aromantic refers to someone who does not feel romantically drawn to anyone; Asexual refers to anyone who does not feel sexually attracted to anyone; A gender refers to someone who does not identify with any of the gender identities, and the "+" at the

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<sup>1</sup> Navtej Singh Johar v Union of India, AIR 2018 SC 4321.

<sup>2</sup> MERRIAM WEBSTER LGBTQIA+, <https://www.merriam-webster.com/dictionary/LGBTQIA> (last visited Apr. 6, 2022).

end alludes to all of the newly discovered or yet to be discovered subject areas.<sup>3</sup>

## Historical Background

Various evidences exist that suggest the LGBTQIA+ existed in the pre-colonial era. Gender fluidity is a well-known idea in ancient India, both for humans and yakshas. From ancient epics and scriptures through mediaeval literature, poetry, art, and architecture, queerness may be traced back to Indian history. Several Hindu sacred scriptures, including Valmiki's Ramayana, Krittivasa Ramayana, Mahabharatha, Matsya Purana, and others, contain stories about homosexuality and transsexuality. Babur, the founder of the Mughal Empire, was attracted to a guy and composed poetries for him in his memoir, according to Muslim literature. Homoerotic or same-sex references can also be found in Sufi poetry.<sup>4</sup>

Apart from literary evidence, there are also visual remnants of homosexuality in Indian history. These records have been turned into art, paintings, and sculptures all around the country. The Khajuraho temples include one such chronicle. The Chandela dynasty created the Khajuraho temple sculptures between 950 and 1050 AD, depicting men exposing their genitals to other men and women erotically embracing each other. This has been regarded by scholars and historians as an admission of homosexuality and same-sex love at the time. These sculptures are a declaration of men, women, and the third gender's sexual fluidity. Similar images can be found in the Sun Temple in Konark, Orissa, the Temples of Puri and Tanjore, and Buddhist monastery caves at Ajanta and Ellora.<sup>5</sup>

Furthermore, the British colonisers, who sought to control such vivid displays of sexuality, were astounded by these descriptions of one's libido. As a result, beyond the prohibition of 'perverse' sex, the British colonisers influenced India's understanding of sexuality. They also anglicised India's moral lens, among other things.<sup>6</sup>

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<sup>3</sup> MERRIAM, *supra*, note 2.

<sup>4</sup> Sachin Mishra, Human Rights of LGBT Community in India, ACADEMIA, (last visited Apr. 6, 2022, 07:58 PM), [https://d1wqtxts1xzle7.cloudfront.net/62895863/HUMAN\\_RIGHTS\\_OF\\_LGBT20200409-22068-qco0uu-with-cover-page-v2.pdf?Expires=1649258841&Signature=Tzjf~mY~Z2dug83ZVWjPLkmzTtWq~3Y2-wq4taF2eusi19op5vCJoJE43k3Hdy-fe4XbTn2gTOAnNa5DIXbAXwtXwScvWKCE~Xar9dwUdl6XpqC-vHLeMzoUBNIEa~Jk66cC~1sclKRSRptpX-dDf4RUUpNqrJghXJmw6yfr00STc6VT5mtuqifldNsMEkqrMCVZq1Ry~HpJp8ed2eoGkLRIN499s2bZAZOwZArioyDN-7SK9fqzAJ8QRJ1cUWnNE8twkuCPTo~7uKLPXeKmtKkPAnTRIPcVRQ7EqnNBZWnl2r0r5P-dnsWaVNCyMSZinJU20yUh9QO~4Thqo0ecvzg\\_\\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA](https://d1wqtxts1xzle7.cloudfront.net/62895863/HUMAN_RIGHTS_OF_LGBT20200409-22068-qco0uu-with-cover-page-v2.pdf?Expires=1649258841&Signature=Tzjf~mY~Z2dug83ZVWjPLkmzTtWq~3Y2-wq4taF2eusi19op5vCJoJE43k3Hdy-fe4XbTn2gTOAnNa5DIXbAXwtXwScvWKCE~Xar9dwUdl6XpqC-vHLeMzoUBNIEa~Jk66cC~1sclKRSRptpX-dDf4RUUpNqrJghXJmw6yfr00STc6VT5mtuqifldNsMEkqrMCVZq1Ry~HpJp8ed2eoGkLRIN499s2bZAZOwZArioyDN-7SK9fqzAJ8QRJ1cUWnNE8twkuCPTo~7uKLPXeKmtKkPAnTRIPcVRQ7EqnNBZWnl2r0r5P-dnsWaVNCyMSZinJU20yUh9QO~4Thqo0ecvzg__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA)

<sup>5</sup> *Id.*

<sup>6</sup> SACHIN, *supra* note 4.

## **The Constitutional Status of LGBTQIA+ in India**

Fundamental rights are fundamentally available to all persons, citizens, and numerous groups such as women, children, schedule castes, schedule tribes, and various minority community groups under the Indian Constitution. Because sexual minorities are included in the concept of a person, they are covered by fundamental rights in general and minority rights in particular. As a result, the provisions of the basic rights articles, namely Articles 13 to 32 (Part III, Fundamental Rights), are relatively important and have a longer history. Similarly, by way of international duties on India as a State, the other laws give a relative presence to the fulfilment of such fundamental rights to sexual minorities.<sup>7</sup>

'Article 38 of the Constitution also states that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it can a social order in which social, economic, and political justice inform all institutions of national life, and that the state shall, in particular, strive to minimise income inequalities and endeavour to eliminate inequalities in status, facilities, and opportunities, not only among individuals.'<sup>8</sup>

'International law is mostly implemented through India's municipal courts, thanks to Articles 51 and 372 of the Indian Constitution. Article 372 allows for the adoption of recognised international law norms in force immediately prior to the commencement of the Indian Constitution, as long as those norms are not in conflict with the Constitution.'<sup>9</sup> Inconsistencies may exist with respect to specific articles or the Constitution's "fundamental elements." Article 13(1) provides another cause for invalidating the execution of the aforementioned regulations if they are incompatible with the provisions of Part III of the Constitution (Fundamental Rights). The Constitution of India fundamental rights provisions (Article 13 to 32) are all available to all including sexual minorities.<sup>10</sup>

Although all people have fundamental rights, they are not explicitly stated, and a proper anti-discriminatory framework for LGBTQIA+ people must ensure that their rights and privileges are fully protected.

## **Recent Judgements On LGBTQIA+**

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<sup>7</sup> INDIA CONST. art. 13- 32.

<sup>8</sup> INDIA CONST. art 38.

<sup>9</sup> INDIA CONST. 51 & 372.

<sup>10</sup> INDIA CONST. art. 13, cl. 1.

***Naz Foundation v Government of NCT Delhi***<sup>11</sup>:

In this ruling, the Delhi High Court found Section 377 to be unconstitutional for the first time. Naz, a non-governmental organisation based in Delhi, filed a Public Interest Litigation (PIL) in the Delhi High Court, claiming that Section 377 of the Indian Penal Code is unconstitutional. They've been in the forefront of the campaign for decriminalisation. They were successful in having Section 377 ruled unconstitutional in 2009, claiming that it violated Articles 14, 15, and 16 of the Indian Constitution.

***National Legal Services Authority vs Union of India***<sup>12</sup>:

The Supreme Court of India's decision in Suresh Kumar Koushal versus Union of India, in which homosexuality was re-criminalized, was a bad year for rights in India in general and LGBTQIA+ rights in particular. The doom was short-lived, however, as the Nalsa verdict was given down by the Supreme Court. Transgender persons were acknowledged as citizens of this country for the first time in legal history, with all Fundamental Rights provided to them and the identity of Third Gender bestowed upon them. This case is still regarded as a watershed point in the country's transgender rights movement. The court established a thorough set of recommendations for all states to follow in order to integrate transgender people into public spaces and give remedies for their marginalization.

***Justice (Retd) K S Puttaswamy vs Union of India***<sup>13</sup>:

It's a significant ruling since it affirms the right to privacy as a basic right. The right to life and liberty is guaranteed under Article 21 of the Indian Constitution, which was recently extended to include the right to privacy. The right to privacy was likewise extended to everyone, regardless of gender or sex. Members of the LGBTQIA+ community gain autonomy and protection from state intervention when their ability to choose their partners is recognised as an intrinsic right. As a result, this decision, coupled with the NALSA decision, served as a forerunner to the reading down of Section 377 in 2018.

***Navtej Singh Johar v Union of India***<sup>14</sup>:

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<sup>11</sup> Naz Foundation v Government of NCT Delhi, 160 Delhi Law Times 277.

<sup>12</sup> National Legal Services Authority vs Union of India, AIR 2014 SC 1863.

<sup>13</sup> Justice (Retd) K S Puttaswamy vs Union of India, (2017) 10 SCC 1.

<sup>14</sup> *Supra*, note 1.

In India, homosexuality was decriminalised as a result of this momentous ruling. As a result of numerous Public Interest Litigations filed by various LGBTQIA+ organisations, the Supreme Court of India issued this ruling. Section 377, to the extent that it criminalised intercourse between two consenting adults, was ruled down by the Court. The Court affirmed the clause that makes it illegal to engage in non-consensual acts with children or animals. The Supreme Court also ruled that Section 377 of the Indian Constitution breaches Articles 14, 15, 16, and 19 1 (a). It acknowledged that everyone, regardless of gender identity or sexual orientation, has the right to live in dignity, autonomy, and privacy without interference from the state.

***Arun Kumar v Inspector General of Registration, Tamil Nadu***<sup>15</sup>:

It is a case from the Madras High Court that reads transwomen into the category of brides. The Hindu Marriage Act of 1955 includes only men and women in the definition of marriage. This decision broadens the definition of women to encompass transgender people who identify as women and wish to marry. It adopts the NALSA judgment's self-identification clause, which states that a person can identify as any gender identity without the necessity for a state or external body to authenticate their identity. This section has evolved to say that if a person desires to identify as a transwoman, they have the constitutional right to do so. This, among many other cases, provides the groundwork for LGBTQIA+ weddings, thereby expanding the right to marry.

Though the courts have ruled that LGBTQIA+ rights must be safeguarded in various judgements, in actuality, this is a far cry from reality due to a lack of anti-discrimination code and social acceptability. Despite the fact that transgender people are given a lot of recognition, there are still many rights that have not been acknowledged, and when we look at the LGBTQIA+ community as a whole, just about any right has been recognized.

## **CONCLUSION**

Fundamental rights are the core human rights that should be guaranteed to all citizens, regardless of their circumstances. To defend LGBTQIA+ rights, India's Constitution should include an express anti-discriminatory code. At the end of the day, everyone is a human being, and it is disheartening to watch how a segment of society must battle for basic human rights, let alone anything else. Regardless of other factors, every citizen should have the same

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<sup>15</sup> Arun Kumar v Inspector General of Registration, Tamil Nadu, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019.

fundamental rights and privileges. To ensure proper operation of the anti-discrimination laws, societal changes like awareness initiatives and the integration of sex education into school and university curricula should be implemented.