



# Jus Corpus Law Journal

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## Representation of the LGBTQI+ community in Indian administration

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*In India homosexuality is a very old concept. According to research conducted around 3102 B.C, the gay lesbian Vaishnava association was established during that time. After the Kolkata Pride Parade in the year, 1999 Delhi High Court put a landmark decision in 2009 in the matter of Naz Foundation v. Government of NCT of Delhi, 2 July 2009 Delhi High Court struck down Section 377 and legalize consensual sexual activities between two adult homosexuals. Before discussing the representation of the LGBTQ Community in the Indian administration let's identify the meaning of the word representation. According to the Cambridge dictionary, representation means when a person or organization speaks or acts, or officially presents something for someone else. It also defines the way somebody or something is shown or described. Generally, representation of something somebody or some community plays a very wide role in our society. It helps to believe something to the society regarding something upon whom the representation is to be made. We can represent some community through advertisements or movies. Some organization, authority, or government also plays a very important role to represent some community by implementing some rules, regulations in favor of them so that they can enjoy their rights and lead a dignified life mentioned under Art 21 of the Indian Constitution. Among all these, movies and advertising play a great role today for representation.*

*This article talks about how the Indian administrative system looks LGBTQ community and accepts them in administrative services after the Supreme Court verdict.*

**Keywords:** *government, LGBT, representation.*

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## INTRODUCTION

In India homosexuality is a very old concept. According to research conducted around 3102 B.C, the gay lesbian Vaishnava association was established during that time.<sup>1</sup> They were commonly known as “Tritiya Prakriti” or the third nature. Even in the Third Century BC, the Kovalam festival was started where Lord Krishna had taken the form of a woman to marry Arvan before the battle of Mahabharata and this festival continues.<sup>2</sup> During the 6th to 14th centuries in Puri and Tanjore, the walls of temples explicitly depicted the queer couple. After that homosexual intercourse was considered to be an unnatural offense during the British East India Rules, 1860,<sup>3</sup> and it was made a criminal offense and included in the Indian Penal Code, 1860<sup>4</sup> under Section 377. On November 26, 1949, after Independence, the Constitution added Article 14<sup>5</sup> which talks about the Right to Equality but Section 377<sup>6</sup> remained a criminal offense. On 11 August 1992 decades later for the first time, the protest for gay rights started. After this protest, Kolkata hosted India’s first gay pride parade with 15 attendees which was known as Calcutta Rainbow Pride which actively initiated the fight for their rights and hurdles.<sup>7</sup>

## RIGHTS OF LGBTQI+ IN INDIA

After the Kolkata Pride Parade in the year, 1999 Delhi High Court put a landmark decision in 2009 in the matter of Naz Foundation v. Government of NCT of Delhi, 2 July 2009 Delhi High Court struck down Section 377 and legalize consensual sexual activities between two adult homosexuals. Then in the year 2013 honorable Supreme Court in Suresh Kumar Kaushal and

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<sup>1</sup> Shambhavi Saxena, ‘How Many of These 93 Things Do You Know about India’s LGBTQ Movement?’ (*Youth ki Awaaz*, 13 July 2017) <<https://www.youthkiawaaz.com/2017/07/lgbtq-movement-in-india-91-facts/>> accessed 15 October 2021

<sup>2</sup> *Ibid*

<sup>3</sup> British India Rules 1860

<sup>4</sup> Indian Penal Code 1860

<sup>5</sup> Constitution of India, art 14

<sup>6</sup> Indian Penal Code 1860, s 377

<sup>7</sup> *Ibid*

another vs Naz foundation overturned the Delhi High Court decision and decriminalize homosexual acts and criminalized homosexuality again. But then after all these struggles, the LGBTQI community has started to see a ray of hope when MP Shashi Tharoor introduced a bill to decriminalize homosexuality in late 2015, though it was rejected by the Lok sabha. But the honorable Supreme Court rethinks about their rights injustice *KS Puttaswamy vs UOI* (2017) justice K.S.Puttaswamy (Retd) vs Union of India And Ors, on 24 August 2017 ruled that the fundamental right to privacy is intrinsic to life and liberty and thus, comes under Art 21 of the Indian constitution and declared that bodily autonomy is an integral part of the right to privacy.

Then finally in 2018 honorable Supreme Court decriminalized homosexuality in the matter of *Navtej Singh Johar vs Union of India*. According to Justice Indu Malhotra, homosexuality is just a variation of sexuality. Sexual orientation is not a choice but a manifestation of early adolescence. Sexual expression and intimacy between two adults in private do not come under carnal intercourse. Justice DY Chandrachud declares Section 377 as unconstitutional as it does not allow the consensual relationship between two adults. He also declared that the LGBTQ community has the constitutional right to citizenship. He told that Section 377 implements the exclusion of transgender persons to access health care due to social stigma attached to their sexual identity so it must be decriminalized on the ground of its unconstitutionality.

**Impact of decriminalization:** After this landmark judgment LGBTQ community can have acquired the following rights

- LGBTQ community has the right to come out in the open with their sexual preferences.
- If they face any discrimination for their health and harassment by police will cease.

- This community can also ask for more progressive laws like gay marriage laws, the right to form partnerships, inheritance, employment equality, and protection from gender identity-based discrimination.

After this judgment, only Transgender Persons (Protection of Rights) Bill 2019 The Transgender Persons (Protection of Rights) Bill, 2019 Bill No. 169 of 2019<sup>8</sup> was enacted to promote and protect the rights of the transgender community by prohibiting discrimination against them regarding employment, education, healthcare, access to government or private establishments, etc.<sup>9</sup>

## REPRESENTATION OF LGBTQI+

Before discussing the representation of the LGBTQ Community in the Indian administration let's identify the meaning of the word representation. According to the Cambridge dictionary, representation means when a person or organization speaks or acts, or officially presents something for someone else. It also defines the way somebody or something is shown or described. Generally, representation of something somebody or some community plays a very wide role in our society. It helps to believe something to the society regarding something upon whom the representation is to be made. We can represent some community through advertisements or movies. Some organization, authority, or government also plays a very important role to represent some community by implementing some rules, regulations in favor of them so that they can enjoy their rights and lead a dignified life mentioned under Art 21 of the Indian Constitution.<sup>10</sup> Among all these, movies and advertising play a great role today for representation. Though movies also take the concept from society only, some few movies are made where the concept comes from beyond societal thought. The only reason behind this discussion is to understand the representation of the LGBTQ community and what society thinks about them. In the year 2008 (just a year before the Delhi High Court judgment) *Dostana* (movie) was released by the Bollywood film industry that dealt with homosexuality. Then in 2011 before Suresh Kumar Kaushal's judgment, Bollywood released, *I am Omar* where gay

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<sup>8</sup> Transgender Persons (Protection of Rights) Bill 2019

<sup>9</sup> *Ibid*

<sup>10</sup> Constitution of India, art 21

characters have intercourse at a public place and are caught by police. This time Section 377 was not decriminalized. It has been shown that after giving the bribe to the police a suit was initiated against the policeman for extorting the money from them. This movie received critical acclaim but was much underrated among the audience. Then in 2018 after the decriminalization of Section 377 *Ek ladki ko dekha to aisa laga (movie)* was released which tries to normalize the concept with no kissing scene but an unconventional love story into a Bollywood style drama. All these movies try to tell different stories to represent the community which creates awareness among those who do not want the involvement of the LGBTQ Community. However, there is a need for societal acceptance by way of positive representation so that the community can get equal opportunities and more recognition like other communities in society.

## GOVERNMENT'S ROLE

Modi government along with U.P chief minister Yogi Adityanath takes an initiative regarding the representation of the LGBTQ community by enacting The Transgender Persons (Protection of Rights) Bill, 2018 to protect the rights of transgender people and increase the involvement of Indian administrative system. This Bill allows self-perception of gender identity and mandates that they would have to obtain the certificate of identity to identify themselves. Identity certificates will be issued by district officers by which will be recorded in all government documents. The main feature of this Bill is to prohibit discrimination against if someone refuses to serve or inappropriately behaves in such sectors as education, employment, products available in public, housing, healthcare, and access to other services. This bill directs the Central Government and State Government to arrange welfare schemes. Separate HIV surveillance centers, sex reassignment surgery, and hormonal-related medical course reviewed comprehensive insurance SC will be taken by the central and state governments. In the year 2019, the is Bill came into being as an Act The Transgender Persons (Protection of Rights), Act 2019,<sup>11</sup> and was introduced in Lok sabha by the ministry of social justice and empowerment. According to this Act transgender person has the right of full

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<sup>11</sup> Transgender Persons (Protection of Rights) Act 2019

inclusion and participation in society, it ensures the protection of the rights and interests of a transgender person. This Act also set up the National Council for Transgender persons to advise Central Government on policies, legislation-related matters.<sup>12</sup> This council supports full participation in several ministries like social justice, empowerment, health, minority affairs, NITI Ayog, National human rights Commission and National Commission for Women, state Governments members nominated from the transgender community, etc with other things discussed in the Bill. After the enactment of this Act, UP Government has taken a significant step. Greater Noida metro station as the Aqua Line and Sector 50 station into a She Man where there has an employment opportunity for transgender. UP Government has also decided to make the first transgender university. The sports ministry has also conferred the Arjuna Award for 2018 Asian Games silver medalist for 24 years old Dutee Chand to accept the transgender community. The Modi Government has urged LGBTQ members to strengthen the participation of weaker sections. In the year of 2020 National Congress Party in Maharashtra set up India's first LGBT cell with Priya Patil and 13 other officers to do justice to the deprived section. These small but very important initiatives show that how the government is working hard to represent the transgender community, but governments of every state should come forward for this.

### **IN THE ARMY, NAVY, AND AIR FORCE**

In the Indian military Army Chief General Bipin Rawat disagrees to include gay soldiers in the military and created a controversy by saying that homosexuality will be an offense in the armed forces according to a published article The Print by Amrita Nayak Dutta on 11 January 2019 after the historic judgment of honorable Supreme Court an interview given by Major J Suresh on 8th July 2020 that he joined National Defence Academy and Indian Military academy on the LGBTQ community. He told about General Rawat who did not agree gay people join the army that the army is not above the law but maintains that the constitution gives gay some freedom. But General Rawat cannot snatch away the fundamental right of serving gay men to a life of dignity, honor, and self-respect and also cannot deny the rights of

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<sup>12</sup> *Ibid*

LGBTQ military aspirants in the future. In Navy Sabi Giri a transgender was removed from her employment by the Indian Navy without having any mistakes after the seven years of service. After two years of getting the permission from Delhi High Court for the tradesman mate exam and appearing for it, the Navy said that she is not eligible for any post as she has only passed class XII and is above 25 years of age. In the case of the Indian Air force, there is no such news so far concerning the representation of the LGBTQ community.

### **IN OTHER ADMINISTRATIVE FUNCTIONS**

In other administrative functions like civil service, Aishwarya Pradhan is India's first transgender civil servant. She is working as a commercial tax officer at Paradip Port Township. On 30th October 2020, Zrarir Hussain reported on Reuters that Assam becomes the first state in India which add transgender as an identity category for people seeking civil service jobs. It allows 42 Trans candidates to apply to sit an entrance exam. Swati Bidhan Baruah from Assam transgender welfare board considers this a big victory and told the Thomson Reuters Foundation that they urged the state government to reserve a quota for Trans candidates in civil service jobs. In Chattisgarh, 13 transgender people were appointed as police officers after qualifying from the police training college. Chattisgarh became the first state in India who welcome transgender police officers as reported by Amrit Dhillon on 18th March 2021 in The Guardian news portal.

### **INTRODUCTION TO GENDER NEUTRALITY IN INDIA**

India is a country that is driven by the past ideologies that women have to submit themselves before men as it is a patriarchal society. There are wide inequalities in their access to education, physical and financial resources, etc. The Constitution has formulated the participation of women in every aspect when India got freedom. Introduction to fundamental rights brings equality between men and women. After that under the constitutional mandate, several laws have been introduced to stop the discrimination against women. Gender neutrality means giving the recognition of all genders and treating them equally. But India never recognized the LGBTQ Community as a part of their society. There are several laws to

protect men and women. If in case someone fails to implement the laws they get the punishment for that and most importantly society helps to fight against the violation of laws. But in the case of the LGBTQ community, we do not see it because society has not accepted them even after the Supreme Court decriminalized Section 377. So it is high time to take gender neutrality seriously and implement the existing laws properly.

## **LEGAL EQUALITY AND LGBT REPRESENTATION**

After the decriminalization of Section 377 and the enactment of the Transgender persons (protection of rights) Act, 2019 there is no doubt that transgender people have had equality in every aspect not only in representation. But the question is do they enjoy equality before the law everywhere? Is the legislation is implemented properly? The answer is no,! It has been two years since the historic judgment given by the honorable Supreme Court but still battling for prejudice. The judgment was welcomed by society and it was a moment of celebration. The judgment gives the confidence to Mr. Singh to share and explain his sexual orientation. But the inequality still exists in society regarding inheritance and surrogacy laws. Subhankar Chakravorty, a writer who resides in Bangalore suggested extending civil rights. He said that things have surely changed but the change has primarily been for the urban, privileged few. Things have not improved much. The transgender community is still fighting against discrimination. The government has taken initiatives for their representation and also started to promote legal equality for them. Army, Navy, and other administrative functions also represent them to treat them equally before the law. But many sectors and many states are yet to represent the community. The Army, Navy, and civil services need more inclusion of people from the LGBTQ community. Indian Air Force still not have allowed any transgender person. Government must do something to create social awareness so that they can get equal recognition like other genders. Law comes from society only, so it has a very important relationship with social conditions. Our society recognizes the community first and accepts their rights equally like others then only law will be implemented properly. LGBTQ community has equal rights for representation under the constitution of India and the



transgender persons (protection of rights) Act 2019 like other genders but it is next to impossible if the society does not cooperate with the laws.

### **HOW LGBTQI+ REPRESENTATION WILL BOOST THE FIGHT FOR EQUALITY?**

There is no doubt that the representation of The LGBTQ community in different sectors of society, but still battling with their right to equality, provides the mental strength of other weaker sections of our society, Other weaker sections like SC/ST get their recognition, legal rights and protection from the legal system but are still fighting with the inequality in every sector but now they are losing hope while represents the increasing poverty rate and the recent attack of covid 19. This massive lockdown period due to the covid 19 destroys the life of weaker sections in India. People belonging to weaker sections do not have any source of income and are not able to eat properly. Situation Due to the online education system, many students are not able to study. The government has failed to bring some permanent solutions yet. In earlier also weaker section face the discrimination in the education sector, most of them cannot afford higher education, they face discrimination even from teachers as well. Even in employment they often face discrimination. Sometimes they lose their hope despite having so many protections given by the law. In other cases, only two years ago honorable Supreme Court decriminalized section 377, and merely one year ago they got few rights from the transgender protection Act. But still, they have not received acceptance and recognition from society. They are still fighting against prejudice. Only a few states have started recognizing them so they are getting the chances for education, employment, and social participation but in many places facing humiliation for their sexual orientation, So one side they are fighting for prejudice and on the other side they are enjoying their victory by representing themselves in government, civil services, army, navy, and other sectors. The battles of the LGBTQ community are much more difficult than other weaker sections of society as they do not have the recognition and victory is much lesser than others, but, till their battle is on which provides the mental strength to others and that is very important to fight for something. If the LGBTQ community gets their social acceptance it will boost the fight for equality.

### **CONCLUSION**

Honorable Supreme Court passed the Historic Judgement two years ago now Mr. Singh is now confident enough to explain his sexual orientation to his parents but inequality persists in society's mindset. Sunaina is not able to identify herself because of society. As per the Bangalore based writer Shubhankar Chakravarty the judgment has given the confidence to express their sexual orientation in society but the change has primarily been for the urban, privileged few, Their life has not improved much, According to a lawyer and deputy director of lawyers collective Tripti Tandon society has not changed yet for that reason they face a lot of violence and hostility and harassment from their parents. If we revisit the matter of Sabi Giri, she was allowed to appear for the Tradesman mate exam after the Delhi High Court Judgment but the Navy did not allow her. According to the standing counsel for the Government of India navy allowed her earlier due to some compassionate ground agreed to take her exam but after the review by the officials, she is not qualified for any navy job even in the category of ex-serviceman category. The navy allows women officers but not as a sailor and there is no provision for transgender where Giri's case was merely an exception. Even in the Army people from the LGBTQ community are not acceptable that much. The government has taken initiatives and only a few states have accepted them. The ministry of social justice has also announced one-time financial assistance for that community whose livelihood has been adversely impacted by the Covid 19. The Ministry has also asked states to take measures for their vaccination. LGBTQ community now needs social acceptance rather than the law because until and unless we accept them the laws cannot be implemented properly.