

# CONSTITUTIONAL SAFEGUARD TO LGBT COMMUNITY: A CRITICAL STUDY

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## Abstract

Constitution of India provides overall protection to every individual irrespective of any kind of discrimination. The scheme of rights guaranteed under constitution did not make any distinction on the ground of sex, age, place of birth, colour etc. It means all people are equal in the eye of law. The philosophies of constitutional rights centre around the principle of all human beings are equal in all status. All human being have equal status and dignity to treat equally.

In recent era, the question was arising about the status and constitutional rights of LGBT community. These people were distraught and ill-treated only because of their gender identity. Sometime these people are treated like aliens by the society at large. The preamble of constitution provides justice including social economic and political irrespective of gender bias. In other words all human being has right to access all these constitutional protection from government. Article 14 and 21 guaranteed equality, safeguard to life and personal liberty irrespective of any kind of discrimination. Through there are scheme of protection of all human beings but in fact the category of people are not come under the preview of these protection like LGBT community. Recently in NALSA cases Supreme Court guaranteed all constitutional rights to LGBT community which proved historic and path breaking judgement for the protection of rights of LGBT community.

Present article has attempted to analyse the 'constitutional safeguard to LGBT community'. The analysis is from legal point of view and various aspects whether really the right of this community are safeguarded by constitution of India or it only remain on paper. This article also focuses existing situation where LGBT community suffer various hateful treatment by society at large. Additionally, the researcher also focuses on various instances of cruel and hateful treatment to LGBT community by society at large. The objective of this analysis is to verify the practical and real problem faces by the LGBT community.

**Keywords:** Constitutional Rights, LGBT community, Fundamental Rights, Supreme Court decisions.

## Introduction

LGBT community refers gay, lesbian, bisexual and LGBT people who having different sexual wellness. As common people think they are acting against the order of nature. And for the reason these community hated and maltreated by the society at large. As society thinks these people has no place in the society to live. For the reason these community are maltreated and hated throughout the globe. The people are not ready to accept this community as human beings. But fortunately our Constitution of India provides overall protection to every gender or community without any kind of discrimination and distinction. Part III provides series of protection to every person without discrimination on the basis of gender, sex, religion, caste and so on. Gender identity of person and sexual wellness refer part of privacy which guaranteed under Art. 21 of constitution. Though this rights is not directly concern with privacy but it cover wide spectrum of privacy which includes gender identity and sexual wellness. The scheme of fundamental rights refers overall protection of every community and social

groups. Recently the LGBT community come forward for the protection of their rights as they treated aliens on the earth. Actually every person has choice of sex and life as per their own wish and will. The LGBT community are not accepted by the society due to their sexual wellness and behaviour, their relationship and norms adopted by them for their life. And for the reason they are not accepted by the society at large. Like male and female the LGBT community people having same rights which guaranteed to individual. LGBT community refers who are sexually depending on the same sex partners.

Since inception of the society LGBT people have existed in every religion, culture, country and class. These people are not alien or they are not invented by the society, they are like as other common human beings. Actually, due to their sexual wellness and biological differences they are hated, discriminated, and ill-treated by the society at large which leads towards the violation of their basic Human Rights and constitutional rights. the LGBT community was recognised throughout the world in century back but the concept was not digest by the Indian due to their typical mentality and orthodox thinking.

The fundamental rights of individual are guaranteed by international instruments and constitution of India. These rights assure basic fundamental rights for all which are necessary to enjoy the life as human beings. The fundamental rights to LGBT community are incorporated and provided to class of people to protect their basic rights. The scheme of fundamental rights is based on gender equality and equality to all. For the enjoyment of theirs rights the essential requirement is human being. It means every human being has right to enjoy the natural rights assured by UDHR<sup>ii</sup>, ICCPR<sup>iii</sup>, ICESCR<sup>iv</sup> and other like convention throughout the globe.

Every individual irrespective of their sexual wellness have right to enjoy all the rights just because being human. The constitutional rights rather human rights are rights inherent and inalienable to all human beings, whatever our nationality, place of residence, sex, ethnic origin, colour, religion, language, or any other status.<sup>v</sup> In other words the human rights are available to everyone without any kind of distinction. On the same line of argument the LGBT community is also within the preview of person though they having different sexual wellness. It means LGBT community having same rights which are available to all.

Non-separation and equivalent treatment to each individual is essential rule of all the universal demonstrations which is a piece of our constitution. The centre thought and reasoning of human rights is "All individuals are brought into the world free and equivalent in dignity and rights." No individual will be managed and segregated on any ground.

The particular thought of basic rights, as an essential necessity for human improvement, deduces that they can have a direction on relations both between the individual and the state, and between individuals themselves. The individual-state relationship is known as the 'vertical effect' of these rights. While the essential job of all fundamental right is to develop approaches for relations between the individual and the express, a couple of these rights can in like manner have recommendations for relations among individuals. The straightforwardly to life thusly suggests that the organization must undertaking to guarantee people against executing by their nearby individuals.

## Constitutional Rights of LGBT community

Gender identity of person is deeply concern of individual. Every person has right to preserve and reflect his or her gender identity. In other words sexual wellness or gender identity is concern with individual no one has right to compel for the same. It is not necessary to correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity therefore, refers to an individual's self-identification as a man, woman, LGBT or other identified category.<sup>vi</sup>

LGBT community have same rights as guaranteed to common people. Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>vii</sup> The dignity of individual is most important to recognise the individual as person. The term identity can be traced primary on the sex or sexual wellness of individual it means that, people shall not discriminate on the ground of sexual wellness. Everyone is entitled to all rights and freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>viii</sup> The declaration itself provides wide range of protection to every individual irrespective of any kind of distinction. Apart from the above the constitution of India also guaranteed various fundamental rights to every individual.

Part III of constitution of India provides series of rights which guaranteed the right to life<sup>ix</sup> what's more, individual character of individual regardless of any sort of separation. The segregation on the ground of sex under Articles 15 and 16, along these lines, incorporates separation on the ground of sexual orientation personality. The articulation sex utilized in Articles 15 and 16 isn't simply restricted to organic sex of male or female, yet proposed to incorporate individuals who believe them to be neither male nor female.<sup>x</sup> Furthermore right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed under Article 21 of the Constitution of India.<sup>xi</sup> Moreover as of late it was announced by the Supreme Court of India that, Section 377 of IPC condemns consensual sexual demonstrations of grown-ups in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. Moreover LGBT isn't a ground to deny the privilege to individual especially the freedom to privacy.<sup>xii</sup> Sexual direction is a fundamental segment of rights ensured under the Constitution which are not planned on majoritarian supporter. In short we can say that, as other individuals the LGBT people group has same human rights which are accessible to each person. Indeed, these individuals will be segregate, loathed, abused simply because of their sexual health or sexual personality is it not an infringement of their human rights?

Sovereign protection of these Human rights under national and international law still the rights were damaged and LGBT individuals face such a significant number of issue and contemptuous treatment by the state and people. The controlling authorities and governing body neglect to give the assurance to this community. As of late the choice given by the courts appears beam of trust in the better assurance of privileges of this system however all is vain. There are normal practices and way by which the fundamental rights of LGBT were disregarded the rundown and not comprehensive.

- **Not sufficient law protection**, LGBT faces such huge numbers of discriminative practices and encounters by the police and other regulatory official they didn't consider as individuals and for the explanation their privileges were not legitimately ensured. Also, this system didn't regard similarly like as people which violative of Article 14 and 21 of the constitution of India.
- **Lack of economical resources**, due to gender discrimination this community did not accepted by the society and due to that, they become poorer. These people did not get opportunity for job and due to that, they are not able to get money. Additionally these people are not appointed by the government as well as private sector and they become poorer. Some LGBT are involved in sexual business and begging which cause more poverty among this community.
- **Irritation and shame**, LGBT has frequent experience of harassment and stigma and hateful treatment by the society at large. These people were sexually, emotionally and physically harassed by the state and common people. Instead of so many protections (basically all are merely on paper) they did not get protection by the authorities.
- **Anti-LGBT forcefulness**, so many LGBT were murdered, harassed, ill-treated by the society merely on the ground of their sexual wellness.
- **Health problems**, due to some physical abnormality these people faces so many problem related with health. Most of the time the doctors are not ready to treat LGBT due to their sexual wellness. Additionally due to some sexual practices they may suffer health problems including HIV/AIDS and other sexual transmitted disease which cannot cured and treated by the health care provider which lead towards violation of right to health.
- **Law of personal identity**, due to sexual wellness and sexual identity these community faces so many problems related with their identity. These people are not allowed to access in society. Moreover dye to identity problem so many LGBT are denied to access in toilet either in male or female which cause serious threat or stigma of gender identity of LGBT.
- **Gender appearance**, due to gender identity these people are fail or denied to express their gender commonly which cause serious threat to human rights. Due to denial of their gender expression they may suffer psychological and metal trauma and harassment.
- **Acumen**, discrimination with LGBT is common experience to these people. Most of the time along with government the family members were makes discrimination to LGBT. They may discriminate in family, society, school, industry and at their work place.

The list of discrimination and violation of human rights of LGBT is not exhaustive apart from the above these people faces so many brutal activities of society and experiences violation of their basic human rights in every walk of human life.

## Conclusion

Basing on the above contention and research the researcher arrives at the determination that, more often than not the LGBT individuals were understood of infringement of human rights. The LGBT faces such a significant number of issues and infringement of essential rights from the administration as well as similarly by the relatives. Instead of so many constitutional protection these people are hated and maltreatment by the

society at large. In short these protections are merely on the paper not in real practice. The infringement of human rights isn't end with the reception of such a large number of universal show and giving some central rights under the umbrella of nearby laws. Except if we built up the felling that, every single individual are brought into the world free and equivalent in nobility and rights moreover, they are enriched with explanation and inner voice and should act towards each other in a soul of fellowship till we can't said that, the human rights are come in to activity or genuine practices. For accomplishing the fairness among ordinary citizens and LGBT one ought to do appropriate execution of human rights and customary law with the rule of uniformity, fraternity and nobility of person.

## End Notes/ References

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- <sup>ii</sup> Universal Declaration of Human Rights, is dynamic and basic document adopted by UN on 10<sup>th</sup> Dec. 1948, for the protection, promotion and preservation of fundamental rights or human rights of individual
- <sup>iii</sup> International Covenant on Civil and Political Rights, is multilateral treaty adopted by UN on 16<sup>th</sup> Dec. 1966 for the promotion and protection of Human Rights guaranteed by UN and UDHR
- <sup>iv</sup> International Covenant on Economic, Social and Cultural Rights, it is also multilateral treaty for the promotion and protection of Human Rights adopted by UN on 16<sup>th</sup> Dec. 1966
- <sup>v</sup> <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> access on 10/02/2019
- <sup>vi</sup> National Legal Services Authority vs Union of India and others, (2014) 5 SCC 438
- <sup>vii</sup> See the preamble of UDHR, 1948
- <sup>viii</sup> Article 2 of UDHR 1948
- <sup>ix</sup> Article 21 of Constitution of India, "No person shall be deprived of his life or personal liberty except according to a procedure established by law."
- <sup>x</sup> National Legal Services Authority vs Union of India and others, (2014) 5 SCC 438
- <sup>xi</sup> Naz Foundation v. Government of NCT of Delhi and others, (2009) 111 DRJ 1
- <sup>xii</sup> Suresh Kumar Koushal and another v NAZ Foundation and others, Civil Appeal No. 10972 OF 2013 decided on 11 December 2013