

## **LGBTQIA AND HUMAN RIGHTS**

*“It is absolutely imperative that every human being’s freedom and human rights are respected, all over the world.”* is an iconic quote by **Jóhanna Sigurðardóttir** that talks about human rights being respected but what is the ground reality?

In today’s modern era though society has evolved in a lot of aspects but there are some things that haven’t changed. The modernization hasn't impacted the mindset. It's important to note that while progress has been made in many parts of the world, there are still countries and regions where LGBTQIA+ individuals face significant challenges and violations of their human rights.

A very crucial right available to all is the Right to Life and that too Right to live with dignity forms a crucial aspect of any and all Human Rights. The etymology of the term “Human”, means having the nature of people and relating to living people. The Human Rights are those which are quintessential for the existence of Humans as such and should not be compromised come what may as these are inherent to the humans. Human rights cover a wide range of rights, such as the freedom from slavery and torture, the right to life and liberty, the freedom of speech, the right to a job and an education, among many more. To ensure that all humans have these rights, various declarations, councils, commissions, conferences and others have been organized over the years for the full and effective implementation of these rights. Any group of people's humanity is denied when their human rights are not recognised, and this has a significant influence on their health.

### **HISTORY OF LGBTQIA COMMUNITY:**

The earliest known LGBT rights organization in the United States was established in Chicago in 1924 by German immigrant Henry Gerber. Gerber was motivated to create his organization by the Scientific-Humanitarian Committee, a German organization that advocated for "homosexual emancipation" during his time serving in the U.S. Army during World War I.<sup>1</sup>

Native American, North African, and Pacific Islander civilizations' acceptance of same-sex relationships and "Two-Spirit" persons assailed European invaders throughout the era of European exploration and empire-building because they challenged their rigid conceptions of

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<sup>1</sup>Gay Rights

<https://www.history.com/topics/gay-rights/history-of-gay-rights#the-early-gay-rights-movement>

"masculine" and "feminine" roles. The European powers upheld their own criminal laws against what was known as sodomy in the New World; the first known instance of homosexual conduct in North America earning the death penalty was when a Frenchman was hanged by the Spanish in Florida in 1566.<sup>2</sup>

What lessons about same-sex love or gender identity might have been gleaned were buried in controversy against the backdrop of rising national power and Christian religion. Ironically, women were left behind to live together and males formed strong connections as well as the departure or deaths of male soldiers during times of war between fledgling states. Where it was taboo for unmarried, unattached males and females to mix or socialise openly, same-sex companionship flourished. Given that there was no risk of pregnancy, women's relationships in particular were shielded from examination. However, in many parts of the world where genital circumcision practises rendered clitoridectomy a recurring practise, female sexual activity and feeling were restricted.<sup>3</sup>

In India too their journey has been quite difficult. The first study on homosexuality to be published in India was "The World of Homosexuals" by Shakuntala Devi in 1977. They first gained voting rights in the year 1994 as third sex. The case of NALSA v. UNION OF INDIA<sup>4</sup> is a landmark case for recognizing the transgender persons and providing them rights of self-determination. The decriminalization of Section 377 of the Indian Penal Code, 1860, was a furthering step towards recognition of the other gender. While Section 377 was struck down, there is still a lack of comprehensive anti-discrimination legislation protecting LGBTQIA+ individuals in India. The Section 377 talks about unnatural offences, that is, anything that is against the order of nature but nobody ever seems to question the fact that what is the meaning of the term unnatural and with the passage of time the definition of something being unnatural and not in consonance with the order of the nature has also changed. In the case of Puttaswamy v. Union of India<sup>5</sup>, the Supreme Court issued a major decision in 2017, holding that the right to privacy cannot be denied "even if a minute fraction of the population is affected." The Court ruled that the right to privacy clearly encompasses the freedom to engage in personal relationships with people of one's choosing, as well as the freedom to express one's sexual

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<sup>2</sup>A brief history of lesbian, gay, bisexual, and transgender social movements

<https://www.apa.org/topics/lgbtq/history>

<sup>3</sup> Ibid 4.

<sup>4</sup> Writ Petition (civil) No. 604 of 2013.

<sup>5</sup> (2017) 10 SCC 1.

orientation and gender identity. The absence of explicit legal protections can perpetuate discrimination and hinder progress in various areas, such as employment, housing, and education.. On August 11, 1992, the first documented protest for LGBT rights was held decades later. - Kolkata hosted the inaugural Gay Pride Parade in India in 1999. Calcutta Rainbow Pride was the name of the march, which had only 15 participants. <sup>6</sup> For over 157 years, from 1861 to 2018, being a queer person in India was punishable by 10 years in prison for the "unnatural offence" of engaging in "carnal intercourse against the order of nature." It is unfair to have a colonial era law or definition of something hamper the present of the people today and the future generations to come.

Hindus have expressed their views on homosexuality from a variety of angles and shared a variety of experiences with it. Hinduism recognises two genders: male and female, as well as a third sex called Tritiya-Prakriti. Intersex, homosexual, and transgender individuals are the three categories of Tritiya-Prakriti people. The book "Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex" by Amara Das Wilhelm cites several instances from India's ancient and mediaeval communities that show gays to have existed and were accepted. The overtly gay motifs in the statues at Madhya Pradesh's Khajuraho Temple are well-known. Sometime in the 12th century, the temple was built. The statues that were carved there appear to depict intimate acts not just between male and female, but also between male and male and female. Go to Khajuraho if you believe that homosexuality is a Western concept, said Hrishikesh Sathawane. Although it is questionable whether these practises were socially acceptable in India, they did exist. Contrary to popular belief, homosexuality has roots in ancient and medieval Indian history, contrary to what the majority of people have been led to believe. In the Kama Sutra's chapter "Purushayita," a 2nd-century Hindu text, lesbians are referred to as "swarinis." These women regularly had families together and were in relationships with other women. The term "klibas" (homosexual guys) was used in the book.<sup>7</sup>

According to some versions of the epic Mahabharata, the king Drupada gave birth to Amba as a daughter. Shiva predicted that she would one day become a man, so Drupada gives her the name Shikhandi and raises her as a guy. In this story, she really is changed into a man by a strong

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<sup>6</sup> **"History of the Pride Movement in India"** by Moksha Sanghvi on July 26, 2019.  
<https://www.deccanherald.com/specials/history-of-the-pride-movement-in-india-742950.html>

<sup>7</sup> **A Legally Recognised Union Of Two Individuals: Same-Sex Marriage**  
<https://www.youthkiawaaz.com/2023/01/a-legally-recognised-union-of-two-individuals-same-sex-marriage/>

creature who lives in the jungle. In some stories, Shikhandi is born a male but develops into a transgender woman as a result of Shiva giving her the capacity to recall her previous existence.<sup>8</sup>

According to the Ramayana, the Hijra community received a blessing from Lord Ram since they continued to support him throughout his exile from Ayodhya. One of Shiva's numerous manifestations as a major Hindu deity involves him merging with his wife, Parvati, to become the androgynous Ardhanari, who has special meaning for many Hijra people.<sup>9</sup> Hanuman, Lord Rama's friend and follower, is claimed to have witnessed Rakshasa ladies embracing and kissing other females in the Valmiki Ramayana.<sup>10</sup> The Ramayana also describes a monarch by the name of Dilip who had two wives. He left no heirs when he passed away. According to the legend, Lord Shiva appeared to the widowed queens in their dreams and promised them a child if they made love to one another. The queens carried out Lord Shiva's instructions, and one of them became pregnant. A kid was born to them, and that child grew up to become the legendary monarch Bhagirath, who is most known for "bringing the Ganges from heaven to earth."<sup>11</sup>

According to the Matsya Purana, Lord Vishnu assumed the appearance of Mohini during the great churning of the milky ocean in order to deceive the demons and allow the gods to consume all the amrut (the eternal juice discovered during the churning of the ocean). While all was going on, Lord Shiva recognised Vishnu as Mohini and fell in love. The result of their coupling was the birth of Lord Ayyappa.<sup>12</sup>

There were four genders recognized in Buddhism which were male and female and two additional categories, called ubhatobyanjanaka and pandaka in Pali<sup>13</sup>. In contrast to pandaka, which seems to refer to kinds of non-normative sexuality or sexual incapacity, ubhatobyanjanaka is primarily a gender term. Both phrases refer to behavior that is currently classified as gay since in modern Western nations, the cultural construct of "the homosexual" merges several forms of

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<sup>8</sup> **Shikhandi: the Mahabharata's transgender warrior**

<https://www.hinduamerican.org/blog/shikhandi-the-mahabharatas-transgender-warrior>

<sup>9</sup> **"Transgender People in Vedic Times"** by Kashish Singh.

<https://medium.com/@kashishsingh2002/transgender-people-in-vedic-times-59aba4334ed9>

<sup>10</sup> **Homosexuality in ancient India**

<https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>

<sup>11</sup> Ibid 10.

<sup>12</sup> Ibid 10.

<sup>13</sup> **Non-normative Sex/Gender Categories in the Theravada Buddhist Scriptures**, Compiled by Peter A. Jackson  
<https://openresearch-repository.anu.edu.au/bitstream/1885/41884/1/theravada.html>

homoeroticism that, in the time of the Buddha, were seen as indicators of particular types of people. For instance, it seems that among the early Buddhist groups, men who engaged in receptive anal sex were considered hermaphrodites and were viewed as having been feminized. Oral sex, on the other hand, was perceived by males as indulging in deviant sexual behaviors without endangering their manly gendered existence rather than violating sex/gender limits<sup>14</sup>.

Babur was a Mughal king who openly identified as bisexual, if not gay. According to Baburnama, the first Mughal Emperor's private diaries, Babur, then 17 years old, had a passionate love affair with Baburi, a younger boy, in the Urdu Bazaar.<sup>15</sup> Babur allegedly had a large number of Eunuchs working for him in the Mughal harems. The women and young boys of the nations the Mughal army raided were typically taken and transported to the harems. To satisfy the lords' desire for sexual gratification, the boys were typically castrated and transformed into eunuchs. It's said that during the time, homosexuality was quite prevalent in Muslim countries, and it wasn't uncommon for young boys to participate in sexual activity in the emperors' harems<sup>16</sup>.

The majority of historians concur that there is proof of homosexual behaviour and same-sex relationships in every society that has been studied, regardless of whether such partnerships were tolerated or outlawed. Because homosexuality is forbidden in the Bible, we know it existed in ancient Israel. In contrast, it flourished amongst men and women in ancient Greece. Significant evidence is also available for those who identified as a gender other than what was assigned to them at birth for at least a portion of their lives. Alternatives to the Western male-female and heterosexual binaries have flourished throughout millennia and culture, from Sappho's lyrics of same-sex desire inscribed in the seventh century BCE to youths raised as the opposite sex in cultures ranging from Albania to Afghanistan; from the "female husbands" of Kenya to the Native American "Two-Spirit."<sup>17</sup>

In 1977, a successful English prosecution against Blasphemy was that of "The Love that Dares to Speak its Name", wherein Gay Love was discussed. It is a euphemism for homosexual love,

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<sup>14</sup> Ibid 5

<sup>15</sup> **Tales from the Baburnama: Babur's homosexuality and 'love' for a young child**  
<https://www.opindia.com/2020/09/tales-from-the-baburnama-babur-and-his-love-for-a-young-boy-homosexuality-lgbt/>

<sup>16</sup> Ibid 9.

<sup>17</sup> **A brief history of lesbian, gay, bisexual, and transgender social movements**  
<https://www.apa.org/topics/lgbtq/history>

especially between two men<sup>18</sup>. It portrays the homosexual fantasies of a centurion concerning the crucified Jesus Christ.

The genders recognised under Jainism were a man, woman and a third sex. The third sex was known as "napumsakas," but as in other societies, it was initially stigmatized. More discussions on whether or not someone should be permitted to become a monk or nun have risen as a result of this. After a while, most of the stigma faded, and Jains started approaching the topic similarly to many others: it's about a person's ability of self-control over their own emotions and inclinations. If a napumsakas can manage their sexuality, there is absolutely no issue in this religion<sup>19</sup>.

### **INTERRELATEDNESS OF HUMAN RIGHTS AND FUNDAMENTAL RIGHTS:**

Some Human Rights that may be obstructed or denied to LGBTQIA+ individuals in certain contexts which are also Fundamental Rights, enshrined by our Constitution.:

1. **Right to Equality:** LGBTQIA+ individuals often face discrimination and unequal treatment in various aspects of life, including employment, housing, education, healthcare, and public services.
2. **Right to Privacy:** LGBTQIA+ individuals may face invasions of their privacy, including outing, harassment, or unauthorized disclosure of their sexual orientation or gender identity.
3. **Right to Freedom of Expression:** LGBTQIA+ individuals may be subject to restrictions on their freedom of expression, such as laws criminalizing same-sex relationships or limiting LGBTQIA+ advocacy and visibility.
4. **Right to Non-Discrimination:** LGBTQIA+ individuals may experience discrimination based on their sexual orientation, gender identity, or gender expression, resulting in unequal treatment and limited access to rights and opportunities.
5. **Right to Family Life:** Same-sex couples may be denied the right to legally marry or have their relationships recognized, denying them access to legal protections and benefits associated with marriage.

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<sup>18</sup> The meaning and origin of the poem "**The Love that Dares not Speak its Name**"  
<https://interestingliterature.com/2021/03/love-dare-not-speak-its-name-quote-origin-meaning/>

<sup>19</sup>What Is The "Third Sex" In Jainism? by MARCH 11, 2021 BY BESSIE CRAIG  
<http://anekant.org/what-is-the-third-sex-in-jainism/>

6. Right to Adoption and Parenting: LGBTQIA+ individuals or couples may face barriers to adoption or face legal restrictions in establishing legal parent-child relationships.
7. Right to Healthcare: LGBTQIA+ individuals may encounter difficulties accessing culturally competent healthcare services, including gender-affirming care and mental health support.
8. Right to Education: LGBTQIA+ students may face bullying, discrimination, and exclusion in educational settings, impeding their right to education in a safe and inclusive environment.
9. Right to Freedom of Assembly: LGBTQIA+ individuals may face restrictions or harassment when organizing or participating in LGBTQIA+ events, protests, or demonstrations.

These are the rights that are not available to the LGBTQIA communities. The Constitution of India imparts certain Fundamental Rights to the citizens of India which are otherwise infringed of this community and thus necessary steps must be taken to ensure its effective implementation. The Articles 36-51 of the Indian Constitution talk about Directive Principles of State Policy which help the State to formulate various policies, wherein Article 44 lays special emphasis on bringing about a Uniform Civil Codes. As it would ensure equal rights to all citizens irrespective race, caste, sex, etc. One of the drafts of the Uniform Civil Code specifies that the sexual orientation of a married couple or a couple living in a partnership will not be a bar to their right to adopt a child<sup>20</sup>, marry, etcetera thus numerous provisions will be available to the LGBTQIA which are not available to them as of now.

The discrimination is not something that has started just now but has been going on for a very long time, even before the said terminology was clearly defined despite its origins. It is generally said that people who are educated are intelligent, prudent but despite their education, people are not ready to understand the plight of this community. Even if society has advanced, "Consensual same-sex relationships are still illegal in nearly 70 countries," according to the United Nations High Commissioner for Human Rights. Only one in ten nations have laws that prevent discrimination against individuals based on their gender identity, and only one in three do so for

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<sup>20</sup> Allow gay marriages, give couples police protection if needed, suggests draft Uniform Civil Code  
<https://scroll.in/latest/853850/allow-gay-marriages-give-couples-police-protection-if-needed-suggests-draft-uniform-civil-code>

those based on their sexual orientation.<sup>21</sup>The broadness of the acronym LGBTQIA+ community which comprises, Lesbian, Gay, Bisexual, Transgender, Intersex and Asexual community and others like pansexual, gender-fluid etc.<sup>22</sup> It has increased manifold but unfortunately, their rights, recognition, acceptance hasn't increased to the same extent. There are only a few countries who have given actual recognition to this community and despite the progressive efforts, they're the victims of constant discrimination, harassment by the society as a whole. It is pertinent to note that Society and Law are two closely knit concepts thus are co-dependent and co-existent, meaning one has a significant influence on the other. The fact that some societies are not ready to accept this community and the constant discrimination only proves the lack of Human Rights available to this community. LGBT people may experience discrimination in housing and employment, which can make it difficult to afford food, shelter, and health care; lack of benefits, which can make it difficult to pay for health care and financial security; harassment and stress, which can have a negative impact on mental health and/or lead to substance abuse, smoking, overeating, or suicide; isolation, which can cause depression; sexual risk-taking, which exposes oneself and loved ones to sexual health risks, such as HIV; and physical violence. By publicly recognising LGBT individuals' presence and tailoring health interventions to their needs, health care organizations can curtail LGBT individuals' fear of discrimination and the prejudice itself while also enhancing health outcomes.

LGBT spouses do not receive the same benefits under laws that grant citizens privileges, including those in the US. Examples include taxation and social security survivor benefits, which the federal government grants to opposite-sex married couples but not same-sex couples, according to a report by the US Government Accountability Office (GAO). Likewise lacking are legal protections. The District of Columbia and 34 of the 50 US states do not forbid discrimination based on sexual orientation<sup>23</sup>. Twenty states don't have "hate-crime" legislation

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<sup>21</sup>**Equality in dignity and rights for LGBTQIA+ people**  
<https://www.unfpa.org/equality-dignity-and-rights-lgbtqia-people>

<sup>22</sup> **LGBTQIA+ RIGHTS ARE HUMAN RIGHTS**  
<https://www.oxfam.org.uk/about-us/lgbtqia-rights-are-human-rights/>

<sup>23</sup>**Marriage Equality Around the World**  
<https://www.hrc.org/resources/marriage-equality-around-the-world>



that lists sexual orientation as one of the protected classes. Even less protection exists for transsexual identity<sup>24</sup>.

The Deep-rooted Social Norms, Limited Representation, Religious and cultural factors, Lack of comprehensive education among others are the major reasons that there are so many hindrances. India has a conservative society with deep-rooted social norms and traditional values. These norms often prioritize heteronormativity and binary gender roles, which can hinder acceptance and understanding of diverse sexual orientations and gender identities. The rigidity of some religions, the lack of proper education on the subject, lack of proper representation and public policies and despite there existing a TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 in India their position has not improved, even today one can spot them begging at the traffic posts and the fact of them having a right of self- determination but the requirement of an application from the District Magistrate violates their rights and makes the whole process very cumbersome and is also against the guidelines of the NALSA judgment. This act talks about just one community but the fact that the other communities are not paid heed to only highlights the even bigger problems existing in India as such. The controversy of Sauarbh Kirpal not being appointed as the judge of the Delhi High Court because of his sexual- orientation further reveal other loopholes existing in the system as a whole. The fate of this community is also dependant on the take of the Honourable Supreme Court of India, with regards to the cases of Supriyo<sup>25</sup> Chakraborty and Abhay Dhang, with respect to Same-Sex Marriage rights.

### **WAY FORWARD:**

1. **Non-Discrimination:** LGBTQIA+ individuals have the right to be protected from discrimination in all areas of life, including employment, housing, healthcare, education, and public services. This includes protection from hate speech, hate crimes, and harassment.
2. **Marriage Equality:** The right to marry and found a family is a fundamental human right. Many countries have recognized same-sex marriage, granting LGBTQIA+ couples the same legal rights and responsibilities as opposite-sex couples.

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<sup>24</sup>Ibid 13.

<sup>25</sup> W.P.(C) No. 1011/2022.

3. Legal Recognition: LGBTQIA+ individuals have the right to legal recognition of their gender identity. This includes the ability to change their gender marker on identification documents, access appropriate healthcare, and have their gender identity respected in all legal and administrative processes.

4. Freedom of Expression and Assembly: LGBTQIA+ individuals have the right to express their sexual orientation and gender identity openly, without fear of persecution or discrimination. They also have the right to assemble and advocate for their rights.

5. Protection from Violence and Hate Crimes: Governments are responsible for protecting LGBTQIA+ individuals from violence, including hate crimes and acts of discrimination or persecution based on their sexual orientation or gender identity.

6. Access to Healthcare: LGBTQIA+ individuals have the right to non-discriminatory healthcare services. This includes access to culturally competent healthcare providers and specialized services related to sexual health, hormone therapy, gender-affirming surgeries, and mental health support.

7. Education and Awareness: Comprehensive and inclusive education is essential to combat stereotypes, discrimination, and bullying. Schools should provide LGBTQIA+-inclusive curricula and create safe environments for all students.

8. Asylum and Refugee Rights: LGBTQIA+ individuals facing persecution in their home countries due to their sexual orientation or gender identity have the right to seek asylum and international protection.

9. Intersectionality: Recognizing the intersecting identities and experiences of LGBTQIA+ individuals is crucial. Many individuals face multiple forms of discrimination based on race, ethnicity, religion, disability, or socioeconomic status, and their rights should be protected accordingly.

It's important to note that while progress has been made in many parts of the world, there are still countries and regions where LGBTQIA+ individuals face significant challenges and violations of their human rights. Advocacy, awareness, and continued efforts toward equality and acceptance are crucial for creating a more inclusive and just society for all.

The famous quote by Bob Paris “Every gay and lesbian person who has been lucky enough to survive the turmoil of growing up is a survivor. Survivors always have an obligation to those

who will face the same challenges.”, enunciates the difficulty that this community faces while trying to live a normal life and the struggle by each of them to actually have the basic human rights which are available to all but them because of being the gender other than the two traditionally recognized genders.

The need of the hour is to let go of our preconceived notions and biases so that human rights are available to the entire mankind irrespective of their gender, provide them a safe space to live in without violating any of their intrinsic human rights and live as one. The recognition and protection of LGBTQIA+ human rights are essential for fostering a just and inclusive society. Throughout history, marginalized communities have fought for their rights, and the LGBTQIA+ community is no exception. By acknowledging and addressing the unique challenges faced by individuals with diverse sexual orientations, gender identities, and expressions, we can create a more equitable world for everyone. To conclude, it means that all humans are entitled to their basic human rights irrespective of their sexual- orientation and the community to which they belong. Thus there is a need to bring about proper policies and laws in place to ensure that all people can live their lives peacefully. The aspirations of our founding fathers who drafted the Indian Constitution were for the country to secure for its citizens all intrinsic Human Rights and denying the LGBTQIA these Human Rights would be akin to mocking their dreams and aspirations for a greater India, a diverse India and a Country that would lead the world one day.

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