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# RECOGNITION OF LGBTQIA+ RIGHTS: LEGISLATIVE FRAMEWORK & JUDICIAL MILESTONES

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## ABSTRACT

The struggle for LGBTQIA+ rights and recognition in India has been a long and arduous journey marked by social stigma, legal battles, and activism by the community and its allies. This dissertation provides a comprehensive analysis of the historical context, legal framework, role of NGOs and government, and the evolving judicial approach towards LGBTQIA+ rights in India. It examines the landmark judgments that have affirmed their fundamental rights, and the addresses the gaps that remain in achieving full equality and inclusion. In an intriguing speech, Justice SR Krishna Kumar contemplated the need for reevaluating the false dichotomy about queer love being non-indigenous and a western import by highlighting the nuances of queer identities present in the Indian Subcontinent.<sup>2</sup> The same has been vehemently supported by CJI DY Chandrachud who observed that queerness is natural, and by definition can't be borrowed or imitated from another culture. Furthermore, he asserted that it is not an urban concept restricted only to privileged communities.<sup>3</sup>

## 1. MARRIAGE

In India, the solemnization of marriage is governed under personal laws such as the Hindu Marriage Act, 1955, the Indian Christian Marriage Act, 1872, Parsi Marriage and Divorce Act, 1936, Muslim Personal Law (Shariat) Application Act, 1937, while the inter-religious marriage is governed under Special Marriage Act, 1954. However, these laws do not provide legal sanction for same-sex marriages.

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<sup>2</sup>Satyendra Wankhade, "*Queer love not 'non-indigenous': LGBTQIA+ individuals grappling with stigma despite Navtej judgment: Justice SR Krishna Kumar*", December 17, 2023, available at <https://www.barandbench.com/news/queer-love-not-non-indigenous-lgbtqia-individuals-grappling-stigma-despite-navtej-justice-sr-krishna-kumar> (last visited on Sept. 7, 2024).

<sup>3</sup> *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348.

## 1.1 JUDICIAL PRECEDENTS

### **Justice K.S. Puttaswamy (Retd) v. Union of India<sup>4</sup>**

There were particular mentions of homosexual relationships in this particular case in which the Supreme Court stated that sexual orientation is an essential component of an individual's inherent identity. The Court described discrimination on the basis of sexual orientation as "deeply offensive to dignity and self-worth. Justice D.Y. Chandrachud also observed that the judiciary should go beyond sexual orientation and discuss the wider topic of sexuality which includes cohabitation and marriage. All the judges unanimously placed individuals at the heart of privacy.

### **Shakti Vahini v. Union of India<sup>5</sup>**

In this case, the Supreme Court made several key observations regarding the right to choose one's partner. The Court held that the decision of two adult individuals to marry each other is an exercise of their Right to freedom enshrined under Article 19 and Article 21 of the Constitution. It was asserted that if an individual's right to choose is hindered or restricted, it becomes challenging to uphold their dignity in its true and complete sense. Two adults have a right to marry each other and consummate their relationship, out of their own volition. This observation safeguards an individual's right to autonomy and self-determination.

### **Navtej Singh Johar v. Union of India<sup>6</sup>**

The Court, in the phenomenal judgment, decriminalized homosexuality, affirming the fundamental rights of the LGBTQIA+ community and enabling same-sex couples to enter into a relationship without any legal repercussions. However, the Court stopped short of granting legal recognition to same-sex marriages or civil unions. It was a notable step for the protection of the dignity and privacy of the community but the issue of marriage equality remains in doubt.

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<sup>4</sup> AIR 2017 SC 4161.

<sup>5</sup> (2018) SCC OnLine SC 275.

<sup>6</sup> (2018) 1 SCC 791.

### **Shafin Jahan v. K.M. Asokan (Hadiya Marriage Case)**<sup>7</sup>

In this landmark case, a Hindu girl willingly converted her religion to Islam and took the name Hadiya Jahan. She later married a Muslim man. Her father filed for an annulment of her marriage stating undue influence, coercion, and a larger conspiracy to recruit his daughter to join the Islamic State. Ultimately, the matter went to the Supreme Court. The Court, while relying on the case of *Justice K.S. Puttaswamy (Retd) v. Union of India*<sup>8</sup>, upheld the fundamental right of an individual to marry a person of their choice as a part of the right to privacy and personal liberty guaranteed under Article 21 of the Constitution. The judgment emphasized the primacy of individual consent and autonomy in matters of marriage and personal life, and the limits on state and social interference in these personal choices.

### **Abhijit Iyer Mitra v Union of India**<sup>9</sup>

In this case, the Delhi High Court considered the question, of whether same-sex marriages can be legally recognized under the Hindu Marriage Act, 1955, and Special Marriage Act, 1954. The petitioners argued that these laws only specify that marriage can only be between ‘two Hindus’ without mentioning the gender of the individuals. Similarly, the Special Marriage Act uses gender-neutral terms that could incorporate same-sex individuals. However, the Central Government opposed such interpretation arguing that the institution of marriage in India is inherently linked to the union of a biological man and a biological woman. Additional arguments were made that the decriminalisation of Section 377<sup>10</sup> does not necessarily grant same-sex couples the right to marry.

### **Supriyo @ Supriya Chakraborty & Anr. v. Union of India**<sup>11</sup>

A writ petition was filed by two same-sex couples seeking legal recognition of same-sex marriages in India. The petitioners urged that the existing marriage laws are discriminatory against same-sex couples as they deny them matrimonial benefits such as surrogacy, adoption, employment and retirement benefits. Moreover, it was asserted that the exclusion of same-sex couples violates their rights to equality, freedom of expression and dignity. They placed reliance on *NALSA v Union of*

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<sup>7</sup> AIR 2018 SC 1933.

<sup>8</sup> *Supra* note 3.

<sup>9</sup> 2022 SCC OnLine Del 3811.

<sup>10</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 377.

<sup>11</sup> *Supra* note 2.

*India*<sup>12</sup>, and *Navtej Singh Johar v Union of India*<sup>13</sup> which recognised non-binary gender identities and guaranteed equal rights to homosexual persons

However, the Constitution Bench unanimously held that there is no fundamental right to marry and that the Court could not recognise LGBT persons' right to marry under the Special Marriage Act, 1954.

## 2. ADOPTION

According to the Ipsos LGBTQ+ Pride Global Survey, 66% of Indians believe in same-sex couples' adoption rights on par with heterosexual couples, 21% disagree, and 13% are unsure.<sup>14</sup>

### 2.1 LEGISLATIVE FRAMEWORK

#### **Hindu Adoptions and Maintenance Act, 1956**

This Act regulates the process of adoption and the legal obligation of the Hindus to maintain certain family members. It lays down various conditions and procedures for an adult to legally adopt a child. Under the Act, a male or female can adopt a child provided they are of sound mind and are not a minor.<sup>15</sup> If the person adopting is married, the consent of their spouse is also required for valid adoption. However, that consent is not needed if the spouse is of unsound mind has ceased to be Hindu or has renounced the world. The Act allows single individuals, both men and women, to adopt a child even if they are unmarried, provided they fulfil the necessary conditions.

As evidenced by interpreting the literal meaning of the provisions upon a plain reading of the Act, the Act does not provide for adoption by same-sex couples by explicitly mentioning the terms 'husband', and 'wife'. Alternatively, adoption by one of the two partners in a same-sex couple, negates every legal right or responsibility of the other, over and towards the child. An additional barrier is presented in the form of 'Hindu males', and 'Hindu Females' creating scepticism about the inclusion of third gender.

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

<sup>13</sup> *Supra* note 5.

<sup>14</sup> Ipsos, "Ipsos LGBTQ+ Pride Survey" 368-385 (2014).

<sup>15</sup> The Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956), ss. 7, 8.

## **Adoption Regulations, 2017**

The Adoption Regulation imposes requirements in addition to the ones laid down in the Hindu Adoption and Maintenance Act, 1956. It requires unmarried men or women to have good mental, emotional, and financial capabilities. The Regulations prohibit a single man from adopting a female child but don't prohibit a woman from adopting a male child. This is in contradistinction to Section 11(iii) of the HAMA, which allows a single male to adopt a female child provided there is a gap of 21 years.

## **Juvenile Justice (Care and Protection of Children) Act, 2015**

This Act provides a secular and uniform framework for adoption, in disregard of the religion of the prospective parents. The Act mandates adherence to the procedures and guidelines laid down by the Central Adoption Resource Authority. Section 57 of the Act states that only those couples having 2 years of a solid marital relationship can be prospective adoptive parents.

This definite requirement makes it impossible for same-sex couples to have eligibility owing to the lack of legal recognition granted to their marriages or even civil unions. Furthermore, the societal stigma surrounding same-sex relationships poses a barrier to adoption.<sup>16</sup>

## **2.2 JUDICIAL PRECEDENTS**

### **National Legal Services Authority v. Union of India<sup>17</sup>**

The instant case laid down that discrimination on grounds of sexual orientation is prohibited under Article 15 of the Constitution. Through, this observation it can be inferred that same-sex couples must be granted adoption rights on par with heterosexual couples.

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<sup>16</sup> Krishnadas Rajagopal, "Supreme Court Divided on Allowing Unmarried Couples to Adopt Children Jointly", *The Hindu*, Oct. 18, 2023, available at: <https://www.thehindu.com/news/national/supreme-court-divided-on-allowing-unmarried-couples-to-adopt-children-jointly/article67431689.ece> (last visited on Sept. 7, 2024).

<sup>17</sup> AIR 2014 SC 1863.

### **Justice K.S. Puttaswamy (Retd.) v. Union of India<sup>18</sup>**

In this case, the Supreme Court laid down that sexual orientation is an essential component of an individual's inherent identity. The Court described discrimination on the basis of sexual orientation as deeply offensive to dignity and self-worth violating Article 21 of the Constitution.

### **Navtej Singh Johar v. Union of India<sup>19</sup>**

In the landmark judgment, the Court stated that basic human, fundamental, and constitutional rights are inherent regardless of the sexual orientation or gender identity of an individual. The disentanglement of adoption by same-sex couples harms the dignity of the people from the community as it is based on their sexual orientation which does not relate to their capacity or merit as a prospective parent.

While the Supreme Court's decision set a pathway for the grant of legal recognition to same-sex couples, it left them in limbo by dismissing rights such as adoption and surrogacy. Moreover, the review filed for seeking civil rights for the LGBT community including marriage, adoption, IVF, and surrogacy, was dismissed by the Supreme Court.

### **National Textile Workers' Union v. P.R. Ramakrishnan<sup>20</sup>**

Justice P.N. Bhagwati strongly emphasized the need for the law to evolve and keep pace with changing social norms and values. He stressed that it is high time for the legal system to grant the long-overdue rights to the LGBTQIA+ community. He acknowledged that while society may not be fully prepared for this change, it is the government's responsibility to address the plight of LGBTQIA+ couples and laid out multitudinous suggestions for future implementation.

### **Supriyo @ Supriya Chakraborty & Anr. v. Union of India<sup>21</sup>**

The Supreme Court stated that the existing legal framework grants adoption rights to same-sex couples jointly. This was further cemented when the Court upheld Regulation 5(3) of Central

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<sup>18</sup> *Supra* note 3.

<sup>19</sup> *Supra* note 5.

<sup>20</sup> AIR 1983 SC 75.

<sup>21</sup> *Supra* note 2.

Adoption Resource Authority Regulations (CARA Regulations) that bars unmarried couples from adopting.

### **3. MILITARY SERVICE**

At present, the Indian Army does not allow LGBT individuals to serve openly serving in the armed forces. The existing laws governing the armed forces, namely the Army Act, 1950, the Navy Act, 1957, and the Air Force Act, 1950, do not provide for or inclusion of the LGBT community in any manner whatsoever.

To address the situation, Jagdambika Pal, a member of parliament from the BJP, proposed amendments to these Acts to allow LGBTQIA+ individuals to serve openly in the forces. The bills presented a means for inclusivity and equality, aligning the armed forces with the changing social norms and the growing acceptance of the LGBT community. Sadly, the bills lapsed in the Lok Sabha, allowing and perpetuating a culture of silence and invisibility around LGBT issues within the military.

This highlighted the need for continued advocacy, dialogue, and efforts to bring about legal and policy changes especially for the LGBT community to ensure equal opportunities and non-discrimination.

### **4. CONVERSION THERAPY**

Reparative or Conversion Therapy is a range of dangerous and discredited practices that falsely claim to change a person's sexual orientation gender identity or expression.<sup>22</sup> Such practices have been rejected by every mainstream medical and mental health organization for decades, but due to continuing discrimination and societal bias against LGBTQ+ people, some practitioners continue to conduct conversion therapy.<sup>23</sup>

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<sup>22</sup> HRC Foundation, "The Lies and Gangs of Efforts to Change Sexual Orientation or Gender Identity", *available at*: <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (last visited on March 31, 2024).

<sup>23</sup> Ibid.



## 4.1 JUDICIAL PRECEDENTS

### **S. Sushma v. Commissioner of Police, Greater Chennai Police**<sup>24</sup>

In the landmark judgment, the Court prohibited conversion therapy. However, the judgment only applies to medical conversion therapy and does not apply to alternative medicine therapy, or religious therapy. The court directed the police to close the missing persons' complaint filed by the parents if the adults are in a consenting relationship, additionally ordering counselling on such aspects. It held that discrimination based on sexual orientation or gender identity is a form of sex discrimination prohibited under Article 15 of the Indian Constitution.

### **Common Cause v. Union of India**<sup>25</sup>

In this case, the Court established that every person has the right to exercise self-determination as established in the judicial precedents, including the right to choose. The right entails the extent to which patients are willing to submit to medical procedures or treatments, and also to choose among the various alternative medical treatments.

### **Jashanmal Jhamatmal v. Brahmanand Sarupanand**<sup>26</sup>

The Court observed that the offence of hurt under Section 319 of the Indian Penal Code, 1860 encompasses both bodily injury and mental injury. The provision was applied to conversion therapy since such treatments traumatize the patient causing life-long trauma which may be irrecoverable in many cases. The judge in this particular case, Justice Anand Venkatesh, willingly underwent psycho-educative sessions to understand the prejudices and problems faced by the LGBT community daily.

## 5. INTIMATE PARTNER VIOLENCE

Intimate Partner Violence 'IPV' is a form of abuse or aggression that can take place in a romantic relationship, regardless of the gender, age, marital status, or sexual orientation of the individuals involved. What it infers is that both men and women can perpetrate or experience such

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<sup>24</sup> 2021 SCC OnLine Mad 2096.

<sup>25</sup> 2018 SCC OnLine SC 1719.

<sup>26</sup> AIR 1944 Sind 19.

violence. It takes forms of physical, emotional, economic, sexual, or psychological harm by a current or former partner or spouse. IPV is often overlooked in queer relationships.

Homophobia, Transphobia and Victim Blaming play a dreadful role in the instigation of the horror and the Covid-19 pandemic only made things worse. The IPV awareness is negligible and the lack of information or academic research thrust the issues into the shadows. In 2015, only 3% of total research on IPV focused on queer relationships, with most of the studies focusing on white, western countries.<sup>27</sup> The statistics make it even more crucial to pay attention to countries in which the LGBT community faces complex barriers and struggles for equality and justice, including India.

In a heteronormative society, there are culturally made ideologies regarding masculinity and femininity that discourage LGBT IPV victims from openly discussing or reporting the violence that happened to them. People have a perceived stigma that gay men are less masculine than heterosexual men, while as in homosexual women, IPV is considered to be harmless because of a pre-made perception that women are physically not strong and dangerous.<sup>28</sup>

## 5.1 LEGISLATIVE FRAMEWORK

### Protection of Women from Domestic Violence Act, 2005

Section 3 of the Act provides a comprehensive definition of domestic violence. It includes an act, omission, commission, or conduct that:

- harms, injures or endangers the health, safety, life, limb or well-being
- harasses, harms, injures, or endangers the woman or coerces her or a related person for unlawful demand of dowry, property, or valuable security
- threatens woman or related person
- otherwise injures or harms the woman, either physically or mentally

The Act recognizes a wide array of abusive behaviours as domestic violence including physical violence, sexual violence, verbal and emotional abuse, economic abuse, etc.

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<sup>27</sup> Katie M. Edwards and Kateryna M. Sylaska, “The Perpetration of Intimate Partner Violence Among LGBTQ College Youth: The Role of Minority Stress” *Journal of Youth and Adolescence* 1721-1731 (2013).

<sup>28</sup> Janice Ristock and Norma Timbang, “Relationship Violence in Lesbian/Gay/Bisexual/Transgender/Queer [LGBTQ] Communities: Moving Beyond a Gender-Based Framework” *Violence Against Women Online Resources* (2005).

However, the definition of ‘aggrieved person’ as per Section 2(a) only applies to women in a heterosexual relationship or women living in joint families. The definition is not inclusive and aware of society as it excludes men, transgender persons, or same-sex relationships. This provision paints a false picture as it establishes gender as a basis for domestic violence.

The prerogative that physically larger or more masculine individuals are the ones perpetrating domestic violence harms and fails to capture the complex ground realities of abuse. It dismisses the numerous experiences of male victims, and female abusers, reinforcing the harmful gender stereotypes, and hindering effective interventions. It is crucial to enforce the concept that domestic violence is not determined by a person’s physical size, strength, masculinity or femininity. This toxic mindset enables and perpetuates the invisibility of male victims, dismissal of female abusers, reinforcement of gender stereotypes, lacunas in diverse support services, perpetuation of toxic masculinity and much more.

To address intimate partner violence effectively, it is crucial to adopt a gender-neutral, inclusive, and nuanced understanding of the harsh actualities. If you view an entire gender as powerless, then how can you believe that they can misuse it?<sup>29</sup> Indian Society has a tendency to keep matters, including domestic violence, within the family or community rather than seeking outside help or intervention, even legally.

Within the LGBT community, there is a reluctance to call and hold abusers accountable because of a lack of rehabilitative services, and support systems. Survivors, or Victims fear that reporting of the abuse will lead to further marginalization, and ostracization from the community, society and even their own family. Many seek recourse through social media platforms by sharing their stories, exposing their abusers, and finding solidarity and support from others who have experienced similar experiences. Reporting abuse creates a heightened risk for the survivors being outed, creating an unsafe and threatening environment for the victims. The community members often hide their identities from their families to remain in good relations with them, outing abuse allegations browbeat put the familial relations at risk. Many hospitals break all protocols of

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<sup>29</sup> Nithila, “Intimate Partner Violence in India: Through a Queer Lens” 009 *Unicornzine*.

psychiatry and subject individuals to torture, hypnotism, hallucinogenic drugs, hormone injections, continuous exposure to porn, etc in the name of ‘conversion therapy’.<sup>30</sup>

## 6. HUMAN TRAFFICKING

Human Trafficking is the recruitment, transportation, transfer, harbouring or receipt of people through force, fraud or deception, intending to exploit them for profit.<sup>31</sup> Human trafficking affects the entire society regardless of age, gender, background, etc. Traffickers use multitudinous tactics to lure the victims including violence, deception, or fake promises of jobs and education, etc. In India, approximately 7,000 cases of human trafficking were reported in 2021.<sup>32</sup> As per the statistics, females have a 30% higher chance of being the victim. The most common purpose made out to be forced labour and sexual exploitation.

### 6.1 LEGISLATIVE FRAMEWORK

#### **The Constitution of India, Article 14<sup>33</sup>**

It states that the state shall not deny to any person equality before law or equal protection of the laws within the territory of India. It prohibits class legislation but permits reasonable classification. The Supreme Court has also ruled that arbitrariness is antithetical to equality.<sup>34</sup> An arbitrary law or action is inherently unequal and violates Article 14.

Despite the constitutional guarantee, the LGBTQIA+ community in India has not been granted explicit legal recognition or protection under any specific provisions or laws. This absence has rendered the community vulnerable to discrimination and marginalization of all sorts. The community is hesitant to report incidents and seek legal retribution from authorities or the judiciary

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<sup>30</sup>Navamy Sudhish, “Torture, Hypnotism as ‘Corrective Therapy’ for LGBT Persons in Some Kerala Hospitals”, The Hindu, June 27, 2019, available at: <https://www.thehindu.com/news/national/kerala/inhuman-straightening-theses-abound-in-a-state-with-transgender-policy/article28159861.ece> (last visited on Sept. 7, 2024).

<sup>31</sup> United Nations Office on Drugs and Crime, “Human Trafficking and Migrant Smuggling”.

<sup>32</sup> Tushar Daku, Margubur Rahaman, et.al., “An Analysis of the Spatial and Temporal Variations of Human Trafficking in India” 10 Cogent Social Sciences (2024).

<sup>33</sup> The Constitution of India, Art. 14.

<sup>34</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

due to fear of increased stigmatization and lack of sensitivity. They are denied a plethora of rights available to heterosexual couples.

### **The Constitution of India, Article 15<sup>35</sup>**

It states that the state shall not discriminate against any citizen based on religion, race, caste, sex, place of birth or any of the grounds. It provides for non-discrimination by the state, prohibition of discrimination in accessing public spaces, special provisions for women and children, special provisions for socially and educationally backward, special provisions in educational institutions along with provisions for economically weaker sections. In *National Legal Services Authority v. Union of India*<sup>36</sup>, the court observed that discrimination on grounds of sexual orientation is prohibited under Article 15 of the Constitution.

Regardless, the LGBT community is blatantly harassed in public, verbally and physically abused, offensive slurs, is judgmental gawking, refused entry in various public places, and refused to be entertained in restaurants, shops, etc. The LGBT pride rallies are often disrupted through public commotion and cause distress.

### **The Constitution of India, Article 19<sup>37</sup>**

It states that all citizens have the right to freedom of speech and expression, assemble peacefully and without arms, form associations or unions, move freely throughout the territory of India, reside and settle in any part of the territory; and practice any profession, or to carry on any occupation, trade or business. However, the freedoms are not absolute as the state has been enabled to impose reasonable restrictions on these.

Regardless of the law, *NALSA*,<sup>38</sup> and *Navtej Johar*<sup>39</sup> Judgments, LGBT individuals still face censorship, backlash, and violence for expressing their gender identities openly in public. The supporting opinions are harshly criticized and shut down. There is the absence of positive representation of the LGBT community in the media, and culture. The LGBT organizations and support groups face numerous impediments in registering, operating or conducting events owing

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<sup>35</sup> *Supra* note 32, Art. 15.

<sup>36</sup> *Supra* note 16.

<sup>37</sup> *Supra* note 32, Art. 19.

<sup>38</sup> *Supra* note 16.

<sup>39</sup> *Supra* note 5.

to social stigma, and administrative barriers. They face discrimination in accessing housing, healthcare, and public spaces. LGBT, especially transgender individuals are often denied formal employment opportunities and are forced into begging or sex work where they are further exploited.

### **The Constitution of India, Article 21<sup>40</sup>**

It establishes that no person shall be deprived of his life or personal liberty except according to the procedure established by the law. In *K.S Puttaswamy (Retd.) v. Union of India*<sup>41</sup>, the Supreme Court laid down that sexual orientation is an essential component of an individual's inherent identity. The Court described discrimination on the basis of sexual orientation as deeply offensive to dignity and self-worth violating Article 21 of the Constitution.

The persons belonging to the LGBT community are forced through 'corrective' rape, forced marriage, 'conversion therapy', bullying, and denial of housing, healthcare and services, leading to violation of their rights to life, dignity, and freedom from torture. Despite the *NALSA judgment*<sup>42</sup>, the community cannot actively exercise their right to self-identity, in the form of challenges faced while changing their gender or name in the official documentation. The invasive sex determination tests violate their right to health and privacy under Article 21.

While the Supreme Court has affirmed the fundamental rights of LGBTQIA+ persons in judgments like *NALSA (2014)*<sup>43</sup>, *Puttaswamy (2017)*<sup>44</sup> and *Navtej Johar (2018)*<sup>45</sup>, the community still faces systemic violations of their rights in the absence of comprehensive anti-discrimination laws and policies.

### **The Constitution of India, Article 23<sup>46</sup>**

This Article deals with the prohibition of human trafficking, forced labour, and other similar forms of labour, and the state's power to impose compulsory service for public purposes. The Article

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<sup>40</sup> *Supra* note 32, Art 21.

<sup>41</sup> *Supra* note 3.

<sup>42</sup> *Supra* note 16.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Supra* note 3.

<sup>45</sup> *Supra* note 5.

<sup>46</sup> *Supra* note 32, Art 23.

stresses that the state shall not discriminate based on grounds of religion, race, caste, or class. It strikes a balance between protecting individual liberty and allowing the state to require citizens to serve the public interest as necessary.

LGBTQIA+ individuals are at a significantly higher risk than their heterosexual peers, of being taken under human trafficking. They are seen as vulnerable targets by the sex traffickers because of their increased vulnerability owing to factors such as discrimination and marginalization, family rejection, lack of legal protection, promise of acceptance, limited access to resources, criminalization and stigma, etc.

Apart from the Constitution, there are central legislations and other legal frameworks enacted to deal with the menace of human trafficking and bonded labour. This includes ‘The Immoral Trafficking Prevention Act, 1956’, ‘Bonded Labour Abolition Act, 1976’, ‘Child Labour (Prohibition and Regulation) Act, 1986, and ‘The Indian Penal Code, 1860’.

The International Organisation for Migration (IOM) in collaboration with NGOs, Government and Private sectors have worked towards initiating Public-Private Partnerships to collectively provide rehabilitation programmes for survivors of trafficking through skill development and enhance their employment opportunities.<sup>47</sup>

### **The Indian Penal Code, 1860**

Section 370 of the Act deals with the prevention of trafficking through various methods, a broad definition of ‘exploitation’ covering a wide range of trafficking situations and punishments for all the prohibited acts. Section 370A of the Act acts as a companion to the previous provision by providing punishment for the exploitation of a trafficked person or minor. The provision imposes harsh punishments accounting for multiple scenarios.

After the tragic Delhi gang-rape incident, a committee was established by Justice Verma. The committee brought some major changes in relation to human trafficking mentioned under Sections 370 and 370A of The Indian Penal Code. By the amendment Act, Section 370 of IPC was reframed and a new concept of human trafficking was added. The provision doesn’t differentiate between coercive prostitution and prostitution.

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<sup>47</sup> Swanti Initiative, “State of Human Trafficking in India and Existing Government Mechanisms” (2022).

In the case of *'Bipindebandra Bhagubhai Patel v. State of Gujarat'*,<sup>48</sup> the court adjudicated on the question of whether a customer at a brothel would be covered under Section 370 of the Indian Penal Code, 1860. It was stated that the customer would be included under the particular provision. Additionally, the court held that the term 'exploitation' also includes 'prostitution'. This was further incorporated by an ordinance creating new problems. Numerous concerns were raised about endangering sex workers by the addition of prostitution, under the section, as there is no aspect of consent. This exploits the already vulnerable sex workers and exposes them to violence, and HIV in the void of legal remedy to redress violence.

IPC incorporate other sections that can be availed in similar situations. These include:

- Section 363A – Kidnapping or maiming a minor for the purpose of begging
- Section 366A – Procurement of a minor girl
- Section 366B – Importation of a girl from a foreign country
- Section 371 – Habitual dealing in slaves

### **Immoral Traffic (Prevention) Act, 1956**

The ITPA is the primary law dealing with sex work and trafficking in India. The Act does not provide a definition for 'trafficking', but rather 'prostitution' as sexual exploitation or abuse of persons for commercial purposes, deeming it a cognizable offence.

The Act penalizes the following:

- Running a brothel or allowing premises to be used as a brothel
- Procuring, inducing, or taking a person for prostitution
- Prostitution in or near public places

The Act also provides for the rescue and rehabilitation of persons in prostitution, including protective homes, and establishes special courts for speedy trial of offences under this Act.

### **Immoral Traffic (Prevention) Act, 1986**

In 1950, the Indian government ratified the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. That resulted in the

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<sup>48</sup> 2019 (3) TR 2351.



Suppression of Immoral Traffic in Women and Girls Act (SITA) being enacted. SITA was amended and ITPA was passed.

ITPA prohibits immoral human trafficking while giving effect to related conventions. The main objective of the act is to abolish the trafficking of human beings for the purpose of sexual exploitation. The offence of trafficking majorly involves the displacement of the victims, exploitation, and commercialization of trafficked persons.

The Act has been criticized for having several harmful consequences on sex workers and the practice of prostitution in India. The act has problematic aspects that negatively impact the lives and rights of those involved in sex work. Key issues with the Act:

- **Conflation of sex work and trafficking** – The Act doesn't differentiate between voluntary sex work by consenting adults and forced prostitution or trafficking. It considers all kinds of sex work as exploitative. This concept stigmatizes sex workers as victims or criminals, resulting in denial of their agency and right to choose a profession.
- **Criminalization of sex work** – While the Act does not explicitly criminalize prostitution, several of its provisions penalize related activities such as running a brothel, living off the earning of prostitution, soliciting in public places, even willingness to indulge in sex work, etc. This drives sex work underground, making it harder for them to access healthcare, legal protection, support services; increasing their vulnerability to violence, exploitation and, health risks.
- **Harassment and Abuse by the authorities** – The existing approach enables police to harass, extort, and abuse sex workers under the guise of enforcing the law without any legal repercussions. Sex workers face arbitrary arrest, detention, forced rehabilitation, and physical and sexual violence.
- **Lack of labour rights and protection** – ITPA does not recognise sex work as legitimate labour, thereby denying sex workers access to labour rights, creation of unions, and even workplace protections against exploitation and unsafe working conditions.
- **Stigma and Discrimination** – The moral dilemma so often created and hyped around the framing of the Act does absolutely nothing but reinforce the social stigma and marginalization of sex workers. It instigates and perpetuates the work as immoral and the people as depraved stripping them of their rights and dignity.
- **Ineffective Rehabilitation** – The ITPA provides for rescue and rehabilitation of sex workers through protective homes and correctional institutions. However, these facilities have a history

of working as sites of confinement and moral policing, with little heed to their choice or need. Rehabilitation is often coercive and fails to achieve the desired goals or results.

- **Obstacle to HIV prevention** – The criminalization of sex work under the ITPA hinders HIV prevention efforts by making it difficult for sex workers to negotiate safe sexual activities, access to testing and treatment, and participation in health programs.