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Inclusive Justice: Navigating Legal Shifts and Global Perspectives on LGBTQ Rights in India

NIDHI UPADHYAY¹ AND DR. ASHA RANI RAWAT²

ABSTRACT

With major ramifications derived from international agreements and human rights concepts, India has seen dramatic changes in the legal environment concerning LGBTQ rights in recent years. Legal arguments and activism for LGBTQ rights in India have been influenced by international agreements, especially the International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, and the Convention on the Rights of the Child. The decision of the 2014 NALSA ruling upholding transgender people's rights also demonstrated a progressive stance informed by global human rights standards.

Even if these legislative developments are encouraging, there are still issues with cultural perceptions and comprehension. International conventions' effects on rights of LGBTQ+ peoples in India are a result of the dynamic interaction of changing public attitudes, international lobbying activities, and local legislative developments. This paper seeks to effectively capture the complex interplay between these factors and recognises the continuous process of promoting equality and inclusivity for the LGBTQ population in India.

Keywords: *International Law, LGBTQ+ Rights, International Conventions, Judicial Landscapes, International Jurisprudence.*

I. INTRODUCTION

The LGBTQIA+ community all around the globe is no stranger to discrimination and alienation. Up until the late 1960s, homosexuality was considered as a mental illness by leading psychiatrists around the globe. It wasn't until the next decade that mental health professionals would stop diagnosing homosexuality as a pathological illness³. Various researches conducted also pointed out that humans are not the only species to engage in homosexual activity, and the same can be found in various, if not all primates⁴.

¹ Author is a Research Scholar at Banasthali Vidyapith, Rajasthan, India.

² Author is an Assistant Professor at Banasthali Vidyapith, Rajasthan, India

³ *Diagnostic and Statistical Manual of Mental Disorders*.(1980) 3rd ed. American Psychiatric Association, Washington, D.C

⁴ Rao TS, Jacob KS. (2012) Homosexuality and India. *Indian J Psychiatry*.

It is yet to be found what causes homosexuality in humans, but it has been rightly ruled out that the reason for it isn't a mental illness or other kinds of psychological dysfunction. Another statement that can be conclusively said is that human sexuality is fluid and extremely complex⁵.

There have been many victories and setbacks in the fight for human rights, but probably never is this more poignantly illustrated than in the experiences of those who identify as LGBTQ. The global LGBTQ cause has been driven by the pursuit of recognition, respect, and equal rights, despite facing significant obstacles and a strong sense of resilience. This introduction explores the complex challenges that the LGBTQ population has in navigating cultural norms, legal restrictions, and societal prejudices in order to achieve basic human rights.

LGBTQ people have faced systemic oppression, marginalisation, and discrimination for millennia. Legal frameworks that criminalise consenting same-sex relationships, reject the acceptance of different gender identities, and prolong the cycle of obscurity for LGBTQ people are examples of societal views, which are frequently driven by deeply rooted prejudices. The community's ongoing struggle to achieve the most fundamental human rights has been hampered by this intricate network of discrimination.

The fight for LGBTQ human rights is not limited to the legal domain; it also involves the wider social acceptance and comprehension movement. Stereotypes and stigma have fostered an environment of exclusion, which has resulted in problems for the LGBTQ community, including assault, bullying, and inequities in mental health. In light of this, the fight for human rights becomes more than just a legal struggle; it also becomes a struggle to change deeply ingrained beliefs and promote inclusivity in society.

Enshrined in numerous conventions and accords, international human rights standards have emerged as vital tools in the worldwide struggle for LGBTQ rights. The fight is far from ended, despite minor victories in the form of decriminalisation initiatives and legal recognition in some areas. The LGBTQ community's path to human rights is paved with brave action, tough legal challenges, and an unwavering dedication to tearing down systems of discrimination.

(A) What are international human rights?

The protection of Human Rights has been a high priority for the United Nations and its organs since the end of World War II. The meaning of Human Rights, however, has evolved with the needs of the people. The purpose of Human Rights is to protect the basic rights of the people, and by ratifying their treaties, member states undertake an implied obligation to implement the

⁵ Sathyanarayana, Rao TS, and Jacob KS. (2014) *The reversal on gay rights in India*. Indian J Psychiatry.

norms of the treaty in a way best suited to their needs. If these rights are violated or overlooked by domestic proceedings, there exist mechanisms at national and international level to remedy the injury.

II. INTERNATIONAL HUMAN RIGHTS AND DISCRIMINATION AGAINST THE LGBTQIA+ COMMUNITY

The entire purpose of a global standard of human rights is to ensure that the core principles of equality, justice and protection from discrimination are implemented globally. The Universal Declaration of Human Rights⁶ (UDHR) and the United Nations Charter exist to serve this purpose. In fact, the first sentence of the UDHR says it best, as ‘All human beings are born free and equal in dignity and rights.’

International human rights legislation guarantees equality and non-discrimination to all individuals, irrespective of their sex, sexual orientation, gender identity, or any other status. None of our international human rights treaties contain any hidden exemption clauses or small print that would permit a State to grant full rights to some people while denying them to others solely on the grounds of gender identity and sexual orientation.

Gender identity as well as sexual orientation are banned bases for prejudice under international human rights law, according to confirmation from UN human rights treaty bodies. This means that, just as it is illegal to discriminate against someone's rights based on their skin colour, ethnicity, sex, religion, or any other status, it is also illegal to do so based on their identification as lesbian, gay, bisexual, or transgender (LGBT). Numerous treaty bodies, including the United Nations Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination Against Women, have repeatedly affirmed this position in their rulings and general recommendations.

Denial of rights may look different from one individual, community, and country to another. It is a very subjective issue that may have different implications from one person to another⁷. It may reflect in their physical and mental health⁸, job opportunity, or in some countries, outright prosecution punishable by death⁹.

⁶ Universal Declaration of Human Rights (UDHR), (1948)

⁷ Marks S. M. (2006). *Global recognition of human rights for lesbian, gay, bisexual, and transgender people*. Health and human rights.

⁸ Diaz RM, Ayala G, Bein E, Henne J, Marin BV. (2001) *The Impact of Homophobia, Poverty, and Racism on the Mental Health of Gay and Bisexual Latino Men: Findings from 3 US Cities*. American Journal of Public Health.

⁹ The International Lesbian and Gay Association. (1999). World Legal Survey.

III. INTERNATIONAL LAW AND PROTECTION OF THE LGBTQIA+ RIGHTS

Ever since the United Nations was established in 1945, human rights were emphasized in their every charter, declaration or treaty. However, there was no mention of protection of LGBTQIA+ rights until 1994, when the case of *Toonen V. Australia*¹⁰ was decided by the UNHRC (United Nations Human Rights Committee).

Brazil brought a resolution to the UN Commission on Human Rights in April 2003 that forbade discrimination based on sexual orientation¹¹. But during the subsequent talks, the Commission decided to push back the resolution's discussion until 2004. When Norway, speaking on behalf of 54 states, issued a joint statement before the Commission on Human Rights on human rights breaches based on a person's sexual orientation or gender identity in December 2006, the conversation widened to encompass gender identity. Following this, in December 2008, Argentina made a joint declaration as a representative of 66 states to the General Assembly. An anti-LGBTQ statement supported by the Organisation of Islamic Cooperation and the Arab League was sparked by the 2008 General Assembly statement in favour of LGBT rights. Neither of the statements has been officially approved by the General Assembly, and both are still available for signing.

South Africa, in June of 2011, approached the UNHRC and requested that the United Nations High Commissioner for Human Rights create a report “documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” and to check-into the Vienna Declaration and Programme of Action¹². By December of the same year, the report was ready and evidenced severe crimes against the LGBTQIA+ community, ranging from job discrimination, hate crimes to criminalization of homosexuality punishable by death. Steps were taken to create equal consent ages, extensive legislation prohibiting bias based on sexual orientation, swift investigation and documentation of hate crime occurrences, the removal of laws that make homosexuality a crime, and other steps to guarantee the protection of LGBT people's rights¹³.

These steps were again followed up in 2014, and the second resolution passed with a higher margin¹⁴, which showed the increasing number of member states to discuss and solve the problem at a global level.

¹⁰ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

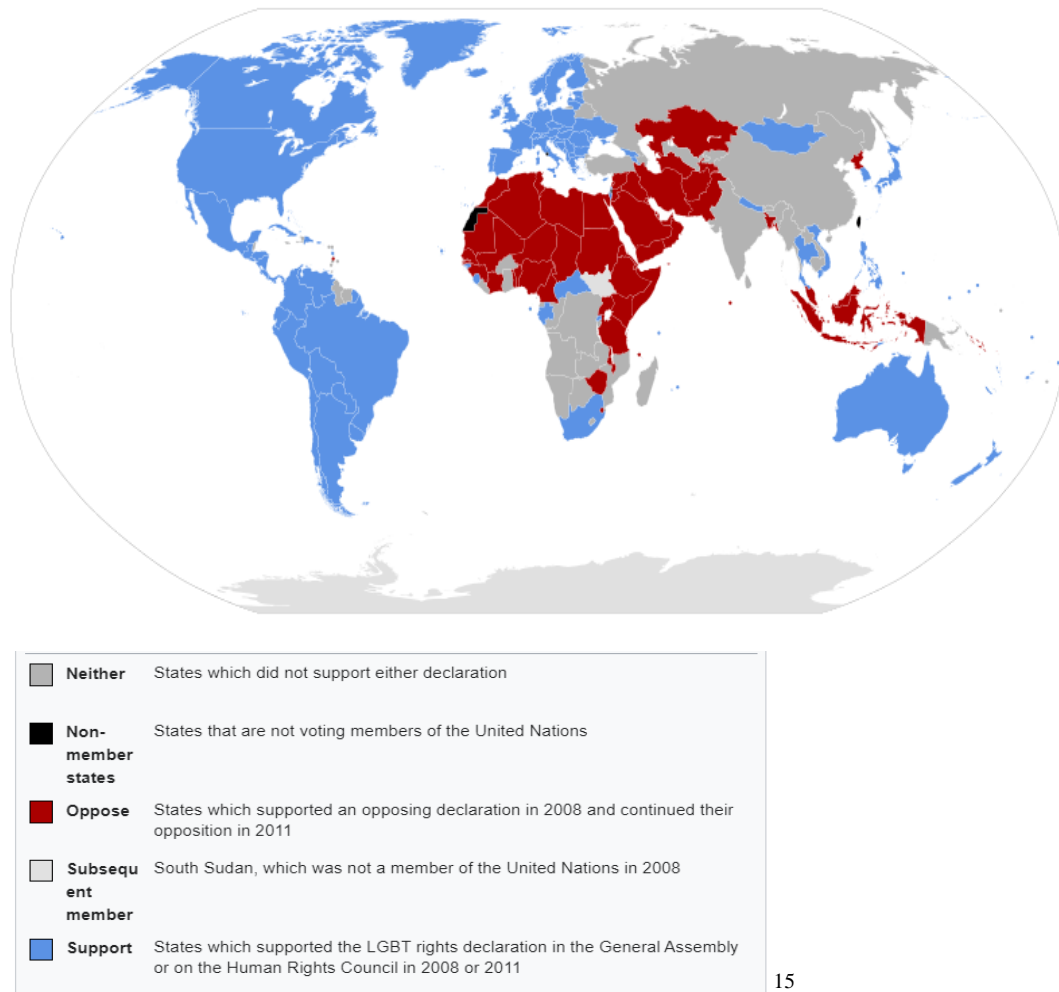
¹¹ IGLHRC (2003). *Resolution on Sexual Orientation and Human Rights - United Nations Commission on Human Rights - IGLHRC Campaign Dossier*

¹² Human Rights Council Resolution, 17th session

¹³ United Nations. (2011), *UN issues first report on human rights of gay and lesbian people*.

¹⁴ *HRC resolution 27/32 on human rights & SOGI*

The following map depicts the member countries of the UN, and their votes regarding both the resolution mentioned above.



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From 1945 to 2024, significant changes in international law and human rights standards can be seen moving favourably for the LGBTQIA+ community. As a result, as of writing of this paper in January 2024, same-sex marriage is recognized in 34 countries, with many more giving them a status of a common-law marriage.

Making a radical statement as an employer, the United Nations in 2014 declared that all the employees of the organization who are in a same-sex union/marriage, shall be given the same treatment and privileges as that of a heterosexual marriage. Then UN Secretary-General Ban Ki-moon was in favour of a shift in the direction of wider acceptance of LGBT rights. "Human rights are at the core of the United Nations' mission," he declared. I am honoured to advocate for increased parity among our employees, and I urge all UN family members to band together in opposing homophobia as a form of discrimination that should never be allowed in the

¹⁵ LGBT Rights at the United Nations, (2024, January 2). In Wikipedia. https://en.wikipedia.org/wiki/LGBT_rights_at_the_United_Nations

workplace."¹⁶

IV. SOURCES OF LGBTQIA+ JURISPRUDENCE IN INTERNATIONAL LAW

There isn't a complete or specific body of legally-binding international legislation that expressly addresses LGBTQ rights. There is yet to be a codified charter or treaty that deals with protection of LGBTQIA+ interests directly and substantially.

Nonetheless, a number of international agreements and frameworks support the defence and advancement of LGBTQ rights, the most notable of which are mentioned below:

1. **The Universal Declaration of Human Rights:** The Universal Declaration of Human Rights (UDHR), which was ratified by the UN General Assembly in 1948, lays forth essential freedoms and rights for all people. In reference to LGBTQ rights, the UDHR's Articles 2, 7, and 16 are frequently invoked, highlighting the values of equality, non-discrimination, and family recognition.
2. **International Covenant on Civil and Political Rights (ICCPR):** A significant international agreement outlining civil and political rights, the ICCPR was adopted in 1966. The principle of non-discrimination, emphasised in Article 2 of the ICCPR, has been construed to encompass discrimination on the basis of gender as well as sexual identity.
3. **The 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR)** is a treaty that addresses economic, social, and cultural rights. It is comparable to the ICCPR. In the larger scheme of LGBTQ rights, the ideals of equality and non-discrimination are also pertinent.
4. **The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or punishment (CAT):** It is an international convention that prohibits torture and any other form of unjust treatment or punishment. The CAT, which went into effect in 1987, forbids torture as well as cruel, barbaric, or humiliating treatment or retribution. Certain incidents of violence and prejudice directed towards LGBTQ people might be covered under this convention.
5. **The Convention on the Rights of the Child (CRC):** It was adopted in 1989 and safeguards children's rights. Children who identify as LGBTQ may be more susceptible to prejudice; the CRC places a strong emphasis on the child's best interests, non-

¹⁶ United Nations (2014) *United Nations will now recognize gay marriage*.

discrimination, and the right to life and survival.

6. **Yogyakarta Principles (2006):** the Yogyakarta Principles offer a set of principles on how to make use of international human rights legislation to questions of gender identity and sexual orientation, even if they are not legally binding.
7. **United Nations Human Rights Council (UNHRC):** The UNHRC has developed a Special Procedure on Sexual Orientation and Gender Identity to look into and document human rights breaches based on these grounds. The UNHRC has also addressed LGBTQ issues through resolutions and reports.

It's crucial to remember that international collaboration and state political will are prerequisites for the implementation of these principles. Furthermore, different nations and areas have quite different laws protecting and recognising LGBTQ rights. While some nations have put particular laws and regulations into place, others might not have done so as quickly in terms of acknowledging and defending the rights of LGBTQ people.

V. IMPORTANT INTERNATIONAL JUDICIAL DECISIONS REGARDING THE LGBTQIA+ COMMUNITY

1. **X v/s Colombia (2007)¹⁷:** The issue at hand concerned pension entitlements.
8. The Committee referred back to its prior case law, which held that discrimination on the basis of sexual orientation was prohibited by Article 26. It further remembered that in earlier correspondence, the Committee determined that disparities in pension entitlements between heterosexual unmarried couples and married couples were fair and impartial, given that the couples in question were free to choose to marry or not, with all that entailed. The Committee further pointed out that although the Act does not distinguish between married and single couples and homosexual and heterosexual couples, it does allow the author to marry his long-term, same-sex partner.
2. **Toonen v. Australia (1994)¹⁸:** Regarding the criminal crime of engaging in homosexual activity. The Committee was asked to decide whether Mr. Toonen had experienced discrimination in his right to equal protection under the law, in violation of Article 26, and if he had been the victim of illegal or unjust interference with his private, in violation of Article 17(1). Legislation, specifically sections 122 and 123 of the Tasmanian Criminal Code, forbids homosexual behaviour in secret. According to the Committee's

¹⁷ X v. COLOMBIA CCPR/C/89/D/1361/2005

¹⁸ Toonen V Australia, Communication No.488/1992

interpretation of the reasonableness standard, any tampering with privacy has to be required in the particular circumstances of the case and proportionate to the desired outcome.

3. **L. vs. Lithuania (2007)¹⁹**: Regarding gender reassignment of an individual. The case's facts, according to the court, demonstrated "a limited legislative gap in gender-reassignment surgery," which left the applicant in a dreadfully unclear situation about his personal life and the acceptance of his true identity. Additionally, the Court declared: "Although the public health service's budgetary constraints may have justified some initial delays in enacting the Civil Code's rights for transsexuals, more than four years have passed since the relevant provisions took effect, and the necessary legislation has not yet been adopted despite being drafted."
4. **H.G and G.B. vs. Austria (2005)²⁰**: Regarding privacy and freedom from discrimination. It was specifically noted that the applicants in this case, like those in the L. and V. case, were found guilty under Article 209 of the Criminal Code and that the Government had not provided strong and compelling arguments in favour of keeping Article 209 of the Criminal Code in effect. It also concluded that, on its own, it was not necessary to make a determination regarding the existence of an Article 8 breach.

The aforementioned cases clearly show that the influence of International law on domestic law and jurisprudence of individual states is wide and deep. In this sense, the purpose of international law seems to be fulfilling.

VI. THE INFLUENCE OF INTERNATIONAL LAW ON DOMESTIC JURISPRUDENCE OF INDIA

The crux of this body of work is to give recognition to the influence that International Law has had on India's own legal sphere. There can be little doubt to acknowledge the fact that International law played a major role in furthering the LGBTQIA+ cause in India.

The legal proceedings to decriminalise Section 377 of the Indian Penal Code started in 2001, when the Naz Foundation Trust challenged it in the Delhi High Court²¹. Back then, the case was dismissed by the High Court saying that the case had no "*Locus Standi*". The appeal to the decision was filed in the Supreme Court of India, which ordered the Delhi High Court to take another look into the case. Ultimately, it was the Supreme Court itself in 2012 which struck

¹⁹ L. v. Lithuania 27527/03, 31/03/2008

²⁰H.G. and G.B. V. Austria. 11084/02 12306/02

²¹ Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277.

down a 2009 order of the Delhi High Court decriminalising consensual sexual activity between adults²².

Finally in 2018, it was the case of Navtej Singh Johar & Ors. V. Union of India, Secretary Ministry of Law and Justice, that successfully decriminalised Section 377 of the Indian Penal Code. The Indian Penal Code's Section 377 was overturned by the court. International Covenants and other global agreements were used extensively in the ruling. India has not consented to human rights treaties pertaining to LGBT people or drafted or signed any multilateral international accords. However, the 1948 Universal Declaration of fundamental Rights ("UDHR") gave the right to live in dignity worldwide legitimacy as a fundamental right. Many of the patterns observed in the global evolution of queer jurisprudence may have a "disproportionate impact upon a particular class."²³

Signatories are forbidden by international law from arbitrarily interfering with these facets of each person's private life and from attacking the honour or character of individuals. The UDHR affirms that people have the right to pursue legal recourse and protection from this type of interference or attack. According to Warren and Brandeis, privacy is "the right to be let alone."²⁴ There is no comparable provision in Indian domestic law that directly defends citizens' right to privacy. Nonetheless, the right to privacy guaranteed by Articles 19 and 21 of the Constitution has been acknowledged by the Supreme Court²⁵.

The freedom to form personal connections without intervention from the government or any other outside entity is part of this right to privacy. LGBTQ+ people's right to form these kinds of relationships with others was violated by Section 377, robbing them of the humanity and dignity accorded to those who fit within accepted heteronormative norms.

(A) The UNHRC's influence

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care, and necessary social services,"²⁶ states Article 25 of the UDHR, which acknowledges the right to health. According to Article 253 of the Indian Constitution, the parliament has the authority to legislate in accordance with internationally accepted norms and values. India has committed to upholding

²² Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors., Civil Appeal No. 10972 OF 2013

²³ Adam Isaiah Green,(2007) "*Queer Theory and Sociology: Locating the Subject and the Self in Sexuality Studies*", Sociological Theory

²⁴ Samuel D. Warren and Louis D. Brandeis, (1890) "*The Right to Privacy*", Harvard Law Review

²⁵ R. Rajagopal vs. State of Tamil Nadu, 1995 AIR 264.

²⁶ International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

"the rights to equality before the law, equal protection of the law, and freedom from discrimination, implicitly if not explicitly," according to a number of international agreements.

In this regard, the court acknowledged the "Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity" in the well-known NALSA case²⁷, "while dealing with the rights of transgender persons."

Furthermore, India's judicial progression has not gone unseen by the rest of the world. The International Court of Justice released a report in 2019 titled "Living with dignity: Sexual orientation and Gender Identity-Based Human Rights Violation in Housing, Work, and Public Spaces in India", which took a deep dive into the discrimination faced by LGBTQIA+ persons in their everyday life. After the NALSA and Navtej Singh Johar case, this report points out the attitude change of the courts and policies towards progression.

However, the report also points out the change that yet needs to be done. "Despite the promise of recent jurisprudence, the Indian Government has not consistently met its constitutional and international obligations to guarantee the rights of LGBTQ persons" noted the ICJ of Asia's Director.

The report argues for the modification or elimination of certain current legislation and gives a set of suggestions aimed at making current laws and regulations more affirming of LGBTQ persons' rights. In accordance with international human rights legislation, the report also suggests holding a national consultation with the aim of passing an extensive anti-discrimination law that forbids discrimination based on gender identity and sexual orientation.

VII. CONCLUSIONS AND RECOMMENDATIONS

It is the view of contemporary jurisprudence that the state has a responsibility to recognize various sexual identities, and that it is the right of those people to expect non-discrimination from their governments. Queer curiosity can lead to new, inclusive, and egalitarian areas of critical legal studies by reorganising the categories of international legal theory. In the context of the global disorder, where crises exist on both a personal and national level, it is imperative to establish a legislative framework that promotes solidarity.

We are witnessing an unparalleled phase of international law's influence on regional courts and liberal interpretations of constitutional concepts, particularly in third-world countries. In the midst of uncertainty, LGBTQIA+ groups are finding certainty thanks to the orientation of queering international law.

²⁷ National Legal Services Authority v. Union of India, Writ Petition (civil) No. 604 of 2013.

A global legal structure is required so that, as opposed to normalising and taking advantage of the ingrained limits and disparities, it may confront them. A postwar queer curiosity has the potential to bring order to the international legal system, much like feminist approaches did in exposing the disparities and absence of intersectionality within the framework of global governance²⁸.

²⁸ Variath, A.A. and Kadam, Riya (2022) *India and queering international law: how international legal theory is 'orienting' the 'disoriented' domestic queer jurisprudence in India*, *Contemporary Law Review*

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