

# AN ANALYSIS OF VARIOUS NEW INDIAN LAWS

Mrs. A. Subhashini



Kripa Drishti Publications, Pune.

# **AN ANALYSIS OF VARIOUS NEW INDIAN LAWS**

**Editor**

**Mrs. A. Subhashini**

Assistant Professor,  
Government Law College,  
Salem, Tamilnadu.

**Kripa-Drishti Publications, Pune.**

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Editor By: **Mrs. A. Subhashini**

Authored By: **Sakshi Wadhwa, Krishna Ghosh,  
Dr. Vidyottma Jha, A. Subhashini, S. Sharan**

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Email: [editor@kdpublications.in](mailto:editor@kdpublications.in)

Web: <https://www.kdpublications.in>

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## **PREFACE**

This book is going to highlight the many legal issues. To educate the people and give legal awareness to the entire society. In legal perspective the people who doesn't know what is right and wrong, they believe in all. The author gives various dimensions in new laws and added more chapters regarding in new aspects. In surrogacy laws, LGBTQ+, Right to religion is a very much fundamental right and various concepts. As a law academician, she has penned the book on the title of corporate law with specific reference to issues and challenges and she had been authored the book of Language barrier among the law students, she had been authored, edited, presented the papers, conducted seminars, conferences etc... For more than a decade she has been serving as a law teacher. This book has been gives very good ideas about the contemporary legal issues. See you later in other topic of new law book.

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# 1. Evolution of Laws Concerning LGBTQI+ Individuals in India: Past Struggles for Inclusion to Scope for Future Possibilities

**Sakshi Wadhwa**

Doctoral Student,  
Jawaharlal Nehru University.

## **Abstract:**

*Discrimination based on sexual orientation and gender identity has been prominent worldwide. However, with the advent of HIV/AIDS as an issue of concern, people belonging to the LGBTQI+ community were particularly impacted in varied ways in different countries. On the one hand, in the USA or UK, where LGBTQI+ groups already existed, their activism found strength in consolidation; on the other hand, in India, the issue exposed the travesty of anti-sodomy laws. In India, while people with HIV/AIDS lived hiding the illness due to fear of societal stigma, those with high risks who were involved in same-sex activities feared to openly come out for prevention and detection of the disease since they could be penalized under Section 377. Starting from health-based issues, the struggle went on to claim equal rights for people identifying as LGBTQI+. Although some legal inclusion for transpersons has been recently evident, this chapter highlights the need for a more substantive inclusion of transpersons in legal and policy discourse.*

## **Keywords:**

*LGBTQI+ community, Fundamental Rights, Crisis, Same-sex marriages, Inclusion.*

## **1.1 Tracing the History of Struggles for Equal Rights of LGBTQI+ Communities:**

LGBTQI+ groups like the International Lesbian and Gay Association (ILGA), International Gay and Lesbian Human Rights Commission (IGLHRC), and organizations like Amnesty International and Human Rights Watch have played a crucial role in spreading awareness about discrimination on the grounds of homosexuality and advocating for LGBTQI+ rights in International human rights discourse, which led to the deletion of homosexuality as a mental illness from the International Classification of Diseases was achieved in 1991 (Borah, 2018). The European Court of Justice Verdict in *Dudgeon v. United Kingdom*, where Northern Ireland was held responsible for violating the European Commission of Human Rights Convention by criminalizing homosexuality and infringing on Dudgeon's rights, became a landmark judgment giving a clear signal on decriminalizing homosexuality as a requisite for members of the Council of Europe (Thoreson 2009, 327). In the case of the United Nations Human Rights Commission, it is only after the *Toonen v. Australia* judgment that held Tasmania's anti-sodomy laws to be contravening the equality and

privacy rights that UN bodies started urging states for decriminalizing consensual same-sex sexual conduct' (International Commission of Jurists 2011, 8).

In India, it was the AIDS Bhedbhav Virodhi Andolan that spearheaded the movement calling for the decriminalization of homosexuality. The organization found Section 377<sup>1</sup> of the Indian Penal Code, a colonial law that criminalizes homosexuality as a roadblock obstructing high-risk people involved in same-sex activities from coming out for HIV/AIDS detection and prevention. At first, the organization knocked on the doors of Parliament in the year 1991 to withdraw the law but to no avail. Changing the strategy, a petition was filed in the Delhi High Court in 1994. Facing delays in hearing, another incident involving Section 377 occurred in 1997 when a program conducted by Azadi Bachao Andolan broadcasted on All India Radio was challenged in court by a metropolitan magistrate in Delhi on the grounds of promoting homosexuality which was a crime back then. While these incidents ignited initial discussions regarding homosexuality in India, the issue was yet to be debated extensively. Two significant events took place in 2002 that further intensified the call for repeal of Section 377. First was the complaint addressed to NHRC against a psychiatrist in AIIMS hospital who forced a gay man into conversion treatment even though the Indian Psychiatric society continued categorizing homosexuality as an illness? The NHRC quashed the complaint due to Section 377, which still featured as a law. The second instance was about the detention and torture of officers and outreach workers of Bharosa Trust and Naz Foundation (India), organizations working on HIV/AIDS prevention.

The arrest of the officers and outreach workers for 47 days under Section 377 led Naz Foundation to file a writ petition in December 2001 against the law in Delhi High Court. While the earlier petition filed by ABVA focussed on privacy and health as issues compromised under the law, the petition by Naz Foundation primarily focussed on a range of fundamental rights, including equality before the law, the Right to life, and personal liberty. However, the writ petition was dismissed by the Delhi High Court in September 2004, stating that Naz Foundation had no locus standi on the matter. A review petition filed before the Delhi High Court for reconsideration was also dismissed, leading to the Foundation filing of a Special Leave Petition in the Supreme Court in February 2005. The Naz Foundation faced challenges as, in 2002, Joint Action Council Kannur (JACK) filed a counter affidavit to the petition filed by Naz in December 2001. The counter affidavit stated the importance of Section 377 in preventing HIV/AIDS by making same-sex activity a criminal offense. Later, the then Government filed a response affidavit in favor of Section 377, which stated homophobic reasons. Such tempests consolidated the LGBTQI+ movement in India when an alliance of 12 organizations formed a movement called 'Voices against 377' (Voices) in mid-November of 2003 to offer support to the petition filed by Naz. Campaigns were launched to spread awareness of the cause. In the reply affidavit filed by the government in September 2005, aversion to repealing the law was visible as public

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<sup>1</sup> 377. Unnatural offences.—whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.



morality was cited in favor of the law. However, the Supreme Court judgment in 2006 offered a ray of hope as it accepted the need for reconsidering the law.

Meanwhile, the Voices filed an intervention application with enormous evidence in terms of FIRs against the claim by the Health Ministry regarding no arbitrary use of Section 377. Even the reply affidavit filed by the Health Ministry unintendedly justified the concern regarding AIDS in homosexuals. Finally, it was the Delhi High Court judgment in the case in 2009 that found Section 377 in contravention of certain fundamental rights in India, stating “insofar as it criminalizes consensual sexual acts between adults in private” (*Naz Foundation v. Government of NCT of Delhi*, 2009, 76). However, the victory was short-lived since many Special Leave Petitions were filed in Supreme Court against the Naz judgment. The respondents for the same were the Naz Foundation and Voices. In December 2013, Supreme Court refused to accept Section 377 as unconstitutional and put the onus on the legislature to decide whether Section 377 can offer exemption for same-sex activity between adults in the *Suresh Kumar Koushal* judgment. Review petitions were filed against the judgment, including the one by the Government, but the court quashed the pleas after considering the same in a closed hearing. A series of Curative petitions were filed against the judgment, which was accepted and was to be decided by the five-judge Constitution bench. Meanwhile, the *NALSA* judgment in 2014 called for treating the transgender as ‘the third gender’ under Articles about fundamental rights and focus on their right to choose. (*National Legal Services Authority v. Union of India*, 2014). The judgment led to the filing of writ petitions by people identifying themselves as LGBT, claiming that a paradoxical situation has emerged where transgender people are given the status of the third gender, implying equal rights as that of the other two genders, but the *Koushal* judgment has denied sexual rights, to them. (*Dr. Akkai Padmashali Ors Vs. Union of India*, 2016).

It was in June 2016 that a petition was filed by Navtej Singh Johar and four other people from the LGBTQI+ community, claiming that Section 377 violates Articles 14, 15, 16, 19, and 21 of the Indian Constitution. (*Navtej Singh Johar and Ors v. Union of India*). Distinct from the curative petitions, it sought redressal under Article 32 of the Constitution. Some more petitions were also filed with similar objectives as the Johar one. All six petitions were heard together by the five-judge Constitution Bench, comprising Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice R.F. Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra in 2018 striking down the criminalization of same-sex activity among adults, thereby decriminalizing homosexuality. The judges found the Section to be violating Article 14 (Equal protection of laws), 15(1) (Non-discrimination on the grounds of sex), 19(1)(a) (Freedom of expression), and 21 (Right to life and personal liberty) of the Constitution (*Navtej Singh Johar and Ors. vs. Union of India*, 2018). Justice Indu Malhotra underlined the fact that the LGBTQI+ community has the same rights to privacy and dignity as other people; further, as a sexual minority, they have all the rights to receive protection under Article 15 as others. She viewed homosexuality as a different form of sexuality that is not unnatural and, therefore, should not be stigmatized. Justice D.Y. Chandrachud, presently the Chief Justice of India, striking down Section 377 not just implies the decriminalization of consensual sexual activity but aims at securing the constitutional rights of the LGBTQI+ community who have been historically marginalized and discriminated against. The verdict, therefore, seeks to ensure their equal citizenship as that of others. Justice Dipak Misra, then Chief Justice of India, and A.M. Khanwilkar focused on the Indian Constitution as a transformative, living, dynamic document that allows for changes according to changing

times. Its pragmatic interpretation by the judiciary is needed to ensure that the document remains so. He further emphasized that a genuinely free society is imbued with inclusivity and openness, and constitutional morality envisions the same. Justice R.F. Nariman pointed out that homosexuality is not a mental illness as per the Mental Health Care Act, 2019, and since Section 377 violates the privacy of individuals who are not causing any harm to others, it attacks their fundamental rights and therefore needs to be read down. There was broad consensus that the Section restrains the LGBTQ+ community from access to healthcare due to the stigma surrounding homosexuality which keeps them from accessing the most fundamental rights (Supreme Court Observer, 2021). While the judgment was lauded for its commitment to ensuring that Constitutional rights are guaranteed for people identifying themselves as LGBTQ+, it opened horizons for them to embrace their identity with legal sanction. The government then pondered over making laws that offer an inclusive and pluralistic space to sexual minorities one such law is analyzed in the next section.

### **1.2 Transgender Persons (Protection of Rights) Act 2019:**

Post the judgment, the government brought The Transgender Persons (Protection of Rights) Bill 2019 (now a law) to support the LGBTQI+ community by warding off discrimination against them. Introduced in Lok Sabha on July 19, 2019, by the Minister for Social Justice and Empowerment and passed in both houses in the same year, the Act aimed at improving the living conditions of Transgenders through penalties in case of discrimination against them and various other welfare measures. Although the Act is a significant step by the government toward the betterment of transgenders, it included specific provisions that left scope for change or improvement. For instance, the provision for the Right of residence for transpersons under 18 can backfire since discriminatory attitudes and humiliation against them also occur in the family (Transgender Persons (Protection of Rights) Act, 2019).. A certificate of identity issued by the District Magistrate is needed to change gender identity (Transgender Persons (Protection of Rights) Act, 2019). The Act did not provide reservations for the community in educational institutions or employment avenues but penalized begging (Transgender Persons (Protection of Rights) Act, 2019). While the Act seeks to safeguard transgender persons from discrimination at various levels, it challenges their identity claims by undermining the right to self-determination of one's gender. The Act, therefore, goes against the NALSA judgment where, as mentioned above, the provision of "third gender" apart from the binary division was called to be recognized and ensured the fundamental rights enshrined in Part III of the Constitution. It is worthy to note here that the judgment secured the right of transgender persons to "decide their self-identified gender" (National Legal Services Authority v. Union of India, 2014). The Act, however, mandates a certificate of identity from the Magistrate to affirm one's identity. Even the definition of 'transgender' in the Act is limited in scope, not involving a range of expressions of sexual identity. The Act was put up for public opinion when the country was affected by the pandemic, thereby limiting the scope for widespread discussion on the same. This fueled the dissatisfaction of the LGBTQI+ community, who felt that their voices remind unheard under the garb of paternalistic protection by the State.

It is significant to point out here that Section 15 of the Act deals with healthcare facilities for transgenders, but in the pandemic crisis that shook the country in 2020, transgenders remained a neglected section by and large.

### **1.3 COVID-19 Pandemic and the LGBTQI+ Community:**

The pandemic halted the ever-moving life of people, both physically and financially. When the “homes” were a primary shield from the virus, transpersons failed to access them since natal homes proved repressive for many, and trans-friendly places on rent are hard to find.

While people with serious ailments faced delays in their much-needed treatment, trans individuals faced delays in their hormone replacement therapy (HRT), leading to further anxieties. Apprehensions regarding vaccines with HRT causing blood clots fuelled vaccine hesitancy among LGBTQI+ people. Their concerns, even if guided by rumors or misinformation, remained to be resolved by the state. Even the quarantine centers were not made exclusively for the LGBTQI+ community to offer them a safe space to recuperate (Rastogi, 2021). Lockdowns posed a severe challenge to people from the LGBTQI+ since companies used the pandemic as an excuse for their sudden mass layoffs. This led them to return to their natal homes, which proved traumatic. While sex workers faced stigma as “carriers of virus” in tandem with the trend of equating sexual deviance with ailment, trans sex workers were doubly disadvantaged since they had less scope for negotiations ensuring protection from Sexually Transmitted Diseases (STDs) during sexual activity as compared to other sex workers.

Except for the government in Maharashtra, almost no state or national-level policy included transpersons as a separate category. The schemes catered to economically weaker populations failed to address the transpersons since they needed more documents to claim the benefits (*Not ‘Sailing in the Same Boat’: Why the COVID-19 Pandemic Has Been*, 2021). They failed to produce the same due to the circumstances that led them to flee or their existing conditions where they lived without rent agreements. Since the proposal to include sex workers as informal laborers was withdrawn, they could not even access the benefits designated for them (*Not ‘Sailing in the Same Boat’: Why the COVID-19 Pandemic Has Been*, 2021). Further, there is a need to go beyond claiming informal laborer status for sex workers since they have specific, distinct needs that remain to be acknowledged. While violence against transpersons continues, whether from a high class or a backward one, the pandemic induced policing made them more vulnerable with the additional trauma of the loss of community support owing to lockdowns (*Not ‘Sailing in the Same Boat’: Why the COVID-19 Pandemic Has Been*, 2021). Therefore, there is an urgent need to formulate a different set of laws and policies catering to transpersons that provide them a guardrail from future crises.

### **1.4 Issues of Same-sex Marriage and Adoption Rights:**

As of December 22nd, 2022, same-sex laws are legal in thirty-three countries, with some accepting same-sex civil unions. Research has shown a correlation between the rights of the LGBTQI+ community and democracy in societies since wherever restrictions on individual rights, like freedom of speech and expression, are seen, violence against the LGBTQ+ community is also evident (CFR.org Editors, 2022). In a recent turn of events, The Standing Committee on Personnel, Public Grievances, Law and Justice, Chaired by Mr. Sushil Kumar Modi, submitted its report on ‘Review of Guardianship and Adoption Laws’ on August 8, 2022, where suggestions were made for formulation of a single law for adoption,

irrespective of religion since the existing two laws on adoption are fraught with inconsistencies related to upper age limit and other requirements. Further, it sought to incorporate the LGBTQI+ community into the same (Kumar, 2022).

As per the existing Juvenile Justice Act, 2015 (JJ Act from hereon), people identifying themselves as LGBTQI+ are allowed to apply for adoption by filing an application in Central Adoption Review Authority (CARA), or under the Hindu Adoptions and Maintenance Act 1956 (HAMA, from hereon), they can apply by entering into an adoption deed. However, it can only be done as a single parent, thereby leading to discrimination against LGBTQ couples who wish to go for adoption (*Parliament Panel Recommendation on Adoption Raises Bigger Question of Recognizing Same-sex Union: Experts*, 2022).

The Parliamentary Panel accepted the need for a new law since JJ Act and HAMA only allow married couples or single parents to go for adoption, thereby neglecting the LGBTQ community (Pandit, 2022). The gravity of the matter is evident in a PIL filed by Parth Phiroze Mehrotra and Uday Raj Anand. Being in a relationship with each other for 17 years, they are raising two children together; however, they cannot legally register as the children's parents since their marriage is yet legally recognized. Although Section 4 of the Special Marriage Act of 1954 allows any two persons to register their marriage, the restriction on sexual orientation concerning males or females enshrined in sub-Section (c) acts as an inhibitor for same-sex couples. (LIVELAW NEWS NETWORK, 2022b). The issue at hand, therefore, is not just about adoption rights but also about the legal recognition of same-sex marriage since it affects several fundamental rights of which surrogacy or adoption are a part. Refusal to allow same-sex marriage is tantamount to discrimination against same-sex, homosexual couples, violating Articles 14, 19 (1)(a), 21, and 25, called "the four-pronged test" by Aman Anand and Ashish Chauhan. Further, the legal means open for people identifying themselves as LGBTQI+ include amendments in the Special Marriage Act 1954 to allow homosexual marriages or arguing for civil partnership systems that would provide similar legal protections to same-sex couples as that of heterosexual ones (Anand & Chauhan, 2022).

Same-sex marriages are opposed on account of reinforcing patriarchal institutions that maintain caste and class hierarchies, like the matrimonial advertisement posted by a mother inviting applications for a "suitable groom" for her son, where she mentioned caste preferences. Another reason for rejection is the claim that such arrangements imply neoliberal lifestyles and class hierarchies, as evident in the wedding of an American and Indian woman settled in the US. The lavish Shannon Seema wedding exemplifies the neoliberal lifestyle of same-sex marriage (Bhattacharya, 2019). For scholars like Michael Warner, marriage is a means for the State to regulate people's lives. He states, "In the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives; it is the zone of privacy outside which sex is unprotected (Warner, 1999)." Therefore, for Warner, the concept of marriage is imbued with State surveillance on individuals' freedom and privacy and acts as another mechanism of state control over people and exclusion of those who do not comply with the norm. Judith Butler finds the state's legitimacy as critical in gaining fundamental rights and recognition of relations, belonging, and even materialistic requirements, such as receiving the deceased partner's dead body; she also challenges the ordering of legitimacy and questions thinking in terms of binaries about the same-sex marriage as essential issues to be

addressed. Sara Ahmad eloquently critiques the “ideal queerness,” which creates divisions among queer people; rejection of all norms to fit into the category of queer raises pertinent questions on possible exclusion within the community (Bhattacharya, 2022). During the hearings on Section 377, the solicitor general had argued on behalf of the Indian government about the right to sexual orientation percolating to same-sex marriages, and in case the court is in favor of same-sex marriage, then the government should be given sufficient time to respond, due to the repercussions that such a decision would have on the Hindu Marriages Act that acquire a mainstream position in India (Bhattacharya, 2022). Although Article 16 of the Universal Declaration of Human Rights (UDHR), a document of prominence in the UN, of which India is a signatory, states, "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family" therefore implying the right to marry for everyone, an explicit mention of discarding the limitation of sex along with race, nationality or religion is needed to enable same-sex marriages in member states.

### **1.5 Conclusion:**

Debates concerning people identifying as LGBTQI+ point to the schism between the dimensions of inclusion and exclusion, whereby although legal inclusion is offered through recent judgments, other related, substantial rights concerning private life are excluded. Contestations regarding same-sex marriage should move away from value perspectives and focus on offering a choice to the people belonging to the community to decide. Access to avenues and the exercise of rights need to be made available to everyone. At times, everyday negotiations and resistance to carve out space for one’s identity require interaction with the heteronormative norms rather than their absolute rejection. Marriage is one such area where having the right to legal recognition offers ground to contest heteronormativity within the State regulation and existing environment, which is not always welcoming for the LGBTQI+ community. Another important aspect concerning people belonging to LGBTQI+ is the class dimension, where higher receptivity and acceptance for them can be seen in well-off families, but those at the lower rungs of class hierarchies face several challenges, ranging from health to occupation. Further, the state’s neglect of the community in times of crisis, like that of the COVID-19 pandemic, reflects that their enfranchisement is symbolic. Therefore, there is an urgent need for substantial inclusion of transpersons in state laws and policies in consultation with them so that their interests could be better represented and a genuinely inclusive and plural society be formed.

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## 2. LGBTQ: Conceptual and Legal Aspects

**Krishna Ghosh**

Assistant Professor,  
School of Law,  
Brainware University,  
Barasat, 24 Parganag (North),  
WB, India.

### **Abstract:**

*Minority people are generally protected by several international and domestic legal frameworks. LGBTQ people are acknowledged as a minority group that need legal protection. The issues regarding conceptual understanding of LGBTQ community and their legal position have been covered in this chapter. Though the people belonging to this community are not same in character and identity, they need to be identified with dignity and legal recognition. In modern culture, gender is not confined to stereotype male and female. The requirements and sexual preferences of LGBTQ people are a bit unusual or at odds with nature. However, due to societal mindset, members of this group continue to experience discrimination, harassment, and hatred from others. The effort to uphold the rights of this minority is now highly well-liked and is altering the way that society thinks. Some nations have even legalized same-sex unions, and the idea has been put up in our nation as well. In this context, an examination of the current legal framework governing LGBTQ rights has been undertaken in this discussion.*

### **Keywords:**

*LGBTQ+, Cisgender, Transgender, Gender Identity, Sexual Orientation, Discriminatory treatment, Human Rights.*

### **2.1 Introduction:**

In human society, governed by statutory laws, we are made to believe that all human beings are born free and equal. But a number of mandates in religious books, customary practices and statutory laws proves the opposite. Examples abound in society where we find that people are subjected to discrimination, disparity, injustice and rampant violation of their rights specifically for the ground reality that they belong to various vulnerable communities and stigma is attached to them for no fault on their part. Society robs them of their expectations, and social, economic and political rights. Justice for them remains a distant dream throughout their life. One such community is LGBTQ community which is subjected to harassment, hate, isolation and deprivation of their rights because of the attitude of the society towards them.

The abbreviation LGBTQ is used to denote several kinds of persons whose identification is not publicly known to humanity in full. Also, this class of deviant gender is commonly

recognized as third gender. However, being a human irrespective of their gender identity or even sexual indifference, they are entitled to exercise every kind of Rights which a normal citizen in their country exercises. This term LGBTQ and issues regarding LGBTQ has become a matter of debate and popular these days. While dealing with the term LGBTQ many get confused with the proper import of the terms SEX and GENDER. However, the concept of gender is quite different from the narrative idea of the word Sex. While Sex is predominantly revolving around the biological mark or as in, the reproductive organs in a human, the idea of Gender revolves around how a human's sexuality is experienced as well as expressed. A male and female identity at birth is a system, where a sex of an individual is determined by a pair of sex chromosomes. The homogametic sex, which includes females, is defined as having two of the same sort of sex chromosomes (xx). Males are said to be of the heterogametic sex since they have two distinct types of sex chromosomes (xy)<sup>1</sup>. The use of the terms 'male' and 'female' generally indicate sex whereas 'masculine' and 'feminine' imply Gender. What is important to realize is that the term Gender is not static; it has some wide variety of sub-category which have been discovered by psychologists and medical scientists depending on combining factors of their psychological, psycho-sexual and biological development.

Social movements and awareness programs demand that our conventional idea of Gender should not be restricted to the static stereotypic concept of 'masculinity' and 'femininity'. Under the influence of progressive culture of societal inclusiveness there are explicit changes in the elite section of the society. The socio-cultural stigma has now been slightly diminishing while people started recognizing alternative gender identity of human beings as well as others are accepting these sexually deviant Genders of Human beings. However, many orthodoxically inspired societies are yet to accept such freedom of thoughts relating to a person's sexuality and their different types of experiencing peculiar personal and psycho-social relationships. A given society considers preconceived social constructs in behaviour, activities and attributes which are acceptable at par for men and women.

The stereotype thinking as to male and female suggest some common attributes like:

- Men do not cry,
- Women are emotional while men are rational,
- Cooking comes naturally to women,
- Men drive vehicle,
- Men can become Scientists,
- Women should have long hair but the men must keep their hairs short,

This stereotype thinking still prevails in our minds which needs to be changed with the progress of the society. Each and every individual in our society has their own emotions, feelings and the right to experience them differently. So, where there exist few exceptional behaviour, the same demands and deserves the society's empathy and respect. Thus, notwithstanding an orthodox outlook or a perspective of identifying a human by their sex only, we must understand them keeping in mind their desire to be identified as a particular

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<sup>1</sup> About: XY sex-determination system. (n.d.). DB Pedia. <http://dbpedia.org>



gender. But in reality, in the advanced society of the living community suffers due to lack of awareness in gender sensitization. It is quite difficult though to conclusively determine the number of such existing deviant genders in today's world. Different genders have their different needs according to their feelings, emotions, psychology, liking or disliking as well as their psycho-social development etc. Further, if we consider the position of a lesbian or gay or cis in many societies today, people are found to be normally hating them.

The issue arises is there need of law to address the issue of recognition as well as protection and respect of rights of LGBTQ community. It is quite evident that each and every law is designed for the purpose of controlling the human conduct and mighty behaviour towards the other fellows while having any transactional relationships. Each and every individual and their multi-dimensional relationships as well as their interdependence with each other, focuses on the law of the land which allows and recognizes their needs, expectation and rights through the instrumentality of law. Before implementing any law, which is related to regulating the conduct and behaviour of the people in relation to psychological or biological needs influenced by the presence of different hormonal disorders, gender sensitization among people in a given society is very much essential.

Judiciary in India broke the shackles of orthodox ideas and took progressive stance while decriminalizing homosexuality and declared *unnatural sexual intercourse* under Section 377 of IPC, invalid and unconstitutional<sup>2</sup>. This implies steady progress in the recognition of variant gender identification and it is now becoming a censoring issue in our modern Indian society. It was an era when female empowerment became a need for balancing the patriarchally dominant society, where the feminist movement started to point out and uproot the factors that led to discrimination against women. Now it is a gender identification issue which needs empowerment in terms of recognizing the alternative forms of sexuality amongst biologically demarcated men and women.

As per Freud's *Three Essays on the Theory of Sexuality* written in 1905, and "*Certain Neurotic Mechanisms in Jealousy, Paranoia, and Homosexuality*," published in 1922, significant narratives on homosexuality. According to Freud, everyone seems to be bisexual, which basically implies they possess traits of both sexes and therefore are sexually attracted to others of both sexes. This primordial bisexual tendency led to the development of both homosexuality and heterosexuality. Freud citing some traumatic heterosexual experience of individuals at their psycho-sexual development stages, may be one of the reasons of homosexuality. Also saying that "*those situations are of special interest*" when the libido switches to an inverted sexual object following a distressing encounter with a normal one.

The Grading points on having greater masculinity is pervasive even amongst competitive comparing males, with a dominance on Power Struggle. The similar aspects of the degree of femininity is explicitly compared within a woman's ground relating her feminism. Recognition by society and others is a secondary matter but one should recognize himself or herself freely at par with their own feelings and mostly when they find themselves

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<sup>2</sup> Navtej Singh Johar v, Union of India AIR 2018 SC 4321

involved with an uncompassionate society and culture. There is no such a concept imbibing the true nature of declaring someone as a perfect man or perfect woman, hence prejudicial intolerant adjectival ideas on who is a true man or a true woman should be curtailed or rather stopped from the societal connotations per se.

## **2.2 Gender Identity and Sexual Orientation:**

As pointed out at the beginning, a person's gender identification may match or diverge from the sex they were assigned at birth. Some of the common categories of gender may be broadly named under the umbrella category as 'cis-gender' and 'Transgender', while a person may be a 'cis' and 'straight' both at the same time.

Gender identity is described by the term "Cisgender," whereas sexual orientation is described by the term "Straight."<sup>3</sup> When a baby is born, people look at their genitals and decide whether it is a girl or boy based on what they see.

If that baby after gaining maturity identifies with its birth assigned gender, the person will be considered as cisgender, or "cis." The word "straight" however, means someone is attracted to the opposite sex, whether it's in a sexual or romantic way and it is often used to mean that the person is "heterosexual."

On the other hand, the opposite of "cisgender" is "transgender". This umbrella term is used for individuals whose gender identity, gender expression, or behaviour differs from that of their generally associated sexual identity, for which they were genetically predisposed. Therefore, a person can be transgender or cisgender.

The LGBT community is referred to by the abbreviation LGBT (lesbian, gay, bisexual, and transgender). While the letter "T" represents difficulties of gender identity, the first three letters (LGB) pertain to sexual orientation.<sup>4</sup> One's internal, personal sense of seeing oneself or herself as a man, a woman, or as someone outside of his or her gender binary is known as gender identity. Sexual orientation is the term used to describe a person who is attracted to another person physically, romantically, or emotionally (for example: straight, gay, lesbian, and bisexual).<sup>5</sup> Lesbian, gay, bisexual, and straight persons can all identify as transgender. For example, a man who undergoes sexual morphosis and transformation may change from being a man to a woman (becoming a transgender woman), and she would normally describe herself as a straight woman if her only attraction would have been to males. As a result, being cisgender and being straight are distinct concepts that occasionally overlap. An individual may realize that they are labelled as transgender, nonbinary, or gender nonconforming if they don't identify with the sex they were assigned at birth.

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<sup>3</sup> Cisgender and Straight Don't Mean the Same Thing — here's why. (n.d.). Healthline. <https://www.healthline.com/health/cisgender-vs-straight>

<sup>4</sup> How is sexual orientation different from gender identity? (2014, June 30). GLAAD. <https://www.glaad.org/how-sexual-orientation-different-gender-identity>

<sup>5</sup> Ibid.

For example, a person can be:

- **Lesbian:** Usually refers to a woman who has a romantic and/or sexual orientation towards another woman.
- **Gay:** When males are attracted to other guys passionately, sexually, erotically, or emotionally.
- **Bisexual or Bi-romantic:** If someone is attracted to people of both the genders male as well as female.
- **Transgender:** Gender identity doesn't always determine sexual orientation, it varies.
- **Intersex:** A person born with neither completely as male nor as female, also termed as hermaphrodite.
- **Pansexual or panromantic:** If someone is attracted to people of all genders.
- **Asexual or a-romantic:** If someone experiences little to no sexual or romantic attraction or if he or she feels no one attractive
- **Queer:** Who is not straight is someone who doesn't identify as traditionally male or traditionally female, or who is not heterosexual.
- **Kink:** It is the use of non-conventional sexual practices, concepts or fantasies to find comfort in expressing their sexuality in alternative and counter cultural ways.

As a result of their perception of their gender identity as more fluid and inclusive than the categories of the traditional sexual orientation, a growing number of people, especially young people, identify with this phrase. So, the entire gender either 'cis' or 'Trans' may identify some common orientation and their short form is LGBTIPAQK. These are but a few instances of ways someone could express their sexual or romantic orientation. Of course, some individuals decide against identifying as gay or straight.<sup>6</sup> This variety of gender is commonly designated as LGBTQ+. The '+' in 'LGBTQ+' signifies that the above list is not exhaustive; it includes other categories as well. Young people in this LGBTQ+ community are facing rejection, violence, humiliation compared to the general population. Result may be sometimes tending to be suicidal or they may become homeless at times. They are allowed to live openly without fear of prejudice and may exercise their freedom of expression and association as well as their equal rights. A major issue on a global scale is discrimination against the lesbian, gay, bisexual, transgender, and intersex (LGBT) population. They are unable to get a job, go to school, or get medical treatment. Unjustified hostility is directed at them because of the way they express their gender or are believed to be sexually oriented. Some of the most prevalent ways that LGBTQ+ individuals experience human rights abuses are –

- Various types of psychological and physical violence for example, verbal attacks like bullying or assaulting towards the body or beating by using force etc.
- Discriminatory criminal law affecting the right to privacy for having consensual same-sex relationships and rendered punishment till 2018. [*Though it has been decriminalized by the Hon'ble Supreme Court of India.*]<sup>7</sup>

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<sup>6</sup> Cisgender and Straight Don't Mean the Same Thing — here's why. (n.d.). Healthline. <https://www.healthline.com/health/cisgender-vs-straight>

<sup>7</sup> Navtej Singh Johar v, Union of India AIR 2018 SC 4321

- Till date it was socially restricted to have or deliver free speech on propagating, the right to have variant sexual orientation of LGBTQ+ people and it was somewhat a disgusting act to assemble the people and discuss on this issue, being treated to be immoral in nature.
- In our everyday life, we find various discriminatory treatment or denial of acceptance upon the LGBTQ+ community amongst their family, school, job or workplace, hospital or any social gathering including religious institutions etc.

In this situation there is a requirement of effective legislation and their implementation for the protection of the rights of the people of the third gender minority in every country. Many of the countries of the world have recently recognized their rights since the recent decade and developing as well as welcoming LGBTQ+ friendly communities. Amongst those countries are Sweden, Netherlands, Spain, Germany, France, UK, Canada, and Australia which have the highest percentage of acceptance of homosexuality.

### **2.3 International Legal Recognition:**

The "right to equality" and "right against discrimination" are the two guiding concepts of human rights. "*All human beings are born free and equal in dignity and right,*" reads the first line of the human rights declaration. No matter a person's gender, sexual preference, or other traits, this also applies to them. Discrimination based on sexual orientation or gender identity is prohibited by international human rights legislation. The same rules that prevent discrimination against people based on their skin colour, ethnicity, religion, sex, or other characteristics also apply to members of the LGBTQ+ minority.

The topic of whether LGBT rights are human rights or not is slowly but surely becoming a concern at the United Nations, although it is not at all apparent what the U.N.'s discussions on the relationship between homosexual rights and human rights will ultimately accomplish. The UN's human rights organisations have further asked nations to put an end to such behaviour by expressing their concern about violations of human rights driven by gender identity and expression. The UN human rights procedures continue to receive reports of transphobic violence, including physical violence (such as murder, beatings, kidnapping, and sexual assault), psychological violence, and other forms of discrimination (such as threats, coercion, and the arbitrary deprivation of liberty, including forced psychiatric incarceration) (such as threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration). It is further claimed that because their gender identity was not acknowledged, trans people may experience other human rights violations such as coerced medical care, sexual assault, torture and other cruel treatment in hospitals and detention facilities, as well as harassment, humiliation, abuse, or arrest when they attempt to report violence and request police protection.

The key U.N. papers provide direction towards empowering LGBTQ+, for instance, "*respect for human rights and for basic freedoms for everyone without discrimination*" is encouraged by the United Nations Charter (1945). According to the Universal Declaration of Human Rights, "*Everyone is entitled to enjoy the rights and freedoms set out in this Declaration, without difference of any kind*" (1945). Until the *Toonen v. Australia* case was satisfactorily settled by the UN Human Rights Committee in 1994, the political bodies of

the UN had not discussed LGBT rights (*related to equality regardless of sexual orientation or gender identity*) since the organization's founding in 1945. The UN Human Rights Committee (UNHRC) received a landmark human rights complaint against Australia in 1994 from Tasmanian Nicholas Toonen (UNHRC). In 1991, Toonen filed a complaint with the Human Rights Committee alleging that laws in Tasmania that criminalized private, consenting sex between adult males violated his right to privacy under Article 17 of the International Covenant on Civil and Political Rights, made distinctions between people based on sexual activity, sexual orientation, and identity in violation of Article 26, and limited the freedom of gay men in Tasmania to express their sexual orientation. When Norway, speaking on behalf of 54 nations, issued a joint statement to the Commission on Human Rights on violations of human rights based on sexual orientation and gender identity in December 2006, the topic of gender identity was covered. According to a resolution that South Africa spearheaded at the UNHRC on June 17, 2011, the United Nations High Commissioner for Human Rights (OHCHR) was entrusted with "*documenting discriminatory laws and practices and incidents of violence against persons based on their sexual orientation and gender identity.*"

In July 2014, the United Nations (as an employer) said that it would provide employees who joined same-sex unions in locations. In 2016, the UNHRC passed a resolution establishing an Independent Expert to examine the factors leading to violence and discrimination against people based on their sexual orientation and gender identity and to offer guidance to governments on how to safeguard such people. Some claim that the UN's long-term mission based on OHCHR is the organization's "most overt proclamation of LGBT rights as human rights." Several States have made significant efforts in recent years to strengthen the protection of LGBT people's human rights. A new law has been approved that forbids discrimination, makes it illegal to commit hate crimes inspired by homophobia and transphobia, acknowledges same-sex relationships, and makes it easier for transgender persons to get documents that reflect the gender of their choice. In addition to police, inmates, teachers, social workers, and other professionals receiving training, several schools have launched anti-bullying initiatives.

Numerous UN human rights instruments have indeed been acknowledged to forbid discrimination against the LGBTQ+ community in any way. As a result, just as it is forbidden to do so on the basis of a person's race, gender, or any other status, it is now unlawful to deny someone's rights on the basis of their sexual orientation or gender identity (LGBT+). The decisions and broad recommendations made by 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 frequently reinforced this view. Most UN bodies agree that discrimination is not permitted.

## **2.4 Indian Legal Position:**

The right to privacy is part of the right to life and to personal liberty as enshrined by Indian Constitution. Though the right to privacy is not expressly stated in the Indian Constitution as a basic right, but the Supreme Court has often emphasized on it, and in some circumstances, it has relied upon it while rendering Justice. Therefore, the state should never

infringe on someone's right to privacy. The LGBT minority is covered by every constitutional provision that is based on basic human rights, which is even found through Article 29(1): Protection of minorities. As stated in Section 377 of the Indian Penal Code, 1860, criminalizing homosexuality, Article 13(1) states that the Supreme Court may declare any existing law as discriminatory and if found violating Article 14, the same shall be declared unlawful and unconstitutional. By partially striking Section 377 of the IPC, the Supreme Court of India delivered a landmark decision by decriminalizing homosexuality. Despite the fact that homosexuality is no longer a crime, Indian laws nevertheless are found to be in tandem for providing holistic empowerment and thus showcasing few discriminatory precepts against the LGBT population in a number of ways. The reason for this is that there is a significant disconnect found between the judicial and legislative evolution of LGBT laws in India.

The Supreme Court of India had laid the foundation for the queer and non-binary community to receive a small portion of the fundamental human rights, by nature of the precedent-setting rulings in *National Legal Services Authority v. Union of India*.<sup>8</sup> In this remarkable decision, the Supreme Court extensively explored "gender identity" and for the first time, recognized legally transgender or "third gender" individuals. The Court acknowledged that individuals of the third gender have rights that were fundamental under both international and constitutional law. Additionally, the Apex court had instructed state governments to create frameworks to realize "third gender"/transgender individuals' rights. In its definition of third gender, the Supreme Court supported everyone's ability to express their gender identification, regardless of the given sex at birth. Furthermore, it said that eunuchs and hijras might legally identify as the "third gender".

In the case of *Navtej Singh Johar* (*supra*) reversed the *Naz*<sup>9</sup> verdict and held that violating the rights to equality, privacy, and personal liberty of such individuals constitutes penalizing sexual behaviour between two consenting adults in violation of Section 377 IPC. The Supreme Court weighed the ideals of equality, liberty, and dignity under Articles 14, 19, and 21 while determining whether Section 377 was constitutional. The Court noted that Section 377 punishes those who have same-sex partnerships unfairly. All individuals, including LGBTQ+ people, have the freedom to express their sexual preferences without fear. It acknowledged same-sex relationships as a common type of human sexuality<sup>10</sup>. Section 377 violates human dignity, sexual autonomy and the fundamental right to privacy and the scope of the right to privacy must be widened to incorporate and protect 'sexual privacy'.

Again, in *Justice K.S. Puttaswamy v. Union of India*<sup>11</sup> the legislature hasn't been able to keep up with the most recent developments. In the Puttaswamy case, it was decided that

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<sup>8</sup> Writ Petition (civil) No. 604 of 2013

<sup>9</sup> Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. ("Koushal"). Civil Appeal No. 10972 OF 2013

<sup>10</sup> Centre for Law & Policy Research. (2020, August 4). NAVTEJ SINGH JOHAR VS. UNION OF INDIA - South Asian Translaw Database - SECTION 377. South Asian Translaw Database. <https://translaw.clpr.org.in/case-law/navtej-singh-johar-vs-union-of-india-section-377/>

<sup>11</sup> ((2017) 10 SCC 1), (Puttaswamy I).

sexual orientation and the right to privacy are fundamental components of the rights to equality, non-discrimination, and life. The Court ruled that because sexual orientation is a crucial part of one's identity, everyone's identity must be safeguarded against discrimination. The verdict is significant since it was the first time the Indian Supreme Court acknowledged the rights of the LGBT community. The right to privacy and the freedom to choose one's sexual orientation were both upheld in the ruling. After the Supreme Court's decision in *Navtez Singh Johar* (supra) to strike down the criminalization of homosexual acts under Indian Penal Code section 377, there is an urgent need to make India's laws governing marriage, adoption, surrogacy, guardianship, inheritance, employment, and education more welcoming to the LGBTQ+ community. The Indian Parliament has recently approved The Transgender Persons (Protection of Rights) Act, 2019<sup>12</sup>, with the intention of protecting the rights of transgender individuals. The act was approved by the president on December 5, 2019, and was then published in the Indian Gazette. On January 10, 2020, after notification, it went into effect. This act's statutory provisions forbid all and any kinds of prejudice towards any version of transgender individuals. The 2019 law defines transgender persons to include intersex people, hijras, jogtas, kinnars, as well as trans-men, trans-women, and genderqueers; however, these latter two groups are not specified. This definition is similar to that of the 2018 bill. A transgender person is someone whose gender does not correspond to their biological gender, according to both the 2019 legislation and the 2018 law.

A transgender person may apply to the district magistrate, in accordance with the 2019 act's requirements, for a transgender person certificate, which will grant them the authority to have their name changed on their birth certificate and all other documents amended to reflect such a change. However, a transgender person cannot be recognized as either male or female without first applying to the district magistrate for an updated certificate following sex reassignment surgery. This is identical to the rules of the 2018 bill. The 2019 act also offers protection for transgender youth and directs organisations and states to develop proper transgender welfare programs. Similar to the 2018 bill's provisions, the provisions enlisted in the 2019 act need a court order to separate a transgender child from their family. However, unlike the Rights of Transgender Persons Bill of 2014, neither the 2018 bill nor the 2019 statute offer transgender persons any special accommodations in places of employment or education. Two percent reservations were allowed in public employment and educational institutions under the 2014 statute. Similar to the 2018 law, the 2019 act imposes a fine and a period of imprisonment of not less than six months but not more than two years for offences against transgender individuals. Both the 2018 bill and the 2019 statute include provisions for the establishment of a National Council for Transgender Persons. In accordance with its authority granted by the 2019 Act, the government issued the Draft Transgender Persons (Protection of Rights) Rules, 2020, on April 18, 2020, requesting public input. This regulation includes requirements for applications for identity certificates, identity certificates for transgender people, and procedures for identity certificates for gender changes. Measures taken by the relevant government for transgender people's welfare, education, social security, and health.

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<sup>12</sup> Act No. 40 of 2019

## **2.5 Conclusion:**

While enacted laws cannot overnight change the attitude of an individual, gender sensitization mechanism stands as the most effective way to change the behaviour of the common people against LGBTQ groups. However, gender sensitization mechanisms should be practiced consciously, knowingly as well as must be culturally sensitive. This also needs to be incorporated in the Education Policy, so that the children may learn it from the beginning while having an agreeable attitude for gender variant grounds must be inculcated in the home and within the family. They should be educated to have empathy towards the LGBT community. While we are discussing the human rights of a certain category of citizens, it is important to note that this classification is being done with the intention of conferring additional rights and safeguards against discrimination. Therefore, it is not necessary to establish a unique legal framework for them. It is necessary to make changes to any and all of the laws that are already in place that discriminate against this group of individuals. Marriage is the socially recognized status of a romantic partnership that consists of two people living together under the same roof, and the final consequence of sexual orientation tends to be living together with the person who is appreciated. Many nations throughout the globe have moved to make marriages between people of the same gender legitimate. The Supreme Court of India also sought the government's response to pleas to allow solemnization of same-sex marriage under the Special Marriage Act 1954 (The Hindu, 2022). If same-sex marriage is legalized in India, then all of the rights that are associated with a person's marital status, such as the validity of their marriage, the ability to get a divorce or a judicial separation, the right to child support, adoption, and succession, will automatically be applicable to same-sex couples. This will further open up Pandora box of various complicated legal issues concerning rights of the members of the LGBT community. Keeping this thing in mind, existing laws should be amended in such a way that the future legal complications may be minimized to a considerable extent.

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## **3. Comparative Analysis of Trans-Gender Laws of India and USA**

**Dr. Vidyottma Jha**

Advocate,  
Supreme Court of India,  
India.

**Abstract:**

*In recent times, there has been a lot of discussion and media hype with respect to Lesbian, Gay, and Bisexual & Transgender (LGBT) persons. But the most important question that has surfaced before the world community today is whether the rights of the gay or lesbians are included under our basic human rights. These inquiries have taken center stage even at the United Nations. Besides, the United Nations has been working with Member States in order to disacknowledge bigotry and interdiction primarily based on homophobia and transphobia. There has been a remarkable shift in the thought process and legal aspect over the past 20 years in various countries across the globe. In fact, approximately over 30 countries have legalized homosexuality. Number of mass movements, resistance, continuous efforts from the U.N., various NGOs internationally, and representatives of Member States to guarantee the human rights of LGBT persons has gained momentum like never before. Also, there has been efforts being made towards the global inclusion of LGBT rights in our basic human rights. Still the trajectory of progress is lopsided and dented. There is no headway with respect to the protection of the people of this community at places of work. The discrimination towards LGBTQ is primarily based on sexual orientation or gender identity. If at all any kind of protections exists they are either inadequate or unenforced. Thus, there is a need for stronger methods and laws to provide the LGBTQ a level playing field.*

**Keywords:**

*LGBTQ, Human Rights, Homosexuality, United Nations.*

The word 'Transgender' is a blanket term which refers to people who have different gender identity from the sex assigned to us since birth. The term 'Transgender' started coming into use in the late 20<sup>th</sup> century though the people who come under this category have always existed in every culture throughout the history. It is only now that we have started discussing about the Trans people and their position in our society. The Trans community is a diverse community. Some of them are identified as Tran's men or Trans women whereas few describe them as non-binary, genderqueer, gender non-conforming, agender, bigender or other identities.

### **3.1 India and the Trans Community:**

India is changing and we may call it as 'New India'. This is because the society and the thought process in the given society have changed by leaps and bounds. As a result of the

changes that have occurred in the social fabric the entire pattern of belief has changed and so has the judiciary. The Supreme Court of India in September 2018 gave a landmark judgement with respect to the LGBTQIA+ community in India. It was a historic moment in September 2018. The judgement struck down the Section 377 of Indian Penal Code and thereby approving sexual relations between adult people of the same sex which was unlawful until then. The government laid emphasis on the significance of including people from various groups and identities.

In fact, the present government has pressed on the importance of including many groups and identities of India which remained on the edge under the previous regimes. The government has acknowledged the changes that the society is going through and that nobody should be isolated.

Due to the changes and growing acceptance in society the Transgenders acquired more tolerance and recognition in past few years and also became a part of the government. In 2014, the Transgenders began to identify themselves as 'Third Gender' and on 6<sup>th</sup> September 2018, with the allusion to Section 377 of the Indian Penal Code, the group came to be legally accepted. The Indian Law does not proscribe to make symbolic same sex marriage. Since 2019, the transgender women have also got the right to record their marriages according to the Hindu Marriage Act by way of the decision of the Madras High Court.

The Ruling party upheld the ruling of the Apex Court on the decriminalization of homosexuality. It is thus believed that the transgender community may get to see greater inclusion, tolerance and normality. It is further believed that since it is the rule of law the people must honour the variegated community and group that exist in the society and those who do not concede they still are required to do so.

The Transgender have been stigmatized in the society since time immemorial. Our government and judiciary have tried to diminish this stigma. The movies have a greater and deeper role in changing the perspectives of society be it any aspect including the lives of Transgenders that are part of our system. Cinema acts as a right medium in changing the outlook of the masses. Initially, the Transgenders were seen in comic or villainous role but now the movies have become more realistic and are trying to portray the true agonies of Transgenders. All this could happen due to the landmark judgement passed by the Supreme Court for Section 377. Now the society has become way more aware.

The young people of India have played an indispensable role in removing this slur. The Supreme Court has established the foundation for respect for this community so now the New India which comprises mostly of young population is trying to accept and embrace the changes.

### **3.2 The Human Rights Violations:**

The Hon'ble Supreme Court of India in its various judgements has reiterated that human rights are supreme. Few landmark judgements with respect to the violation of Human Rights are as follows:

### **3.2.1 M.C. Mehta vs. Union of India<sup>1</sup>:**

This case was related to Bhopal Gas Tragedy. Mr. M. C. Mehta filed a Public Interest Litigation for the tragedy that occurred due to the poisonous gas leakage by a plant in Bhopal. In this case the scope of Article 21 and 32 of the Constitution of India was extended by the Court.

### **3.2.2 Naz Foundation vs. NCT<sup>2</sup>:**

In this case the Naz Foundation (India) Trust challenged the constitutionality of Article 377 under Article 14, 15, 19 and 21 before the Delhi High Court. The Foundation argued that Section 377 reflects a superannuated understanding of the purpose of sex as a means of procreation and has no place in a modern society. Further, the police detonated the provision which held back the efforts aimed at preventing the spread of HIV/AIDS. The Foundation also cited an instance as an example from an incident that happened in 2001 in Lucknow where HIV prevention workers were distributing condoms to homosexual men who were arrested on the allegation that they were conniving to commit an offence. The Naz Foundation also argued that this provision was being misused to punish the consensual sexual activities that do not happen to be peno-vaginal. Thus, the Delhi High Court gave a ruling in the year 2009 with respect to Section 377 that this section cannot be used to punish the sex between two consenting adults. The court said that it is the violation of right to privacy and personal liberty under Article 21 of the Constitution. The Court held that the classifying and targeting of homosexuals violates the fundamental rights viz. right to privacy and personal liberty guaranteed under Article 21 of the Constitution. Besides it violates human dignity which is the nucleus of the Indian Constitution. The court decriminalized the sexual activities which were considered against the order of nature which included homosexual acts according to the Section 377 of the Indian Penal code. Several organizations and individuals challenged the decision of Delhi High Court in the Supreme Court arguing that the right to privacy does not include the right to commit any offence. Also decriminalizing homosexuality could be detrimental to the institution of marriage and might entice the young people towards homosexual activities. The Apex court overruled this verdict of Delhi High Court in 2013 in Suresh Koushal case and held that the decision of decriminalizing homosexuality can only be done by the Parliament and not the Court.

### **3.2.3 NALSA vs. Union of India<sup>3</sup>:**

This is the landmark judgement where Court for the first time acknowledged the rights of the Transgenders as 'Third Gender' and the non-binary identities ordered the government to treat them as minorities. The court also upheld the fundamental rights of the Tran genders and ordered to provide them with reservations in jobs, education and other amenities.

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<sup>1</sup> 1987 AIR 965, 1986 SCR (1) 312.

<sup>2</sup> Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi High Court 2009) Archived 26 August 2009 at the Way back Machine

<sup>3</sup> (2014) 5 SCC 438<sup>3</sup>

### **3.2.4 Navtej Singh Johar v UOI; Akkai Padmashali v UOI<sup>4</sup>:**

In September, 2018 the five judges Bench with one accord struck down Section 377 of the Indian Penal Code to the extent that it criminalized the same-sex relations between consenting adults.

The Section 377 of the Indian Penal Code classified the sexual intercourse between same sex people as ‘unnatural offence’ which is ‘against the order of nature’ for which 10 years imprisonment was prescribed. This provision was a Victorian-era law which pulled through the 21<sup>st</sup> century. As per the reports from across the globe there are 123 countries in the World who have never penalized or decriminalized homosexuality whereas there are 57 countries that have actively criminalize same-sex relations. According to Indian Law, the LGBT individuals are now lawfully allowed to engage in consensual intercourse. In addition to this, the Court has upheld provisions in Section 377 which criminalizes non-consensual acts or sexual acts performed on animals.

The judgment collectively cited fundamental rights violations in reading down Section 377. They found Section 377 as discriminating against individuals on the basis of their sexual orientation and gender identity which violates Articles 14 and 15 of the Constitution. Hence, they ruled that Section 377 violates the rights to life, dignity and autonomy of personal choice under Article 21. Lastly, they found that it impedes an LGBT individual’s ability to fully realize their identity by violating the right to freedom of expression under Article 19 (1) (a).

### **3.3 Globalization and Trans Community in India:**

The developing nations like India have number of issues to deal with along with the mobilization of ‘third sex’ and the ‘sexual character’ as legislative issues further arousing the predominant issues such as citizenship, human rights, social personality and convention.

Globalization is primarily the transfer of ideologies past the economic borders and supranational interchange along with international exchanges. In the case of issues with respect to sexuality, the globalization results in a sort of repressive attitude towards the same. The effect of globalization on ‘third gender’ with respect to acceptance of what contradicts the ideologies bound by the traditional rules of nature comes from the deep-rooted cultural framework of a country. Nevertheless, what efforts the country takes having an extremely positive outlook towards the social acceptance of what was once contemplated as an interdiction seems formidable. But the society needs to untie itself from the existing boundaries and think from the perspective of the ideals that our Constitution beholds. The Transgender community like any other community must be treated fairly and on equal footing in every sphere be it political or economic aspects as the source of the rights comes directly for the Constitution and not from the wounded ideologies of the society which is in contradiction with the legal and political framework of the country.

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<sup>4</sup> (2018) 10 SCC 1 (Navtej Singh Johar vs. Union of India)

### **3.4 United States and the Transgender Community:**

The Federal statutes in the United States of America does not explicitly protect people from gender identity-based discrimination in any field be it employment, education, housing, public accommodations or any other streams. The Transgender people exercise the right to marry individuals in the United States, irrespective of their current gender identity or birth sex. But the courts are yet to ponder over the constitutionality of recent policies which tend to restrain the transgender people to serve in the military. The United States' federal system of governance has decentralized its policy-making and approbates a blending of policies and laws among federal, state, and municipal governments.

The transgender rights in United States vary markedly by jurisdiction. In the year 2021 by mid-April there were approximately 117 bills introduced in 33 states to regulate the rights of transgender people.<sup>5</sup>

The Supreme Court ruling on transgender rights in 2020 in the case of *R.G. &G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* held that the Title VII protections against sex discrimination in employment would extend to transgender employees. Besides, the Equality Act, if passed, might as well prohibit the discrimination on the basis of gender identity in employment, housing, public accommodations, education, federally funded programs, credit and jury service.<sup>6</sup>

Few lawsuits have argued on the Equal Protection Clause of the federal constitution or federal laws that prohibit discrimination based on gender identity. In fact, U.S. President Barack Obama issued an executive order which prohibited discrimination against transgender people in employment by the federal government and its contractors. In the year 2016, a letter was issued by the Departments of Education and Justice to the schools who received federal funding which interpreted Title IX protection to apply to gender identity and transgender students and advised schools to use a student's preferred name and allow the use of bathrooms and locker rooms to the student's past the gender identity. In US, the recognition and protection against the discrimination is provided by some states and local jurisdictions but only to an alternating point.

If we closely analyse, we find, a majority of people in United States have become more tolerant towards the transgender people. They want their country to extend more support and protection to Transgender people. They have disagreed that the transgender people are violating their culture in anyway and that they are not perturbed from exposing their children to them. They further argue that the society in U.S. has gone too far in and allows its people to dress and live as one even though they were born another. According to an LGBTQ advocacy group in March 2021, the State legislators in United States have come forth and filed 82 bills which might impact the rights of transgender people.

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<sup>5</sup> Krishnakumar, Priya (April 15, 2021)

<sup>6</sup> House Passes the Equality Act: Here's What It Would Do". NPR.org. February 24, 2021.Retrieved April 23, 2021(<https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>)

The human Rights Campaign President Alphonso David in a statement "Progress in the fight for equality has always come in fits and starts but nevertheless marches forward. We know we are on the right side of history."

### **3.5 Challenges the Trans People Face:**

The Trans people have become visible to a great extent in both popular culture and in daily life. But they still face the challenges like discrimination, stigma, and systemic inequality. Despite the decision passed by U.S. Supreme Court the transpeople lack legal protection and face discrimination in the work place. There is still no comprehensive federal non-discrimination law which would include the gender identity. This clearly shows the Trans people still lack legal recourse.

The other problems of Trans people include that they live in elevated rates of poverty and it gets higher if they are of colour. The data reveals that around 29% of Tran's adults live in dire poverty; followed by 39% Black Trans adults, which gets hiked at 48% if they are Latinx Tran adults and up to 35% of Alaska Native, Asian, Native Americans and Native Hawaiian or Pacific Islander Trans adults. Besides this, the Trans people still face a significant level of stigma for over a century as they have been characterized as mentally ill, socially digressive and sexually acquisitive. They are often ridiculed by a section of people in society who do not understand them and rather bully them, harass them and commit serious violence against them. Due to all these issues and stigma they are unable to access necessary services for their survival like housing. There are only 30% women's shelters that are willing to house trans-women. With the recent progress in legal system approximately 27% of Tran's people have been fired, not hired and denied promotion due to their identity. The Trans people, many times have refrained from exercising their rights such as basic right to vote as they fear the discrimination at polls. Not only this, the trans people also experience intimate partner violence which is up to 54% as per the data while 47% are sexually assaulted and one in ten are physically assaulted.

According to the reports of the HRC Foundation analysis it is found that 22% of Tran's people and 32% of Trans people of color have do not have health insurance coverage. To add to this, 29% of Trans adults i.e. more than a quarter have been refused health care by the doctors because of their gender identity. This data itself reveals the situation of health care system that fails to meet the needs of the Trans community. The Trans community also lacks the accurate identity documents due to which they are unable to access the emergency housing or any other public services. Without proper identification, everything becomes difficult like travelling, registering for schools or accessing many services that are considered essential to function in society. At many places there is a requirement for the evidence of medical transition which could be exorbitant and is not something all people would go for; also, it might be unaffordable for some.

### **3.6 Conclusion:**

The social organizations, NGO's, media and the judiciary are all working to remove the differences, discriminations, disparities, stigma and harassment that the Trans people as the marginalized community go through in their lives. They have tried to set a progressive

pattern where people could think, understand, acknowledge the co-existence of the Trans community and it is this approach that has made a critical difference. Also, the Human Rights Campaign is committed to support and advocate the causes and issues of Trans Community. Still a large proportion of discrimination and inequity persists in society which is yet to be addressed. In these cases, the Parliament is under the burden of ratifying a potent anti-discrimination law to protect minorities like the transgender community. The jurisprudence has progressed over the years, but it alone cannot bear the load of protecting the citizens. Hence, despite the legislations people need to develop acceptance for the Trans community because there is not only the need for laws but also sensitivity to the conditions of minorities in an egalitarian democracy and much still needs.



## 4. The Freedom of Religion is the Basic Human Right

**A. Subhashini**

Assistant Professor,  
Government Law College,  
Salem, Tamilnadu, India.

**Abstract:**

*This paper provides information about human rights specifically about freedom of religion as a basic human right. It consists of articles and other things related to the freedom of religion and furthermore how UNO has the human right recognized and enshrined it under its declaration.*

**Keywords:**

*Human rights, Freedom, Religions, Conscience, Practice, Secular.*

**4.1 Introduction:**

The Human Rights is a right that everyone has no matter who we are and where we are, it is universal and it's not a privilege. Human rights are inalienable. The human rights got more recognition after the World War II when people realized that life is more than just surviving, it is to be able to live the way we want the way we like and it is a universal right.

So, the creation of UNO has one the main purpose that is to reaffirm the faith in fundamental human rights. And with the same spirit in 1948, the UNGA adopted the universal Declaration of human rights, it is also stated in the Article 18 that freedom of religion is human right. This also lays basis for modern international human rights law.

**4.2 Statement of Problem:**

Freedom of religion is a fundamental right given in the Indian Constitution. In fact, the Indian Constitution's preamble states that India is a secular country. The 42nd Constitutional amendment act of 1976 added the word 'secular' to the Preamble.

The word secular differs from region to region. The same word secular is present in France constitution but what France's secular means is that, there is no state religion and all the practices of religion must be kept in private not in public whereas it is not same in India.

India has secularism which means it gives freedom of religion and the people of India are free to practice, profess, propagate their religion in public as well as private, there is no state religion as well. India is a unique country with diversity beliefs, faith, tradition, custom and more... India respects and treat all religion equally

### **4.3 Analysis of Study:**

The British believed India wouldn't last even a decade after independence due to the amount of diversity present in India but that's not the case in India despite the fact that India has more than 8 major world religions, sub religion, castes, sub castes and sects India never lost its glory. There are problems but it ends in the moment and people continue to enjoy their freedom of religion. The framers of Indian Constitution believed that if there is no freedom of religion guarantee to Indians who stayed back in Indian after partition then it will make the Indians feel insecure and therefore the freedom of religion is enshrined in the fundamental rights article 25, 26, 27 and 28.

Under Article 25, it is stated that all person has the right to freedom of conscience and freedom to profess, practice and propagate religion as long as their acts do not threaten public order, morality and health.

This article allows the people of India to have their freedom to choose whom to believe, worship, and perform prayer, read holy books and also propagate his religion which means to discuss or preach one's religion to another. The religious freedom in India includes wearing and carrying stuff related to religion such as Kirpans is part of profession of the Sikh religion and do not threaten public order, morality and health just like how the Hindus apply tilak, Muslims wear caps or hijabs and more. It is rights guaranteed to the people of India and there is no problem in practicing religion in India.

The government may interfere in religious rights and make reform for the welfare of the people such as reforms made in Hindu customs of abolition of sati system and triple talak practice of Muslims. It is done with the consent of society for the welfare of the people.

Article 26 provides the right to every religion's denomination including the sub sections or sects to

- Establish and maintain institutions for religious and charitable purposes
- Manage their own matters of religious affairs
- Own and acquire movable as well as immovable property.
- Administer such property in accordance with law.

These rights are conditional, they should not endanger public order, morality and health.

Article 27 prohibits forcing anyone to pay any taxes on revenues that are used in payment of expenses for the promotion or maintenance or any religion or section.

Article 28 prohibits religious institutions in educational institutions that are wholly maintained out of state funds. For example, Government run schools like Sainik schools and Kendriya Vidyalaya schools cannot impart religions instruction on students. However religious instructions are exempted from the rule those which are administered by state but are established by endowments or trusts that require religious instructional in such educational institutions.

Furthermore, state recognised or state aided educational institutions cannot force any student to take part in any religious instructions or to attend any religious worship conducted in such institution.

**Bijoe Emmanuel and Ors. vs State of Kerala**

In the above-mentioned case, three children belonging to a sect of Jehovah's Witnesses had been suspended from their educational institution as they refused to sing the national anthem stating it to be against their beliefs and faith. The court gave a verdict that such a suspension on such grounds is completely against the freedom of religion.

In this way the Indian Constitution protects the freedom of religion and makes sure it is not denied to any person, despite the amount of diversity of religions present in India. As there is no state religion no person can force their beliefs and practice on others, at the same time no person is denied to practice other religion, other than his own religion. Everyone has freedom of conscience and believe whatever they like such as to be atheist or theist and more...

Universal Declaration of Human Rights has also made it clear that freedom of religion is the basic human right which is mentioned in article 18 of its declaration... It states that

Article 18 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

All the member countries of United Nations follow the fundamental human rights as declared and accept it as universal law.

#### **4.4 Conclusion:**

The freedom of religion is a basic human right as guaranteed by the world's largest organization that is UNO and also the largest democratic country that is India. Many other countries also have secularism and have different views on the concept of freedom of religion. Indeed, all independent religious freedom can't be fully realized unless other human rights are respected. And when the government violates their people's right to believe and worship freely, it will jeopardize all the other human rights. It is the religious freedom that is key element of an open and stable society.

## 5. Is Juvenile Crimes are Prevailing in Society?

### A. Subhashini

Assistant Professor,  
Government Law College,  
Salem, Tamilnadu, India.

### S. Sharan

IInd Year BA.LLB,  
Government Law College,  
Salem, Tamilnadu, India.

#### **Abstract:**

*For the past 15 years the numbers of the Juvenile crimes are increased due to this the health of the society is affected a lot. These are happening because of the children are mentally and physically are affected by the toxicity of the society. Due to these offences are happened that leads to very dangerous and also it impacts in the development of the country's growth in international level. These crimes are existed only by the attraction of the Drugs, Social Media, Bad Company of the children in the adolescence age; Racial Discrimination are inserted in children mind in their young age itself & also the influencing of Movies.*

*To overcome this problem the government of India as to take further effort to control the poverty and should provide the healthy education to all the children who are all wandering the streets & railways. This illegal activity is the disease to the country it should be cured absolutely otherwise the society may face the consequences. Here there is the strong support of the parents and to take care of their children activities. By this way they will restrain them to develop delinquent personality. The Juvenile Justice Act 2000 is enacted to provide care and protection to the children by the government of India. The main objectives of the act to maintain public safety, develop skills, habituate & rehabilitate youth & successfully reintegrate youth into civilization. Government as established Youth Detention Center (YDC) for the Juvenile Delinquency to reform them and rehabilitate from the drugs and to give counseling to them. It is also called as observation home for the delinquency, this home the educational facilities to the children who interested in studies. Children are involving in illegal activities only by the situation of the family and economic factors*

**Keywords:** Juvenile, Crimes, Anti-Social Behavior, Delinquency, Drugs, Attractions, Economic Health, Toxicity, Society, Family, Adolescence, Economic Factors, Economic Development and Growth.

#### **5.1 Introduction:**

Major offences of society I the main causes of development of the country's economic growth. Now-a-days the Juvenile crimes are also becoming high rate in the association. Juvenile Delinquency means the criminal behavior committed by the children under the illegal age of adulthood.

It is almost an outcome of rapid urbanization and industrialization of modern times. This has almost become a universal problem in most of the industrialized countries. Juvenile Crimes are proving to be the dangerous to our community.

Who commits the Juvenile unlawful act?

One who;

- a. Run away from home
- b. Gets bad company
- c. Brought up in the bad environment
- d. Fails in Love
- e. Visits gambling Centers
- f. Attracts towards drugs
- g. Attracts towards movies of crimes
- h. Don't have self-confident
- i. Hate the society
- j. Attracts to sexual matters to do
- k. Wandering on the streets and railway stations
- l. Don't have interested in studies etc.,

There are considerable variations in the socio – cultural economic & psychological bases of causation of juvenile delinquency across the societies in the global. The laws governing deviant behavior among children as well as adults have also under gone a drastic change.

The handling of misbehaving individuals has got developed into a highly civilized one and lot of change to the existing laws also being affected in the background.

Juvenile delinquency is a common problem everywhere how the communities conceptualize. It is the thing which matters most of the facts that delinquent behavior is a defined behavior only when a child is defined delinquent he is delinquent, otherwise not.

## **5.2 Statement of the Problem:**

Teenagers under the minor age have taken a similar way that increasing the risk of executing the crimes by them. Poor Socio – Economic status, Insensitive activities of the parents, feeling of inferiority, Lack of attention and many other causes can lead to various types of psychological issues in the children and adolescents.

## **5.3 Research Questions:**

- a. What are the main causes of crimes?
- b. Is Juvenile Crimes will affect the development of the Country?
- c. Is family is considered to be the primary social institution?
- d. Why the family situations are also the cause of juvenile illegal acts?
- e. What are the remedies to Control the juvenile delinquency in the society?
- f. Is the Societies is generating the teenager's criminals?

#### **5.4 Hypothesis of The Study:**

Individuals need to be responsible for their own actions. An understanding of root causes cannot and should not be seen as a way to absolve us from personal accountability. However, while individuals have an obligation to act responsibly and with respect for their fellow citizens, communities have a responsibility to address those conditions, which hinder healthy development and can become the breeding ground for crime. The root causes of crime are well documented and researched. Crime is primarily the outcome of multiple adverse social, economic, cultural and family conditions. To prevent crime, it is important to understand its roots.

Juvenile delinquency is an enormous problem in India by which most of the youth spoil their lives. Because of juvenile crime and related problems youth, their families, and entire society is suffering multiple the problems and consequences. Not only does the problem affect the victims of the crime; it also affects the juvenile delinquents' family, the future, and society as a whole. The most obvious people affected by juvenile delinquency are the victims.

Nurturing child is a crucial in every child's life and if provide proper care, attention in a right way the child grows in constructive manner. Children behave in a good manner when the factors like socio-economic condition, psychological condition, surrounding environments etc. are good and positive and which support them positively in shaping of their life. Physical, psychological moral and spiritual development makes children competent conscious and makes them able to understand their capabilities. On the other hand, detrimental environment lack of basic requirements, Poor parenting care and supervision etc. are some of the major factors that induce child to become criminal or juvenile delinquent. The problem of juvenile delinquency not only affecting on the family but also affecting on the society at large. The term juvenile delinquency refers to the violation of criminal code and or pursuit of certain patterns of behavior disapproved of for children and young adolescents. The second United Nations Congress on the prevention of crime and treatment of offenders (1960) pointed out that if the term juvenile delinquency is restricted to those juveniles in the country who have committed criminal offences, it would seem that no universal definition is required. It is observed that majority of the children who are in conflict with the law have committed miscellaneous crimes or minor offences like vagrancy truancy, begging or alcohol use etc. some of those offences are known as status offences. The main concern area is the increasing juvenile crime rate in the overall crimes committed by children due to various socio-economic and psychological factors. Which are caused for increasing rate of juvenile delinquency in India? Through the present study, efforts have been made to study causes and explore the various rehabilitation measures taken by government

The study postulated that although there are different factors that Impact on the development of child character, the family plays a central role in child development and consequentially impacting on the character of a child. In order to critically analyze the hypothesis of study, the paper reviewed the concepts of juvenile delinquency and family. Although the paper centered on the family factors influencing delinquency, it equally attached premium on the non-family factors influencing levels of juvenile delinquency.

The study found out that there are several notable family-related factors that impact on child crime. These include parental attitudes, the degree of family cohesion, physical violence, and uninvolved parenting. There are also non-family factors that impact on juvenile delinquency, which include the failure of the juvenile justice system, poverty, a lack of access to education, drug abuse and genetic problems.

### **5.5 Remedies to Optimum the Juvenile Crime Rate:**

Rehabilitation homes should be developed according to the children and counseling shall be provided to children to recover from it

- a. Government should implement the socio-economic policy.
- b. To provide healthy education for below 14 years age of children under the Right of Children to Free and Compulsory Education Act 2009.
- c. To provide better standard of living to the children who are homeless and helpless.
- d. To deliver the awareness to people about the impacts of the juvenile crimes and to call them for joining their hands to manage it.
- e. Establishment of Special Juvenile Police Force Unit to oversees these matters especially.
- f. To help of supplying enough off fund facilities to NGOs (Non-Governmental Organizations) and also Social activists to support in this issue.
- g. Avoid the supply of drugs to the school students.
- h. Make to realize the reality of life among the students mind and to give self-confident program to the children.
- i. Improving the social environment- slum areas, busy market places, gambling centers' etc., to prevent children to get polluted.
- j. Not to involve the children in the occupations at the age of minor, because child labour also leads to increasing of juvenile crimes in the community.

This study is mainly related to the causes & impacts of juvenile crimes in the society. On this research we came to know that the society is become unhealthy. In India the city wise the analysis as gone on this the northern states that are affected by poverty and due lack of education leads to involvement of crimes by the teenagers.

The Analyses says crimes are happened on bases of self – hatred of individual on the activities the society. Reasons for committing a crime include greed, anger, jealousy, revenge, or pride. Some people decide to commit a crime and carefully plan everything in advance to increase gain and decrease risk.



Crime Triangle identifies three factors that creates a criminal offense

A- Desire of a criminal to commit a crime

B- Target of the criminal's desire,

C- The Opportunity for the crime to be committed.

### **5.6 Conclusion:**

Youth in the juvenile justice system should not have to fear the very facilities that are being utilized for their treatment and rehabilitation. However, many youths are being subjected to abusive, unlawful, and inhumane conditions of confinement. Detained and committed youth in need of education, treatment, health care, and legal counsel have the right to be protected from violence, unsanitary conditions, and inadequate access to counsel. Research shows that subjecting youth to such harsh confinement conditions increases rates of violence and recidivism. In a society that already faces daily violence and crime, deficiencies in the care of incarcerated youth serve only to further threaten the well-being of our children, families, and communities.

Beyond the Walls is an important resource for all those who are committed to improving the quality of care received by juveniles in detention and correctional facilities across the country. It is designed to be a reference that helps youth advocates, parents, attorneys, and program administrators safeguard and maintain the rights of youth in confinement.

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## About the Editor



***Mrs. A. Subhashini***

*The Author is presently working as an Assistant Professor in Government Law College, Salem, Tamilnadu. She is a prolific academician into the teaching for the past 14 years. She has been active participant and convenor of Seminars, Moot Court, Conferences and she has presented papers on wide range of topics. She has authored books and published papers in various seminars and conferences.*



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A-503 Poorva Heights, Pashan-Sus Road, Near Sai Chowk,  
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