



# Milestone for LGBTQ Rights

## Why in News

The **senior advocate Saurabh Kirpal** could be India's **first openly gay judge**. After deferment for four times, the Supreme Court Collegium has finally recommended his name as **judge of the Delhi High Court**.

- Although **conflict of interest** was claimed as the excuse for deferment, it has been a popular argument in legal circles that the delay in recommending his name was due to his sexual orientation.
- If selected, his elevation will mark a key turning point in LGBTQ rights. LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer or questioning.
- Earlier, the European Parliament had declared the **European Union an “[LGBTIQ Freedom Zone](#)”**

## Appointment of a High Court Judge

- **Article 217 of the Indian Constitution** states that **the Judge of a High Court shall be appointed by the [President](#) in consultation with the [Chief Justice of India \(CJI\)](#), the [Governor of the State](#)**, and, in the case of appointment of a **Judge other than the Chief Justice, the Chief Justice of the High Court**.
- The **Second Judges Case (1993)** introduced the [Collegium system](#), holding that **“consultation” really meant “concurrence”**.
  - It added that it was not the CJI's individual opinion, but an institutional opinion formed in consultation with the two senior-most judges in the SC.
- Judges of the higher judiciary are appointed only through the collegium system and the **government has a role only after names have been decided** by the collegium.
- A **High Court (HC) collegium** is led by its Chief Justice and four other senior most judges of that court.
  - The names recommended for appointment by a HC collegium reaches the government only after approval by the CJI and the SC collegium.
- The government's role is limited to getting an inquiry conducted by the Intelligence Bureau (IB) if a lawyer is to be elevated as a judge in a High Court or the Supreme Court.
  - **Intelligence Bureau (IB):** It is a reputed and established intelligence agency. It is authoritatively **controlled by the Ministry of Home Affairs**.
- It can also raise objections and seek clarifications regarding the collegium's choices, but if the collegium reiterates the same names, the government is bound, under Constitution Bench judgments, to appoint them as judges.

## Key Points

- **Status of LGBTQ Rights in India:**

- **National Legal Services Authority Vs. Union of India (2014):** The SC observed that “**recognition of transgenders as a third gender** is not a social or medical issue, but a human rights issue”.
- **Navtej Singh Johar vs. Union Of India (2018):** The SC **decriminalised homosexuality by striking off parts of Section 377 of the Indian Penal Code (IPC)** which were held violative of Fundamental Rights of LGBTQ Community.
  - The SC held that **Article 14 of the Constitution guarantees equality before law** and this applies to all classes of citizens thereby restoring ‘inclusiveness’ of LGBTQ Community.
  - It also **upheld the pre-eminence of Constitutional morality** in India by observing that equality before law cannot be denied by giving precedence to public or religious morality.
  - The SC stated that the **‘Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity’** should be applied as a part of Indian law.
    - Yogyakarta Principles recognise freedom of sexual orientation and gender identity as part of Human Rights.
    - They were outlined in 2006 in Yogyakarta, Indonesia by a distinguished group of International Human Right experts.
- **Tussle Over Same Sex Marriages:** In **Shafin Jahan v. Asokan K.M. and others (2018)** case, the SC observed that choice of a partner is a person’s fundamental right, and it can be a same-sex partner.
  - However, in February, 2021, the **Central Government opposed same-sex marriage** in Delhi High Court stating that a marriage in India can be recognised only if it is between a “**biological man**” and a “**biological woman**” capable of producing children.
- **Transgender Persons (Protection of Rights) Act, 2019:** The Parliament has passed the **Transgender Persons (Protection of Rights) Bill, 2019** which has been criticised for its poor understanding of gender and sexual identity.
- **Challenges Faced by LGBTQ Community:**
  - **Family:** The problem of sexual orientation and gender identity leads to fighting and family disruption.
    - Lack of communication and misunderstanding between parents and their LGBTQ children increases family conflict.
  - **Discrimination at Work Place:** LGBTQ suffers from the socio-economic inequalities in large part due to discrimination in the workplace.
  - **Health Issues:** Criminalisation of homosexuality leads to discrimination and results in LGBTQ people getting poor or inadequate access to services within the health system.
    - It also creates barriers to both the availability and the ability to access HIV prevention, testing and treatment services.
  - **Isolation and Drug Abuse:** They gradually develop low self-esteem and low self-confidence and become isolated from friends and family.
    - These people mostly get addicted to drugs, alcohol, and tobacco to get themselves relieved of stress and rejection and discrimination.

## Way Forward

- The LGBTQ community **needs an anti-discrimination law** that empowers them to build productive lives and relationships irrespective of gender identity or sexual orientation and place the onus to change on state and society and not the individual.
- Government bodies, especially related to Health, and Law and Order **need to be sensitised** to ensure that the LGBTQ community is not denied public services or harassed for their sexual orientation.

**Source: IE**

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