

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 6 | Issue 2

2024

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Analysis on Discrimination Faced by LGB (Lesbian, Gay, Bisexual) People in India

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ABSTRACT

Though sexual desire, instinct, and attraction are inherent human characteristics, acceptance of sexual orientation is a result of cultural perspective. Many different aspects of sexual identity, including biological sex, gender-identity, sexual orientation, and others, are influenced by both biology and psychology. Anti-homosexuality or hostility towards unnatural sexual practices were never a part of original Indian thought; instead, they are a product of colonialism and modern biased religious convictions. Researcher analyze that those people who openly declare their unconventional sexual orientations, such as being LGB (Lesbian, Gay or Bisexual), are finding it difficult to adjust and flourish at workplaces as they are harassed and bullied by their co-workers, and also denied with the opportunities to explore and grow. It is found that despite the Supreme Court's decision in National Legal Services Authority (NALSA) v. Union of India which has become a progressive stance on decriminalizing homosexuality, the LGBs are not ensured with civil rights or protection from other forms of discrimination and harassment. It cannot be denied that this social stigma has its roots to the existing intolerance and inclusiveness that this old country lost all through its multiple pre-independence invasions.

Researcher analysis that all the organizations must embrace specific rules and policies in support of this community in order to eradicate or the least prohibit discrimination based on once gender identity or sexual preferences and to produce a healthy atmosphere. It becomes the duty of legislature to make necessary changes and create new policies that paves way for this necessary social reformation.

Keywords: *Gender identity, sexual orientation, Employment, LGB (Lesbians, Gays and Bisexual), discrimination, harassment.*

I. INTRODUCTION

Same sex relationships or homosexuality are not new to our society, Homosexuality has a long history dating back from the Vedic period. Kamasutra an ancient Hindu text by Vatsyayana, which is a treatise on Human Sexual Behaviour. It has portion which discusses about the same

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sex relationships, wherein men enter into physical relationships with men, and women with women and it also describes about the people with ‘third nature’³ those men who behaves like women and vice versa. Homosexual or bisexual activities could also be found between Gods in various ancient literatures, although those were represented to be ritualistic than for sexual pleasures. Despite such immense ancient existence of LGB community within India, their significance and relevance faded with the convergence of different invasive cultures. Finally with the establishment of English Law based on Christian religious philosophy which predominantly considered sex itself as shameful and sinful⁴.

Thus, the term “unnatural sex” found its place in Indian Penal Code which had forbidden all types of sexual pleasures which were purportedly against the order of nature, whereby prescribing penal punishments for even voluntary involvement in oral sex or sodomy. It is understood that with time these factors set a new standard within the society whereby such acts became taboo and the individuals who identified themselves as LGB were shamed. Thus, the people of the community either had to hide themselves or were subjected to oppression, isolation and discrimination. They were thrown out of the mainstream society, only left behind to struggle without any social acceptance and recognition. The only way to survive, LGB had to either beg or become sex workers to earn their livelihood.

Various activists, NGOs, etc. fought hard throughout the world including in India to secure legal sanctions and protection for the existence and survival of the members of the LGB community. However, no Government or legislature took a stand to bring any law in this regard in India. Finally, Judiciary through verdict in *National Legal Service Authority vs. Union of India*⁵ recognized “Third Gender” and also decriminalized section 377 of Indian Penal Code, 1880 in 2018.

Further, even though it does not cover all the members of the LGB community, a new statute by the name Transgender Persons (Protection of rights) Act, 2019⁶ has been enforced with effect from January, 2020. However, the Act fails to address all the issues and difficulties faced by the transgender people, despite it being amended and redrafted twice at the stage of the Bill. This brings to the conclusion that the legislature has grossly either neglected or failed to

³ Ina Goel, “India’s Third Gender Rises” Again, *available at* https://www.sapiens.org/biology/hijra-india-third-gender_1, (last visited on 1st November 2023)

⁴ *Ibid.*

⁵ AIR 2014 SC 1863.

⁶ The Transgender Persons (Protection of Rights) Act, 2019, *available at* https://www.indiacode.nic.in/handle/123456789/13091?locale=en_1, (last visited on December 30, 2023)

contemplate the exact requirements of the members of the community.

(A) Objectives

- To explain the concepts of gender identity crisis and Sexual orientations.
- To analyse the current rights given to LGB.
- To analyse how judiciary can help in creating a society which will abolish the discrimination faced by LGB.
- To discuss the Social Status of LGB Community.
- To discuss the challenges faced, due to discrimination and to provide recommendations.

(B) Problem Identification

The researchers have studied all the Constitutional provisions, and other laws which act as a protector to the people of India, but found that the people belonging to LGB community lack certain basic human rights, even though fundamental rights of people are protected by the constitution of our country. The researchers found that the judiciary has played major role in recognising the human rights of LGB through judicial interventions. Moreover, the researchers have also analysed the provisions of the newly enacted Transgender Persons (Protection of rights) Act, 2019, which has left lot many areas untouched.

(C) Scope Of The Study

The scope of the research article is to study how judiciary can protect the human rights of LGB community and safeguard their Rights in Employment Sector.

II. CONCEPTS OF GENDER IDENTITY AND SEXUAL ORIENTATIONS

Throughout the world the gender and sexual orientations are perceived in binary format. However, it is now known that there are people who identify themselves as an opposite of the gender they are biologically assigned with. Thus, we may conceive that there are women who feels to be trapped in the body of man and vice versa. Gender is majorly understood to be a biological aspect but one's gender cannot be determined only on the basis of body parts. Humans are the only species that possess high degree of intellect and emotions and hence the existence of human life cannot be limited to its mere biological life but also includes psychological aspects. These people are generally termed as transgenders or transexuals, in common as an umbrella word. With the passage of 2019 Act, in India, transgenders have a legal right to register themselves as a third gender and get their legal gender changed post sex-

reassignment surgery.

Sexual Orientation refers to the emotional or romantic attractions of one individual for another. The sexual orientation is categorised as heterosexuals, homosexuals, bisexuals and asexual. Majority of the people are attracted towards opposite sex who falls within the ambit of heterosexuals. Whereas, Lesbians and Gays are the people who have emotional or romantic feelings to their same gender, while bisexuals are individuals having attraction towards the either of the genders. In the case of homosexuals, even though the provision of section 377 of IPC which criminalised sexual activities by same-sex couples has been struck down by Hon'ble Supreme Court, neither any central law has been enacted nor any judicial order passed in support of same-sex marriage, their legal status, their rights to adopt children and other rights as on date.

III. CONSTITUTIONAL & LEGAL RIGHTS OF LGB

- Article 14 provides for equal treatment towards all the individuals *including the members of LGB*
- Article 15 prevents discrimination on the ground of **sex**, race, caste, place of birth or religion.
- Article 16 prescribes equal opportunity to all the citizens (*which includes the members of LGB*) in matters of public employment
- Article 21 confers upon *the members of LGB*, right to live a dignified life with personal liberty and privacy. Right to identify oneself as a gender of one's choice can also be derived from this article.

The most vulnerable group of people in current India is the people belonging to Third Gender and homosexuals. These constitutional provisions provide rights of equality, protection against discrimination and also provide opportunity in the place of employment, even for the LGB people.

Moreover, the 2019 Act has defined "transgender person"⁷ as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person

⁷ The Transgender Persons (Protection of Rights) Act, 2019 available at <https://www.indiacode.nic.in/handle/123456789/13091?locale=en>, (last visited on December 30, 2023)

having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*. Although the act claims to provide for legal recognition of trans-people, prohibits against discriminations, encourages and promotes inclusiveness, provides for their welfare and also penalise those who cause harm to a trans-person, it has received strong criticism from the community and activists. However, the Act fails to explicitly define discrimination in the context of transgenders and does not penalise such discriminations. The penalty provided is only for any harm caused or sexual abuse with a minimum punishment of six months and maximum two years, but is silent about the punishment for rape. Even though the act mentions welfare, it fails to specify the methods and way in how welfare activities need to be carried out and more importantly, despite providing inclusiveness, the act misses to address the necessity of reservation for the community.

India is also signatory to the international convention the Yogyakarta Principles, 2006⁸ which addressed the human right issues faced by the LGB community and covered varied range of human right principles. However, in spite of this these principles are yet not wholly conceived by the law makers of the country although the Hon'ble Supreme Court took inspiration from the same while passing its landmark judgment of 2014.

IV. SEXUAL ORIENTATION IDENTITY IN WORKPLACE

The Indian stereotype mentality state that all homosexual men exhibit feminine tendencies, traits, and behaviours, whereas all lesbian women are perceived as being more masculine than their straight cis-gender counterparts. All also due to the negative stance of the state towards the LGB community, organizations treat LGB individuals as deviant and inferior (Concannon, 2008). Even organizations do not account for equal rights to same-sex families since the state has given no legal sanction to the same. Work-family policy for LGBT employees (Beauregard et al., 2007).

The employees who identified as LGB have always observed that, the other people in the workplace exclude them, talks uncomfortably, or remains silent, thus creating a alienated identity.

Evidence of Discrimination faced by LGB community

1. A Research conducted in 2011–12 of 455 LGB people in India, who worked for

⁸ The Yogyakarta Principles – 2006, available at <https://translaw.clpr.org.in/international-conventions-declarations/the-yogyakarta-principles> (last visited February 17 2024)

Indian/Multinational corporations in the software, engineering, and finance sectors. Thirty percent reported being harassed by coworkers, and eighty percent said they occasionally or frequently overheard anti-gay remarks at work⁹.

V. JUDICIAL INTERVENTION IN PROTECTION OF LGB RIGHTS

The Constitutional Courts have always been the protector and guardian of the vulnerable people of the country. The Hon'ble Supreme Court being the guardian angel of Fundamental Rights, had the occasion to deliberate and pass two landmark judgments in support of LGB community.

*National Legal Services Authority (NALSA) v. Union Of India*¹⁰

In this case the Apex Court has legally recognised the person who fall outside the criteria of male/female gender binary, including persons who identify as “third gender”.¹¹ The Court also interpreted the Constitutional provisions of Article 21 to include self-expression and gender identity within the definition of ‘dignity’ and further observed the Articles 14 and 19 to be gender neutral. The Court also expanded the scope of term “sex” under Article 15 and 16 to contain self-perceived genders along with biological genders. Further the Court made directions to the Central and State Governments to:

- 1) Legally recognise third gender
- 2) Include third gender as a “socially and educationally backward class of citizens” for the purpose of reservations
- 3) Laws be framed for safeguarding their rights, to promote inclusiveness and overall welfare of them

*Navtej Singh Johar v. Union Of India*¹²

The Hon'ble Supreme Court further through this landmark judgment recognized the Right to Privacy of every individual irrespective of gender or sex, the court also decriminalised section 377 of IPC which prescribed punishment for voluntary unnatural sexual activities which included homosexuality. The Court thus recognised that every individual irrespective of sexual orientation have right to live with dignity.

⁹ M. V. Lee Badgett, “The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India” (October 2014), available at <https://openknowledge.worldbank.org/entities/publication/bd5d40a3-0247-5c44-a9eb-5675d86aea73>, (last visited on December 1, 2023).

¹⁰ A.I.R. 2014 SC 1863.

¹¹ National Legal Service Authority v. Union Of India, South Asian Translaw Database, available at <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity>, (last visited December 1, 2023)

¹² (2018) 10 S.C.C. 1.

VI. SOCIETAL STATUS OF THIRD GENDER AND LGB

The human rights and dignity of LGB people around us are abused in ways that shock the conscience, LGB people are tortured, thrown out from their own houses, Lesbian women and gay men are subjected to rapes, by their own family members, these individuals are disrespected because of the sexual orientation.

Despite of the judicial intervention, recognizing Third gender and decriminalising homosexuality, our country is still hostile and prejudice towards them, people are acceptable to family only if they agree to behave like heterosexuals.

There is no much changes brought in the behaviour of the Society, but there are some protections given, which is insufficient. Indian society finds that being transgender as weird and abnormal, and connects it to the mental status of the transgender. Education, employment, health, etc. are basic right of every individual say it a male or a female.

Decriminalizing the carnal sex has given this community a relief from the police torture and societal abuse. But still this community feels like aliens, due to unacceptance of their biological character by their own families and society, Yet the stigma of the society with regards to giving equal status as of men and women to these community has not changed, even after the recognition by the Apex Court, society still mistreats this section of population Hence due to social and economic vulnerability these people are driven in the paths of prostitution, begging and sex works for earning their bread and butter. As a result of this, due to lack of awareness and education, data suggests that HIV prevalence in Third Gender community is up to nine times higher for transgender sex workers¹³.

The transgender people use Hormone Injection for gender enhancement, and carry out the injecting themselves. Without creating awareness and counselling on safe injecting practices, people going through this process is vulnerable to HIV transmission because of the risk of sharing needles with others.

VII. POLICIES TO REDUCE DISCRIMINATION

1. Increase Acceptance and Social support
 - The institution must focus on increasing and spreading the awareness about the acceptance of LGB people.

¹³ HIV And Transgender People, *available at* https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/transgender#footnote10_ns0jp58 (last visited October 30, 2023).

2. Formulating Non- Discriminating Laws, Regulations and Policies.
 - A set of policies and Bye laws can be formulated in the employment sector favouring equal rights to all the individual working the organisation, which removes discrimination.
3. Increase Visibility and Representation
 - Greater visibility and representation may provide and promote leadership skills also promote wider societal acceptance.
4. Education and training about the gender equalities must be implemented.
5. Involving LGB individuals in the formulation, implementation, and monitoring of relevant laws, policies, and programs, including development and humanitarian efforts.

VIII. CONCLUSION & RECOMMENDATIONS

Despite of living in an Independent country, where constitution has recognised the LGB, the present status of this community is grey and does not comply with the constitutional aspirations. Even though Right to Equality and Right against discrimination and right to choose gender is a fundamental right guaranteed to every citizen of our country, the status of LGB has not yet changed.

Even where legal protection exists, the fact is that many LGB workers encounter significant discrimination and even harassment at work, forcing many to conceal their sexual orientation or to sink towards industries with a more friendly working environment.

Even though the society is taking a slow pace in accepting this community, still these people are suffering from disparities in the education, employment, healthcare sectors, moreover right of marriage has not yet recognised by our country,

Change in the society cannot be brought in a single day, rather it will take years, so it's better to change the mentality of young generation as they are the future of India.

1. Creating awareness about the Third Gender people in the secondary school education.
2. Free and compulsory Education and vocational training to the LGB community, (awareness about education)
3. Free Legal and Medical awareness about the Sex change surgery- its complications, Sexually transmitted diseases, along with free medical checkups and camps to be organized by the government.

4. Separate rest rooms for LGB, in public places.
5. Right to choose partners, is within the purview of Right to privacy and hence such rights must be accepted and must be implemented.
6. Equal employment opportunity in case of public as well as private employment must be given.

Legislature, after consulting with Transgender community shall bring upon amendment to the 2019 Act.
