

Status of Lesbian, Gay, Bisexuals and Transgender in the current society.

It's Protection & challenges

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Abstract: The community of LGBT are often rejected, tortured, discouraged and bullied in our society. Not only in India but in the other countries the LGBT community had a lack of legal and human rights. Although these rights have now been amended and as several reforms has been made with the help of precedents and rallies but yet there are several problems which is yet faced by the community.

Though the human right absolute rights given to every individual of the country and provides a framework to all the citizens to choose their own life styles that is also centred on same sex relationship. Therefore, the discrimination of homosexuality, protection of human rights and non-discrimination on the basis of sexual orientation should be on the agenda of every human rights organisation.

However, due to the decade of lesbian and gay activism few agenda was included under the human rights regarding the gay and lesbians and primarily gained attention by the US and Europe. In India, at that time had not been raised the issues of lesbian and gay rights. The only initiative undertaken in India was a gender on gender just laws organised by women's group and human rights group in 1996 where the lesbian and gay rights were discussed openly on a broad platform with people from various backgrounds.

Not only lesbians and Gays but also other minorities such as transgender, hijras, prostitutes also challenge the same norms as heterosexuals, patriarchy, monogamy and controls of women sexuality. At one level the norms of the family in India has to be questioned from its very roots as the law should broaden the concept of family and has not to be judged and believed from the view of hetro-patriarchy but also through other views that reflect lived realities.

This paperback has focussed on the legal rights and Status of lesbian and gay men, transgender and bisexuals and will also attempt to state some extraordinary fights against discrimination by the community.

Keywords: Lesbian, Gay, Bisexual, Transgender, origination, Constitutional Approach, State Laws, Section 377 of Indian penal code, Political Approach, Discrimination, Public Opinion.

I. Historical Background

From time and again the Lesbian, bisexuals, gay, transgender and queers have become a victim of inequality in our Secular Country with no intention to improve the situation by the government. Such community has to face all types of problems and torture whether mental or physical by the people who judge this community as sinned community.

The Concept in India isn't a modern start off Concept but even in the ancient India such as in the ancient Indian text Kamasutra written by Vātsyāyana dedicates a complete chapter on erotic homosexual behaviour. Religion has played a very important role in order to shape such concept. Even though in Hinduism it is not expressly mentioned about the homosexuality's morality but in Rigveda, one of the four canonical sacred texts of Hinduism says Vikriti Evam Prakriti (Sanskrit: विकृति एवमप्रकृति: meaning what seems unnatural is also natural), which according to many jurists and philosopher it is believed to be the homosexual, heterosexual and transsexual dimensions of human life, like all forms of universal diversities.

Further, In Arthshastra several types of Sexual practices done by both men and women were sought to be penalized with the lowest grade of fine. While homosexual intercourse was not sanctioned, it was treated as a very minor offence, and several kinds of heterosexual intercourse were punished more severely.¹

In 1860, During the British raj, the government Criminalised the all the sexual activities against the order of the nature which also included homosexual activities under section 377 of the Indian Penal code, 1860. For more than a hundred years India considered the homosexual behaviour as a punishable crime.

¹ Vanita & Kidwai 2001, p. 25

II. CURRENT SCENARIO

After independence it gave rise to several public debates in order to repeal section 377 and soon after a writ petition was filed by AIDS Bhedbhav Vidrohi Andolan (ABVA) in the petition committee of parliament and stated that the section 377 should be repealed on the grounds that it is violative of Article 14, Article 19 and Article 21 respectively. This parliamentary petition has however remained dormant till 1994 when media attention focused on tihar jail where the then inspector General of Police, Kiran Bedi refuses to distribute condoms to male prisoners as she claimed no such homosexuality activity is ongoing in the prison. Further she added that if there was such ongoing activity, such act of distribution will only promote the crime. ABVA used this incident and initiated a public interest litigation in the Delhi High Court for the repeal of Section 377 of IPC. The petition was filed under article 226 and 227 of the constitution. The petitioner prayed in the writ petition:

- To declare Section 377 of IPC as unconstitutional and void.
- Direct the implementation of government's National AIDS programme.
- Restrain respondents to immediately make condoms available at the dispensary in Tihar jail.
- Restraining respondents from segregating or isolating prisoners with a certain sexual orientation or those suffering from AIDS.²

The case was admitted in the high court on 8th February 1995 and was never decided.

Further, in the current scenario there have been a handful of judgements which has raised the hope that the government and the judiciary are both now concerned about the progress of the LGBT community. In the recent case of K. Prithika Yashini³ W.P. No. 15046 of 2015 where the question arose that the appellant comes under the ambit of third gender and there was no mention of the third gender category in the process of recruitment of sub-inspector. However, the hon'ble Sanjay Kishan Kaul, C.J. and Pushpa Sathyanarayana, J. Of the Madras High court were of the view that the petitioner is entitled to be recruited to the post of Sub Inspector and for declaration of her result with the hope that she would carry out the duties with dedication and commitment to advance the cause of other trans genders. The writ petition is accordingly allowed, leasing the parties to bear their own costs. And the administration also stated that that by the time the next recruitment process is carried out the respondent would have taken corrective measures for including the third gender as a category.

In the subsequent case⁴ where the Supreme Court of India, which declared transgender people to be a 'third gender', stated that the fundamental rights granted under the Constitution of India will be equally applicable to transgender people, and gave them the right to self-identification of their gender as male, female or third-gender. This judgement is a foremost step towards gender equality in India.⁵ Moreover, the court also held that because transgender people were treated as socially and economically backward classes, the community will be granted reservations in admissions to educational institutions and jobs.

Many incidents such as rally, awareness programs, and judgements had been pronounced since the foundation but all such programs had been resulted into absolute failure as a major part of the Community was yet being violated by section 377 of the IPC. The biggest and most vivid judgement of the era for the community was pronounced which led to the decriminalisation of section 377 of IPC in the case of NAZ Foundation Vs. Government of NCT and Ors⁶. The issue of Section 377 was first raised by NGO Naaz Foundation, which had in 2001 approached the Delhi High Court which had already decriminalised sexual relations between consenting adults of the same gender by holding the penal provision as "illegal". This 2009 judgement of the high court was overturned in 2013 by the apex court which had also dismissed the review plea against which the curative petitions were filed which is pending. The Supreme Court had commenced the hearing on a fresh writ petitions in this matter challenging the re-criminalisation of consensual gay sex between two adults. It had in 2013 restored the criminality of the sexual relationship the same sex persons, after the Delhi High Court had decriminalised it in 2009. At the outset of the hearing, the five-judge bench on July 10 had made it clear that it was not going into the curative petitions and would adjudicate on the fresh writ petitions in the matter.⁷

Although the central government has pleaded that the penal provision dealing with minors and animals should be allowed to remain enforced under section 377 in the statute book. This was permitted by the bench. In four different but concurring opinions, the Supreme Court in the case⁸ stated that Section 377, as far as the aspect of criminalising consensual homosexual sex goes, runs contradictory to the provisions of the Constitution. In consequence, the court has read down the provision and has declared all forms of consensual sex between adult persons who are competent to be legal. This consent, the court clarified, should be free consent without any coercion but that does not means that the community has been given all the rights as same as a normal citizens. Justice DY Chandrachud said: "Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution. Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law." But this statement does not include all

² "Strategies for Furthering Lesbian, Gay and bisexual rights In India" paper presented on Mumbai, 1997.

³ 2016(1)SCT815(Madras)

⁴ AIR 2014 SC 1863

⁵ Supreme Court recognizes transgenders as 'third gender'. Times of India. 15 April 2014. Retrieved 06 March 2019.

⁶ 2009(3)RCR(Criminal)52

⁷ "Section 377: thing you need to know" India times, Sept 8 2018. Retrieved 06 March 2019.

⁸ AIR 2014 SC 563

the rights which has been denied to them since the very begging, such as Rights like inheritance and marriage are founded in laws that assume heterosexuality as the norm. However this judgement has opened a gate for the community to enforce all fundamental rights and push the state to amend all laws to recognise their rights.

Justice Indu Malhotra said history owes an apology the LGBTQ community:

“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality.”

III. Challenges

Proceeding further, there have been several provisions inherited under the constitution of India which explicitly prohibit discrimination for the LGBT community:

Article 15 of the constitution of India States “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
- (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public”⁹

Several precedents although states that Indian Constitution bans discrimination based on sexual orientation via the category of "sex"¹⁰ and that the discrimination on the basis of gender identity is constitutionally prohibited.¹¹

In the words of Supreme Court Judge K. S. Panicker Radhakrishnan, “Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution.”

But it also has to be considered that Article 15 of the constitution will only prevent discrimination from the state and the government body but the private educational and employment institutions are not governed and prohibited under this provision. This has led to the Transgender Persons (Protection of Rights) Bill, 2016 currently pending in the Parliament which bans discrimination against transgender people in such private areas.

Despite this provision in the constitution there is no other provision which explicitly prohibit discrimination for the LGBT community by the non-LGBT people. Even some times before the LGBT people were being discriminated and were banned for serving the Indian Army, but in late December 2018MP Jagdambika Pal (BJP) introduced a bill to the Indian Parliament to amend the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 and allow the LGBT people to Serve in the Army.

IV. State Laws Relating Transgender

The State of Tamil Nadu and Karela were the first two states to start a transgender welfare policies according to which the transgender were offer free sex reassignment surgery (SRS) in government hospitals (only for male-to-female), various citizenship documents, admission in government colleges with full scholarship for higher studies, free housing program; alternative sources of livelihood through formation of self-help groups (for savings) and initiating income-generation programmes (IGP). Tamil Nadu was also the first state to form a transgender welfare board with representatives from the transgender community.¹² And Karela started giving free Surgery in Government hospitals for SRS.

Later in July 2016, Orissa also enacted a welfare benefits with all the same programs as Tamil Nadu for the transgender who are below the poverty line in order to improve social and economical status.

⁹ Article 15 of Constitution of India

¹⁰ Navtej Singh Johar v. Union of India

¹¹ National Legal Services Authority v. Union of India,

¹² Karthikeyan, Divya (25 May 2017). "Tamil Nadu, once a pioneering state for welfare of transgenders, now shuns the third gender". Firspost.

In October 2017, the Karnataka Government issued the "State Policy for Transgenders, 2017", with the aim of raising awareness of transgender people within all state educational institutions. Educational institutions will address issues of violence, abuse and discrimination against transgender people. It also established a monitoring committee designed with investigating reports of discrimination.¹³

The High Court of Uttarakhand directed the State Government in September 2018 to provide special reservation for transgender people in educational institutions. The court also advised the Government to frame social welfare programmes for the betterment of transgender people.¹⁴

V. Political Approach For The Community

The transgender even had their voting rights as a third Sex after 40 years of independence in 1994. The first transgender person who stood in the politics was Kali in 1996 for the office in Patna, Bihar from the judicial reform party followed by Munki in Maharashtra in south Bombay. Although they both lost that election¹⁵ but it resembles that the state does not discriminate in politics and give equal rights to the Transgender.

3 years later, Kamla Jain ran and won the election for the position of mayor in Katni. Subsequently Shabnam Mausi was elected to the Legislative Assembly of Madhya Pradesh in 2002, she even became the first Indian transgender to hold the public office from 1998-2003. Since then many positions has been won and governed by the transgender.

In the recent political era, under the election of 2014-2019 there were several positions which were governed and controlled by the transgender. Such as in January 15 independent transgender candidate Madhu Bai Kinnar was elected as the Mayor of Raigarh, Chhattisgarh.¹⁶ Then Manabi Bandhopadhyay became the first government college principal on 9 June 2015 when she assumed the role of principal of the Krishnagar Women's College in Nadia district, West Bengal.¹⁷

In November 2015 after a long suit¹⁸ K. Prithika Yashini became the first transgender police officer in the state of Tamil Nadu. At the time, the Tamil Nadu police had three transgender constables, but Yashini became the first transgender person to hold the rank of officer in the state.

On 12 February 2017, two transgender people were appointed by the Kolhapur District Legal Services Authority (KDLSA) as panel members for the local Lok Adalat (People's Court). After which In July 2017, Joyita Mondal was appointed to the Islampur Lok Adalat, becoming West Bengal's first transgender judge.¹⁹ In 2018, Swati Bidham Baruah became the first transgender judge in Assam. Swati, founder of the All Assam Transgender Association, was appointed to the Guwahati Lok Adalat.²⁰

VI. Discrimination Under Sports Against Transgender

There have been multiple instances where the transgender is being discriminated, humiliated and even removed on the basis of Sex. Due to which transgender had to face unemployment and even shame for the life. A Middle-distance runner Santhi Soundarajan, who won the silver medal in 800 m at the 2006 Asian Games in Doha, Qatar, was stripped of her medal just because she was a transgender.²¹ Later because of the humiliation she tried to attempt suicide but luckily survived.

Indian athlete Dutee Chand won a case against the IAAF in 2015, which permitted women athletes with high testosterone levels to compete as women, on the basis that there is no clear evidence of performance benefits.²² In 2016, some sports clinicians stated: "One of the fundamental recommendations published almost 25 years ago. That athletes born with a disorder of sex development and raised as females be allowed to compete as women remains appropriate as there is no inappropriate benefits which can be attained by those people during the sports."²³

¹³ "Transgender policy cleared by Karnataka cabinet". The Indian Express. Press Trust of India. 27 October 2017. Retrieve 2019-03-08

¹⁴ Uttarakhand HC directs state to provide reservation to transgenders in educational institutions". Jagran Josh. 1 October 2018. Retrieve 2019-03-08

¹⁵ "Accept history and move on". The New Indian Express retrieve 2019-03-08

¹⁶ "India's First Openly Transgender Mayor in Her Own Words". The Wall Street Journal. 7 January 2015. Retrieve 2019-03-08

¹⁷ IANS (9 June 2015). "India's first transgender college principal starts work". Business Standard India. Retrieve 2019-03-08

¹⁸ K. Prithika Yashini Vs. Respondent: Chairman, Tamil Nadu Uniformed Services Recruitment Board 2016(1)SCT815(Madras)

¹⁹ "India's first transgender judge Joyita Mondal wants jobs for her community". The New Indian Express retrieve 2019-03-08

²⁰ Assam gets its first transgender judge". The Economic Times. Asian News International. 15 July 2018. Retrieve 2019-03-08

²¹ "Indian silver medalist female runner at Asian Games fails gender test". International Herald Tribune. 18 December 2006.

²² Court of Arbitration for Sport (July 2015). "CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)". Court of Arbitration for Sport.

²³ Genel M; Simpson J; de la Chapelle A (August 4, 2016). "The olympic games and athletic sex assignment". JAMA. 316 (13): 1359–1360. doi:10.1001/jama.2016.11850. ISSN 0098-7484. PMID 27490137.

VII. Public Opinion On Same Sex marriages

Public opinion is not a key essential to judge the rights of any person, but it enables us to view the same community from different types of approaches and inspection. The poll was conducted in 2016 by the international LGBT Association where it was witnessed that 35% of the people were in the favour of same sex relationship and wanted everyone to have equal rights, on the other hand 35% were opposed to it claiming that the same sex relationship is illegal and should be ban.²⁴

On the other hand the Varkey Foundation in a survey found that support for same-sex marriage was higher among 18-21 year olds at 53%. Which gives us an idea that in the upcoming times there is a handful of chances that the same sex marriages should be treated as any other marriage?

According to a 2017 poll carried out by ILGA, 58% of Indians agreed that gay, lesbian and bisexual people should enjoy the same rights as straight people, while 30% disagreed of that view. Moreover, 59% agreed that they should be protected from workplace discrimination. 39% of Indians, however, said that people who are in same-sex relationships should be charged as criminals, while a plurality of 44% disagreed. As for transgender people, 66% agreed that they should have the same rights, 62% believed they should be protected from employment discrimination and 60% believed they should be allowed to change their legal gender.²⁵



²⁴ ILGA/RIWI Global Attitudes Survey on LGBTI People". www.ilga.org. International Lesbian, Gay, Bisexual, Trans and Intersex Association. 31 December 2016. Retrieved 2019-03-08

²⁵ "ILGA-RIWI Global attitudes survey". igla.org. The International Lesbian, Gay, Bisexual, Trans and Intersex Association. October 2017. Retrieved 2019-03-08