

LGBTQ RIGHTS IN INDIA

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Abstract

Human rights are basic rights which belong to every human being in the world irrespective of nationality, language, religion, national or ethnic, sex, etc., The concept of human rights is based on the center of thinking that all human beings are equal. Every human being should be treated equally so that they live in dignity. Anything that hampers dignity is a violation of human right which provides a way for discrimination. The right of LGBTQ is the most debated issues across the world which raises the question on human rights. The LGBTQ people faced serious difficulties across the world only because of their different sexual orientation and gender identity. After years of struggle for their rights many countries have started recognizing the LGBTQ rights including India. In the year of 2018, Indian Court decriminalized Homosexuality which gives a ray of hope LGBTQ community of their rights. Even though law has changed but discrimination and violence are still present. There is a need of separate laws for LGBTQ people so that their rights should legally protected under specific law and to driven out taboo regarding LGBTQ people and to make people believe that all human beings are equally entitled to human right.

KEY WORD : LGBTQ, Homosexuality, Heterosexuality, Sexual Orientation, Gender identity

INTRODUCTION

“To realize a world of equality and dignity for all, we will have to change laws and policies; we will also have to change hearts and minds. Every sector and every person can play role, speaking out to remind the world that it should not be illegal to live your life as you are and to live your life with whoever you love”

-Rick Parnell

The LGBTQ is an umbrella term which mean Lesbian, gay, bisexual, transgender and queer or questioning. LGBTQ community is loosely defined group of individuals whose sexual orientation, identity, behavior, experience or practices are differ from

the other people in the society. Earlier, LGBTQ community was referred to as the gay community but activists argued that this term did not include all the community members. LGBTQ community is referred by various terms by different people in the society like LGB, LGBT, GLBT, LGBTQ+., RAINBOW, UMBRELLA, QUEER, LGBTQIA. The LGBTQ community is continuously facing various problem such as intolerance, discrimination, harassment, non- acceptance, bullying, hatred, threat of violence etc., in the society due to their sexual orientation differ from those people whose sexual orientation is seen by the society as heterosexuality. Various countries including India, have recognized LGBTQ rights after years of struggle for their basic human rights. Despite the fact , LGBTQ rights are recognized in India through protest and courts decision but still there are gaps in the effectiveness of the rights of LGBTQ community. Legislation and policies are needed to provide LGBTQ community security, rights as well as a sense of belonging. Culture barrier must be eliminated from the society with the aid of law and everyone must accept that human rights are open to all human being regardless of their sexual orientation or gender identity. Not only in India all over the world rights of LGBTQ community is increasing and various countries have started enacting a law to give effect of LGBTQ rights and anti-discrimination law. In upcoming years, at international level major focus will be on eradicating discrimination against LGBTQ community, to provide equal rights, privileges and protection to LGBTQ community, and to educate peoples about homophobia and heterosexism.

“I do not consider myself just an ally to LGBT community, I consider myself your family. And so I am doing what we should all do with our families: I am loving you, I support you, I completely accept who you are.”

- Anne Hathaway

RESEARCH METHODOLOGY

Researcher has adopted doctrinal method therefore used primary and secondary sources such as number of articles, books, journal and newspaper and all important case law are collected from Indian Kanoon, Manupatra, SCC online e database and so on.

OBJECTIVE

The aim of this article is to explain the concept of LGBTQ, to discuss rights of LGBTQ in India perspective as well as global perspective and to provide some suggestion.

DEFINITION

The LGBTQ is an inclusive term which is widely accepted for minority community all over the world which describes individuals who are struggling with their sexual orientation and gender identities in the face of the world. The LGBTQ is a short form of lesbian, gay, bisexual and queer and each letter in LGBTQ has its own meaning. L in LGBTQ stands for Lesbian which used to describe a female who is physically, emotionally, and mentally attracted to another female. G in LGBTQ stands for gay and it is used to refer man or male who is physically, emotional and mentally attracted to another male or man. B in LGBTQ stands for bisexual and it is used to describe individual who is sexually attracted to both man as well as woman. T in LGBTQ stands for transgender used to describe an individual whose gender identity, expression or behavior is differs from their biological sex. Q in LGBTQ stands for queer which refer to someone who is neither heterosexual nor cisgender.¹

According to Yogyakarta Principle², sexual orientation denotes each person's capacity for profound emotional, affectional and sexual attraction to and intimate and sexual relation with the individual of same gender or different gender or both. In a nutshell, sexual orientation refers person's emotional or physical attraction to the individual of same sex or different sex or both. Homosexual female or male have sexual orientation for people of same gender. Heterosexual female or male have sexual orientation for people of different sex or gender. Bisexual female or male have sexual orientation for people of same sex as well as people of different sex. Sexual Orientation is divided into categories such as Heterosexuality, Homosexuality and Bisexuality Gender denotes to socially constructed characteristics of female, male and gender diverse individuals. Gender identity refers to person's internal conception of himself as man

¹ SUKANTA SARKAR, LGBTQ RIGHTS IN HUMAN RIGHTS PERSPECTIVES 21 (1st ed. 2016) .

² Arvind Narrian, The Yogyakarta Principles on Sexual Orientation and Gender Identity : Six Conceptual Advances enabled by Principles (Apr. 1, 2021, 7 :45 PM), <https://www.refworld.org>p...PDFWebresults>.

or woman or anything else entirely which may or may not conform with one biological sex.³

LGBTQ RIGHTS IN INDIA

In India, after years of struggle LGBTQ people have gained more tolerance and acceptance in India, especially in large cities. Despite of this, majority of LGBTQ people in India remain secretive because they are afraid of discrimination from their families and relatives who may regard homosexuality as a shame or sin. On 6th September 2018, the Supreme Court in Navtej Singh Johar v. Union of India has passed a historical verdict by striking down the Section 377 of Indian Penal Code, 1860 which criminalized the homosexuality.

Constitutional Provisions

The Preamble of the Constitution of India declares to secure all its citizen:- Justice (social, economic and political), Liberty (thought, expression, faith, belief and worship), Equality (of status and of opportunity), and to promote among them all fraternity (assuring the dignity of individual and the unity and integrity of the nation). Article 13 of the Indian Constitution deals with the validity of pre-existing laws and post-existing law in the light of provision of Indian Constitution. Under this Article the power of interpretation lies to Judiciary. It is the duty of court to repeal those laws which violates the fundamental rights of LGBTQ people which guarantees to all the people under Indian Constitution. Article 14 of the Indian Constitution guarantees equality before law and equal protection of law. Here, the expression “any person” refers to every individual without any kind of discrimination. Article 15 of the Indian Constitution prohibit discrimination on the basis of sex, caste, religion, place of birth etc.,. Article 16 of the Indian Constitution guarantees every citizen an equal opportunity in public employment which also has interpreted to guarantee social equality to LGBTQ community in case of public employment. Article 15 and Article 16 of the Indian Constitution empowers the state have power to make law for protection and enhancement of LGBTQ minority which are now included in the

³Shivo ghosh , Gender Identity (Apr. 1, 2021, 8:00 PM) , <https://emedicine.medscape.com/article/>.

categories of socially and educationally backward classes.⁴ Article 19 of the Indian Constitution guarantees protection of certain rights such as freedom of speech and expression etc., which also protect one's gender expression or behavior. Article 21 of the Indian Constitution guarantee every person protection of life or personal liberty which also include right to privacy and personal dignity.⁵

The word "Sex" is not restricted to biological sex i.e., male or female but it also include the individual who do not consider oneself to be restricted to male or female. Non- Recognition of gender identity violates the right of identity of an individual who do not considered oneself man or woman. The most important rights is right to choose one's own identity to life with dignity under the Indian Constitution.⁶

Directive Principle of State Policy consist in Part IV of Indian Constitution which entrusted the state with responsibility to promote welfare of people through eliminating the inequalities in status, opportunity, facilities etc., among people. So, it is also a duty of state to protect and ensure the welfare of LGBTQ community.

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Cases related to Protection of LGBTQ Rights

Naz Foundation v. Government of India⁷

The Supreme Court in this case stated that Section 377 of Indian Penal Code,1860 imposes unreasonable restrict on consensual homosexual sex between two adults which is a crime and is also a direct violation of Article 14, 15, 19 and 21 of Indian Constitution which provides basic fundamental right for the LGBTQ community. The Court declares Section 377 unconstitutional but did not strike down this section as a whole.

National Legal Services Authority v. Union of India⁸

⁴ Tanzim Surani & Mili Vakil, Civil and Political Rights Of LGBT: The Perspective of Indian Constitution (Apr.1,2021),<https://thelawbridge.com/constitution/constitution-law-/civil-and-political-rights-of-lgbt-thw -perspective-of-indian-constitution>.

⁵ Diya Dutta, *Comparative Analysis of laws developed in India, Britain & Germany with special reference to LGBTQ rights*, 6 IHLDAI 173(2020).

⁶ *Id.*

⁷ 2009 (160) Delhi Law Times 277 (India).

The Supreme Court in this case held that the Non-Recognition of Transgender community identity is violation of Article 14, 15, 16 and 21 of the Indian Constitution. Further, the Court also created the 'Third Gender' status for Transgender and also directed government to make policies for the transgender community under Article 15 and 16.

K. S. Puttaswamy v. Union of India⁹

The Supreme Court in this case states that even if only small percentage of the population is affected, the right of privacy cannot be denied. The Court held that right of privacy also includes right to the sexual orientation and gender identity.

Navtej Singh Johar v. Union of India¹⁰

In this case, the Supreme Court ruled that the Section 377 of Indian Penal Code, 1860 is unconstitutional as it violates Fundamental Rights protected under the Indian Constitution and strike down the Section 377 of Indian Penal Code, 1860.

The decriminalization of Section 377 of Indian Penal Code, 1860 is first step of recognizing the right of LGBTQ community in India but the LGBTQ rights have away long to go.

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Same – Sex Marriage

The recent verdict of Supreme Court in Navtej Singh Johar Case¹¹ removed the restriction for same sex couples to legally enter into consensual sexual relationship, but if these couples want to get married, the law is silent which ultimately lead to discrimination to LGBTQ community. Presently, in India same sex marriage is neither legal nor illegal because there is no punishment mentioned in any law in India.¹²

There is a legal aspect of marriage which confers some rights and obligation on two persons like adoption, inheritance, life insurance and any such other rights. Unfortunately, Indian laws do not provide same right to LGBTQ couples as to

⁸ A.I.R 2014 S.C. 1863 (India).

⁹ (2017) 10 S.C.C. 1(India).

¹⁰ Writ Petition (Criminal) No.76 of 2016 (India).

¹¹ Writ Petition (Criminal) No.76 of 2016 (India).

¹² Deepali M. Babar, *Homosexuality and Same Sex Marriage- Need For Legislation*, 7 PAJ 4 (2019).

heterosexual married couples. For LGBTQ Community marriage is still far-fetched dream because laws in India do not provide any provision for LGBTQ community to get married. LGBTQ community does not have the most basic rights of marriage even after striking down the Section 377 of Indian Penal Code, 1860. LGBTQ community has only option of civil union which does not include same sex marriage that itself is discriminatory in nature.

The Madras High Court in *Arun Kumar v. The Inspector General of Registration*¹³, on 22nd April 2019 have taken a positive step toward matrimonial rights of LGBTQ community. The Court permits trans woman and man to register their marriage under Hindu Marriage Act, 1955 considering it legal. Further, the Court stated that the expression “Bride” under Hindu Marriage Act, 1955 not just refer to someone born as a woman but it also refer to trans sexual.

The Transgender Person (Protection of Rights) Act, 2019

Since, after the judgment of National Legal Services Authority v. Union of India in 2014 many efforts were made to enact the law to protect the transgender community rights at Central Level. In 2014, Transgender Right bill was introduced and passed in Rajya Sabha but this bill was lapsed in Lok Sabha. In 2019, the Cabinet passed the Transgender Person Bill, 2019 in the month of July and it came into force on 10th January, 2020. This Act may be called the Transgender Persons (Protection of Rights) Act, 2019. The Transgender Persons (Protection of Rights) Act, 2019 guarantee protection of rights of transgender and their welfare. The Act was enacted after so many efforts but still have several lacunae which serve no good to the Transgender Community. The definition in the Act is outdated or profuse regarding the community and discrimination is forbidden in a chapter that lacks enforcing power, remedial steps and punitive measures. The ban on separation of child from the parent on the basis of being transgender, allowing them to separate child from their parent only through the order of Court is absolutely irrational and there is not one single procedure in the Act that directs medical professional how to treat transgender person. The Statutory body, the National Council for Transgender has no independence to carry out the function of the Act which has a mere representation five person from Transgender Community. The Act only provide the formation of National Council, however the State Council

¹³ WP(MD)No.4125 of 2019 and WMP (MD)No.3220 of 2019 (India).

should also be established as well. The Act only provides two years punishment for any kind of violence including sexual abuse against transgender person. There is no provision in the Act for those who discriminate bully or harass them to be prosecuted. The Act was enacted without consulting anyone from transgender community about their problem and requirement, and Act was passed without having single transgender person.¹⁴

GLOBAL PERSPECTIVE

Many countries have made strides in LGBTQ rights over last past decade while other more restrictive. However, huge challenges remain on the global level as LGBTQ people faces discrimination everywhere. In 1990, when the World Health Organisation recognized homosexuality as natural variation of human sexuality¹⁵, attitudes of states towards homosexuality have shifted with accepting homosexuality as normal Human behavior and guarantees rights and privileges to homosexuals. Furthermore, LGBTQ rights have major effect on foreign relation over the last decade, but controversy over the issue has remained unabated amongst all the nations. Several International Organisations such as United Nation and Human Rights Watch have taken measures but due to opposition from several members states, no official statement have released. The United Security Council released a rare statement after the Pulse nightclub mass shooting in Orlando in 2016 in which 49 peoples were killed and 46 injured, condemning the attack for targeting persons as a result of their sexual orientation.¹⁶ For the first time in this statement, United Security Council discusses the Sexual orientation which is also supported by countries like Russia and Egypt which have long history anti-LGBTQ rights.

In 2008, 66 Countries show their support by releasing a statement for LGBTQ protection before UN general Assembly but many countries opposed this. In 2011 same statement was made by Human Right Council which included the problem faced by the LGBTQ community. It was further revised again in 2015 when the United Nation Human Right Council published a report on abuse against the community in

¹⁴ Diganth Raj Seghal , Policy analysis of Transgender Persons Act (Apr. 4, 2021, 9:00 PM), <https://blogs.ipleaders.in/policy-analysis-transgender-person-act/>.

¹⁵ Sheila Mysorekar, Homosexuality is not a disease , (Apr. 4 2021, 9:30 PM), <https://www.dandc.eu/en/article/world-health-organisation-considers-homosexuality-normal-behaviour>.

¹⁶ Michael Ray, Orlando Shooting of 2016, BRITANNICA (Apr. 5, 2021, 8 : 15 PM), <https://www.britannica.com/place/Florida>.

relation to International Law commitments. 12 Agencies of United Nation such as ILO, UN Women, WHO, UNICEF, UNAIDS Secretariat, UNDP, UNODC, WFP, UNESCO, OHCHR, UNFPA and UNHCR issue a statement which show their intention to end violence, abuse or discrimination against LGBT community.¹⁷ In 2016, to examine global violence and discrimination against LGBT community, an independent expert is established by the United Nation Human Rights Council. In 2017, the annual State sponsored Homophobia report of International Lesbian, Gay, Bisexual, Trans and Intersex Associate states that 24 countries have decriminalized homosexuality and this change in law is made either by amendment in statutory law or by the way of the court judgment. The Countries such as Brazil, Canada, England, France, South Africa, Spain etc., recognized same sex marriage. The Netherland was the first country to legalize same sex marriage twenty years ago. In 2019, Taiwan was the first country in Asia to pass laws on marriage equality. In 2020, Costa Rica became the 1st Central America to legalize same sex marriage. In 2020, Municipal government of Tokyo have passed bill which prohibit the discrimination against LGBTQ community. In 2021, Japan Court ruled that ban to same sex marriage is unconstitutional.¹⁸ The Executive Director of International Lesbian, Gay, Bisexual, Trans and Intersex Associate, Andre` du Plisses says “we have seen a lot of exciting changes from decriminalized same sex relations in some countries to public apologies and marriage equality in others , progress has been slow but steady”.¹⁹ The increasing awareness of LGBTQ rights in countries like Africa, Asia, Eastern Europe , Asian etc., represent a steady shift in global LGBTQ rights movement. To make LGBTQ rights worldwide reality, countries must uphold their domestic human rights obligation while calling for reform on the Global level.

IMPACT OF COVID-19 PANDEMIC ON THE LGBTQ COMMUNITY

Even in the best times, the LGBTQ Community is the most vulnerable section of society which faces lots of difficulties in employment, healthcare or any other field, no one can visualize what this community is going through during the difficult times of global COVID -19 pandemic. Aside of lack of housing, health care, employment or

¹⁷ United Nations Human Rights Office of High Commissioner, Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and Intersex (Apr. 5, 2021, 9 :00 PM), <https://www.ohchr.org/EN/Issues/Discrimination/pages/JointLGBTIstatement.aspx>.

¹⁸ Mari Yamaguchi , Court says Japan’s ban on same-sex marriage is unconstitutional, L.A .TIMES, March 16 , 2021.

¹⁹ Tanya Mohan, The Shifting Global Terrain of L.G.B.T.Q. Rights, The N. Y. Times, June 21, 2018.

any other field, persistent bias and uneven protection of law have exacerbated the situation.²⁰

- Many older adults of LGBTQ community live alone, non-partnered and depend on their family for care and support. LGBTQ older adult also experienced physical health issues just like any other older adult which leave them vulnerable to the deadly complication during COVID-19 pandemic. Mostly, these individuals live in crowded care facilities like nursing homes or senior living communities which put them at higher risk to come in contact with an individual having COVID-19. Generally, LGBTQ community faces discrimination by people of the society which make them afraid to speak which eventually place them at higher risk.
- In all over the country, lockdown was imposed due to the spike of daily COVID-19 cases which made everyone to stay at home. Due to the lockdown LGBTQ Youth are stuck to live with their oppressors of physical and mental abuse. Mehak Sharma, a 24 year old customer service executive identifies herself as transgender female living in Kandivali. She says that it is more and more difficult for her to deal with her orthodox family during this lockdown. My family is against my gender identity even my father has announced that I am dead to him. It is horrifying and heart breaking to live under the same roof when you are presumed to be dead.²¹
- Transgender people, especially those from hijra or kinnar community are unable to earn a living because their traditional livelihoods have been impacted by the strict lockdown.²²
- LGBTQ people who are getting older and those who live alone are facing much more loneliness.²³

²⁰ Suzanne B. Goldberg, Covid-19 and LGBT Rights (Apr. 7, 2021, 9:30 PM), https://scholars.law.columbia.edu/faculty_scholarship/2678/.

²¹ Vinay Arote, IDAHOTB2020: CORONAVIRUS LOCKDOWN BRINGS IN A WAVE OF HOSTILITY FOR THE LGBTQIA+ COMMUNITY (Apr. 7, 2021, 10 : 00 PM), https://mumbaimirror.indiatimes.com/others/health-lifestyle/idahotb-2020-cornovirus-lockdown-brings-in-a-wave-of-hostility-for-the-lgbtqia-community/amp_articleshow/75784985.cms.

²² FICCI, IMPACT OF COVID-19 ON LGBTQ+ COMMUNITIES, (Apr. 7, 2021, 10:15),

<https://ficci.in>.

²³ *Id.*

- LGBTQ people have higher risk of HIV and cancer, which means that more of them may have a weak immune system that makes them more vulnerable to COVID-19.²⁴
- HIV patients on antiretroviral therapy and those on hormone replacement therapy from the LGBTQ community are stranded because of the lockdown.

CONCLUSION AND SUGGESTIONS

India is a developing country which is known as the world's largest democratic country with the minority of LGBTQ people. LGBTQ people are those who have sexual orientation differ from heterosexual people due to which they are facing discrimination. LGBTQ people are prima facie human beings so they are entitled to have equal human rights as well as fundamental rights in India. India requires progressive legislation that ensures that all people are treated equally and have equal opportunities to contribute to the nation's future, in order to accelerate its growth and development. One of the most discriminatory pieces of British Era legislation in India i.e., Section 377 of Indian Penal Code, 1860 which criminalized homosexuality has been finally repealed which gives a ray of hope to LGBTQ people for their rights. However, same-sex marriage is still not legalized. Adoption, life insurance plan, inheritance and other rights and obligations are conferred on two individuals by marriage. In a country like India, where marriage is the fundamental right for every person and so much importance is attached to the marriage but still LGBTQ marriage is not legalized. What good will it do to decriminalize homosexuality in India where LGBTQ people are still unable to marry the person they love. On 10 January 2020, The Transgender Persons (Protection of Rights) Act, 2019 came into force to protect the rights of transgender people but still has several lacunas and does not serve any good to LGBTQ people.

- The suggestions are as follows:-
- Amendment in Transgender Persons (Protection of Rights) Act, 2019 in favour of the LGBTQ community should be made such as inclusion of the term LGBTQ in the Act, right to marriage, right to adoption, right to inheritance etc.,

²⁴ *Id.*

- State should protect the rights of LGBTQ community without any discrimination such as education, employment, health, privacy etc.,
- Special law for the protection of rights of LGBTQ Community should be enacted.
- Need for legalizing the same-sex marriage.
- State Government should make effort to change society attitude toward LGBTQ community by educating the society, and by organizing workshops and seminar about their rights.
- Government should take preventive measures to protecting LGBTQ from any kind discrimination.



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