

LEGALFOXES LAW TIMES

RIGHTS OF HOMOSEXUALS: In-depth Analysis

“Whoever tries to bring us down is already below us”

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ABSTRACT

This paper deals with the human right violation of the LBGT community with a special focus on homosexuality in India and Internationally. The minority is fighting for equal rights and non-discrimination since long, where the reason, consequences, and societal attitude are explained in details. The history and constitutional stand of India have been presented with utmost clarity explaining the evolution of homosexuality in India. The International and National jurisprudence has played a major role in defining and supporting the LGBTQ community globally & locally yet they still face discrimination at the workplace, health care facilities, same-sex marriage and child adoption. These issues have been discussed in the paper along with the practical steps to overcome them where social acceptance still plays a major role in freedom and non-discrimination of the community. Along with the human rights issues, the paper also deals with the relation of a current pandemic on the LGBT community and how they're more vulnerable to COVID-19.

DEFINITION

Homosexuality is defined as an emotional, romantic and sexual attraction towards the same gender or sex, it is a greek prefix with Homo meaning 'same' and Latin root meaning 'sex'. The females are generally referred to as 'lesbians' and males are referred to as 'gay'.

INTRODUCTION

In India, like many other countries remains a minority of the population in love with the same sex which here mean men in love with men and women in love with women. This broadly confines us to the concept of “sexual orientation” and “gender identity” as a means to describe

them, where an individual is said to have an orientation on the basis of ‘choice of the sex of partner’, however, this concept did not exist for centuries as people were assumed to be heterosexual i.e attracted to the opposite gender. Further the term ‘Gender identity’ defines the conformity and non- conformity of their physical sex to their psychological sex, although there is always a majority of the population who find themselves in the position of conformity as they are born in the into physical sex which matches up to their psychological sex.

These concepts have always established their existence in Ancient India, with the evidence to be procured from the sculptures, stories and holy books. In the temps of Khajuraho, there are images of women and men embracing other women and men by displaying their genitals to each other, which acknowledges their engagement in homosexual acts¹. Mahabharata also portrays the existence of third genders, where Shikhandi, who’s born as a woman but is later identified as a male and gets married to a female. Such texts and inscriptions on temple walls may not approve of homosexuality but clearly acknowledges the existence of homosexuality. Further, the experts believe in the acceptance and embracement of homosexuality in ancient India, which was terminated by British Colonial authority in 1860 by implementing Section 377 of the Indian Penal Code.

Since then till 2018, the LGBT community which stands for lesbian, gay, bisexual, and transgender has seen various phases of establishing their legal identity and acceptance by society. This social- legal issues is not only prevalent in India but has become an international matter which needs to be resolved so as to stop the violation of their human rights. But due to unfortunate stigma, unfair laws and legal protection stand in the way of achieving the basic goal. The LGBT community has been facing discrimination at work, community, family which not only exploits their human rights but also obtrude them under the social taboo. Today, homosexuality may be accepted by the youth but still poses a challenge to be accepted in the boundaries of families, schools and organisations. Where they’re still looked down upon. Moreover, there are people in India who might not even know what LGBTQ stands for, as it is considered to be sinful and thus is it never discussed openly in public or private.

Due to the discrimination faced by them and its consequences such as weak immune system, being homeless, de-prioritization for health services, stigma and many more makes them

¹Indian today web desk, ‘Homosexuality in ancient India: 10 instances’, (July 10, 2018)
<https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> (accessed on June 3, 2020)

vulnerable to the current pandemic faced by the humanity i.e COVID-19. There have been reports of police attacking the LBTQ organizations moreover there are times when same-sex marriages are blamed to cause disasters, either manmade or natural just like in times of coronavirus². Discrimination has also been based on their right to movement based on gender, where women and men are allowed to move on the alternate days, leaving non- binary at the risk of discrimination during a lockdown³.

INTERNATIONAL SCENARIO

The rights of the LGBT community have seen a diverse phase, encompassing from the legal recognition of same-sex marriage to the death penalty for homosexuality. By 2020, there have been about 29 countries to allow same-sex couples to marry, with the latest country to pass legislation in Costa Rica on May 26, 2020⁴. Although there are still 12 countries who prescribe the death penalty for homosexuality. The battle against the unfair treatment started back in 1994 wherein **Toonen v/s Australia**⁵, it was put forward to United Nations Human Rights Committee that there has been a violation of the right to privacy under **Article 21** of ICCPR and distinguishing on the basis of sexual activity & sexual orientation violating **Article 26**, the case brought the change by repealing Australia's sodomy laws with committee decision to declare sexual orientation a part of provisions to protect status under the **International Covenant on Civil and Political Rights**. The right to equality and non-discrimination are the core principles of human rights, established in United Nations charter, the opening of Universal Declaration of Human Rights states "*All human beings are born free and equal in dignity and rights.*" Further in June 2011, the **United Nations Human Rights Council** become the first UN intergovernmental body, which adopted resolutions on human rights, sexual orientation as well as gender equality. The study further revealed the pattern of violence and discrimination faced by

²YaghoufFazeli, Al Arabiya, 'Iraqi Shia cleric Muqtada al-Sadr says gay marriage caused coronavirus' (March 28, 2020) <<https://english.alarabiya.net/en/News/middle-east/2020/03/28/Coronavirus-Iraqi-Shia-cleric-blames-gay-marriage-for-coronavirus>> (accessed on June 3, 2020)

³HALEY OTT, 'Trans woman fined for violating Panama's gender-based coronavirus lockdown, rights group says', (APRIL 10, 2020) <<https://www.cbsnews.com/news/trans-woman-fined-for-violating-panamas-gender-based-coronavirus-lockdown-rights-group-says-2020-04-10/>> (accessed on June 3, 2020)

⁴Rosie Perper, 'The 29 countries around the world where same-sex marriage is legal', (May 28, 2020) <<https://www.businessinsider.com/where-is-same-sex-marriage-legal-world-2017-11?IR=T>> (accused on June 3, 2020)

⁵*Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC)

the LGBTQ community which became a topic of the panel discussion that took place in 2012⁶. The support increased when **second resolution** took place with 25 votes in favour to 14 against, proving the effect on discussing good practices on an international platform⁷.

The influence of UNHRC has placed a major role on the international level, it is not only causing awareness globally but also gaining support from other countries to fight against the discrimination faced by the LGBTQ community. UNHRC has also passed a resolution to appoint **independent expert** to find the reason behind the grave violation present in the society. **Argentina** legislation has always been the standard for equality for same-sex gender, it has legalised same-sex marriage in 2010 along with providing the child adoption rights. Countries like Uruguay and Mexico City have followed the same path, yet the Asian countries are making slow process⁸. The major challenge still stands in countries like Iran, Nigeria and Uganda where same-sex rights are worsening with a sentence of 14 years prison terms and the death penalty⁹. There have been many violent attacks on people when revealing their gay identity, it was assumed that many times the victims do not report of the abuse they have been dealing with, due to the fear to be subjected to more abuse and unfair treatment.

The LGBT community is backed by the presence of international and national organizations, NGOs fighting for their rights such as The **International Lesbian, Gay, Bisexual, Trans and Intersex Association** which stands for to promote equality and non-discrimination in education, employment, family, health care¹⁰. The discrimination and violence faced by the community violate their right to private life, adoption and parental rights, freedom to assembly, freedom from discrimination, social benefits, serving the country like military services. To address these issues the **International jurisprudence** had played a major role. In 2009, Case of **SCHLUMPF v. Switzerland**¹¹ came forward calming the violation of respect for private life and freedom from

⁶UNHR, 'International Human Rights Law and Sexual Orientation & Gender Identity' <<https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf>> (accessed on June 3, 2020)

⁷Ending violence and other human rights violations based on sexual orientation and gender identity' <https://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf> (accessed on June 3, 2020)

⁸Eminesaner'Gay rights around the world: the best and worst countries for equality' (July 30, 2013)<<https://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>>(accessed on June 3, 2020)

⁹Ibid

¹⁰<<https://ilga.org>>(accessed on June 3, 2020)

¹¹ ECHR 2009/9 Case of Schlumpf v. Switzerland, 8 January 2009, No. 29002/06

discrimination, where the court held that Article 8 of ECHR i.e right to respect for one's "private life" includes aspects of gender identity. In 2008, the case of **E.B. v. France**¹², the court held that refusing to grant applicant authorization for adoption solely on the basis on their sexual orientation is discriminatory. Moreover, the government has granted adoption by a single individual thus the same possibility shall be there for a single homosexual. The community has also been discriminated on the basis of "age of consent" many times, it was repeatedly decided by the international courts of justice that such discrimination violates Article 14 in conjunction to Article 8 of the convention as decided in the case on **B.B. V/S United Kingdom**¹³ in 2004, where the applicant was prosecuted for the criminal offence of engaging in homosexual activities with men under 18 years while the age of heterosexual activities were 16 years of age thus violating **Article 14** of Human Rights Act, that states all of the **rights** and freedoms set out in the **Act** must be protected and applied without discrimination. It was stated in **Case of Perkins and R. v. the United Kingdom**¹⁴, that discharge from the army on the basis of sexual orientation directly interferes with the applicants right to privacy which could not be justified under the second paragraph of Article 8 stating "necessary in a democratic society" therefore discharge from armed forces on the ground of homosexuality is not violating Article 8 when read Article 14 of the Act.

It is essential to provide the LGBT community with their rights to bring an end to homophobia and transphobia abuse, to understand the community better so as to bring change and remove the limitations imposed by gender stereotypes, to protect them from all social and economic exclusion, at last, to make everyone feel proud of who they are and who they love. The United Nations mechanisms have applied international law to provided states with some practical steps in order to safeguard the rights of the LGBT community: *-protect, prevent, repeal, prohibit and safeguard*¹⁵.

- Protect people from gender-based discrimination and homophobic and transphobic violence, report, investigate, prosecute and punish the perpetrators, enact all hate crime

¹² E.B. v. France, 43546/02, Council of Europe: European Court of Human Rights, 22 January 2008,

¹³ BB v UK (Application no. 53760/00), European Court of Human Right, 10 February 2004

¹⁴ Perkins and R. v. United Kingdom (Applications nos. 43208/98; 44875/98, European Court of Human Rights

¹⁵UNHR, 'BORN FREE AND EQUAL' (June 12, 2012

)<<https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>>(accessed on June 3, 2020)

laws encouraging society to hard people on the basis of sexual orientation and gender identity. Also, take efforts to provide public education and captions to counter the violent attitude and promote mutual respect and values¹⁶.

- Prevent the torture and report the inhuman actions, the state agents and law enforcers must be trained to monitor the place of detention.
- Repeal all laws that criminalise homosexuality and ensure that individuals are not being arrested on the basis of their sexual orientation and gender identity.
- Prohibit discrimination especially in the context of employment and healthcare which the basic necessity to survive and live with dignity.
- Safeguard their freedom to expression, association and peaceful assembly, any limitations faced must be compatible with the international law and shall not possess any discriminatory form.

NATIONAL SCENARIO

The preamble of the Constitution of India mandates “*Justice, social, economic and political - equality of status*”, wherein any person means that any individual must not be discriminated of the basis of their sexual orientation and gender identity yet the individuals engaged in homosexual acts face abuse and discrimination in almost all sectors of the society. **Article 15** of Indian constitution states “ *discrimination on grounds of religion, race, caste, sex, place of birth or any of them* ” is not allowed. Criminalising homosexuality violates the human right of an individual, where the central idea of these rights is that all human are equal and must be treated with dignity and equality the anything that undermined dignity paves the way for discrimination which further causes social, economic, psychological consequences for the individual. India being a diverse country and culture brings a lot of complexity to understand and accept homosexuality and gender identity. The Indian Penal Code punishes homosexuality under Section 377 of the Code, stating “*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be*

¹⁶UN, 'Homophobic and transphobic violence' <<https://www.unfe.org/wp-content/uploads/2017/05/Homophobic-and-Transphobic-Violence.pdf>>(accessed on June 3, 2020)

*liable to fine*¹⁷. This law has been criticised for not matching the modern morality and was stuck down in 2009 by the Delhi High Court in the case of **Naz Foundation v. Government of NCT of Delhi and Others**¹⁸, where the court stated that treating consensual homosexual sex between adult as crime is a violation of their fundamental right which is a contrast to constitutional morality. But the same judgement was reversed by the two judge bench of Supreme Court in the year 2013, in case of **Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors**¹⁹, stating that the court had relied upon the errors international precedent to protect the small community of Lesbian, Gay, Bisexual and transgender in India. Moreover, there was no need for judicial interference in this matter thus the parliament shall debate and decide on this matter thus the judgment of Delhi High court was overruled and the validity of Section 377 was upheld.

India has been on a long road of equal rights for LGBTQ community, where the evolution of protecting the community from violation of Right to equality under Article 14, Right against discrimination under Article 15, Right to freedom of speech and expression under Article 19 and Right to privacy under Article 21 has been endorsed to struck down Section 377 of Indian Penal Code by the following judgments:-

- **Article 14** - Under Right to equality, all individuals are to be treated equal, for which it mandates a distinction on the basis of intelligible differentia, yet this cannot be determined for the terms such as “Natural” and “unnatural or against the order of nature” and has no rational nexus to provide the same. Further, in **E.P. Royappa v. State of Tamil Nadu and another**²⁰, it was observed that equality is dynamic and thus it cannot be “cribbed, cabined and confined” on the basis of traditional and doctrinal limits thus Section 377 is a violation of Article 14 of the Indian constitution.
- **Article 15** - Right against discrimination on the basis of sex, caste, race, religion or places birth but not sexual orientation which clearly shows that sexual orientation is alien to our constitution has broadened its horizon in **Navtej Johar Case**²¹ and included sexual orientation as a ground to prohibit discrimination.

¹⁷Section 377, Indian Penal Code, 1860

¹⁸ Writ petition 2010CriLJ 94

¹⁹ CIVIL APPEAL 10972 OF 2013

²⁰ AIR 555, 1974 SCR (2) 348

²¹Navtej Singh Johar&Ors. v. UoI, (2018) 10 SCC 1.

- **Article 19** - American Psychological Association has stated that sexual orientation is a natural condition and it is equally normal to have an attraction towards the same or opposite gender, further the LGBT community is restricted to express their sexual identity or orientation through speech or actions and Section 377 is not covered under Article 19(2) of the constitution. Moreover, NALSA strongly stands with the view that Article 19(1) includes the freedom to express their self-identified gender.
- **Article 21** - In **Kishore Samrite v. State of U.P**²² and others and **Umesh Kumar v. State of Andhra Pradesh and another**²³, it was held that under Article 21 reputation is an essential element for the enjoyment of life and liberty but the LGBT community are denied of this right which makes them apprehensive to openly talk about who they are, in the fear of being subject to more abuse and discrimination. Many of them do not reveal their identity in the fear of being arrested or being attacked at the workplace or being blackmailed, which infringes with their right to live life with dignity and privacy. Also in **Common Cause (A Registered Society) v/s Union of India**²⁴ and another and in **Francis Coralie Mullin v/s Administrator, Union Territory of Delhi**²⁵, it is clearly held that Article 21 is meaningless until it provides individuals dignity which includes right to carry out functions and activities as a sane person would constitute.

Section 377 brings hostile discrimination which makes the LGBT community more vulnerable to live with the fear of prosecution on the basis of their sexual orientation, the situation was turned down when Section 377, a colonial-era law was struck down in 2018, in the case of **Navtej Singh Johar and Ors. v. Union of India**²⁶. The court stated that criminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional. It also held that the LGBT community is entitled to equal citizenship and protection under the law. However, other portions of Section 377 like bestiality, non-consensual acts and sex with minor still remain in force. This judgement leads to the beginning of a new era for the LGBT community. UN also supported India's judgement and stated that this might be the step towards guaranteeing the full range of

²²AIR (2013) 2 SCC398

²³AIR 2014 ALL SCR 661

²⁴writ Petition (CIVIL) No.215 of 2005

²⁵ AIR 746, 1981 SCR (2) 516

²⁶(2018) 10 SCC 1.

fundamental rights given to the community²⁷. Despite the support of the NGOs and judiciary, the community still faces discrimination, violence and social stigma as this socio-legal issue has become a taboo in India. The Judgement was supported on the national and international level yet why does this community still live in the fear of being subject to discrimination. Are rights provided to the community only limited to theoretical aspect?

RIGHTS OF SAME-SEX RELATIONSHIP? AN OXYMORON

The apex court gave its judgment to decriminalise homosexuality on the enlightenment to bring them the full usage of fundamental rights mentioned in the Constitution of India yet the conditions with which the same-sex relationships are allowed is not benefiting the community. They still face discrimination in spheres of employment, military service, child adoption, social benefits, social acceptance and even same-sex marriage. Until these issues are addressed and solved by the country till then it can't be said that they are enjoying their right to equality and freedom from discrimination to their full potential. The following are the major issues faced by the community, detouring their fundamental rights and citizenship:-

SAME-SEX MARRIAGE

The allowance of same-sex relationship does not fully help in development and rights of the community as same-sex marriage is still not allowed in India or any other legal ceremony which binds two individuals together such as a civil union or domestic partnership thus to eliminate long - term discrimination from the society, it is must allow homosexual marriages. There are in and out benefits of same-sex marriages, starting from the social and family acceptance can be brought if the government policies support the marriage. Also, there are many benefits in a lot of sectors which are exclusively made for married individuals who cannot be enjoyed by the people engaged in same-sex relationships. Moreover, there are many legal benefits such as succession, maintenance rights which can be enjoyed by married couples only. The economic benefits like Employment Provident Fund Scheme, 1952 and Workmen's Compensation Act, 1923, are only enjoyed by blood relatives or marriage thus it is essential to provide them with the option of legally recognised relationship. There are a lot of people who simply wish to marry their partner because marriage is a part of their culture and restricting one from marrying the person of their choice due to interference of the state is a violation of rights in itself. It is pertinent to observe

²⁷<https://in.one.un.org/un-news/united-nations-india-welcomes-supreme-court-judgment-striking-section-377/> 9
accessed on June 4, 2020)

that the laws encased in India for marriage are only based on heterosexual bias. However, as long as the society is concerned there shall be uniform laws to address inequality and other issues for which a new draft for “**uniform civil code**” has been suggested to Law Commission of India and debated to bring reforms and allow marriages between male, female and transgenders in 2017²⁸.

A Haryana court in 2011, allowed the marriage of two lesbians²⁹. According to the polls conducted by International Lesbian, Gay, Bisexual, Trans and Intersex Association showed that about 35 % of Indians were in the favours of legalising same-sex marriages while 35 % were also against the same³⁰. There are a number of cases still pending in courts for allowing the same-sex marriage, for many of which has been shut down on the name of matter to be decided by the Parliament and not courts. Many petitioners have argued that the prohibition of same-sex marriage is against a lot of provisions of the Constitution of India. Moreover, in **Shakti Vahini vs Union of India**³¹, the Supreme Court of India held that it is a fundamental right of every citizen to marry the person of their choice. Still, the government of India hold no provisions to legalise same-sex marriage and considers it to be a separate matter³².

SOLUTIONS

- Many western countries such as the United States of America and many Europe countries have opted for civil union such has domestic partnerships that are recognised by private companies and city councils which will get them the special benefits of marriage. While country like Germany extends the befits of civil unions to the extent of tax, pensions and adoptions. Indian too needs such separate yet equal legal benefits to ease the same-sex relationship and provide them with a sense of legal protection and safety. There are many benefits of such a model as it likely to face less opposition from religious and cultural

²⁸Seema Chishti, 'Drafting change: What the new 'progressive' intervention in Uniform Civil Code debate entails', (October 1, 2017) <<https://indianexpress.com/article/explained/drafting-change-what-the-new-progressive-intervention-in-uniform-civil-code-debate-entails/>>(accessed on June 4, 2020)

²⁹Dipak Kumar Dash & Sanjay Yadav, 'In a first, Gurgaon Court recognizes lesbian marriage' (July 29, 2011),<https://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>>(accessed on June 4, 2020)

³⁰THE PERSONAL AND THE POLITICAL: ATTITUDES TO LGBTI PEOPLE AROUND THE WORLD'<https://ilga.org/downloads/Ilga_Riwi_Attitudes_LGBTI_survey_Logo_personal_political.pdf>(accessed on June 4, 2020)

³¹AIR 2018 SC 1601

³²Indian Express, ' No plan to leagues same sex marriage : Rajya Sabha',(February 7, 2020), <<https://www.newindianexpress.com/nation/2020/feb/07/no-plan-to-legalise-same-sex-marriage-ravi-shankar-prasad-in-rajya-sabha-2100115.html>>(accessed on June 4, 2020)

communities due to its differences that makes it different from a usual marriage but it may be opposed on the basis of legitimacy of live-in relationships of a homosexual relationship.

- The issue can be overcome by amending or interpreting the personal norms/ laws provided for marriage in India such as interpreting the laws in a way that would allow same-sex marriage, establishing a different set of customs for the LGBT community which allow same-sex marriage, amending Hindu Marriage Act, 1956 to allow same-sex marriage otherwise it shall be declared unconstitutional, use gender neutral terms in the Act as these interpretations will not only give them their basic rights but will also help curb the gender stereotypes and promote acceptance of homosexuality.
- There have been many movements in the past where the folks of Tamil Nadu tried establishing their own set of rules for marriage, the same strategy can be pursued by the LGBT community, where they may agree on some common practices of getting married and registering themselves under a common Act³³. Special Marriage Act is also one of the best solutions to the issues as this itself has been enacted with the nature of allowing marriages for those who do not wish to get married according to their personal laws, although it has to be kept in mind that all the approaches will end up their fate in the hand of government and parliament and will be and will be difficult to achieve due to the hostile attitude of society towards the LGBT community.

EMPLOYMENT & MILITARY SERVICE

The LGBT community still faces discrimination in the workforce, where the corporate sector has been diversified and more changes are made to protect individuals at their workspace yet at the same time there is still the presence of discrimination based on individuals' sexual orientation at the workplace. This not only creates discrimination but puts them under the pressure of not coming out i.e not revealing who they are and who they love, which is a problem in itself. Such challenges make them vulnerable to being poor, malnutrition as they have no lifestyle or a job. The corporate world in India still holds no permanent space for the LGBT community, the LGBT community reveals how they spend most of their childhood in anxiety and depression which kills their senses to function normally and facing such issues workspace, leaves a huge psychological

³³Nayantara Ravichandran, 'Legal Recognition of Same- sex Relationships in India' <<http://docs.manupatra.in/newslines/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf>>(accessed on June 4, 2020)

and physical impact on them as most of the times they are abused at home for not securing a job or not getting promotions. The problem does not end here, it is much deeper than one thinks, many times they are bullied at the workspace which makes them quite the job or else they're provided with unfair wages or salaries as the social stigma is not only prevalent in our religious and cultural community but also in our corporate workspace³⁴.

The issue of employment shall be taken up from its root cause where the community faces harassment at schools or colleges which further hampers with their employment opportunity. Coming across the other prospects, it is recorded that they face embarrassment at workplace when asked questions about their personal life following the need to establish their femininity or masculinity which many times forces them to keep their identity a secret from all. There are many countries who secure the LGBT community with the employment law stating "the prohibition of discrimination on the basis of sexual orientation and gender identity" in Hungary and South Africa. But India has no such legislation moreover they just have protection from sexual harassment in private companies which shows how behind we lag to bring equality in the society. Due to this, the government took the initiative to **hire a consultant** to bring benefits like equal pay, corporate representation, etc³⁵. This will also help boost the self-esteem of the employees and bring sensitivity and friendly environment to work. It is being observed that the employment security has been provided to the community to some extent only in government jobs, no such law has been made to monitor the same in private companies. This whole process affects their living conditions and puts them under depression.

After the decriminalisation of Section 377, the Modi government requested the corporate sector to take the LGBT community into consideration and provide jobs to them so as to strengthen our nation by getting participation from the weaker sections of our society³⁶. This soon became an agenda for the government though no such provisions have been made to fight with this defect. The Indian MNC has been gripping up with the LGBT cause and is encouraging people to talk

³⁴Nayantara Ravichandran, 'Legal Recognition of Same- sex Relationships in India' <<http://docs.manupatra.in/newline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf>>(accessed on June 4, 2020)

³⁵ Indo-Asian News Service, 'India set to get first dedicated the LGBT hiring consultancy', (July 21, 2019) <<https://www.indiatoday.in/india/story/india-set-to-get-first-dedicated-lgbt-hiring-consultancy-1571782-2019-07-21>>(accessed on June 5, 2020)

³⁶Web Desk, 'Modi govt bats for more jobs for the LGBT community members'(July 18, 2019) <<https://www.theweek.in/news/india/2019/07/18/modi-govt-bats-more-jobs-lgbt-community-members.html>> (accessed on June 5, 2020)

about their identity openly in public, the LGBT employees are putting blogs about their experience on YouTube, sharing their journey at Accenture and holding campaigns at various places³⁷.

The issues of social exclusion do not end with corporate sector, the LGBT individuals are banned from service country through Indian Armed forces³⁸. This issue is still prevalent in India as the **Section 45 the Army Act, 1950** states any person guilty of any disgraceful conduct of a “**cruel, indecent or unnatural kind**”, where the term unnatural is associated with the term mentioned in Section 377 of Indian Penal code. The same is mentioned in **Sections 45 and 46(a) of the Air Force Act, 1950** with imprisonment of 2 years. It is often stated that the soldiers are away from their families for months with the support of their buddy for emulation companionship, away from any sexual release. Moreover, the chief general of the Indian army very clearly stated in public that “ we have not modernised neither westernised” thus they will not allow homosexuals in the Indian Army³⁹.

SOLUTIONS

- The LGBT friendly policies must be made in the corporate sectors, before the judgement came in 2018, the companies feared in falling into legal issues, but it is no more a concern as during the judgement of **Navtej Singh Johar and Ors. v. Union of India**⁴⁰, it is emphasised that the community must live with dignity without the stigma attached to their sexual orientation thus it is important to draft policies exclusively for the LGBT community.
- The individuals having a hard time in the office must report to HR teams and the issue must be dealt immediately⁴¹. Provide rest of the employees with workshops to promote awareness in order to bring equality and opportunities for underrepresented minorities.

³⁷Anjali Venugopalan, ‘ Indian MNCs openly allying with the LGBT cause’(June 26, 2019)<<https://economictimes.indiatimes.com/news/company/corporate-trends/indian-mncs-openly-allying-with-the-lgbt-cause/articleshow/69951140.cms?from=mdr>>(accessed on June 5, 2020)

³⁸Amrita Nayak Dutta, ‘ Indian army is worried now that men can legally have sex with other men ‘ , (September 7, 2018)<<https://theprint.in/security/indian-army-is-worried-now-that-men-can-legally-have-sex-with-other-men/113644>>(accessed on June 5, 2020)

³⁹ShauryaKaranbir Gurung, ‘ Homosexuality and adultery unacceptable in Army : Bipin Rawat’ (January 11, 2019)<<https://economictimes.indiatimes.com/news/defence/homosexuality-and-adultery-unacceptable-in-army-bipin-rawat/articleshow/67480500.cms?from=mdr>> (accessed on June 5, 2020)

⁴⁰Navtej Singh Johar&Ors. v. UoI, (2018) 10 SCC 1.

⁴¹ Melissa Cyrill, ‘ Section 377:the LGBT Rights and HR Policy in the Indian Workplace’(October 11, 2018), <<https://www.india-briefing.com/news/section-377-india-lgbt-rights-hr-policy-indian-workplace-17804.html/>>(accessed on June 5, 2020)

- **Article 33 of the Indian Constitution** states that Parliament has the power to decide which rights shall be applied to the military and this issue can only be solved once Parliament approves to decriminalise homosexuality in the military. While in December 2018, Jagdambika Pal of BJP **introduced a bill in the parliament seeking amendment in the Army Act, 1950**, to bring equal rights and opportunities for the LGBT community⁴².
- **Naz Foundation** started with 'Milan Project', to create awareness and direct the gay community with the basic information that could be helpful while applying in the corporate sectors. The same initiative can be taken up by other NGOs to protect and preserve the dignity of the LGBT community.
- Pride Circle organised career fair, where about 300 candidates showed up along with 35 companies, about 40 job offers were extended for the LGBT community thus having such more platforms where they're coming out and being accepted for who they are will be an extensive initiative to fight against unfair treatment⁴³.

SOCIAL ACCEPTANCE & CHILD ADOPTION

The phenomenon of Homosexuality has been changing with its feature, even though it has previously existed in India but has certainly never been enough to have acceptance in our society, however, the manifestation of homosexuality depends upon the social norms. In India, there has been a progressive change in matters of legal recognition yet the community still faces issues with the social recognition. The individuals often run from the small towns to migrate in cities or else they leave the country and flee off to places where they're more likely to be understood and protected. Some of them even start forming their own NGO, through which they build strategies to overcome their cause. On the grounds of reality, the sexual minority in India is still not fully accepted on social, cultural and political grounds the reason to which is that marriage, Child bearing, caste system and family pressure still hold them⁴⁴.

⁴²PTI, 'parliament winter session : Bills seek ban on non - veg food at official events, rights to the LGBT to serve in armed forces', (December 28, 2018) <<https://www.newindianexpress.com/nation/2018/dec/28/parliament-winter-session-bills-seek-ban-on-non-veg-food-at-official-events-rights-to-lgbt-to-serv-1917748.amp>> (accessed on June 5, 2020)

⁴³ Shefali Anand, ' India's LGBTQ Activists Raise Their Voices ' (December 31, 2019) <<https://www.usnews.com/news/best-countries/articles/2019-12-31/indias-gay-activists-grow-in-numbers-but-acceptance-remains-elusive>> (accessed on June 5, 2020)

⁴⁴ Ashok Row Kavihe is the editor of Bombay Dost ("Bombay Friend"), the Quarterly gay magazine published in India

In the past, the LGBT community has been treated with the strict laws and consequences which yet place a major role in their present condition, they're still living with the fear of falling in the hand of abuse at home or at the workplace. Many times, they're abused and harassed at school and college level which leaves a psychological impact on them while they further isolate themselves. There have been times when the individuals are subject to oral sex, bullied, blackmailed by the know people, and threatened to reveal their identity if denied anything. India has diversified cultures and religion while none of it tends to support Homosexuality. NGOs like Naz Foundation has approached these issues and fought for creating awareness and acceptance for the community in the legal and social aspect. The condition in India has not improved as the social stigma we're surrounded with is way stronger and stricter, there is the time when people gather all of their courage and come out in public, yet they're disowned by their families and social surroundings, this is especially evident in rural areas.

The injustice is further continued when same-sex couples are yet not allowed to go for child adoption or surrogacy. Giving them the right to engage in a same-sex relationship is not enough and denial of bearing a child is a violation of their rights. The **American Psychiatric Association** has supported the same-sex couples to adopt children as there is no such evidence of parenting being harmful to a child rather the denial of such a basic right affects the gay and lesbian couples in many ways⁴⁵. Also, there is no difference in a child being raised by straight couples or same-sex couples thus sexual orientation shall not be a basis to allow child adoption in India. Considering the situation, being adopted is in any way better than being at an orphanage. In recent years, many countries like Australia, Belgium, Costa Rica, Switzerland, Taiwan and many more have allowed child adoption by same-sex marriage. The **Juvenile Justice (Care and Protection of Children) Act, 2000**, does not prevent single individuals but the LGBT individuals are prevented from adopting a child, **Central Adoption Resource Authority (CARA)** also prevents foreigners in same-sex relationships from adopting a child. Many people have argued that at the time when the world is taking a step further in relation to

⁴⁵ 'Adoption and Co-parenting of Children by Same-sex Couples'

<https://web.archive.org/web/20090823142855/http://archive.psych.org/edu/other_res/lib_archives/archives/200214.pdf> (accessed on June 6, 2020)

LGBT, Indian has taken a step back⁴⁶. Which is further creating a bias of the state against same-sex couples. Adopting a child is the most basic right that every individual must be enjoyed without facing any discrimination on the basis of sexual orientation. The **Surrogacy (Regulation) Bill, 2016**, states that no single parents, homosexuals and live-in couples are not allowed to go for commercial surrogacy. Which again discriminates the gay men on the basis of their sexual orientation⁴⁷. Even after legal recognition, the states hold a discriminatory policy against LGBTQ community, where it is often expressed by people that gay culture is still not acceptable in India thus they will not allow the adoption of children by ‘inferior families’⁴⁸.

SOLUTION

- The matter of social acceptance is very crucial and sensitive at this stage thus there shall be the implementation of laws in order to support the LGBT community and protect them for any kind of discrimination.
- There shall be counselling sessions for families to understand the meaning of homosexuality and accept the individuals, it will be a long process but would make a huge difference in our society.
- More and more platforms must be created for the community to come out openly and express their grievances and create awareness about their present situation.
- To work with the state in order to foster the implementation of a measure that protects the LGBT community from social stigma.
- Involved the international and national human rights council and send them reports biannually⁴⁹.
- To address multiple abuse and violence faced by individuals based on their sexual orientation.

⁴⁶Dhamini Ratnam, ‘ Adoption by same - sex couples may be barred’ (August 8, 2014)<<https://www.livemint.com/Politics/J3opALtv29XMrLV6keC2IO/Adoption-by-samesex-couples-may-be-barred.html>>(accessed on June 6, 2020)

⁴⁷Vaibhav Tiwari, ‘ Surrogacy regulation bill passed in Lok Sabha’ (December 19, 2018)<<https://www.ndtv.com/india-news/surrogacy-regulation-bill-passed-in-lok-sabha-10-points-1965215>>(accessed on June 6, 2020)

⁴⁸Prashasti Awasthi, ‘ India’s Adoption Policy Discriminative Against LQBTQIA’ , (November 10, 2019) <<https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lqbtqia/>> (accessed on June 6, 2020)

⁴⁹UNHR, ‘Independent Expert on sexual orientation and gender identity’ <<https://www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx>> (accessed on June 6, 2020)

- Right to adopt or opt for surrogacy is a matter which is completely in the hands of the government, there have been many pleas filled in the local courts as well.

IMPACT ON COVID-19 ON LGBTQ

Coronavirus detected in Wuhan, China in last December 2019 is reportedly pneumonia of unknown cause, on January 22, 2020, WHO issues a statement stating human to human transmission the reason behind the spread of virus so fast, the outbreak was declared as a Public Health Emergency of International (PHEIC). The LGBT community is more vulnerable to COVID-19 because of the following reasons:-

- They may not report anyone about their condition and may not be able to access the health care services in the fear of being discriminated and being abused by the hospital staff or doctors.
- They are mostly De-prioritised in terms of getting medical treatment including HIV Aids, hormonal testing etc. which will affect their immune system and make them more prone to the virus. Also, there have been cases of government where the restriction on the movement has been put over people, where they're against discriminating on the basis of sexual orientation and gender identity⁵⁰.
- With the restrictions to stay at home due to lockdown and cohabiting with unsupportive family members or friends will have a psychological impact on the people, leaving them with anxiety and depression.
- Due to higher number of unemployment rates, the LGBT community is likely to be poorer than the rest of the population, they're also not entitled to paid leaves or any other benefits at their workspace due to the bias on the basis of their sexual orientation⁵¹.
- Human Rights Committee has revealed how COVID-19 is having an adverse effect on the life and livelihood of LGBT, most of them already face discrimination at the workplace, thus during the times of crises where the world economy is facing major issues leads us to the conclusion that it will now become harder for the community to get

⁵⁰AFP, 'Peru restricts movement by gender during Covid-19 lockdown' (April 3, 2020)<<https://www.nst.com.my/world/world/2020/04/580816/peru-restricts-movement-gender-during-covid-19-lockdown>>(accessed on June 6, 2020)

⁵¹UNHR, ' COVID-19 AND THE HUMAN RIGHTS OF LGBTI PEOPLE'<<https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>>(accessed on June 6, 2020)

placements to even daily basis work, it is also revealed that about 40 % of the LGBT community works at a place, where they're more likely to be catch virus⁵².

- About 5 million LGBT people are infected from Coronavirus⁵³. The virus will leave a major impact on all of our lives but we still have the guarantee to face no discrimination yet the LGBT community has no such surety, which makes their life harder than any of ours.

CONCLUDING REMARKS

The same-sex relationship has been made legal in India, but the reality is way more different as the LGBT community is still fighting for their rights to be allowed to get married, have children and to face no discrimination at the workplace. The social taboo present in our society has a very deep impact on the minds of people which cannot be changed by any law or government. The evolution in the society will further come with time, for which many organizations, national and international are taking initiatives to bring more equality and less discrimination in their plates. Many pleas have been filled and bills have been sent to the parliament to look into the human rights of the community and provide them with some relief. Moreover, during the current pandemic, the lives of the LGBT will have a major economic, political and social impact on theirs.



⁵²HRC, <<https://www.hrc.org/resources/the-lives-and-livelihoods-of-many-in-the-lgbtq-community-are-at-risk-amidst>>(accessed on June 6, 2020)

⁵³The LGBT Workplace issues , (June 01, 2020)<<https://www.catalyst.org/research/lesbian-gay-bisexual-and-transgender-workplace-issues/>> (accessed on June 6, 2020)