



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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LEGAL DISCRIMINATION AGAINST LGBTQIA+ PEOPLE AND THEIR RIGHTS IN EMPLOYMENT

AUTHORED BY - VIDHI KAPOOR

ABSTRACT

The Indian Penal Code section 377, criminalize homosexual behaviours which were deemed "against the order of nature" by British authorities in 1861.

The first research on homosexuality in India, titled "**The World of Homosexuals**," was published in 1977 by Shakuntala Devi. They had received official voting rights as a third sex in 1994. Transgender individuals ought to be recognized as the third gender category, according to a 2014 Supreme Court of India ruling. The LGBTQIA+ community in the nation was granted the ability to openly disclose their sexual orientation from the Supreme Court in 2017. An individual's right to privacy protects their sexual orientation. Social racial prejudice LGBTQIA+ people encounter prejudice in many areas of their lives, including employment, housing, and healthcare. This can make living freely and safely challenging for them. Discrimination can also result in less work possibilities, as well as poverty and a lack of fundamental necessities. Lack of Representation of LGBTQIA+ people are frequently underrepresented in media, politics, and government, and they are excluded from mainstream society. This makes it difficult for them to get their voices heard and their needs met. This lack of representation can also result in a lack of understanding and acceptance of the group. In the "**Crosshairs of Mental Health Issues**" LGBTQIA+ people are frequently victims of hate crimes, such as physical and verbal assault, bullying, and harassment. This may induce depression and nervousness in the population, affecting both physical and mental health. Unheard Rural LGBTQIA Voices the voices of urban LGBTQIA persons are heard on a variety of online and offline channels. Rural LGBTQIA+ persons, however, typically hide their opinions owing to a lack of exposure, comfort, and accessibility to the internet, because refusal to marry leads to further discrimination.

KEYWORDS:- Homosexual behavior, Transgender, LGBTQIA, Unheard Voices, Discrimination

INTRODUCTION

Over the last two decades, the legal environment has gotten better, as has the change of social beliefs and attitudes about an individual's sexuality, gender identity, and gender expression. Nonetheless, members of the LGBTQ community keep facing grave and obvious discrimination based on gender in all aspects of public and private life, including housing, employment, academic opportunities, the ability to purchase goods and services, and meaningful involvement in our society's decision-making processes. There is a growing number of laws around the country being enacted under the guise of religious freedom that curtails – even eliminates – the rights of LGBTQ individuals. Furthermore, homophobia and discomfort with individuals who do not conform to antiquated stereotypes of sex and gender often manifests into heinous discrimination against these individuals. Nearly 41% of gay and lesbian adults face some form of hostility or harassment on the job, including being fired or forced to quit because of their sexual orientation . In India, the effort to fight for LGBTQIA+ rights has made significant progress in recent years. Landmark decisions and legislative reforms have opened the path for more inclusion and protection against discrimination. The Indian judiciary has played an important part in this shift, with numerous landmark judgments that have broadened the rights of LGBTQIA+ human beings which also includes in “**The Transgender Persons (Protection of Rights) Act, 2019**”.

3. LITERATURE REVIEW

3.1. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 AND RIGHTS AND ENTITLEMENT GIVEN TO TRANSGENDER COMMUNITY

The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in Lok Sabha on July 19, 2019 passed on 5th August, 2019 and passed in Rajya Sabha on 26th November, 2019, by the Minister for Social Justice and Empowerment, Mr. Thaawarchand Gehlot. Unanimously. Consequently, after passing the Rajya Sabha to obtain the President's assent, the bill was enacted as the Transgender Persons (Protection of Rights) Act, 2019. The actual definition of a transgender is who does not match the gender which was assigned by the birth. It involves transgender men and transgender women, people with intersex variations, gender-queers, and those with socio-cultural identities like kinnar or hijra. The Bill prohibits the discrimination against a transgender person, by denial of service or unfair treatment which includes :- (i) education (ii) employment (iii) healthcare (iv) access to, or enjoyment of goods, facilities, opportunities available to the public (v) right of movement (vi) right of residing anywhere, rent, or otherwise occupy the property (vii) opportunity of holding the public or private office and (viii) access to a government or private establishment in whose care or custody a transgender

person is. The transgender person also has a right to residence that he/she can reside anywhere they want. If the transgender person's closest and nearest family is unable to care for him or her, a competent court may order that they be placed in a rehabilitation center. Nobody can discriminate on the grounds of employment, the transgenders have a right that they can be given a job including recruitment, and promotion. They should be given equal opportunities for education and sports. The government must make a little extra effort to offer health services for transgender people, such as specialized HIV surveillance centres and sex reassignment surgery. The government must evaluate medical programs to address transgender people's health concerns and establish comprehensive medical insurance schemes for them. The certificate of identity of a transgender should be given to him/her as a transgender person may apply to the District Magistrate for a certificate of identification, specifying their gender as 'transgender'. An updated certificate may only be issued if the individual gets surgery to change their gender, either as a male or female.

3.2. HISTORY AND EVOLUTION OF TRANSGENDER COMMUNITY

The transgender community consisted of hijras, kothas, Aravanis, shiv-shakthis etc. They all have existed from the 9th century BC. Various texts suggested that sex individuals were well known in pre- modern India. Ancient Hindu law, medicine, linguistics, and astrology all address the concept of a third gender. The Manu Smriti (200 BC - 200 AD), a foundational work of Hindu law, explains the biological origins of the three genders: **"A male child is produced by a greater quantity of male seed, a female child by the greater proportion of the female seed, if both are equal, a third-sex child or boy and girl twins are produced; if either are weak or deficient in quantity, conception collapses."** In Mughal period hijras played a very significant role in the role courts of the Islamic world, specifically in ottoman empires of the mughal period. They held prominent positions such as political advisers, administrators, generals, as well as the guardians. During the Mughal Empire, Hijras were valued for their intelligence, loyalty, and were important aspects to society. . They played a vital role in building the empire's politics. They influenced the queens and kings of that era and received a lot of money from them as prizes, thus hijra had frequently stated the role of their status in that period very drastically.

In the beginning of the British period in the Indian subcontinent, hijra received protection and advantages from various Indian governments by joining the hijra society. The transgender has existed in Indian society for many centuries. In ancient India, "third sex" or non-confirmed gender

individuals were acknowledged in early literature.¹ Lord Rama, in the epic Ramayana, was living in the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone did feel bound by this direction and decide to stay with him. Impressed with their loyalty, Rama sanctioned them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which was supposed to set the stage for the custom of badhai in which hijras sing, dance and confer blessings.

3.3. RECOGNITION AND DEVELOPMENT

LGBTQA+ community has their own experiences, culture, pride and practices and this has evolved from a long generation. In the past 10 years the colours of the rainbow have been increasing day by day. The presence, voice, colour and faith has also been increased. There is more diversity and understanding of this community. There are many developments in recent years i.e decriminalizing section 377 of Indian Penal Code. The court's decision to overturn Section 377 was a historic step toward acknowledging LGBTQ+ people's dignity and humanity, as well as affirming their right to pursue their passions freely without fear of harassment.² Article 14 (Equality before Law) ensures that every citizen of the society is equal in the eyes of law and according to Article 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) respectively to every person. They have also received gender identity and legal recognition by society. No one can deny or violate their rights under above mentioned articles respectively. There are no legal restrictions for LGBTQA+ Community, the government has introduced a scheme called "SMILE" - (Support for Marginalized Individuals for Livelihood and Enterprise) which was launched on 12th February, 2022. This scheme also includes two sub-schemes i.e 'Comprehensive Rehabilitation for Transgender Persons' and 'Comprehensive Rehabilitation of persons engaged in the specific act of begging', the government also took various measures which includes medical services, education and skill development etc.³

3.4. CHALLENGES AND LIMITATIONS

While significant progress has been fulfilled, hurdles remain on the path to full LGBTQ+

¹ M. Michelraj, Historical Evolution of transgender Community in India pg. - 17-19, Asian Review of Social Sciences, <https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>.

² LGBTQA+ communities, <https://www.vic.gov.au/pride-our-future-victorias-lgbtqi-strategy-2022-32/lgbtiq-communities>, (last visited March 28 2024).

³ Smile, National portal for Transgender persons, <https://transgender.dosje.gov.in/#:~:text=The%20Ministry%20of%20Social%20Justice,Persons'%20and%20'Comp rehensive%20Rehabilitation%20of>, (last visited March 29, 2024).

acceptance. Social stigma, familial rejection, and a lack of knowledge continue to be obstacles for LGBTQ+ community seeking legal help.⁴ The complex relationship of cultural norms, societal attitudes, and legal safeguards highlights the value of comprehensive education and activism in bringing about long-term change. In our history the transgender community has faced numerous challenges and limitations which includes criminalization, homosexuality was illegal in many countries which leads to imprisonment, fines and other legal penalties. Pathologization, once considered as a mental illness leading to stigma and there were problems with the legal representation of this community, has historically been underrepresented in media, politics and other areas of public life in the media.⁵

4. CASE LAWS

1. NAZ FOUNDATION VS GOVT OF NCT OF DELHI

Naz Foundation vs Govt of NCT of Delhi is a landmark Indian case, the decision of this case was held by a two-judge bench of Delhi High court. The Court further held that Section 377 violates the promise of equality established in Article 14 (under the fundamental Right to Equality charter) of the Constitution by creating an arbitrary division and targeting homosexuals as a group.

2. SURESH KUMAR KOUSHAL VS NAZ FOUNDATION

The court's decision led to the legalization of Homosexual conducts between consenting adults across India. The Supreme Court of India later overruled this decision in this case by the two-judge bench.

3. NAVTEJ SINGH JOHAR VS UNION OF INDIA :-

The case of Suresh Koushal vs Naz foundation was also been overruled in this case by five judge bench of high court Delhi. The Court drew on the doctrine of progressive realization of rights to hold that rights should not be revoked. The Supreme Court considered Section 377's validity in light of the principles of equality, liberty, and dignity enshrined in Articles 14, 19, and 21.

5. SUGGESTIONS

The suggestions also include about their personal growth which involves education, take a stand against discrimination and they should also support policies that promote equality, events should

⁴ Barelawindia, *LGBTQ+ Rights in India: A Comprehensive Legal Guide*, BareLaw (August 10, 2023), <https://www.barelaw.in/lgbtq-rights-in-india-a-comprehensive-legal-guide/>.

⁵ Bonnie J. Morris, A Brief History of Lesbian, Gay, Bisexual, and Transgender social movements, American psychological Association (March 16, 2023), <https://www.apa.org/topics/lgbtq/history>.

be organized by which LGBTQA+ community can participate such as pride parades and meetings by all this means they will be called as an active ally they will also grow, engage and learn through all these methods. More recognition should be given to the achievements of people belonging to the transgender community like Naaz Joshi who was born on 31st December, 1984 who is also India's first transgender international beauty queen, a trans rights activist and a motivational speaker and Sathyasri Sharmila who became India's first transgender lawyer. These people have set a record in their respective fields. Hence media should highlight the achievements of these people so it will be convenient to include them into the mainstream of the society as media plays a significant role in building the thought process of the society. The transgender people should be given equal opportunities in the field of politics which in turn will help in building a more equitable and inclusive society.

6. CONCLUSION

During the Mughal period, the transgender minority faced significant challenges due to British colonial restrictions. The government has adopted several policies and plans to protect transgender communities. The social and economic position of the transgender people has improved as they also have been given many rights which they can exercise. To effectively serve the transgender population, the government had eliminated stigma, discrimination, and violations of human rights. Incorporating these practices into daily life might benefit the transgender population in India, according to "***THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019***" they have given right to residence, education, sports, opportunities in jobs including the recruitment and the promotion. They have been given a little extra care for health services in India. We have seen many challenges and limitations for transgender community. For example, in India, the Supreme Court's recent decision denied to legalize same-sex marriages, which has been seen as a setback for the LGBTQIA+ community. The court left the issue to the legislature, emphasizing on the continued battle for equal rights in marriage and other legal safeguards. In conclusion, while progress has been accomplished, much more needs to be done to guarantee that LGBTQIA+ individuals are not discriminated against and have equal access to all rights, including employment, healthcare, education, and legal recognition. Community-building, education, and public awareness are crucial for enhancing these rights and building a more inclusive society.