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LGBTQ Rights in India Its Challenges, Criticisms and Recommendations

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ABSTRACT

Since time immemorial, rights for the LGBT community in India have been a constant struggle; there have been victories and losses, and the constant trials and tribulations they face are nothing short of remarkable. Section 377 was altered in India in 2018 because it violated India's constitutional morality between consenting adults, but despite how monumental it was for the LGBTQ community, India still has a long way to go to protect the LGBTQ community and their rights; they face challenges across the board from schooling, housing, work, public spaces, marriage, and so on. This article will go into detail about the challenges that the community faces, criticisms of the laws and acts that have been enacted, and recommendations that will help protect the rights of the LGBTQ community.

Keywords: LGBT, LGBTQ, Hijra, Transgender

I. INTRODUCTION

The sexual orientation of a person is not something that can be changed. Accepting a person for this aspect of their identity is a decision that someone makes.

"Ignorance is no justification for normalizing any form of discrimination," Judge Anand Venkatesh of the Madras High Court in 2021

II. HISTORY OF HOMOSEXUALITY

Khnumhotep and Niankhkhnum, Ancient Egypt's royal servants, were the first gay couple to be interpreted in recorded history. They were buried together at Saqqara and are listed as "royal confidants" in their joint tomb, but homosexuality has been depicted since 5,000 BCE. Though marriage between men was not legally recognized in Ancient Greece, Dorian aristocrats in Crete formed lifelong relationships between aristocrats and adolescent boys, but they were no different from heterosexual marriages.

Even the Catholic Church, which is well known for its opposition to homosexuality, was fine

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with it for the first millennia and a half of its existence.²

When it comes to India, homosexuality has a place in ancient texts such as the Manusmriti, Rig Veda, Upanishads, Kamasutra, and Puranas. There were Harems of Young Boys kept by Hindu Aristocrats and Muslim Nawabs shows that there was a place for homosexuality in Indian Muslim History. Pederasty was also very common but it was considered to be “pure love” in that time period.³

However, there were many instances in history it slowly lost its significance like the emergence of Vedism and British Colonialism, around 1500 BCE there was a decline of homosexuality after the surgency of Patriarchy.

In the Manusmriti, there were punishments for gay or lesbian behaviour such as whipping or monetary payment and purification rituals, but the punishment for heterosexual adultery was far worse, such as shaving a married woman's head and cutting two of her fingers off and parading her around on a donkey or the loss of caste for men.

Women were subjected to harsher punishments than men, but while homosexuality was still considered a crime, it was not as severe or openly condemned in religious or mortal terms as the latter. Nonetheless, it was a retroactive period for queer rights in India.

Despite this, the LGBT+ community coexisted in society, in a small village Angaar in Gujarat, where a ritualistic transgender marriage is performed among the Kutchi community during the Holi festival. This wedding, which has been held every year for the past 150 years, is unique in that both the spouses in, Ishaak, are men.

Cis-male-to-female transgender people in India have traditionally organised themselves into Jamaat communities. A matriarchal structure has an older Hijra or Aravani as a guru. According to the 2011 Indian Census, there are approximately 500,000 people in India who identify as third gender.

Then came British Colonialism, and the Crown's puritanical views decided that it was pornographic and evil, and it was considered "unnatural."⁴

So, during the codification of laws that began during the British Period, homosexuality was considered unnatural in nature and declared illegal, a punishment was prescribed by the Indian Penal Code, which went into effect in 1860. Homosexuality was finally declassified as a mental

² Greenberg, D. and Bystry, M., 1982. Christian Intolerance of Homosexuality. *American Journal of Sociology*, 88(3), pp.515-548.

³ Ruth Vanita, *Same-Sex Love in India* (Penguin Books) (2008)

⁴ Alan Bray, *Homosexuality in Renaissance England* (Gay Men's Press) (1982)

disorder in 1974, after being considered abnormal behavior for over a century.

During the late nineteenth century, queer liberation took center stage with the establishment of various civil societies. With the launch of India's first gay magazine, *Bombay Dost*, in the late 1980s, and the establishment of a lesbian collective in Delhi called *Sakhi*, lesbian, gay, and bisexual issues were first articulated in a public forum. When the AIDS *Bedhbhav Virodhi Andolan* (ABVA) organized a public demonstration against police harassment of gay people in 1992, it was the first collective and public reaction to the various injustices perpetrated on queer people.

South Africa was the first country in the world to enshrine lesbian, gay, bisexual, and transgender people's rights in its constitution in 1994.

Similar laws exist in Canada, France, Luxembourg, Holland, Slovenia, Spain, Norway, Denmark, Sweden, and New Zealand, and the provision of equal rights for sexuality minorities, including marriage rights, was critical in Scandinavian countries.

The United States Supreme Court ruled in 1996 that no state could pass legislation discriminating against homosexuals,⁵ and same sex marriage was later legalized in 2015, but on the other hand India has not made significant progress in protecting its LGBT minorities or granting them equal marital rights.

Despite how amazing it was to see Section 377 altered in India in 2018 because it violated India's constitutional morality between consenting adults, it was disheartening to see the Delhi High Court strike down same sex marriage in 2021 because it was deemed not to be a fundamental right, and that marriage was seen as a "bond between a biological man and a biological woman."⁶

III. INDIA'S LGBT MINORITY COMMUNITIES' CHALLENGES

1. Schooling

Gender-specific school uniforms, a lack of toilet facilities, and difficulties obtaining accurate identification documents are all barriers for LGBT students.

Bullying and physical violence are all too common; teachers beat up and chastise male students for being too effeminate, and trans students are separated from their peers.

⁵ Lambda Legal, "Supreme Court Vacates Cincinnati's Anti-Gay Amendment" (1996)

⁶ M, A. & hani. (2021, February 25). Gay marriage not a fundamental right, wedding a bond between man, woman—Centre to Delhi HC. *ThePrint*. <https://theprint.in/judiciary/gay-marriage-not-a-fundamental-right-wedding-a-bond-between-man-woman-centre-to-delhi-hc/611698/>

UNESCO polled 371 sexual and gender minority youth and gathered detailed information from more than 60 through focus groups in Tamil Nadu state. 84% percent of participants reported being bullied, the majority by other students, but one-fifth by a male teacher. Only 18% of those who had been bullied reported the incident to school authorities.

2. Housing

One of the most serious concerns is the lack of safety and security, as well as the denial of housing, segregation in communities, and threats from family, neighbours, and landlords.

Families that impose "conversion therapy," forced marriages, various forms of sexual violence, and illegal confinement force LGBT people to leave their homes and live in deplorable conditions. Even if the tenant can afford better housing, those options are unavailable, and they are forced to live in places with few basic amenities due to landlord discrimination. They are prejudiced against them because they believe they are involved in illegal activities, and they are evicted from their homes on the basis of false and derogatory beliefs. As a result, they become homeless and must rely on begging and sex labour to meet their basic needs. Because of this never-ending cycle, they face hostility and hatred from law enforcement and other government officials.

3. Work

Queer people face discrimination and violations of their human rights in the workplace, including a lack of equal job opportunities, discrimination during the recruitment process, discriminatory and gendered working conditions, and a lack of job security.

Because of harassment, bullying, and violence, LGBT people are frequently denied educational and training opportunities. Difficulties in obtaining gender identity documents, such as school records, have a negative impact on transgender people's employment prospects.

Public and private workspaces are frequently gendered within a male-female binary, resulting in restrictive and discriminatory dress codes and appearance standards. Those who have transitioned or undergone sex reassignment surgery may have their pre-transition work records ignored.

According to a resource guide titled "Creating Inclusive Workspaces for LGBT Employees in India" produced by IBM, Google, Goldman Sachs, and Community Business, this group accounts for 5-10% of the workforce in India Inc. Not only does this imply that India loses 0.1-1.7 percent of its GDP due to the denial of equal employment opportunities to LGBT+ people, but it also implies that output and productivity suffer as a result of the depression caused by

such discrimination.

4. Public Spaces

When attempting to access public spaces that are essential to the enjoyment of human rights and living a fulfilling and dignified life, including harassment and physical and verbal assault. This discrimination has an impact on LGBTQ people's ability to exercise a variety of human rights.⁷ LGBT people are constantly targeted and harassed by the state, particularly the police and other individuals, through the selective enforcement of laws that criminalize sex work, begging, and public nuisance. LGBT people are often targeted even when they are not engaging in criminal activity.

Access to sanitation facilities in public places, including public transportation, is particularly difficult for queer people in India. They are frequently denied access to restrooms that match their gender identity. This limits their access to work, education, and cultural spaces, as well as their right to water and freedom of movement.

Access points for travel, such as ticket booking forms, security screening, and restrooms, are frequently gendered. When asked about their self-identified gender, LGBT people are sometimes forced to engage in a public negotiation of their gender identity.

LGBT people face discrimination when entering privately owned places that are generally open to the public, such as shopping malls, hotels, restaurants, privately owned transportation, and other private businesses. Outright denial of entry, refusal to provide services, invasive surveillance, and discriminatory pricing are all examples of discrimination.

5. Marriage

The marriage institution in society is generally considered only to be male-female centric, many jurisdictions have maintained their legal prohibitions of homosexual marriages, therefore, relations between the same sex irrespective of their duration have no legal and economic privileges automatically conferred by marital status.

These include the ability to file joint tax returns, employment benefits and perhaps the most important especially since the AIDS epidemic - health benefits and partners' death rights, including interstate legacy, adoption etc. In society as a whole, heterosexuals have many of these advantages as partners, but homosexual partners still have no access to them.

⁷ LGBTQ community upset with 'homophobic' complaint - The Hindu, <https://www.thehindu.com/news/cities/bangalore/lgbtq-community-upset-with-homophobic-complaint/article24948858.ece> (last visited Aug 17, 2021).

IV. ACTION TAKEN BY THE STATE AND CENTRAL GOVERNMENT

1. The Transgender Persons (Protection of Rights) Act of 2019

Prohibits discrimination against transgender people in employment, educational establishments and services, healthcare services, access to "goods, service, accommodation, facility, privilege, benefit or opportunity dedicated to the use of the general public or customarily available to the general public," the right to movement, and the right to be treated with respect and dignity.

2. Real Estate (Regulation and Development) Act, 2016 known as RERA

Introduced an anti-discrimination clause in allotment matters. This prohibits sellers from discriminating against a prospective buyer based on religion, caste, gender or sexual orientation.

3. The Madras High Court, ruled on April 22, 2019, that the term "bride" under the Hindu Marriage Act, 1955 includes trans women. It specifically ordered that a marriage between a man and a transgender woman be registered.

V. RECOMMENDATIONS

1. To the Indian Parliament

In accordance with international law and standards, enact a comprehensive anti-discrimination law and legal framework based on nationwide consultations, with the goal of prohibiting discrimination on protected grounds of Sexual Orientation even Gender

Identity and Expression (hereinafter SOGIE), and incidental grounds, such as marital status and adoption rights.

Elaborate a comprehensive Transgender Persons (Protection of Rights) Act that guarantees equal rights and non-discrimination to transgender people in accordance with international law and standards, based on **community consultation**, consistent with India's international human rights obligations, and in accordance with the National Legal Services Authority vs. Union of India.

Amend the provisions in the Indian Penal Code, 1860 on sexual assault, sexual harassment, disrobing, voyeurism, stalking, rape, and gang rape (Sections 354, 354A, 354B, 354C, 354D, 375, 376, 376A, 376B, 376C, 376D, 509) to introduce gender-neutrality for victims in accordance with international law standards and the recommendations of the Justice Verma Committee in 2013.

Ratify the ICESCR Optional Protocol, which establishes the ICESCR's communication and inquiry mechanisms, as well as the Optional Protocols to other international conventions such as the ICCPR, CRC, CEDAW, and CRPD.

2. To the State and Central Government

Ensure that all administrative bodies established by the central government and state governments provide critical documents such as birth certificates, graduation certificates, marksheets, and passports in preferred name and gender through a simple and accessible process, without the need for proof of medical intervention.

Implement SOGIE training for all public service officers, including police, and identify appropriate police responses in consultation with LGBT people.

3. Others

Licenses should be revoked for medical practitioners who claim to be able to "cure" homosexuality.

Gender-nonconforming or transgender prisoners should be housed separately to protect them from sexual assault, according to the National Human Rights Commission (NHRC), which issued detailed guidelines for the protection of the LGBT+ communities' rights in detention.

VI. CRITICISMS

1. Transgender Persons (Protection of Rights) Act, 2019

Have forced requirements for people to register with the government in order to be recognized as transgender. They also criticize the inequity inherent in the disparities in punishment for the same crime, such as sexual abuse committed against a transgender or cisgender individual.

The bill is devoid of any real remedy or mechanism for integrating transgender people into public spaces and improving the quality of their lives, or of how the State intends to enforce this, or of what the State will do if and when such discrimination occurs.

The bill was also chastised for failing to consider any of the suggestions made by transgender activists, specifically that it only allows transgender people to receive identity certificates recognizing them as "transgender" and thus excludes other gender identities. Although the definition of transgender people includes terms such as "trans-men," "trans-women," "persons with intersex variations," and "gender-queers," these terms are not defined.

2. Military

LGBT people are banned from serving openly in Indian Armed Forces.

3. **Banning Discrimination on the Basis of Sexual Orientation in Employment**

Apart from the constitutional interpretations of article 15 of the Indian Constitution there's no legislative law in play to ban discrimination on this basis.

4. **Real Estate (Regulation and Development) Act, 2016 known as RERA**

Forced evictions, in particular, are a flagrant violation of human rights.

However, no normative framework exists to protect the LGBTQ community. While it is true that the Supreme Court recognized the need for India to act in accordance with international standards to protect the rights of the LGBTQ community in landmark judgments in 2014 and 2018, there are no legal frameworks in place that offer substantive equality.

VII. CONCLUSION

The progress of LGBT rights is often directly tied to – sometimes through indirect routes – multiple fights for human dignity and freedom.”- Michael Bronski.

Invalidation and stigmatization of a certain section of society has been practiced for thousands of years, and the atrocities committed against homosexuals are not surprising, but they are still disheartening. This struggle is far from over, as there are many minds to mend, but it has not been in vain.

India should be a place where heterosexuality is not the norm and homosexuality is not the exception: a place where one does not exist at the expense of the other and where both can coexist peacefully.
