

ISSN: 2582 - 2942



LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- VI

AUGUST 2020

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of LexForti Legal Journal. The Editorial Team of LexForti Legal Journal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of LexForti. Though all efforts are made to ensure the accuracy and correctness of the information published, LexForti shall not be responsible for any errors caused due to oversight otherwise.



ISSN: 2582 - 2942

EDITORIAL BOARD

EDITOR IN CHIEF

ROHIT PRADHAN

ADVOCATE PRIME DISPUTE

PHONE - +91-8757182705

EMAIL - LEX.FORTII@GMAIL.COM

EDITOR IN CHIEF

MS.SRIDHRUTI CHITRAPU

MEMBER || CHARTED INSTITUTE
OF ARBITRATORS

PHONE - +91-8500832102

EDITOR

NAGESHWAR RAO

PROFESSOR (BANKING LAW) EXP. 8+ YEARS; 11+ YEARS WORK EXP. AT ICFAI; 28+ YEARS WORK EXPERIENCE IN BANKING SECTOR; CONTENT WRITER FOR BUSINESS TIMES AND ECONOMIC TIMES; EDITED 50+ BOOKS ON MANAGEMENT, ECONOMICS AND BANKING;

EDITOR

DR. RAJANIKANTH M

ASSISTANT PROFESSOR (SYMBIOSIS INTERNATIONAL UNIVERSITY) - MARKETING MANAGEMENT

ISSN: 2582 - 2942

EDITORIAL BOARD

EDITOR

NILIMA PANDA

B.SC LLB., LLM (NLSIU) (SPECIALIZATION BUSINESS LAW)

EDITOR

DR. PRIYANKA R. MOHOD

LLB., LLM (SPECIALIZATION CONSTITUTIONAL AND
ADMINISTRATIVE LAW)., NET (TWICE) AND SET (MAH.)

EDITOR

MS.NANDITA REDDY

ADVOCATE PRIME DISPUTE

EDITOR

MS.SRISHTI SNEHA

STUDENT EDITOR



ABOUT US

LexForti is a free open access peer-reviewed journal, which gives insight upon broad and dynamic legal issues. The very objective of the LexForti is to provide open and free access to knowledge to everyone. LexForti is highly committed to helping law students to get their research articles published and an avenue to the aspiring students, teachers and scholars to make a contribution in the legal sphere. LexForti revolves around the firmament of legal issues; consisting of corporate law, family law, contract law, taxation, alternative dispute resolution, IP Laws, Criminal Laws and various other Civil issues.



Sexual Orientation and Law: A Critical Analysis

Yash Aggarwal and Soumya Sharma

ABSTRACT

Since the inception of LGBTQ+, various opinions and conclusions were made about the community, stating it a sin, a stigma, a mental disorder, and sexual orientation disorder. Like every other controversial topic, this also paved the way for rigorous research to understand the community. Within a minority stress conceptualization, however, stigma-related prejudice and discrimination experienced by LGBTQ people constitute chronically stressful events that can lead to adverse health outcomes. The impact on social recognition for them is a question of thought. This article explores the effects of the challenges they face in every domain of life. The Justice system, through its optimistic liberal approach, tried to enumerate rights of this community through its historical judgments like the fundamental rights of life and dignity, privacy, equality and right against discrimination mentioned under Part III of the Constitution. The potential reforms suggested in the article have implications for the Government officials concerning the LGBTQ+ population. After thorough research of existing lawsuits for different communities, these reforms are proposed and would facilitate the development of the LGBTQ+ community.

INTRODUCTION

It is okay! Remember, it's okay to be unsure of all the labels we now have to describe sexual and romantic orientation, alterations, and behaviours. A person must maintain their originality and individuality, be it the God one prays to, the person he/she/they loves, the favourite kind of food, the caste one belongs to, even the sexual preference. Nobody has a right to judge someone based on another person's belief. Sexual orientation, by definition, is a person's sexual identity concerning gender and the fact of being heterosexual, homosexual, bisexual, or any other orientation¹. Beyond the ability to reproduce, sexuality defines who we are as humans and how we see ourselves. Self-acceptance is, first and foremost, the key to be the original self and do what one wishes. This paper targets various aspects of LGBTQ+ life to analyse and provide implications on the existing laws. Part I provides the information about the LGBTQ+ community, part II lists the challenges, Part III & IV talks about the judicial evolution and potential solutions concluding with future prospects in Part V.

ABOUT LGBTQ+

Before proceeding further, the need to know details about the community, its challenges, what all misconceptions and stereotyping they face, and above all, fundamental aspects of the justice system for them, are significant to shape any opinions. It is essential to get the stereotyping out of the picture, for which awareness is necessary. As discussed above, sexual orientation is about the identity an individual sees himself/herself. There are different kinds of sexual orientation. For instance, a person may lie in any of the categories² below:

1. Heterosexual (straight): it describes a person who is attracted only to a person of "opposite" gender and has no romantic feelings for someone of the same gender.
2. Homosexual (gay, lesbian) - a person is considered homosexual if he/she is attracted solely or almost exclusively to the same gender person and wishes to establish a romantic relationship with them.
3. Bisexual - a person, attracted to both the genders, men and women. Though the person might not necessarily be attracted to both genders at the same time.

¹ <https://www.merriam-webster.com/dictionary/sexual%20orientation>

² <https://www.healthlinkbc.ca/health-topics/abj9152>

4. Pansexual (or omnisexual) represents a person who is attracted to a person of any gender. The prefix “pan” comes from Greek and means “all”. A pansexual individual may be attracted to all persons regardless of gender identity.
5. Asexual describes someone who is not sexually attracted to any gender. Asexuality should not be confused with someone who has decided not to have sex with anyone (abstinence or celibacy).

Apart from this, Sexual orientation and gender identity are not the same things. Here, the authors have listed some definitions of words and phrases³ commonly used and heard:

Ally: Commonly used term for a heterosexual person who supports and celebrates all characters, challenges discriminatory remarks and actions of others;

Bi: Shortened term for "bisexual," a person who have romantic feelings for both a man and a woman;

Cisgender: A person with gender identity same as the sex they were recognised with at birth (for example, woman and female);

Coming Out: ("coming out of the closet") accepting oneself or knowing about their queer's sexual identity; trans identity, accepting their identity, and informing others about it;

Gay: A man or woman who is attracted to only or almost only to a person of the same gender. This word often used to refer to men only;

Gender identity: it describes the self-identification of being a male, a female, both, neither, or some other gender under LGBTQ2+. The person might not recognise with the gender he/she had by birth;

Lesbian: A woman, attracted to other women only;

LGBT2Q+: An evolving acronym for Lesbian, Gay, Bisexual, Trans, Two-Spirit, Queer and additional identities;

³ *Id*

Queer: refers to the range of non-heterosexual and non-cisgender people.

Straight: An informal word for "heterosexual";

Transgender or transsexual: describes a wide range of people whose gender or gender expression differs from their assigned sex and the societal and cultural expectations of their assigned sex. Sometimes shortened to "trans";

Two-Spirit: used by an Indigenous person to describe their spiritual, gender, and sexual identity.

IMPACT ON PHYSICAL HEALTH

Discrimination against LGBT persons has associated with high rates of psychiatric disorders. However, before even thinking about having stable emotional health to live a peaceful life, the LGBTQ people are deprived of the necessary facilities to maintain physical fitness. According to various statistics, there are facts about the increased health concerns of these people. Studies have shown that LGBTQ youth are 2 to 3 times more likely to commit suicide due to fear of rejection and humility⁴. They have less or no access to preventive services from the hospitals or clinics, and risks of HIV and other STDs are much higher due to lack of sex education. They are also at higher risk of obesity due to over-stress. The individuals are more likely to indulge in higher consumption of alcohol⁵ and other drug usages. Not only the psychiatric reasons impact their health, but unfortunately, they fall prey to violation and victimisation⁶, wrecking them. These facts prove that unawareness among different communities leads to miserable and traumatic experiences for members of the LGBTQ community.

For a better understanding, it is necessary to address some fundamental questions. How is their emotional health compromised? What challenges do they have to face? What can we do to curb these practices of violation against a whole community? How can we stop the discrimination towards them? What is the Government doing for them?

⁴ Garofalo R, Wolf RC, Wissow LS, et al. Sexual orientation and risk of suicide attempts among a representative sample of youth. *Arch Pediatr Adolesc Med.* 1999;153(5):487-93.

⁵ Xavier J, Honnold J, Bradford J. The health, health-related needs, and life course experiences of transgender Virginians. Virginia HIV Community Planning Committee and Virginia Department of Health. Richmond, VA: Virginia Department of Health; 2007.

⁶ Whitbeck LB, Chen X, Hoyt DR, et al. Mental disorder, subsistence strategies, and victimisation among gay, lesbian, and bisexual homeless and runaway adolescents. *J Sex Research.* 2004;41(4):329-42.

CHALLENGES AND SOCIAL CULTURE

How would a person feel if their whole existence is a question, or there are hurdles in every step they take? Devastated, they would rightly be so. Rejection, prejudice, fear, and confusion can break anyone to a point they can never recover. However, the level that LGBT face is beyond the limit to describe their pain in words. The challenges of LGBTQ+ people lead to tremendous difficulties in their journey from childhood to adulthood since homosexuality ever since its inception is considered to be deviant, a mental illness, and later a Sexual Orientation Disturbance by the American Psychiatric Association (APA) in the year 1973⁷. They have to struggle in every walk of life facing humiliation and discrimination. It never gets old; the stereotyping never stops. The constant whispering in the ears makes you realize that you are not wholesome, is never fading away.

It starts with strife in getting social protection schemes to withstand harassment due to fear of losing their job in the labour market. Then, young LGBT has to go through estrangement from family and friends, resulting in increased school drop-out rates, ill health, and homelessness. Not only this, but stigmatisation negatively impacts the psyche of teens and makes them vulnerable. LGBT teens tend to develop low self-esteem and low confidence. Self-harm, anxiety, loneliness, and discomfort can be the effects of social exclusion and marginalisation.

The other forms of marginalisation can be racism, sexism, and poverty, making their life a living hell. The teens have to wait until they are adults to “come out” to their parents. When they do, their parents' reactions devastate them, resulting in violence and abuse. Most times, families disown them and force them out of their homes. So, now they are homeless with no money, socially criticised, and mentally disturbed. These poor economic conditions leave them with no choice but to indulge in illegal activities. They get involved in prostitution (sex worker), giving an edge to immoral trafficking.

When it comes to older LGBT people, problems of housing, and jobs. Heterosexual people earn more than homosexuals. Job instability and workplace harassment contribute to the high levels of depression and suicidal tendencies. They cannot find shelter, and no one is ready to give them apartments on lease due to apparent social pressure.

It's not right to say that a judge always does the right thing. Even the apex court of our country failed to deliver justice to this community. Various international organisations globally criticised the

⁷<https://www.nytimes.com/1973/12/23/archives/the-issue-is-subtle-the-debate-still-on-the-apa-ruling-on.html>

judgment in the case of *Suresh Kumar Koushal v. Naz Foundation*.⁸ The Court held that only the Parliament has the power to decriminalise the "so-called" criminal offense of homosexuality. It curbed the right of the Court to intervene in the matter. It also held that a person couldn't use Privacy's umbrella right as protection against performing the act of homosexuality. The judgment declared homosexuals as criminals and restricted even more people from coming up and asking for their rights. The decision not only failed to render rights to the community but instead took away the sole meaning of a person's life in the eyes of the law.

One can map all these problems/challenges back to their root, which is the lack of awareness, lack of role models to look up to, lack of sex education, lack of policies to deal with the marginalisation, and lack of sensitivity and acceptance among communities. No human being deserves social abuse, victimisation, discrimination, and, more importantly, the feeling of worthlessness and doubt. So, we need to realize that Lesbian, Gay, Bisexual, Transgender, and any other sexual orientation are as human as "socially-accepted" male and female genders.

THE CONSCIOUS INSPECTION OF JUDICIARY

India is a developing nation that ever since its independence is striving towards better facilities for its citizens. With the growth in educational amenities, more and more people are forming opinions about different controversial aspects prevailing in the country and around the globe. One of which is the present topic of the paper.

The LGBTQ population is not alone when it comes to asking for the rights. Various organisations like Nazariya and Naz Foundation are actively working for their rights. The first case to openly address same-sex intercourse was the *Naz Foundation Case (2009)*⁹. The petitioners wanted the decriminalisation of Section 377 of the IPC. The Delhi High Court upheld the right of life and personal liberty of all the persons irrespective of being a homosexual or not and stated that the Right to Dignity and Privacy is the basis of Article 21. Further, the Court also held that Section 377 of the IPC was a violation of Article 14. It unreasonably discriminates against homosexuals by declaring them to be a separate class of society. Moreover, it is also a violation of Article 15 that prohibits discrimination based on sex.

⁸ Civil Appeal No. 10972 of 2013.

⁹ WP(C) No.7455 of 2001

Thus, sex is not only considered to be the biological sex, but it also includes the sexual orientation of a person.

The situation is that the group stands still in the middle of nowhere with dejection filled in their bodies. The diverse list of questions and confusion is not only faced by the community but has also been a significant concern for other citizens. The question remains the same, whether to grant the rights to this group or not. To answer this question, various courts have adopted different approaches to tackle this situation. As in the Suresh Kaushal case, to rectify the mistakes, the Court in the case of *Justice K.S. Puttaswamy v. Union of India* (2017)¹⁰ held that the Golden Triangle of our constitution, i.e., Article 14, 19, and 21, declare sexual orientation as an attribute of the Privacy of a person and thereby again upheld the case of Naz Foundation (2009).

According to the data provided in the year 2014, around 4.9 lakhs individuals have come out to be in the transgender category.¹¹ The enormous amount of humankind sets the need to recognise separate rights for this community individually. Late in the year 2014, after this data was released, the Supreme Court of our country enumerated the transgender community's rights in the case of *NALSA v. Union of India and Ors.*¹² The Court stated that the laws in our country are based only on binary genders, i.e., male and female. Therefore, there is no special provision for the transgender people that covers a whole lot of our population in the country. The only reason why discrimination against the transgender section takes place in our country is because of this lack of provisions. Therefore, in an endeavour to recognise the transgender community's rights individually, The Supreme Court, through this case, enumerated the following rights of the transgender community:

1. Under Article 14 of the Constitution, every person, irrespective of being a male or a female or a transgender person, has the freedom to enjoy their rights, protected under the aforesaid article.
2. Article 15 and 16 protect an individual from any kind of discrimination on the grounds of sex, and thereby, it also protects from discrimination on the grounds of sexual orientation.
3. Article 19(1)(a) ensures a person's privacy, identity, gender, and integrity, and thus, the provision of Section 377 of IPC is somehow wrong on the face of it.

¹⁰ WP (C) No. 494 of 2012

¹¹<https://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms>

¹² Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013)

4. Lastly, Article 21, i.e., right to life and personal liberty, allows a person to choose his/her own gender identity.

The Court, stating the aforesaid rationale, suggested that the Union Government bring such laws that fulfil the present-day requirements. In a nutshell, the rights granted to the transgender community were:

- Right to self-identify the gender
- Right to have equal treatment
- The right to have legal recognition of gender identity, be it men, women, or transgender.

The Court, in a very optimistic approach, classified the rights of the Transgenders. After a period of five years, the Government now brought the Transgender Persons (Protection of Rights) Act, 2019 (*hereinafter Act*), which has both positive and negative implications. Like the two sides of the same coin, the Act prevents discrimination against transgender in varied contexts like healthcare, employment, education, etc. and on the other side of the coin, it is getting criticised by a distinct number of activists over India. The new Act has been seen as the violation of the NALSA Judgement because the latter laid down the grounds of self-identification of gender. Still, the former gives power to the District Magistrate to classify this community as “Trans,” which directly restricts the community's rights. It is hard to say whether one should agree with the Government for bringing up a set of rights or stand by the community for what it wants.

It often said that slow and steady wins the race. As a whole, the LGBTQ community has struggled a lot to achieve what it has got today. The constant efforts have helped the community to at least get some rights recognised through the courts. On the other hand, the liberal approach of the courts has helped the community obtain what they had deserved since the very beginning. Not even this, the scope of the Transgender Person Act, 2019 was restricted to the welfare of one community, on the contrary to the judgment ruled in 2018, involving partial unconstitutionality of Section 377 of IPC.

On 6th September 2018, the Apex Court of our country delivered the most celebrated judgment of the year 2018, furnished in the case of *Navej Singh Johar v. Union of India*.¹³ The Apex Court, through this judgment, decriminalised all consensual sex among adults in private (including homosexual sex),

¹³ WP(Crl.) No.76 of 2016

by partially declaring Section 377 of IPC to be unconstitutional on the grounds of no intelligible differentia and lack of rational nexus. The Court suggested that one should let go of all the confusions relating to such social norms that are too ambiguous and subjective. The Court appreciated the decision of the Naz Foundation Case 2009. It also raised the point that the right to express one's own identity is a right under Article 19 of the Indian Constitution. Furthermore, while discussing Article 21 for the right to life and personal dignity, the bench said that it includes the Right to Privacy, Right to Dignity and Autonomy. However, there can be reasonable restrictions, which does not imply that Section 377 of IPC goes on criminalising the sexual intercourse between consenting adults.

Decriminalising consenting sexual intercourse is not the end. It is instead the start of a conflict between the LGBTQ community and the Government. The phase of actual struggle has started, where the community, along with some activists, are still demanding the fundamental civil rights that every person has and is free to execute. On the other hand, this community neither has codified rights nor the option of execution. It is like they are standing in the middle of an ocean, drowning slowly ever since. As of now, there is no way out for them because the Government has not yet initiated any new bill or any kind of amendment in the pre-existing laws of the country.

CRITICAL ANALYSIS AND POTENTIAL REFORMS

Every human being has inherited some fundamental human rights that exist irrespective of the cast, sex, class, place of birth, and nationality. Various Human Rights Treaties, the United Nations Charter, and the Universal Declaration of Human Rights majorly uphold the Right to Equality and Non-Discrimination as the sole basis of Human Rights. These provisions of the law are available for all humankind irrespective of the sex, sexual orientation, gender identities, or even the "so-called" other statuses that one connotes the LGBTQ community.

In India, the customs and traditions of a community at large plays a very significant role while framing the personal laws of religion. Since several people consider LGBTQ's stigma and a medical problem, this community's practice was never a part of society and thereby not seen in any of our customs and traditions. Personal Laws in our country usually cover the sphere of family relations, marriage, divorce, and succession. On the one hand, we have Muslim Personal Law often called as the Shariat, Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956). While on the other hand, we have secular laws like the

Special Marriage Act (1954). The LGBTQ neither holds a place in personal laws nor secular laws even though our Preamble agrees to grant social, economic, and political justice while maintaining the dignity of a person.

The LGBTQ community is not a part of either of the boats, neither a part of personal laws nor a part of secular law. It is high time for our Parliamentarians to consider the LGBTQ community as citizens of India and have similar rights like that of any other citizen of India. In this regard, the following are some of the possible solutions that the Parliament can consider while functioning their duties towards this community.

- Without hurting the sentiments of any particular section of society, it is a humble request that the Parliament must consider bringing a separate law for this community. The separate law should deal with all the personal laws like Marriage, Divorce, Adoption, Surrogacy, Proprietary Rights/ Succession, and other similar personal laws. This will strike a balance between religious sentiments and the rights of LGBTQ individuals.
- Article 15 of our Indian Constitution states that the state shall not discriminate against any person on the grounds of sex. The state, keeping this in mind, shall make special laws for the LGBTQ community to prevent social, economic, and political discrimination. It is also suggested that the Parliament bring amendments in Clauses 1 and 3 of Article 15 by adding LGBTQ in the picture. By such a bill, the community will have a constitutional right against any kind of discrimination; moreover, the Government will be free to make special laws to uplift the community.
- The lawmakers can also think to bring reservation in employment for this community so that they are in a position to develop individually. By bringing reservations, more and more people will strive for better education, job opportunities, and whatnot. These reservations will build their community as a whole. The LGBTQ, especially the transgender people of our country, would not be forced to beg for their livelihood. They will be in a position to stand on their feet.
- The Government can also make certain reservations for land or apartments, especially for this community, so that they are not forced to suffer communal hatred that exists even in the 21st century while going out to find homes for themselves.

- The Government must consider the formulation and implementation of anti-bullying policies in schools, colleges, and workplaces, with special provisions for LGBT teens and adults. These policies could solve the problem of drop out and would result in high self-esteem.
- One of the most effective ways to prevent STDs and disease spread is education and training. So, the central Government must consider providing med students with medical training for transgender people to increase the provision of culturally competent care.
- The lawmakers must give a thought to incorporate comprehensive sex education and gender therapy programs. This policy would help every LGBTQ community member, especially the teens, who deserve to feel safe and enjoy social life as much as any other heterosexual person.
- The appropriate Government can also consider forming a Board Committee on small levels (like that in the state of Tamil Nadu) and a watchdog committee at the central level that selflessly works for this deprived section of the society and monitors implementation of rules and laws that favours the LGBTQ Community. This watchdog can further keep an eye on government officials or those in power like Police and other agencies to curb their arbitrary power and thereby protect this community from harassment.
- There exists a social duty upon the community at large to accept this group. This acceptance must start from the individual houses. The parents of a community member must be liberal enough to take them for who the person is. Although acceptance is very personal and depends on individual to individual, the Government must initiate awareness campaigns for the society at large that somehow aids the families and the society, in general, to understand how an individual of this community feels.

Until the Government takes the responsibility of implementing or considering the solutions aforesaid, LGBTQ people could reach out to a trusted person, who could be their school counsellor, a relative from LGBTQ, their healthcare provider, or a therapist. They could also seek help from various online organisations. Seeking help won't harm but could be done to avoid stress and feelings of worthlessness.

FUTURE PROSPECT

With the suggested solutions, we are looking forward to establishing a society with varied communities, taking social responsibility for others' welfare, and with a sense of togetherness. This would improve the LGBTQ+ community's conditions to the extent that the transformed life and attitude of those people won't be even close to the situation they are living in today. The benefits of addressing LGBT concerns and reducing disparities would lead to -

- Reduced disease transmission due to educated youth with proper sex education and information about STDs and other infections would reduce health care costs as the number of medical cases would decrease.
- Increased mental health and physical well-being resulting from no violence based on sexual orientation, caste, race, and status
- Increased longevity
- Reduced safety concerns due to established safe meeting places and equal rights without any discrimination with increased social activities as no one are going to judge a person just because he/ she/ they chooses to love the person with whom they want to spend their life.
- Acceptance of society for the LGBTQ people, since due to never-ending discrimination, LGBTQ has created an aversion from society.

With these amendments in the future, every community will be celebrated equally and rationally. The atmosphere of harmony and brotherhood will get established, and no social, economic, or political dispute would come up concerning the marginalisation and discrimination against any person.

CONCLUSION

“If you want to be happy, do not dwell in the past, do not worry about the future, focus on living fully in the present.”¹⁴

Roy T. Bennett has rightly said the above statement. We must not fret over what has happened; instead, we should be thankful for what we have and always look forward to a bright future without regret. In context to LGBT people, self-acceptance is what required and nothing else to their lives with no regrets, fear, or guilt.

We can change the current scenario where being gay, lesbian, bisexual, or transgender is considered a taboo. All we need is support from our Government to heed the solutions given above to improve the quality of life the LGBTQ community is living. Let’s get to know ourselves, our community, and our society. Let’s pledge to be socially responsible and aware to stand against any discrimination.

¹⁴The Light in the Heart (Book) by Roy T. Bennett