

A Neglected LGBTQ Community in India Problems and Solutions

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ABSTRACT: Human evolution is dynamic in nature. Over the years and decades, it preferences has been of living. One of the aspects of this ever-changing preferences is the choice of sexual orientation. A stratum of the human population i.e. young children and the LGBTQ community (lesbian, gay, bisexual, transgender, queer) now a days tend to become the victim of the societal distress just because of their sexual choices. Society does not approve them because of its pre-conceived notions that sexual orientation can only be heterogeneous in nature and not homogenous like gay, bisexual, lesbian etc. Even in this era of pool of statutes, human rights agencies and various constitutions across the world, the rights of this community are still being undermined. Human evolution in a proper way can only be possible if the natural rights of every human, irrespective of its gender, are addressed sufficiently and in consequence are respected and welcomed by the society. But the biggest challenge in the present era is that the LGBTQ community faces difficulties in the every sphere of life. Therefore, now it is high time that the rights of this community along with children are protected and confer a dignified life to them.

Keywords: LGBTQ, Sexual orientation, Queer, Discrimination, Harassment, Bullying.

INTRODUCTION

The United Nation Convention of the Rights of Children (UNCRC) deals with the rights of all children (including LGBTQ one) who are below the 18 years of age. These rights among others include the right not to be discriminated against (Art. 21), the Right to life, survival and development (Art. 6), the Right to express their views (Art. 13) and for such views to be respected (Art. 12), protection from violence, abuse and neglect (Art. 19), access to health services (Art. 24), Right to an adequate standard of living (Art. 27), Right to education (Art. 28), Protection from drug abuse and sexual exploitation (Art. 33 and 34) and protection from abduction, sale and trafficking (Art. 35). The forefathers of the Indian Constitution will foresighted the need of inserting the provision related to the protection and development of the children (including of the LGBTQ community). The Indian Constitution ensures certain important fundamental rights to all citizens like Article 14 (Right to equality and equal protection of laws) Article 21 (Right to life and personal liberty), Article 23 (Prohibition on trafficking of human beings and forced labour). Besides this, Indian constitution also provides some special rights to children (Art. 15(3)), securing their right to education (Art. 21A), prohibition of child labour (Art. 24) protection of children from sexual abuse (Art. 39(e)), directing the state to provide early childhood care and education for all children up to 6 years of age (Art. 45) and to raise the level of nutrition and standard of living

and improvement of public health (Art. 47), Apart from this Art. 39(f) of the Indian Constitution provides that children should be given opportunities to develop their skills in a congenial atmosphere and environment of freedom and dignity. It should also be taken care of by the state that youth is protected against every kind of exploitation.

In addition to these provisions, the Union and State governments have also formulated the various legislations and policies for the protection of the interest of such interest. But despite these steps, the remarkable improvement in the condition and right issues of such children is yet to see the light of the day.

Statement of Problem

1. Till the time, the Hon'ble Supreme Court struck down the section 377 of Indian Penal Code, 1860 in September, 2018, the consensual homosexual acts between two adults were to be punished. But in Navtej Singh Johar case (2018) the Supreme Court (Navtej Singh Johar v. Union of India, AIR, 2018, SC, 4321) held down the regressive provision which criminalized the homosexual acts between two consenting adult's citing the reasons that this provision is not in consonance with the contemporary demands of the societal youth. Under Article 19 of the constitution of India, a person has the fundamental right to choose his/her sexual orientation. Choice of sexual orientation is part of the freedom of speech and expression and therefore the young adults who chose to be gay, lesbian,

bisexual etc. are will within the law to opt for such dimension.

2. But what this judgement provided was only protection from being prosecuted for homogenous sexual (consensual) acts. Beyond this aspect, this LGBTQ community is still fighting for its rights. They have not been provided the legal right to marry. In India, a marriage is valid only between the male and a female. Same sex marriages are not allowed under any law or personal law in India. Therefore, the youth who want to solemnize same sex marriages has no remedy in the eyes of law. They are still unaddressed on this aspect by the Union and the State governments (Ream, 2019).

Under the Indian personal laws, the gender specificity given to the matters of marriage has completely ignored the choices made by the youth regarding same sex marriages. The exclusion of homogenous marriages shows the prejudice towards LGBTQ community children. Rather there should have been the sense of inclusiveness to draw everyone under the umbrella of personal law to solemnize marriage irrespective of the choice of the gender of their counterpart partner. In India, major statutes which relates to the rights of the children are the Juvenile Justice Act, 2015 (JJ Act) and the Protection of Children from sexual offences Act, 2012 (POCSO Act) As per section 1(4) of the JJ Act, children has been categorized under two heads i.e. Children who are in need of care and protection and the Children who are in conflict with the law. And the POCSO Act protects the children from being sexually assaulted and becoming the victim of pornography and penalizing the offenders who go against these provisions.⁴ But unfortunately, none of these two legislations talk about the discrimination and assault which such children face on the basis of their sexual choices. Yet one more legislation is there for the protection of the children specially a girl i.e. Domestic Violence Act, 2005 (Section 2(b) and 2(c) of the Protection of Women from Domestic Violence Act, 2005). Under the scheme of this Act on “aggrieved person” is only a woman who is or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent⁵. Under this Act too, a child who has to face domestic violence on the basis of his/her sexual orientation has no say to the law authorities.

Under the scheme of Indian Penal Code, 1860, the consent of the minor has no value. Therefore, NGOs also are not in position of fight for the rights of LGBTQ community especially when such young children are either sent out of their homes or are rejected by their parents. This kind of situation leaves them in lurches and there is no door they can know for the redressal of their grievance.

State of LGBTQ+ Community/Children at Global-Level

The United Nations Children’s Fund (UNICEF) in its 2021-report stated that young Children whose sexual orientation are gay, lesbian, transgender, bisexual etc are susceptible and are more likely to become the

victim of social stress such as bullying, non-approval from the parents which is directly related to their deteriorating mental health conditions.

The report also states that the children who go against the pre-conceived notions of the society about sexual choices has to face a lot of discrimination at various levels and thus they pay the cost for their sexual orientation. It also puts them on a disadvantageous position in the societal mainstream. Another report in United Kingdom i.e. Millennium Cohort Study disclosed that LGBTQ community/young children tend to confront more depressive symptoms in comparison of their heterosexual counterparts. Such children are also negatively commented by their peers, rejected by the parents, avoidance behavior by the society, hate crimes which places them on a totally disadvantageous position and in some cases, this victimization and abuse increases so much that they even try to commit suicides.

In U.S.A. data collected between 2016-19 shows that number of LGBTQ individuals between the age group 12-14 committing suicide was three times higher than 25 to 29 years of age. Despite the fact of rising social acceptance, today’s generation is committing more suicides than the previous one. In 2018, report published by Ministry of Women and Child Development, Government of India has collected data related to child care institutions under the Juvenile Justice (Care and Protection of Children) Act, 2015 (MWCD). However, this report suffers from two lacunas. First, it only includes the institutionalized children. It does not address the interests of other children. Second, it has collected the data only of boys, girls and transgender and thus excluding the other queer children. Evidently, LGBTQ or the queer children are at great risk of discrimination at school by friends, sexual abuse, violence, trafficking, malnutrition, sexually transmitted diseases, homelessness, trauma, health and rejection by parents etc.

State of LGBTQ/Children in India Intersecting Rights Infringement

The most valuable rights enjoyed by the children are the rights to life, education, protection and participation. Children can’t use these rights in isolation rather the availability of one rights in isolation rather the availability of one right is dependent upon the existence of the other. Unless one of them is available, no other right can be enjoyed. For instance, a child may not get himself educated if he/she is not mentally and physically healthy. Further, if he is not mentally and physically fit, then it would tantamount denying the right to life and when right to life is not there, right to participation is also lost. The inaction on the part of the government in safeguarding one particular right automatically results into violation of other incidental rights.

LGBTQ+ Individuals and Health Issue

LGBTQ community and the young children face a lot of health issues. The most common health issue is mental health. Due to avoidance behavioral pattern by their peer group, family, society etc. and also negative comments occasionally make them to be in isolation.

This isolation further enhances the depression and anxiety which is equal to the physical torture. The basis of the whole functioning of the body is the good mental health and when this is deteriorated then other incidental diseases pop up in various forms such as tuberculosis and even in some cases HIV (Amos *et al.*, 2020). Not only this, young children of this community are also compelled in some situations at a greater risk of their life. And this risk comes in the form of forced commercial sex work. A large number of LGBTQ community individuals are forcibly pushed into sex work which makes them vulnerable to various communicable diseases and thus severely affecting their health.

LGBTQ Community; Poverty and Discrimination at Workplace

4. Lesbian, gay, bisexual, transgender people face a lot of discrimination at workplace. First, they do not get jobs easily because of the exclusiveness orthodoxy thinking of the employers. In public sector too, governments has also not provided them adequate opportunities till now. Secondly, even if they somehow managed to get the employment, their colleagues do not support at workplace (United Nations Educational, 2019).

Because of such atmosphere at workplace these communities get very few chances to remain in employment. And thus, they have to face bad economic conditions which pushes them in abject poverty. In various studies, it is also found that the persons have homosexual preferences do not receive equal pay for equal work as the heterosexual counterparts get.

LGBTQ Individuals and Drug Addiction

The young children of this community are more likely to consume alcohol, tobacco and drugs in comparison of the general population. They also consume the drugs for the same reasons as the general population do. But their likelihood of consuming the drugs is more because of the fact that they have to face lot of anxiety, stress and discomfort because of their sexual choices. When they confront such unacceptable and exclusionary behaviors from the society, there are more chances that they will fall into drug addiction.

Parental Rejection

In some cases, the children having homosexual orientation has to confront the rejected from the parents. The parents, in most of the cases, being the persons of preconceived notions of the society, do not support in any way that their children can have same sexual orientation choices. In frustration, parents discard their children who don't change their sexual choices and thus in such a situation, the children of this community further suffer from the lack of roof along with parental rejection.

Discrimination in Healthcare Services

Another problem faced by LGBTQ community is that they do not receive the same quality of health care from the doctors as the heterogenous sexual counterparts. Somewhat doctors fraternity also can be seen lethargic in some cases in giving proper care and caution and treatment to the people of this community. The reason

is again same i.e. they still not have been able to accept this community's people as they are. They are overwhelmed by the everlasting thinking about this community. Thus, this situation becomes more pathetic for the LGBTQ community.

Victims of Hate Crimes and Violence

Lesbians, gay bisexual and transgender people are targeted by the society and sometimes, this prejudice goes to such an extent that they are even physically assaulted. Assaulting physically these queer children encourages others also to do the same. Therefore, LGBTQ community also has to face hate crimes and physical assault at times.

1. They have been many reports on LGBTQ suicides. In a new report of October 2015, it was stated that there were 16 LGBTQ suicides in 18 months in Tamil Nadu and these victims were between the age of 18 to 30 (16 LGBT Suicides in 18 Months; The New Indian Express, October 2015). In February, 2022 a 15 year old boy in Faridabad committed suicide citing the reason of discrimination and harassment owing to his homosexual preferences at school. In the same manner, a 19 year old boy in Chennai had taken away his life after he was made fan of being homosexual.

Taking own's life is the most dreadful task. Imagine the mental trauma with which an adolescent goes through before he commits suicide. It is not the random comments which pressurize them to take such a big step rather it is the piled up emotions in a LGBTQ community individuals over a period of time owing to social avoidance behavior of the society that compels him to end his life.

UNESCO conducted a survey in 2019 among the youth having homosexual preferences in the schools of Tamilnadu to find out what is the state of discrimination and harassment, they have to face on daily basis. In this survey, it was found that 60% students of High and Middle schools were under the threat of bullying and 50% students from the secondary schools were being targeted on a daily basis. Even in the primary schools, 43% children were being discriminated and harassed for having their particular sexual choices.

It was also quite distressing to note that whenever the victimized children reported this harassment to the authorities, in most of the cases, they were suggested to change their feminine behavior and act like normal children, if they want this harassment and discrimination eliminated. Non-cooperation by the school guardians and authorities also further deteriorates the situation of these young children and LGBTQ community individuals. At school level, there has to be a mechanism which would make the non-cooperative students to accept the LGBTQ children for their sexual choices. Acceptance of the nature and choices of others would normalize the situation at school levels.

The National council for Educational Research and Training published a manual in which it sought the teachers to sensitive themselves towards the LGBTQ community children and educate the other students to try to bring the LGBTQ individuals in the mainstream

of the other students. But after sometime, this initiative was taken down.

Judiciary and LGBTQ Community

Indian judiciary has always been custodian and protector of the fundamental and other legal rights of every segment of the society. In this line-up Supreme Court also extended its hand and provided the relief to the LGBTQ community in its two path breaking judgements which the first one is National Legal Services Authority v. Union of India, 2014 in which it recognized the “Transgender” as the third gender besides the ‘male’ and ‘female’ and passed a slew of guidelines to all citizens of the country to adopt inclusionary practice at public and private places with the LGBTQ community (See Vaibhav Jain and Anr v. Union of India, W.P. (C) 7657/2020 and Dr. Kavita Arora and Anr. v. Union of India and Anr., W.P(C) 7692/2020). It had also directed to the State and Union government to formulate special policies and enactments for the benefits of this community and also find a way to include them in the employment also.

Another judgement passed by the Hon’ble Supreme Court was the Navtej Singh Johar v. Union of India, 2015. In this judgement, the Supreme Court further extended the horizons of rights of LGBTQ community. In this decision, it decriminalized the consensual homosexual relations between two adults. Before this judgement if two adults irrespective of their gender are having sexual relationship with their mutual consent, even then they were criminally held liable under section 377 of Indian Penal Code, 1860.

While decriminalizing the Supreme Court supported its rational with the fact that under article 19 of the Indian Constitution every citizen has the right to freedom of speech and expression and having a particular i.e. either homosexual or sexual orientation heterosexual is part of this freedom of speech and expression. Sexual orientation is an innate feature and one can’t be compelled to leave it and adopt a new one.

But unfortunately, neither of these two judgements dealt with the discrimination faced by the LGBTQ community as every new and then even after these judgements. Surely their right to sexual orientation was upheld but they are still remediless, if such rights are denied to them.

However, Madras High Court rendered two landmark judgements which takes into account some of the issues faced by the LGBTQ community children in India. In first one i.e. Arun Kumar and Anr. v. Inspector General of Registration, 2019, in this judgement, the court upheld the right to informed consent for intersex children. The court taking the note of the WHO’s report “Sexual Health, Human Rights and the Law” which proposed a ‘deferral of intersex Genital Mutilation until intersex persons are old enough to make decisions for themselves (UNCF, 2021). And in NALSA judgement also, the Supreme Court held that no person can compelled to undergo any kind of surgery to fix their gender identity. By these judgements, the Hon’ble Court prohibited the performance of sex reassignment surgery on intersex children and infants.

In another decision, the Hon’ble Madras High Court in June 2021 in S. Sushma & Anr. v. Commissioner of Police and Ors. brought many reforms relating to the rights of the LGBTQ community. It was the seminal decision which paved the way for upcoming developments that may take place in future. Under this judgement, the court for the first time in India banned the “conversion therapy”. Apart from this, it sought to remove all school records that contained unscientific literature on sexual choices. It also issued the guidelines to the Ministries and Government Departments involved in school and higher education to change the curriculum and make teachers sensitive towards LGBTQ community. It also condemned the NCERT for taking down the initiative of training teacher towards LGBTQ community. Most importantly, these two judgements show that there is a need of humanity, will and empathy in upholding the rights of the vulnerable segments of the society.

CONCLUSION AND RECOMMENDATIONS

It is manifestly clear that LGBTQ community who have different sexual orientation face discrimination and avoidance from the society. This avoidance is extending from simplest personal relations up to the most general social ignorance. In the light of the above discussion, following initiatives can be taken safeguarding and improving the conditions of the LGBTQ community. Schools are the crucial places where the situation of LGBTQ community needs to be addressed efficiently. Because from here, the ways to the other aspects of life opens.

Schools can implement the following practices.

1. Motivate all the students to respect the choices of everyone and prevent harassment, discrimination and bullying.
2. Establish counseling rooms in the school premises so that an aggrieved LGBTQ individual can take shelter under it an address his/her issue and take necessary counseling.
3. Encourage school staff to develop and hold trainings on how to create safe congenial school atmosphere for all students irrespective of sexual orientation or gender identity and encourage staff to attend all these trainings.
4. Provide health services like HIV/STD testing and counseling to LGBTQ youth.
 - a. Union and the State Governments should take initiatives to support employers in making workplace more of inclusive cultured to LGBTQ community
 - b. Stigmatizing language to LGBTQ community should be avoided
 - c. Authorities, school, peers and family need to be more tolerant in accepting the gender variant children and treating the people of different sexual orientations equally.
 - d. Framing the policies and applying them in a friendly manner rather than being hostile.
 - e. Instilling the confidence and assurance in the individuals of LGBTQ community that they do not require the social validation either from their parents, peer etc. to exercise their right to sexual choices.

f. State will have to take stand to protect the rights of LGBTQ community as *parens patriae* if LGBTQ/Children are rejected by their parents.

At last it can be said that there is no need of creating a new specific set of LGBTQ rights because the legal obligations on the states to safeguard the rights of LGBTQ individuals are well established in international human rights law on the basis of the Universal Declaration of Human Rights. All persons regardless of sex, sexual orientation or gender identity are entitled to the protection conferred by international human rights law.

FUTURE SCOPE

Future scope for the further research in reference to the LGBTQ community as new developments required with the time.

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