



**LEX HUMANITARIAE:  
JOURNAL FOR A  
CHANGE  
(ISSN: 2582-5216)**

**VOLUME II ISSUE IV  
DECEMBER 2021  
(Pages 670-679)**

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# LGBT COMMUNITY: RIGHT TO EMPLOYMENT IN INDIA

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## ABSTRACT

*Lesbian, gay, bisexual and transgender (LGBT) rights in India have been sprouting rapidly in recent years. However, Indian LGBT community still faces certain social and legal difficulties, inferior approach and lack of development resources. LGBT community often loses an ease to live life with dignity. Society is not ready to accept their different sexual orientation other than heterosexual approaches. LGBT people around the world face violence, discrimination and torture because of their different Sexual orientation and their gender identity. Human rights watch works for lesbian, gay, bisexual, and transgender peoples' rights, and with activists representing a multiplicity of identities and related issues. This article will focus on laws, judicial pronouncement and rights of LGBT community.*

*Keywords: LGBT community, employment, homosexual, discrimination, work place.*

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## INTRODUCTION

*"Equality means more than passing laws. The struggle is really won in the hearts and minds of the community, where it really counts."*

- Barbara Gittings

In today's era we have many examples of social tycoon who declared themselves as a belong to LGBT community and on the other hand many of LGBT community persons struggling within the boundaries of family, home and school for acceptance of their sexuality and freedom to openly express their gender choices. This community most of the time pointed as a shameful, and stigma for society.

People in the LGBT community are fighting for equal rights and acceptance. A Transgender person especially, faces a lot of difficulty in finding acceptance. People in the LGBT community are looked down upon all the time. This is a major issue because discrimination against the LGBT community is very common.

In this scenario acceptance of LGBT community in the society become battle of existence. From right to education to right to work this community faces many challenges. These hurdles lead to very miserable situation for LGBT community. Many

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of them accepted to become a part of flesh trade; begging or many times get involved in to serious crimes.

This phenomenon creates lot of social and legal issues in this present article will emphases on the rights of LGBT community in opportunity of employment.

### **Historical Background of LGBT Community in India**

India's Transgender person converted in to woman community has been a part of the subcontinent for about as long as civilization. In various evidences a recorded history of over 4,000 years and being mentioned in ancient texts. Third gender community mentioned as a Hijra community is a testament to the sexual diversity that is integral yet often forgotten in Indian culture<sup>1</sup>

The concept of Hijras and other Transgenders in India is not a new concept; they have been recognized in our ancient history as well. Transgender Community comprises of Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts<sup>2</sup>. Person with both male and female qualities by nature; an intersex, transgender or homosexual person; sexually neutral people such as children, the elderly, the impotent and the third sex” which has been an integral part of the Hindu mythology, epic and early Vedic and Puranic literature, we can learn that the Transgender community has been part of Indian society for centuries.<sup>3</sup>

### **PROBLEMS FACED BY LGBT COMMUNITY**

Transgender people in India face a variety of issues. This discrimination not only denies transgender people equal access to key social goods, such as employment, health care, education and housing, but it also marginalizes them in society and makes them one of the helpless groups who are at risk of becoming socially excluded.

#### **1. Banishment and Social Exclusion**

Banishment is at the core of exclusion from fulfilling and full social lives at individual, interpersonal and societal levels. People who are marginalized have relatively little control over their lives and the resources available to them; they may become indistinct and are often at the receiving end of negative public attitudes. Their opportunities to make social contributions may be limited and they may develop low self-confidence and self-esteem. Social policies and practices may mean they have relatively limited

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<sup>1</sup> Available at, <https://www.google.com/amp/s/theculturetrip.com/asia/india/articles/a-brief-history-of-hijra-indias-third-gender3famp>.

<sup>2</sup> National Legal Services Authority vs. Union of India (UOI) and Ors. AIR 2014 SC 1863

<sup>3</sup> Wilhelm, Amara Das, Tiritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism, Page No. 430, 1st Edition 2003)

access to valued social resources such as education and health services, housing, income, ease activities and work.<sup>4</sup>

## 2. Negative impact on mental health

Circumstance Transgender individuals may experience multiple forms of marginalization-such as racism, sexism, poverty or other factors such as non-acceptance from society alongside homophobia or trans phobia that causes negatively impact on mental health.

## 3. Poor social life

Difficulty for living normal social life, lack of opportunities of development and rash behavior from society this concluded in to negative social life.

## 4. Lack of Development facilities

Transgender people from many support structures, often including their own families, leaving them with little access to services many others take for granted, such as medical care, justice and legal services, and education.

## 5. Health Problems

The marginalization of transgender people hinders initial prevention and education efforts, encourages risk-taking behavior that can lead to HIV infection, and places obstacles in the way of receiving proper medical treatment and psychosocial support for Transgender youth already living with HIV/AIDS.

## 6. Involvement in criminal activities

Due to lacking other means of support, many Transgender youth are forced to turn to criminalized activities such as sex work, extortion to survive

The exclusion and discrimination have major impacts on the lives of transgender persons. This has resulted in the following:

- Dropping out of school earlier
- Leaving Home and Family
- Unable to find regular jobs, have less options than others.
- Being ignored in the community and isolated
- Mobility, Move to other areas, (such as the city and urban areas)
- Lack of family and social support
- Migrate to other countries for seeking safer livelihood and acceptance
- Rejected from Religion
- Attempt to suicide
- Decide to follow their parents to marry opposite sex and then divorce.
- Depression

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<sup>4</sup> The impacts of marginalization, in terms of social exclusion, are similar, whatever the origins and  
www.ijcrt.org © 2018 IJCRT | Volume 6, Issue 1 January 2018 | ISSN: 2320-2882 IJCRT1705102  
International Journal of Creative Research Thoughts (IJCRT) www.ijcrt.org

## INDIAN CONSTITUTION AND RIGHT TO EMPLOYMENT

India is a welfare state which implies that the social and economic welfare of the citizens is one of the primary tasks of the lawmakers. The Indian Constitution does not explicitly mention the 'right to work' as a fundamental right. It is through Article 41 in part IV of the Constitution that the 'right to work' finds its place.<sup>5</sup>

The Constitution of India instructs upon the State, the duty to secure the social and economic rights of the people. The Constitution under part IV dealing with the Directive Principles of State Policy prescribes the state to make effective provisions for securing the "right to work" and "right to public assistance in cases of unemployment".

Article 39 of the Indian Constitution specifically requires the state to direct its policies towards securing the following principles which are related to the 'right to work'. These include:

1. Equal rights of men and women to adequate means of livelihood.
2. Equal pay for equal work for both men and women.

Article 41 directs the State to ensure people within the limits of its economic capacity and development employment, public assistance in cases of unemployment, old age, sickness, disablement, and in other cases of unjustifiable want.<sup>6</sup> Article 43 requires the State to take steps by suitable legislation or in any other way to secure the participation of workers in the management of industries, establishments, or other organizations engaged in any industry. Article 43 also prescribes a 'living wage' and not a 'minimum wage'. The concept of a 'living wage' comprises not only the basic necessities of life but also provisions for the education of children; insurance, etc. Article 47 imposes the duty upon the State to raise the standard of living of its people in addition to other duties. In the judgment of *Olga Tellis & Ors. vs. Bombay Municipal Corporation & others*.<sup>7</sup> Recognized the 'right to work' as a fundamental right inherent in the "right to life". In addition, India is a signatory to all the provisions of the 'right to work' of The Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights

## LGBT COMMUNITY'S EMPLOYMENT RIGHTS IN INDIA

LGBT workplace survey of 2016 showed that more than 40% of LGBT people in India have faced harassment at their workplace because of their gender/ sexual identity.<sup>8</sup> Many LGBT people often have to hide their sexual identities because of the anxiety and stigmatization of potential discrimination or losing their jobs. Therefore, the access to

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<sup>5</sup> Introduction to the Constitution of India 1960, Durga Das Basu

<sup>6</sup> Cited by 12 Constitution of India. (As on 9th November, 2015). Published by. Government of India. Ministry of law and justice.

<sup>7</sup> 1986 AIR 180, 1985 SCR Supl. (2) 51

<sup>8</sup> Available at, <https://www.catalyst.org/research/lesbian-gay-bisexual-and-transgender-workplace-issues>

employment and discrimination at the workplace continues to pose a challenge for the LGBT community.

This situation gets even more miserable in the case of transgender people who often have no education lack of vocational training and work skills face a much more violent form of discrimination at the workplace. There have been several instances of workplace discrimination against the transgender people all across the country. One of the publicized cases in this regard is the case of *Manish Kumar Giri Alias Sabi Giri v. Union of India and Ors.*<sup>9</sup>

In the instant case, Sabi Giri, who suffered from the Gender dysmorphia and when underwent a sex change operation was dismissed from the navy. Military in defense said that the present rules and regulations do not allow the sailor's continued employment in the navy owing to his altered gender status.

The case was argued in Delhi High court wherein the court suggested the Navy find an alternative job for Giri. Thus, despite having no proof of Sabi not being able to do her job after her sex reassignment surgery she was thrown out of her job and was rather offered a job as a data entry operator. Apart from this, the petitioner also testified against the discrimination meted out to her during the course of her employment, highlighting the dark truths about work-place discrimination and the lack of awareness on the issue of transgender rights.

However, it is also important to mention here that the Equal Remunerations Act, 1956 prohibits discrimination between men and women at the stage of recruitment but makes such exceptions in the case of military service where such discrimination is permitted but still the removal of the sailor only on the basis of gender identity is arbitrary, discriminatory and illegal.

Similarly, in the cases of *Jacqueline Mary v. Superintendent of Police, G. Nagalakshmi v. Director General of Police*<sup>10</sup> where the petitioners identifying as females were removed from their posts on the ground that upon medical examination it was found that they had intersex variations hence can't hold the post that was reserved only for females.

Although the court ruled in favors of the petitioners in all the above-mentioned cases these incidents of discrimination reflect gross inequality and do not conform to the NALSA ruling. Therefore, it is submitted that this will keep on continuing until the employment laws are not amended to be inclusive of people falling outside the gender binary.

### **Transgender Persons (Protection of Rights) Bill, 2019**

The Transgender Persons (Protection of Rights) Bill 2019 as already discussed suffers from various loopholes especially concerning the fact that how it certifies one to be a

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<sup>9</sup> (2018) 2 SCC (LS) 398 , 2017 (8) SLR 730 (SC)

<sup>10</sup> Available at, <https://www.casemine.com/judgement/in/56090682e4b014971116473>

transgender or not but what is worth considering is that the bill at least provides protection to the gender community in certain aspects of employment.

As according to sub-section (b) and subsection(c) of Section 3, the bill prohibits any person or organization from discriminating against transgender in matters of employment, recruitment, promotion and other related issues. But all these protections provided can't be availed and utilized fully until and unless the government makes amendments with regards to how the transgender must be certified and recognized by the law.

### **Workmen's Compensations Act, 1923**

Although Section 2 of this act provides a comprehensive list of dependents, but all these terms are defined only in the reference with the heterosexual families.<sup>11</sup>

Further, it's very essential to define the "dependents" because dependents are entitled to the monetary benefit. Under the worker compensation insurance, it is mandatory for every employee to nominate at least one dependent. Therefore, the term "dependents" must be redefined in the context of same-sex unions and LGBT families to provide them equal incentives in employment as available to a heterosexual individual.

### **Payment of Gratuity Act, 1972**

The Payment of Gratuity Act, 1972 requires the employer to nominate people so that in case the employer dies, then the gratuity benefits are conferred to the nominee. But for the purpose of this Section 2(h) of the act defines the term "family" which includes spouse, children, dependent parents and any adopted child.<sup>12</sup> Therefore, the current definition of "family" eliminates the possibility of recognizing LGBT family from its ambit.

### **Factories Act, 1968**

The Factories Act of 1968 is structured on a protectionist approach and lays down various restrictions concerning the employment of women such as regulations of limiting their work hours from six to seven among many others. So, the current rules and regulations fail to recognize people not fitting in traditional notions of the gender binary.

The provisions which are confined to the gender binary exist not only in these discussed laws but extend across a range of other employment and Labour laws as well.

### **Maternity Benefits**

At present Maternity Benefit Act of 1961 provides maternity leaves and benefits only to the transgendered women who give birth, adopt or rely on surrogacy to have a child. Essentially speaking there are two implications of this law.

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<sup>11</sup> Available at, [https://labour.gov.in/sites/default/files/TheWorkmenAct1923\(1\).pdf](https://labour.gov.in/sites/default/files/TheWorkmenAct1923(1).pdf)

<sup>12</sup> Available at, <https://clc.gov.in/clc/sites/default/files/PaymentofGratuityAct.pdf>



1. Firstly, it reiterates the same archaic ideas and notions that it is the sole responsibility of the mother to take care of and nurture the child while the father can be waived off this duty.
2. Secondly, it does not take into cognizance the fact that there can be a possibility of alternate families such as the LGBT families.<sup>13</sup>

Therefore, it is essential that the language of this law must be gender-neutral so that even LGBT families can also have access to parental benefits and further it can also serve as a progressive step in the direction to eliminate sexual biases reinforced by the maternity benefit legislation.

### **Protection against Sexual Harassment at Workplace**

The present law i.e., Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 regarding the sexual harassment recognizes only women as a victim and does not take into account the harassment can happen irrespective of the gender of the person. That is, the aggrieved party can even be a male, transgender or any person belonging to LGBT community as well. Therefore what we rather need is gender-neutral laws in relation to harassment at workplaces. But there is another very important argument that can be advanced here i.e. the “sexually coloured remarks” or “unwelcome behavior” may have a different interpretation and scope in the case of LGBT community. The amendments in employment and labour laws are basically to make them inclusive of LGBT community as this is the need of the hour. However, a more organizational and important change cannot be appreciated until and unless the private and public organizations are eager to outline policies and rules to make the workplaces LGBT comprehensive. These may include making policies such as granting equal benefits to LGBT couples as those available to heterosexual partners, adopting comprehensive anti-discriminatory laws, supporting LGBT employee support groups, granting leaves for gender-conforming processes, and organizing awareness and sensitization programs. In 2014, the Indian Supreme Court, in *NALSA v. Union of India*, recognized transgender people as “third gender” under the Indian Constitution. It acknowledged the unfair treatment faced by transgender people in various areas of life, including employment, and held that discrimination on the basis of gender identity is constitutionally prohibited.<sup>14</sup> Following this judgment, the Indian parliament passed the Transgender Persons (Protection of Rights) Act, 2019 (Transgender Act).

### **SUCCESS STORIES OF LGBT PERSONALITY**

LGBT community people achieved a great success and gave us inspiring by their stories of courage. They’ve stood up for themselves and through that, supported the people from their community.

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<sup>13</sup> Available at, <https://www.ilo.org/dyn/travail/docs/678/maternitybenefitsact1961.pdf>

<sup>14</sup> AIR 2014 SC 1863

Here are the inspiring stories of LGBT people from India that will warm even the coldest of all hearts *Navtej Singh Johar*. The first Sikh to take up Bharatnatyam as a dance form, Navtej is a Sangeet Natak Akademi awardee and is a known name when it comes to the dance form being practiced in India. In June 2016, Johar and five others from the LGBT community filed a writ petition in the Supreme Court of India challenging Section 377 of the Indian Penal Code. In the year 2018, *Navtej Singh Johar and others v. Union of India*<sup>15</sup> became a landmark case when the Supreme Court unanimously declared the law unconstitutional "in so far as it criminalizes consensual sexual conduct between adults of the same sex".

The name is Gauri Sawant in 2014 she became the first transgender individual to file a petition with the Supreme Court of India for adoption rights of transgender people. This made sense since she had adopted a girl child in the year 2008 after the baby's mother, who was a sex worker, passed away. Her part in the fight for rights has been a considerable one given that she was also a petitioner in the National Legal Services Authority case in which the Supreme Court recognized transgender as the third gender.

Harish Iyer has had a strong voice supporting the LGBT community. However, he set a historic record by becoming the first openly gay individual in India to join a political party.<sup>16</sup>

Anwesh Mr. Gay World India in 2016 came out to his sister at the age of 16 and since the age of 18, has been writing extensively to dispel the stereotypes people have about people from the LGBT since he was severely bullied as a child in school. Anwesh went on to become the youngest winner of the Mr. Gay World India in 2016 and since, then has also become a public speaker.<sup>17</sup>

Keshav is the Executive Director of The Lalit Suri Hospitality Group but is also a social activist who has, through his entrepreneurial ventures, created safe spaces as well as professional opportunities for the LGBT. He's the first royal in India to come out as homosexual after which he started a trust called the Lakshya Trust to educate people from the LGBT individuals about protected sex. Moreover, the trust also offers counseling sessions and treatment for sexually transmitted diseases<sup>18</sup>. While he had to face a lot socially after coming out, that didn't deter him from making efforts towards the well-being of one of the most marginalized communities in India.

An extremely famous novelist and poet, Vikram Seth identifies as bisexual. He has brought in a homosexual narrative through his writing, which in itself is an achievement given that he started writing at a time when homosexuality as a concept didn't just lack narrative but also legality in India.

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<sup>15</sup> AIR 2018 SC 4321; W. P. (CrI.)

<sup>16</sup> Available at, <https://indianexpress.com/profile/columnist/harish-iyer>

<sup>17</sup> Available at, <http://globalindianstories.com/index.php/2020/04/26/lockdown-diaries-anwesh-sahoo-shares-his-gratitude-for-the-real-heroes-during-the-lockdown-in-india/>

<sup>18</sup> Available at, <https://www.idiva.com/relationships-love/relationships/same-sex-couple-prince-manvendra-singh-gohil-and-duke-deandre-richardsons-love-story/18017311>

Aishwarya Rutuparna Pradhan is India's first openly transgender civil servant and works with the Indian Financial Services. She legally changed her gender identity after the 2014 Supreme Court ruling which recognized individuals from the transgender community as the third gender.

In 2017, Joyita Mondal is no longer afraid to stand out in a crowd. This is not just because she was recently appointed a judge to a government deemed civil court in West Bengal, India, but more so because she became the country's first transgender to achieve this feat.<sup>19</sup>

In 2022 in UP poll a transgender person is set to contest from Agra Cantonment assembly seat in the coming Uttar Pradesh election. Radhika Bai, aged nearly 26 years, filed her nomination papers from the seat to raise voice for the people of her community. Radhika Bai claimed that she is the first transgender woman from Agra to contest the assembly polls

### SUGGESTIONS FOR EMPLOYERS

Following are suggestions for public and private workplaces/institutions/Organizations to implement the following measures:

- To create awareness programs and workshops with the help of LGBT members/workers for attachment of LGBT community and maintain harmony at workplace.
- To spread awareness among individuals on prohibition of discrimination as provided for in The Transgender Persons (Protection of Rights) Act, 2019 and relevant rules made thereunder.
- To make suitable changes in hiring policies for inclusivity.
- To Set up and enforce Human Resource policies to make them LGBT community-friendly.
- To Support members of the LGBT community in case of any grievance;
- To Extend benefits such as insurance to members of the LGBT community; and
- To adopt suitable policies that address non-discrimination on grounds of sexual orientation, including sexual harassment of persons belonging to the LGBT community in the workplace.
- To establish well trained counseling center with in institute/organization to solve problem related to LGBT community.

### CONCLUSION

This is a clear that LGBT community facing various problem ranging from emotional, economical, psychological, sociological and legal. Sexual orientation and gender

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<sup>19</sup> Available at, <https://womensenews.org/2017/10/meet-the-first-transgender-judge-in-india>

identity-based discrimination are common in many workplaces across the country and in both the public and private sectors. There is not an iota of doubt regarding the fact that all the judgments related to LGBT People will shape the future of the LGBT rights movement in India. The significance of the NALSA judgement and Navtej Singh Johar judgment is not only limited to the recognition of third gender identity and decriminalization of homosexuality. But these judgments are also progressive because apart from deciding upon the issue in hand, they have even laid down the basic groundwork to confer a host of other civil rights which were earlier not available to the LGBT community but are ordinarily enjoyed by the heterosexual persons and transgender persons. These civil rights include the right to marriage, right to adoption, right to surrogacy, right against discrimination, freedom from sexual assault etc. But, even after so many developments, LGBT People are still struggling to get the societal validation. A Supreme Court Judgment can merely pass a resolution, but it is the duty of the society to not discriminate against LGBT People and to make them feel inclusive. Merely allowing Sexual Acts between the same sex couple will not bring them at the equal peril as the other citizens as the future of same sex marriage, Legal Sanctity of adoption by same sex couple, right against oppression etc. are still uncertain and the community is still fighting for it. So, the battle is clearly not yet won, there is a long road ahead to make India an inclusive country in the true sense.