



LGBTQ+ IN INDIA: AN EVALUATION OF THEIR SOCIO-LEGAL ACCEPTANCE

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ABSTRACT

The cry for change in the Indian society is getting louder day by day but the period of transition is a long-drawn process. However, the Indian Judiciary has stood the test of time by ensuring justice and securing the interests of the underprivileged. The recent *Naveej Singh Johar* judgement of 2018 is one such event in the history of Indian society which celebrates the triumph of humanity and peaceful coexistence over the age-old notions which are discriminatory and irrelevant in the present. This research paper analyses the extent to which the LGBTQ+ Community is socially and legally accepted in the Indian Society. Furthermore, it digs into the history of India to understand the perspective of ancient Indian society regarding the LGBTQ+ community. Through this paper, an attempt is made to expose the hardships faced on a daily basis by the community and their views. It further tries to study the perspective of non-LGBTQ+ people on the same. Moreover, the paper debates why a legal acknowledgment for the LGBTQ+ community is the need of the hour. Taking into account the socio-legal aspect of the situation it is observed that there is a need for social awareness and state's intervention to improve the condition of the LGBTQ community.

Keywords: LGBTQ+ Community, Gender and sexuality, Social and Legal acceptance, Gender-based discrimination

I. 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.

The discussion on the LGBTQ Community and their rights has gained huge momentum in the past few years. After a long struggle of overcoming the hardships for recognition through rallies, activism, petitions, etc., India is finally among the countries that have legally recognized Homosexual intercourse. However, social acceptance is still an obstacle in the road of equality. Homosexuals, even at present have to deal with problems like discrimination and harassment for being who they are; there is still a lot of stigma attached to their gender identity. Besides the social unacceptance, India is yet to legally recognize issues like same-sex marriage, adoption, inheritance rights, etc. which are significant to human life.

The paper begins by exploring ancient Indian society. The historical evidence found among the various pieces of literary texts and monumental carvings suggests the prevalence of the LGBTQ+ community from the very beginning. This is followed by an in-depth analysis of the social hurdles encountered by the community. The section deals with major problems such as rejection from the family and society, sexual harassment and abuse, same-sex marriage, Child adoption by homosexual couples, discrimination at educational institutions and workplace, etc. The next section analyzes the legal aspect of the issue by taking into consideration various laws and cases dealing



with the same. The paper takes into consideration both the perspective of LGBTQ+ and non- LGBTQ+ individuals.

II. METHODOLOGY

The research data is collected by conducting surveys through separate questionnaires for the LGBTQ+ and the Non-LGBTQ+ community. A total of Fifty-two participants from the LGBTQ+ community and One Hundred participants from the Non-LGBTQ+ community participated in the survey. The responses of the respondents were analyzed to understand the concept from the grass-root level. For further research and data collection books, journals, e-articles, research papers, etc. were referred. The individuals belonging to the LGBTQ+ community who have already revealed their identity to the society were approached for the survey. For the purpose of citation OSCOLA 4th edition has been used.

III. OBJECTIVE

- To understand the concept of LGBTQ+.
- To examine the historical evidence supporting the existence of gender fluidity in ancient Indian society.
- To highlight the issues and challenges faced by the LGBTQ+ community.
- To analyse the attitude of society towards the community and their willingness to accept them.
- To evaluate the extent of Legal recognition granted to the community.

IV. HISTORY OF LGBTQ+ COMMUNITY IN THE INDIAN SOCIETY

Instances of homosexuality can be found throughout the world and India is no exception to this. However, the outlook of people in different societies and their

understanding of the concept vary. In some societies, it is widely accepted while for others it's a crime. A wide spectrum of sexualities and its existence is not an alien concept to India. Instances of homosexuality and its acknowledgment in the country are evident through various texts of literature, mythology, and some historical monuments. Hinduism is the third largest religion in the world with as many as 1.25 billion followers which constitutes roughly about 15-16% of the total world population. Hindus consider Vedas and other ancient texts which are as old as 6,000 BCE as sacred and binding. The existence of homosexuality can be seen in our ancient scripts like Jathaka tales, Puranas, Bhagavata, Kamasutra, the great epics: the Ramayana & the Mahabharata, Manusmriti (the oldest law code of conduct). The sculptures and imagery on temples all around the country, literature works and tales, ancient law books, and ancient sacred religious scriptures indicate the existence of homosexual activities in some form or other in ancient India. The Khajuraho temples located in the Chhatarpur district, Madhya Pradesh are one such example that substantiates the fact. The walls of this monument are covered with various carvings and sculptures including those depicting copulation between same-sex couples.

The reference of the origin of a third sex child can be found in chapter 3, verse 49 of the Manu Smriti: "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child [*napumsaka*] or boy and girl twins are produced; if either is weak or deficient in quantity, a failure of conception results".¹ The epic, Ramayana, written by Maharishi Valmiki belonging to

¹ G. Buhler (trs), *Manusmriti: The Laws of Manu*, (Library of Alexandria, 2012) 13.



the *Treta Yuga* (second of the four *yugas*) mentions a sexual encounter between two women. Another great epic Mahabharata talks about Shikhadini, a transgender, who was a great warrior and also defeated Bhishma, the Kuru Prince.

The Hindu epics mention several other characters that demonstrate a wide range of gender identities, indicating the acknowledgment of gender fluidity by Hinduism. Chitrangada (wife of Arjuna), Brihannala from the Mahabharata, Ardhanarishwara (Lord Shiva as half-man, half-woman) and Lord Ayyappa {born to Shiva and Vishnu (as Mohini)} are more such examples reflecting the subtle approach of the Hindus towards the LGBT in ancient India.

Homosexuality, although a familiar concept in Hinduism, was not always accepted. The Manu Smriti prescribes certain punishments for Homosexual activities. For instance the punishment given to an older woman for having a relationship with a virgin woman was to get her head shaved or cut two of her fingers and ride on a donkey through the town.² Another verse mentioned in Manu Smriti prescribes a punishment of a fine of “two hundred (panas), pay the double of her (nuptial) fee, and receive ten (lashes with a rod)”³ for a relationship between two virgin women. Religious works of religions other than Hinduism also works as evidence supporting the existence of homosexuality in the ancient India.

India, under the British rule in 1861, criminalized homosexuality and considered it

against the order of the society under Article 377 of the Indian Penal Code (IPC). In contrast with India under colonial rule, ancient India, i.e., India before the British rule was quite liberal and was relatively tolerant in its approach toward the LGBT. Vedic India welcomed the LGBT people in its rich culture and heritage⁴. The Law criminalizing homosexuality brought in the country by the British colonizers has been one of the most oppressive and unfair acts of the British rulers, especially towards the LGBTQ+ Community. India was one of the first few colonies under British rule to outlaw same-sex relations. Though post-independence India did recognize the Right to Equality, Right to freedom under the constitution but homosexuality remained a criminal offense. It is only after a long struggle and activism that Homosexual relations are no more considered a legal and punishable offense. In 2009, Delhi high court struck down some portion of the section as unconstitutional and recognized the LGBTQ rights but the Judgment was overturned by the Supreme Court in the year 2013. Finally, on September 6, 2018, the Hon’ble Supreme Court of India gave the historical verdict of decriminalizing consensual same-sex relations and ruled that Article 377 of the IPC, insofar as it applied to Homosexuality is violative of their fundamental rights granted in the constitution.

V. SOCIAL ACCEPTANCE

Although change is constant in the institution of society, it is difficult for people to deviate from their customs and beliefs. However, in order to form a better society for all, such

² G. Bulher (trs), *Manusmriti: The Laws of Manu*, (Library of Alexandria, 2012) 55.

³ Ibid.

⁴ Amara Das Wilhelm, ‘*Tritiya-Prakriti: People of the Third Sex*’, (Xlibris Corporation, 2004).

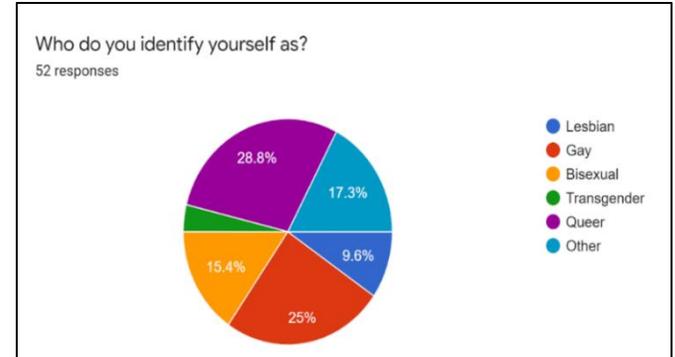


deviation becomes necessary. “Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality.”⁵

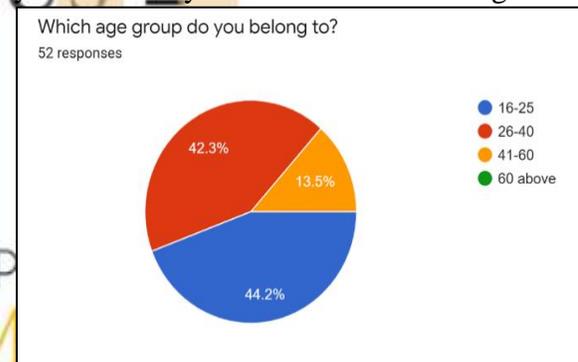
A. FINDINGS

1. LGBTQ+ people’s response to the survey
 On the basis of sex identity, 38.5% of the respondents were male, 59.6% were female and 1.9% were intersex. Furthermore, on the basis of sexual orientation and gender identity, 17.3% of the respondents identified themselves as Lesbians, 25 % identified themselves as Gay, 15.4% identified themselves as Bisexuals, 3.8 % identified themselves as Transgender, 28.8% identified themselves as Queer & 17.3% identified themselves as others. Here we would like to clarify the difference between sex, gender identity, and sexual orientation. People generally consider both the terms to be the same. Sex is a social status usually based on genital appearance.⁶ Persons may be female, male, or intersex. The term gender identity was coined by Robert Stoller in 1964,⁷ which is an individual’s understanding of their gender and their internal sense of self. Whereas, sexual orientation is a person’s “emotional, affectional and sexual attraction

to...individuals of a different gender or the same gender or more than one gender.”⁸



The majority of the respondents, who were willing to disclose their identity belonged to the age group of 16-25 years followed by the people belonging to the age group of 26-40 years and very few from the remaining.



1.1. Troubles faced while accepting oneself as a part of the community
 While accepting oneself as a part of the LGBTQ+ Community a person encounters many challenges. The fear of negative response and rejection compels them to bury their true identity. Discrimination, isolation,

⁵ *Gobind v. State of Madhya Pradesh & anr.* A.I.R. 1975 S.C. 1378

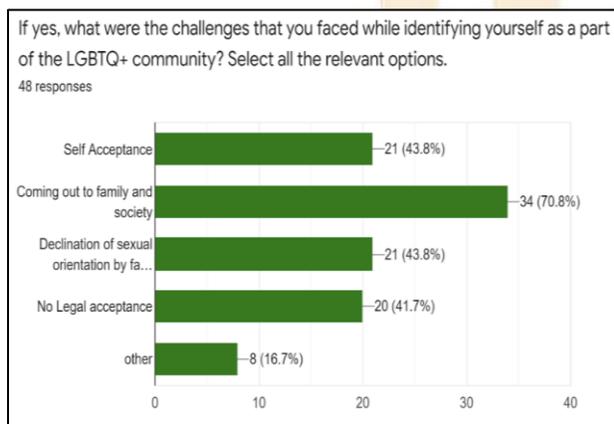
⁶ Devor, H., ‘Toward a Taxonomy of Gendered Sexuality’ (1994) *Journal of Psychology and Human Sexuality*, 23

⁷ Stoller, R. J., ‘A contribution to the study of gender identity’ (1946) vol 45(issues 2 to 3) *The International Journal of Psychoanalysis*, 220

⁸ International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (Yogyakarta Principle, 2007)



bullying, social stigma, marginalization are the other factors that keep oneself away from coming out to society. Self-acceptance among LGBTQ+ youth can be strengthened with the help of the family's support and through parental support LGBTQ+, youth can be encouraged to utilize resources that assist in the growth of positive sexual orientation.⁹ It was found in the survey that 61.5 % of the respondents faced trouble while accepting themselves as a part of the LGBTQ+ Community and the major challenge to them was coming out to the family and society about their identity. Other key challenges identified were self-acceptance, declination of their sexual orientation by family and society, and not getting legal acceptance.

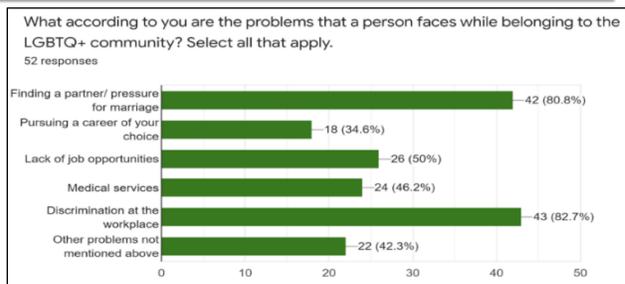


1.2. Challenges faced by the community

As per the study by V.Chakrapani on Kothi identified MSM, about half of the respondents underwent violence & verbal

⁹ Mohr Jonathan, Fassinger Ruth, 'Self-acceptance and self-disclosure of sexual orientation in lesbian, gay, and bisexual adults: An attachment perspective' (2003) Vol-50 Journal of Counseling Psychology, 482

¹⁰ Venkatesan Chakrapani, Peter A. Newman, Murali Shunmugam, Alan McLuckie, and Fredrick Melwin, 'Structural violence against Kothi-identified men who have sex with men in Chennai, India: a qualitative



abuse from their family which created a societal pressure upon them to marry. To avoid such pressure and the conflict arising from the clash of traditional beliefs and their sexuality, they left their home.¹⁰ Being a member of the LGBTQ+ Community 80.8% of the respondents faces problems while finding a life partner or are pressurized to marry against their will; 34.6% faces problems while pursuing the career of their choice; 50% faces problems due to lack of job opportunities for them; 46.2% faces problems in getting medical facilities; 82.7% faces discrimination at their workplace.

1.3. Education

Many students from LGBTQ+ Community face harassment and bullying in the educational institution where they are expected to be safe. During our research, it was found that education of 69.2% of the people from the community was affected due to their sexual orientation. It was observed in a study, by Naz Foundation in 2005 that due to harassment and violence by classmates and teachers 50 percent of MSM respondents who were the victim of such act faced problems during their academics.¹¹ An option

investigation' (2007) AIDS Education and Prevention, 346 .

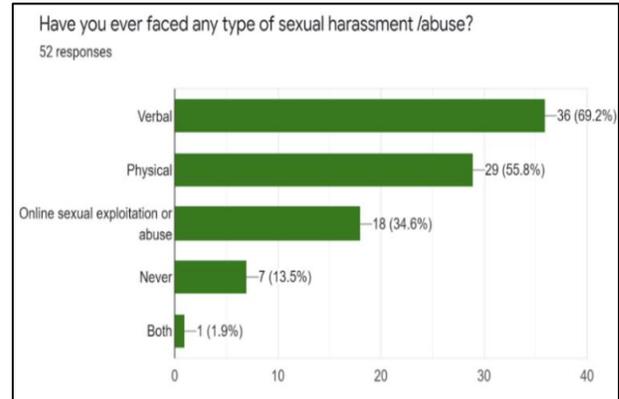
¹¹M. V. Lee Badgett, 'The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India' (2014) World Bank Document, <<http://documents1.worldbank.org/curated/en/527261468035379692/pdf/940400WP0Box380usion0of0LGBT0People.pdf>> accessed 5 June 2020



of ‘other’ was included under the gender section in the 2011 Indian census and it was found that 74% of the people selecting ‘male’ & ‘female’ options were literate while only 46% of those selecting ‘other’ option were literate.¹²

1.4. Sexual harassment/ abuse

As per Monro, 2005, transgender people encounter various difficulties due to their sexualities such as interacting with societies that don’t recognize them, discrimination by sexual health services, are more vulnerable to sexual violence and rape, etc.¹³ As per the Centers for Disease Control and Prevention (CDC), lesbian, bisexual, and gay people encounter more or higher rates of sexual violence as compared to straight people.¹⁴ 69.2 % of our respondents reported that they have faced verbal form of sexual harassment or abuse, 55.8% of them faced physical form of sexual harassment or abuse, and 34.6% of them have faced online sexual abuse while only 13.5% reported that they never faced any form of abuse or sexual harassment.



1.5. Decriminalization of homosexuality

The majority of the respondents believe that the recent judgment of the Supreme Court of decriminalization homosexuality under Section 377 in India is one step closer towards their legal acceptance, but societal acceptance is still a farfetched dream.

“Yes, but the most important part is to change the mindset of the people from the earlier generations. Abolishing 377 did give us a sense of freedom but at the end of the day acceptance from our closest ones is what matters.” (Respondent)

1.6. Same-sex marriage

There is a wide range of benefits such as maintenance, pension etc. that are given to married couples but are denied to homosexual couples. Many such couples just want legal recognition of their partnership without any discrimination.¹⁵ Many

¹²UNDP, ‘Measuring LGBTI Inclusion: Increasing Access to Data and Building the Evidence Base’ (2016), UNDP, NewYork <<https://globalphilanthropyproject.org/wp-content/uploads/2016/11/Measuring-LGBTI-Inclusion-Research-Paper-July-5-submitted-for-Montevide....pdf>> accessed 8 June 2020

¹³ Surya Monro PhD, ‘Beyond Male and Female: Poststructuralism and the Spectrum of Gender’ (2005) International Journal of Transgenderism, 3

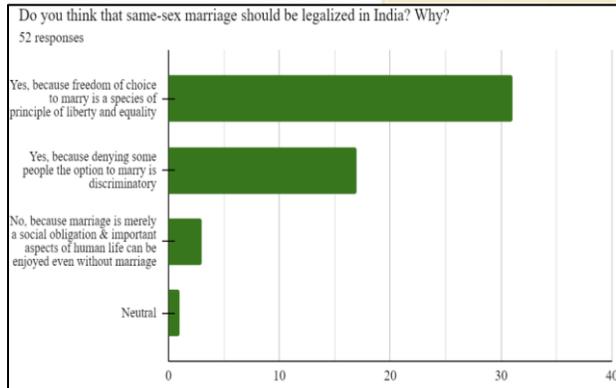
¹⁴ Mikel L. Walters, Jieru Chen, Matthew J. Breiding, ‘The National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation’ (2013) National Center for Injury Prevention and Control Centers for Disease Control and Prevention Atlanta (Georgia) <https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf> Accessed 8 June 2020

¹⁵ Thomas John, ‘Liberating Marriage: Same-Sex Unions and the Law in India’ in Arvind Narrain(eds.) & Alok Gupta(eds.), *Law Like Love* (Yoda Press 2011)



homosexual couples believe that marrying a person of one’s choice is a personal decision and no one else (especially state) should exercise control over it.¹⁶ Nearly 59.6% of the respondents believe that same-sex marriage should be legalized as marrying the person of one’s choice is a part of liberty and equality.

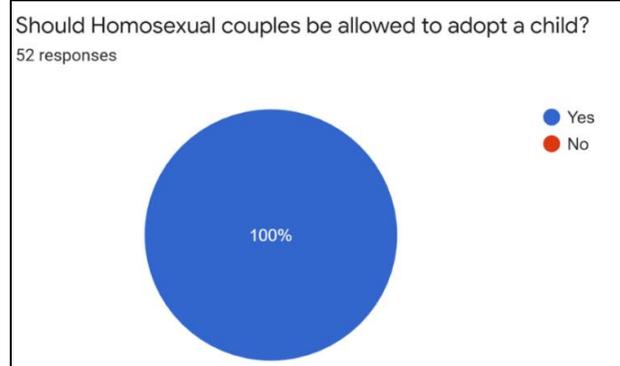
“... We still don't have human rights like starting our own family and getting married. We don't have property rights or neither are we acknowledged as an equal part of the society.” (Respondent)



1.7. Child adoption

The majority believe that care and consistency matter more than the sexuality of the person for being a good parent. Every respondent agrees that homosexual couples should be allowed to adopt children.

“I expect the government to include people from the community in legal aspects, giving people from the community adoption and marriage rights, education, and proper healthcare facilities.” (Respondent)



1.8. Change in people’s attitude

About 51.9% of the respondents are certain that in the present era of globalization, people will change their attitude towards gay culture in India, while 46.2% are unsure about such a change.

“I do not live in India, but I live in the US. I am grateful for the rights that I have here, but it took a long time. India is moving much faster than the US did. I think it will happen soon and it makes me proud to be Indian.” (Respondent)

2. Non - LGBTQ+ people’s response to the survey

Out of the 100 respondents, only 5% felt that they were well versed about the LGBTQ+ Community while the majority felt that they were either having enough (50% of the respondents) or a little (42% of the respondents) knowledge of the community. The remaining 3% had no knowledge about the community. The majority (nearly 74%) felt that they would be comfortable being around a person belonging to the LGBTQ+ Community while only 3% said that they won’t be so, and the rest were unsure about it. 91 % of the people consider the LGBTQ+

¹⁶ Mary L. Bonauto, ‘Goodridge in Context’ (2005) Vol-40 Harv. C.R.-C.L. L. Rev. 1



Community people as normal human beings and only 1% considered them to be abnormal.

2.1. Family's attitude

Only 4% felt that their family would be welcoming and supporting the people belonging to the LGBTQ+ Community and 43% felt that their family will be hesitant at first but will eventually support them. Around 15% of the people felt that their family will not be welcoming of people of the community. Remaining considered that their family members will be neutral towards such people.

2.2. Equal treatment

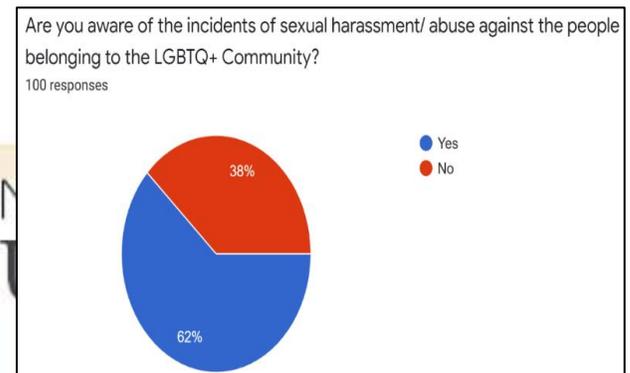
99 out of 100 believe that people from the LGBTQ+ community should be treated on an equal plane with others. The people from the LGBTQ+ community have to face a lot of discrimination which prevents them from taking benefits of their social, cultural, civil, political, and economic rights. They are treated as unequal in various aspects of life, such as they are unable to access healthcare due to stigmatization faced by them. From the health service providers, they are refused rental accommodation many times from landlords, they have to face discrimination and harassment at the workplace or an educational institution.¹⁷ On 21 August, 2020 'National Council for Transgender Persons' was set up by government to observe and analyse the effect of government policies and programmes on the transgenders.

¹⁷Home Office, *Country Information and Guidance India: Sexual orientation and gender identity* (2014)

¹⁸Gregory M. Herek, Jeanine C Cogan, Joseph Roy Gillis, 'Victim experiences in hate crimes based on sexual orientation' (2002)58(2) *Journal of Social Issues* 319

2.3. Sexual harassment/ abuse

The authorities are less likely to be reported about the hate crimes against homosexuals due to homophobic and trans-phobic nature of Criminal justice system.¹⁸ In our research, it was found that the majority of the people are aware of the incidents of sexual harassment and abuse occurring against the people of the LGBTQ+ Community.



2.4. Decriminalization of homosexuality

77% of the respondents support the Supreme Court's judgment of decriminalization of homosexuality in India whereas 38% of the respondents are against it. Even though the ruling of decriminalization of homosexuality is a positive step towards their betterment but it's still not enough as per Indian psychologists. "Society is still not really accepting, that's the sad part.... We still have a lot of work to do" says Hemchand.¹⁹

2.5. Same-sex marriage

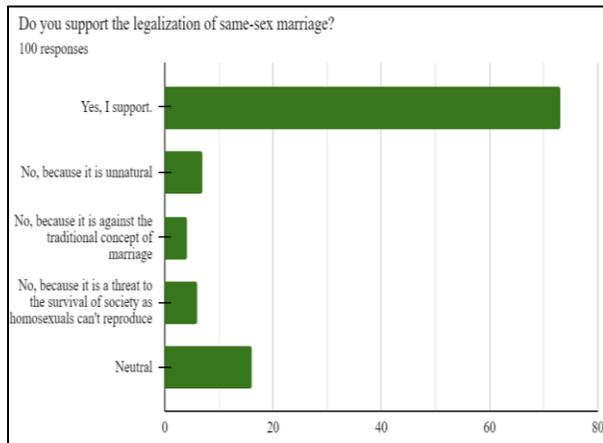
With regards to the legalization of same-sex marriage, 73% of the respondents were

¹⁹ Rebecca A. Clay, 'Decriminalizing homosexuality in India' (2019) 50 (2), *American Psychological Association*

<https://www.apa.org/monitor/2019/02/homosexuality-india> Accessed 15 June 2020

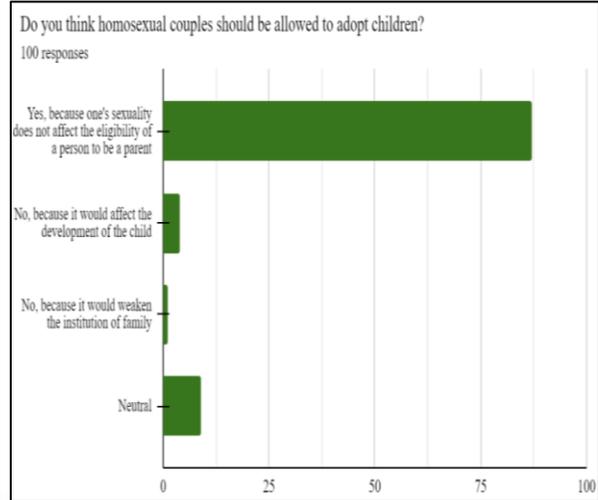


supportive of it and 16 % were neutral about it. Others were against it due to certain reasons such as it is unnatural, or it is against the traditional concept of marriage between a man and a woman, or that such marriages are a threat to the survival of society as such couples cannot reproduce.



2.6. Child adoption

87% of the respondents believe that homosexual couples should be allowed to adopt children as one's sexuality does not affect the person's eligibility to be a parent. 1% believe that allowing so would weaken the institution of family and 4% think that it would affect the development of the child.



2.7. Military

According to the Indian military, homosexuals cannot be allowed in the military as it could have various adverse effects on the military and is unacceptable due to the conservative nature of the army.²⁰ From the study of the armed forces of Israel, it was found that the knowledge of gay peers didn't decrease the unit cohesion.²¹ In our survey, it was found that the majority of the respondents agree that the people belonging to the LGBTQ+ community are equally eligible to be in the military as other citizens and only 4% disagree with it.

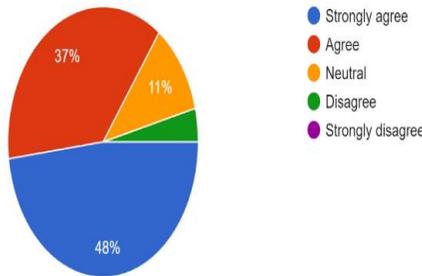
²⁰ Pritika Jain, 'Should the Homosexuals Be Allowed To Serve In Armed Forces: A Critical Analysis' (2015) 20(2) IOSR-JHSS 12

²¹ Danny Kaplan, Amir Rosenmann, 'Unit Social Cohesion in the Israeli Military as a Case Study of "Don't Ask, Don't Tell," (2012) 33(4) Political Psychology 419



People belonging to the LGBTQ+ community are equally eligible to be in military as other citizens.

100 responses

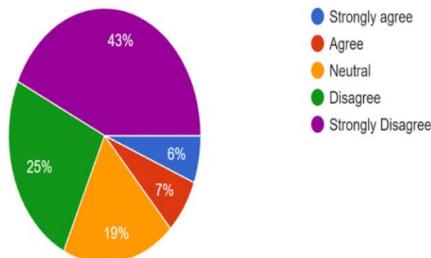


2.8. Workplace

43% of the respondents strongly disagree with the statement that an employer should have the right to decline a position to an LGBTQ+ person solely based on their sexual orientation or gender identity. Lee Badgett, an economist, in her report on income inflation observed that LGBT people’s earning is lesser than non-LGBT people.²² 56% of the respondents (college-educated, white-collar LGBT workers in India) of a survey conducted in 2013 experienced

An employer should have the right to decline an LGBTQ person a position based on their sexual orientation or gender identity.

100 responses



discrimination in the workplace due to their sexual orientation.²³

2.9. Movie & social media

The misconstrued demonstration through the media about homosexuals has created a negative impact on the mind of the viewers which has resulted in worsening the situation for the LGBT community.²⁴ Although homosexuals are widely represented in the mainstream media but not in a justified manner and such negative representation has a more intense effect on the audience rather than the positive depiction.²⁵ 60 out of 100 respondents believe that the image of the LGBTQ+ Community is affected to some extent by the way of their portrayal in movies and social media.

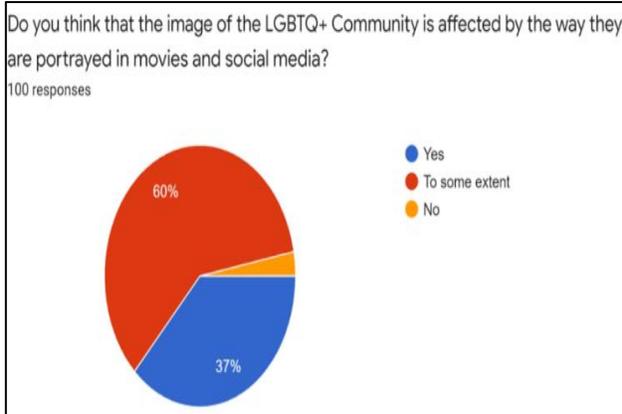
“Many movies should come up to portray the love of same-sex couples and take those live cases who have gone through difficulties and leading a respectable life in society, instead of just portraying some random stories.”
(Respondent)

²² ibid 7.

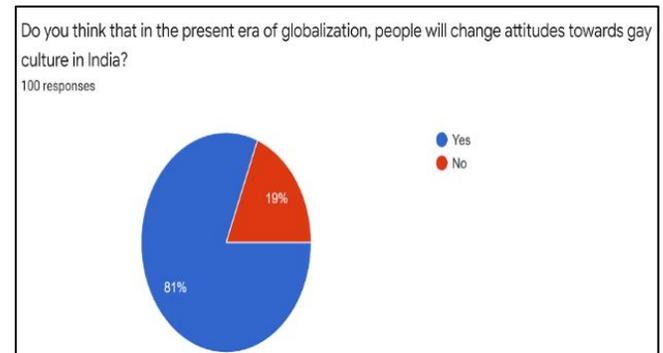
²³ ibid 8.

²⁴ Iman Tagudina, ‘Media Representations of the LGBT Community and Stereotypes’ Homophobic Reinforcement’ (Department of communication Ateneo De Manila University 2012)

²⁵ Mabokela Sedibu Evelyn, ‘The viewers’ perception on the portrayal of gays and lesbians in selected television programmes’(M.A thesis, University of Limpopo 2015)



will change their attitude towards gay culture in India while 19% do not think so.

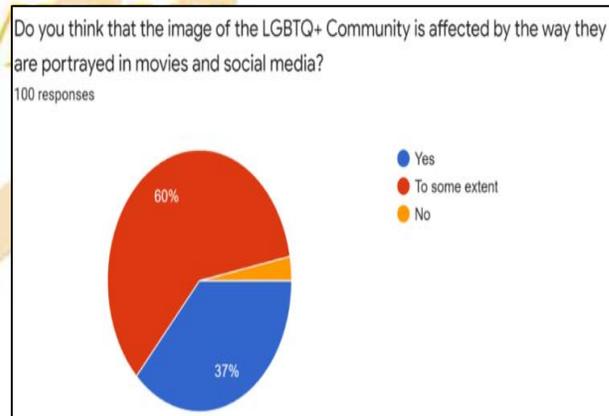


2.10. Awareness among students
 About 4% of the respondents do not agree with the thought of educating students about the LGBTQ+ Community in the schools. From the National School Climate Survey, 2017²⁶ it was found that students having LGBTQ-inclusive courses are less likely to receive the word “gay” in a negative sense, received fewer remarks on gender expression in a negative way, and had better academic performance than those without such lessons in their school. The majority of the LGBTQ students, in schools having an LGBTQ-inclusive curriculum, reported that the fellow students were more welcoming of them.²⁷ *“Deprivation of the knowledge of the LGBTQ+ community is the main reason people are unable to hugely accept them.”* (Respondent)

B. Analysis

The terms gender and sex are generally used interchangeably in India; which might be the reason that majority don’t recognize the difference between the two. Indeed, both the terms are closely linked but they don’t act as a substitute for each other. It can be inferred that much recognition is given to the biological difference, i.e., sex while the psychological and emotional one, i.e., gender is overlooked by society. In the survey, we

2.11. Change in people’s attitude
 The majority of the respondents are certain that in the present era of globalization, people



found that the people belonging to the

²⁶ JG Kosciw ,EA Greytak, AD Zongrone, CM Clark, & NL Truong, ‘2017 School Climate Survey’ (GLSEN 2018)

²⁷GLSEN, ‘State Inclusive Curricular Standards’, (GLSEN, New York 2019) <<https://www.glsen.org/activity/inclusive-curriculum-standards>> accessed 18 June 2020



LGBTQ+ community recognized the difference between their sex and gender thoroughly whereas non-LGBTQ+ people may not be aware of the same due to the fact that their sex and gender are the same.

More number of people who came forward for the survey belonged to the age group of 16-40 and unfortunately no one above 60. The reason that a greater number of young people were responsive to our survey might be that due to decriminalization of homosexuality more people can open up about their identity but before 2018 homosexuality was a crime and was highly stigmatized by the society. Thus, due to lack of legal protection many elders have suppressed their identity. After such a lifetime of stress and vulnerability to ill-treatment, many LGBTQ+ elders have isolated themselves and are less likely to open up. Hence, the LGBTQ+ people belonging to the age group of 16-40 were more easily approachable than those above 40.

When asked about problems faced by the LGBTQ+ community majority responded that they faced trouble while coming out to family and society about their identity and also that they face various types of discrimination which shows that there is no equal treatment meted out to them. 76.5% of the LGBTQ+ respondents faced sexual harassment or abuse in their life while only 62% of the non-LGBTQ+ respondents are aware of such incidents of sexual violence against the LGBTQ+ community people. This shows that since a very little number of people can come out in open about their identity because of the unwelcoming nature of the society, many heinous crimes taking

place against them are also suppressed in silence.

A common opinion is that social media and movies have a great influence on the mind of the audience. Generally, the way the LGBTQ+ community is portrayed in these platforms creates a negative impression about them. Furthermore, the majority of the respondents never came across any society/club supporting such a community this shows that the problems of the community are overlooked by society and therefore more such clubs/societies should be set up to create awareness in the society. The majority agrees that LGBTQ+ inclusive curriculum should be introduced in schools to make educational institutes safe for them and to make people aware that it is not a separate community but a part of society itself. Furthermore, about 13.5% of our LGBTQ+ respondents are unaware of social support systems working for their community and thus are denied the resources which can be beneficial for their growth and development.

The survey data demonstrate that the general response of the LGBTQ+ community people was that they never thought of changing their sex identity. This implies that they are happy with who they are and want others to know that it's natural rather than a choice or decision. While 9.8% of the respondents thought about changing their identity, this might be due to societal pressure and unacceptance.

81.5% of the non-LGBTQ+ respondents and 46.2% of the LGBTQ+ respondents think that in the present era of globalization people will change their attitude towards gay culture in India. Most of the non-LGBTQ+ respondents think that the LGBTQ+ community people are a normal human being, worthy for the



society, should be treated equally with other and support the decriminalization of homosexuality, same-sex marriage, adoption of children by homosexual couples, this shows that more people are having a positive attitude towards the community. However, most of the LGBTQ+ community people are still not sure that people's outlook towards them is changing, this generates a need for more interaction between them and other members of the society.

VI. LEGAL RECOGNITION

Prior to the British rule, Indians embraced the idea of homosexuality and the homosexuals were treated at par with the other members of the society. The Britishers' homophobic attitude gave furtherance to the enactment of a new law in the colonised India, criminalising homosexuality. The Indian Penal Code (IPC) was introduced in India in the year 1860 and s.377 of IPC was inserted in 1861 which read as:

“s.377. **Unnatural offenses:** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.²⁸”

The above-mentioned section of IPC was modeled on the Buggery Act of 1533, which defined ‘buggery’ as an act of unnatural sexual offense against the will of God and Man. Later on the courts defined it to include only anal penetration and bestiality. There

were other similar colonial legislations and legal provisions that specifically criminalized transgender and intersex persons in India. For example, the **Criminal Tribes Act of 1873** punished the eunuchs ‘dressed or ornamented like a woman’ for appearing in a public street taking part in any public exhibition. Other such legislations are **The Telangana Eunuchs Act,**²⁹ enacted in 1919 & **The Karnataka Police Act 1963**³⁰.

Among the various drawbacks of having Section 377, one was the probability of having repercussions on the fight against HIV/AIDS in India. An example of the pernicious effect of s.377 on HIV prevention occurred in 1994 when a group of physicians recommended that condoms should be distributed in a Delhi prison where high rates of homosexual sex were reported. The prison authorities refused because homosexual sex was a crime under s.377 and that distribution of condoms would mean condoning a criminal act.³¹

In response to the above 1994 Prison case, ABVA filed a petition challenging the constitutionality of s.377 of IPC. However, because of the irregular funds, the organization was unable to engage a regular lawyer & on the date of the hearing, the case was dismissed. This marked the beginning of the legal battle for restoring the rights of the homosexuals.

i. **Naz Foundation v. Govt. of NCT, Delhi & Ors. (2009)**

Naz Foundation then, along with Lawyers Collective asked the Supreme Court to review the dismissal of the petition. The

²⁸ s.377 of Indian Penal Code 1860 (IN)

²⁹ s.4 of the Telangana Eunuchs Act 1919 (IN)

³⁰ s.36A of Karnataka Police Act 1963 (IN)

³¹ Agoramoorthy G, Hsu M, ‘India's homosexual discrimination and health consequences’ (2007) 41(4) Rev. Saúde Pública 657



Supreme Court then ordered that the grounds for the dismissal were not valid & asked the Delhi High Court to rehear the case. In the year 2009, the Supreme Court held that treating consensual sex between adults as crime is a violation of constitutionally prescribed rights; however, the law would continue to apply to non-consensual, penile, non-vaginal sex involving minors.³²

ii. Suresh Kumar Koushal v. Naz Foundation (2014)

In *Suresh Kumar Koushal v. Naz Foundation*³³, the decision of the Delhi High Court in '*Naz Foundation case*' (2009) was challenged. The petitioners contended that S.377 is gender-neutral & does not discriminate based on the person committing the act. The Supreme Court pronounced the decision that S.377 of IPC does not suffer from any constitutional infirmity. After the '*Suresh Kumar Koushal case*', there have been plentiful discussions in an attempt to overrule the decision of the case.

iii. National Legal Services Authority (NALSA) v. Union of India (2014)

In April 2014, the Supreme Court passed a judgment in the '*NALSA case*'³⁴ holding that the right to identify oneself as male, female, or transgender is a part of the fundamental rights guaranteed under the Constitution. It was held that the right to one's gender identity and sexual orientation is an integral part of the right to life and dignity and there is no need for medical assurance of the same. The fight for equality for those who fall beyond the mainstream notions of gender gained

impetus with the Supreme Court's judgment in this case.

iv. K.S. Puttaswamy v. Union of India (2017)

In this judgment, the Supreme Court held that the right to equality, life, and fundamental freedoms constitutes within themselves the right to privacy. It further held that "Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation."³⁵ Finally, the year 2018 changed the outlook of society at gender, sex, and sexuality.

v. Navtej Singh Johar & Ors. v. Union of India (2018)

The 5-judge Bench held that section 377 of the colonial legislation is violative of Art.14, 15, 19 and 21 of the Constitution of India. This case highlighted the discrepancies between s.377 of IPC and the guaranteed rights of Indian Constitution to respect privacy, liberty, and non-discrimination. This implies that the content of the rights sanctioned in Articles 14, 15, 19, and 21 based on which same-gender relations have been decriminalized is much broader and will encompass a range of civil rights.³⁶

Legally, the decision makes persecution of same-sex couples intractable and organizations working on issues of sexual rights with LGBT communities now have more freedom to operate without police harassment. However, the verdict is only one step towards equality and acceptance for LGBT individuals.

³²*Naz Foundation v. Govt. of NCT, Delhi and Ors.* (2009) 160 DLT 277

³³*Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1

³⁴*National Legal Services Authority v. Union of India* (2014) 5 SCC 438

³⁵*K.S. Puttaswamy and Anr v. Union of India and Ors.* (2017) 10 SCC 1

³⁶*Navtej Singh Johar vs Union of India*, Para 156



A. Human Rights

“Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere.” — UN Secretary-General Ban Ki-Moon to the Human Rights Council, 7 March 2012

United Nation’s effort

In 2011, the UN Human Rights Council passed the ‘Human Rights, Sexual Orientation, and Gender Identity’ Resolution³⁷ which was introduced by South Africa. Such human rights violations have been a constant concern of the human rights institutions of the United Nations since the early 90’s. The Human Rights Council has appointed independent experts to report on the burning human rights challenges. Agencies have been appointed to monitor the compliance of states with the internationally established human rights treaties.³⁸

The Charter of the United Nations (1945) encourages "respect for human rights and fundamental freedoms for all without distinction."³⁹ The Universal Declaration of Human Rights (1948) states:⁴⁰ *Everyone is*

*entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind.”*⁴¹

Article 14, 15, 19 & 21 of Indian Constitution and human rights

The interrelationship of the principles of anti-discrimination and equality is among the most fundamental elements of international human rights law. Lack of anti-discrimination legislation or complaint structures connotes absence of protection for LGBT persons from discrimination in education, at the workplace, in the workforce, within the health care system, etc. It further suggests lack of legal protection from sexual, verbal, and physical violence and harassment due to sexual orientation, expression, or gender identity. Discriminatory legal systems reserve some rights for heterosexuals such as marriage, adoption, succession, etc. Such a legal system creates a constant fear of persecution in the minds of LGBTQ+ persons and deprives them from claiming protection from discrimination and violations.

According to the survey for the Non-LGBTQ+ community people, 99% of respondents are of opinion that people belonging to the LGBTQ+ community should be treated at par with others.

³⁷Edward Jordan, ‘South Africa and sexual orientation rights at the United Nations: Batting for both sides’ (2017) 44(2) *Politikon* 205

³⁸ Office of High Commission, ‘Combatting Discrimination Based on Sexual Orientation and Gender Identity’ United Nations Human Rights <<https://www.ohchr.org/en/issues/discrimination/pages/lgbt.aspx>> accessed 10 July 2020

³⁹ Charter of United Nations and Statute of the International Court of Justice 1945, c I art 1 (3)

⁴⁰ Universal Declaration of Human Rights 1948, art 2 - Everyone is entitled to all the rights and freedoms set

forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁴¹Juneau Gary, and Neal S. Rubin, ‘Are LGBT rights human rights? Recent developments at the United Nations’ (2012) 23(2) *American Psychological Association*

<<https://www.apa.org/international/pi/2012/06/un-matters>> accessed 25 July 2020



If an individual expresses' his or her sexuality without other individuals' harm of interest, any invasion of this state will result in a breach of privacy.⁴²The right to self-identity is one of the intrinsic rights under the right to life with dignity, and article 21 mandates the state to protect this facet of right from violation. Article 21 also secures the right of the transgender communities to live a dignified life.

B. Transparency and openness of sexual identity and orientation in India

According to the survey of the LGBTQ+ community, 41.7% admits that one of the challenges faced while identifying themselves as a part of the LGBTQ+ community was lack of Legal Acceptance. A state's stillness on the rights and existence of LGBTQ+ persons in many countries contravenes the principles of good governance and transparency. There are enormous threats to amassing data relating to LGBT groups such as public health statistics, sexual identity, etc. In states with weak democratic organizations and weak institutions, most of the marginalized and stigmatized groups not only suffer from biased treatment from the governmental entities but also have difficulties in gathering information on policies that are affecting their lives.

Legal norms and rules as enshrined in the human rights instruments should apply to LGBTQ+ persons also and governments should be made accountable for the observance of those rights. The right to participation is imperative and inextricably

related to fundamental democratic principles. Worthwhile participation is dependent on the realization of several human rights.⁴³

According to the survey for the Non-LGBTQ+ persons, 93% of respondents think that there is a need for special laws to protect the rights and interests of the LGBTQ+ community. Similarly, according to the survey for the LGBTQ+ community, 94% of respondents agree with the statement that the government should revisit the existing laws for the protection of civil and constitutional rights of the LGBTQ+ community.

The draft submitted by the Law Commission in 2016 provided for homosexual marriage & live-in relationships, ruling out any kind of gender-based discrimination for marriage, adoption, inheritance.

The **Transgender Persons (Protection of Rights) Act, 2019** was enacted to enable for the protection of rights for transgender their welfare and other relevant schemes. Under this, to lawfully sanction one's transgender identity, the Act makes it compulsory for the individual to apply for a 'Transgender Certificate', which will label their gender as transgender. Under new rules for acquiring the 'Certificate of Identity', there is a requirement of submitting a psychologist's report. Furthermore, a person who changes their gender identity through surgery has to acquire a 'revised certificate' issued by the District Magistrate. The District Magistrate has to judge the authenticity of the application, although they can submit proof

⁴²*The National Coalition for Gay and Lesbian Equality v. The Minister of Justice* 1999 (1) SA 6

⁴³Department for Empowerment (Democracy, Human Rights and Gender Equality), 'Human Rights for Lesbian Gay, Bisexual and Transgender Persons'

(SIDA)

<https://www.sida.se/contentassets/083aa1b914594f479568ea24a80bda21/human-rights-of-lesbian-gay-bisexual-and-transgender-persons-conducting-a-dialogue_3327.pdf> accessed on 20 June 2020



of their surgery for gender confirmation. The rules make the procedure of gender reassignment and identification cumbersome and intrusive. The rules are unclear on how the accuracy or correctness will be judged. The inclusion of psychologists, medical proofs, and district administrators go against the right of “self-declaration” as recognized under the ‘*NALSA judgment*’.⁴⁴

The LGBTQ+ community people have limited rights and face many social difficulties that are unknown to the majority of Non-LGBTQ+ people. Even though the colonial law is repealed, there is no specific law that protects the persons from the LGBTQ+ Community from discrimination.

C. Workplace equality

According to the survey for persons from the LGBTQ+ community, 82.7% of respondents have faced discrimination at their workplace. While 50% of them are facing a lack of job opportunities. According to the survey for the Non-LGBTQ+ community, 68% of respondents disagree with the statement that an employer should have the right to decline any person from the LGBTQ+ community, a position on office because of their sexual orientation and gender identity.

Cases of termination of employment highlight the persisting discrimination on gender identity & orientation. Back in the

year 1998, two women constables from Madhya Pradesh Special Armed Forces were discharged from service because they married each other. The ostensible grounds for discharge were unauthorized absence and conduct of unbecoming public servants. However, none of the service rules define homosexuality as misconduct.⁴⁵

Furthermore, economic benefits like **Employment Provident Fund Scheme, 1952**, and **Workmen’s Compensation Act, 1923** are given only to those related by blood or marriage and are denied to the LGBTQ+ community people.⁴⁶

D. Military

Following the survey data for the Non-LGBTQ+ community, 85% of respondents agree while 4% disagree with the statement that people belonging to the LGBTQ+ community are equally eligible to be in military service as other citizens from the non-LGBTQ+ community.

In 2018, Ms. Jagdambika Pal from the Bharatiya Janata Party introduced a bill seeking amendments in the **Air Force Act, 1950**, **Army Act, 1950**, and the **Navy Act, 1957** so as to provide an equal opportunity to the LGBT community people to serve in the armed forces.⁴⁷ After BSF, CRPF is ready to recruit transgender persons.

⁴⁴ Shruti Jain, ‘Pride Month 2020: Evaluating the Transgender Persons Act, 2019’ (ORF, 2 July 2020), <<https://www.orfonline.org/expert-speak/pride-month-2020-68965/>> accessed 16 July 2020

⁴⁵ Bina Fernandez, ‘Hum Jinsi - A Resource Book on Lesbian, Gay & Bisexual Rights in India’ (1999) ICHRL 71

⁴⁶ s. 2(g) Employment Provident Fund Scheme 1952 (IN) and s. 2(d) Workmen’s Compensation Act, 1923 (IN)

⁴⁷ ‘Parliament winter session: Bills seek ban on non-veg food at official events, rights to LGBT to serve in armed forces’ *The New Indian Express* (New Delhi, 28 December 2018) <<https://www.newindianexpress.com/nation/2018/dec/28/parliament-winter-session-bills-seek-ban-on->



E. Marriage, adoption, and inheritance

According to the survey for the Non-LGBTQ+ community, 73% of respondents support the statement that same-sex or homosexual marriage should be legalized. However, 17% of respondents do not support the legalization of same-sex marriage, believing that it is unnatural or against the tradition or a threat to survival. While 92.3% of the respondents from the LGBTQ+ community think that same-sex marriage should be legalized because the freedom of choice to marry is a species of the principle of equality and liberty and denying the same is discriminatory.

It is an undeniable fact that the initial focus of the 2018 judgement was on decriminalizing consensual sexual acts. But this, however, is only the initial stage. It would require statutory recognition of long-term same-sex relationships, on par with heterosexual marriages. There are feasible aspects to seek social and legal recognition of same-sex unions. Certain legal perks such as succession, maintenance, and pension rights are available only to married couples and not to same-sex couples. The courts have been playing a vital role in protecting them.⁴⁸ Even though same sex- marriage is still invalid in India but the Gurgaon Court in 2011 recognized the lesbian marriage.⁴⁹ In April

2019, the High Court of Madras recognized the right of transgender women to be married under the **Hindu Marriage Act, 1956**.⁵⁰

Legislations such as the **Special Marriage Act, 1954**,⁵¹ although allows marriage between two persons namely a male and a female, has nowhere mentioned homosexual marriage. Although marriages between a transgender and transgender and cis-gender persons are being registered under the **Special Marriage Act, 1954**, the law recognizes only persons of opposite genders in a romantic monogamous meeting to be worthy of protection.⁵²

However, 5.8% of respondents think that same-sex marriage should not be legalized because they believe that marriage is merely an obligation and an important aspect of human life can be enjoyed even without marriage. With a similar mindset, the Uttarakhand High Court has acknowledged that though the parties living together are of same-sex and therefore, cannot enter into wedlock, they still have the right to be in a live-in relationship.⁵³ Though there is no specific law protecting the parties in live-in relationships, few legislations have been left untouched for liberal interpretation by the courts to prevent partners in live-in relationships from misusing it.⁵⁴ These

non-veg-food-at-official-events-rights-to-lgbt-to-serv-1917748.amp> accessed 2 August 2020

⁴⁸ ibid 10.

⁴⁹ Dr. S.A.K. Azad, Prafulla Kumar Nayak, '*Same Sex marriages in India, United States of America, European Union: A Comparative Analysis*' (2016) vol. 3 Internal Journal for Academic Research 22

⁵⁰ *Arun Kumar and Sreeja v. Inspector General of Registration* (2019) Writ Petition (MD) No.4125 of 2019 and Writ Petition (MD) No.3220 of 2019

⁵¹ s.4(c) Special Marriage Act, 1954 (IN)

⁵² Niharika Alva, 'First Transgender Marriage registered in Karnataka' *Times of India* (New Delhi,

24 January 2018) <<https://timesofindia.indiatimes.com/city/bengaluru/first-transgender-marriage-registered-in-state/articleshow/62632252.cms>> accessed 8 August 2020

⁵³ *Madhu Bala v. State of Uttarakhand* 2020 SCC OnLine Utt 276

⁵⁴ Astha Saxena, 'Live-In Relationship and Indian Judiciary' (SCC Online blog, 23 January 2019) <sconline.com/blog/post/2019/01/23/live-in-relationship-and-indian-judiciary/> accessed 6 August 2020



include the **Code of Criminal Procedure, 1973, Domestic Violence Act, 2005**⁵⁵, and **Evidence Act, 1872**^{56,57}. In a case,⁵⁸ The Supreme Court held that the right of a person to be in a live-in relationship comes within the ambit of the right to life.⁵⁹

The draft submitted for Uniform Civil Code to the Law Commission proposed for the same-sex marriage defining marriage as “the legal union as prescribed under this Act between a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or a woman”. Partnership/Live-In Relationship has been defined as “living together of a man with a woman, a man with another man, a woman with another woman a transgender with another transgender or a transgender with a man or a woman.” This provides that any two people who have been in partnership for more than two years shall have the same rights and duties towards one another as a married couple. The registration of such a partnership shall be mandatory.⁶⁰

If India were to adopt a uniform civil union model, it would not only generate a need of enacting a new law governing civil unions but also of amending the relevant legislation on adoption, succession, pensions, etc. so that

a partner in a civil union is given the equivalent status as a spouse and is considered to be a ‘family’. However, legislation, especially on such issues is likely to have vehement opposition and be delayed. In matters of inheritance, personal laws govern the succession rights of transgender children. For this, the transgender children need to identify themselves as either male or female; this binary gender identity makes discrimination based on sex (Art.15) as the Act does not talk about transgender. Being a transgender is no ground for disqualification from the property.

87% of the respondents from the Non-LGBTQ+ community think that homosexual couples should have adoption rights. While 5% think that they should not be allowed to adopt as it would weaken the institution of family and would affect the development of the child. Similarly, for adoption, the Uniform Civil Code draft proposes that irrespective of couples being married or in a partnership or their sexual orientation, they should be allowed to adopt a child. And in the matters of succession and inheritance, it says that upon the parents’ death, the child (adopted or biological) is eligible to hold an equal share regardless of its sexual orientation and gender.⁶¹ The Central

⁵⁵s.2(f) of the Domestic Violence Act, 2005 defines: Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

⁵⁶s.114 of the Evidence Act, 1872 - Where a man and a lady live respectively for a long spell of time as a couple then there would be an assumption of marriage.

⁵⁷Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System*, <https://indialawyers.files.wordpress.com/2009/12/criminal_justice_system.pdf> 181-194.

⁵⁸S. *Khushboo v. Kanniammal* (2010) 5 S.C.C. 600

⁵⁹ Art. 21 of the Constitution of India 1950 (IN)

⁶⁰ Anurag Dey, ‘A New UCC for New India? Progressive draft allows for same sex marriages’ *Indian News* (New Delhi, 13 October 2017) <<http://www.catchnews.com/india-news/a-new-ucc-for-a-new-india-progressive-draft-ucc-allows-for-same-sex-marriages-85386.html>> accessed 15 August 2020

⁶¹ ‘Allow gay marriages, give couples police protection if needed, suggests draft Uniform Civil Code’ (SCROLL, 13 October 2017) <<https://scroll.in/latest/853850/allow-gay-marriages->



Adoption Resource Authority (CARA) guidelines for adoption has made it difficult for the unmarried couples and single persons to adopt. Similarly, the Surrogacy (Regulation) Bill, 2020, excludes persons from the LGBTQ+ community to opt for surrogacy.⁶²

F. Abuse and sexual harassment

It has been found in the survey (for LGBTQ+ community) that 13.5% of respondents have never faced harassment and abuse. However, 69.2% of the people have faced verbal abuse/harassment, 55.8% have faced physical abuse/harassment and 34.6% of people have faced online abuse/harassment. In addition to this, few people have faced both verbal as well as physical abuse/harassment. About 38% of the non-LGBTQ+ respondents were unaware of such incidents of abuse and harassment faced by the LGBTQ+ community.

While the Constitution of India recognizes equality before the law and the equal protection of laws, the gendering of laws is the rule and, in many instances, even expedient.⁶³

Reports suggest that LGBTQ+ persons in India are subjected to blackmail. Country

Reports for 2014 reveal that LGBT persons have experienced physical attacks as well as rape. Sources report on multiple instances of the homicide of LGBT persons. In February 2014, a man was murdered by his former partner who was afraid that their relationship would become known to others.⁶⁴

The approach of courts has been inconsistent when it comes to issues of violence being faced by LGBTQ+ persons. Under ICCPR and the Convention Against Torture, the State is duty-bound to stop, prevent, and penalize family members that commit torture or other ill-treatment and is further obligated to protect stigmatized individuals (including the LGBTQ+ persons) from torture and ill-treatment.⁶⁵

It is usually very difficult to register a criminal complaint against family members because victims are unwilling to file criminal complaints due to pressure from family & are usually told by the police to “settle”. Moreover, criminal laws on rape and sexual harassment recognize, only women as potential victims of sexual crimes.⁶⁶ According to the law, transgender persons with a government-approved female identity document can access legal remedies under

give-couples-police-protection-if-needed-suggests-draft-uniform-civil-code> accessed 16 July 2020

⁶² Aniruddha Ghosal, ‘The New Surrogacy Bill won’t let Live-In and LGBTQ Couples Become Parents’ *NEWS (New Delhi, 18 December 2018)* <<https://www.news18.com/news/india/the-new-surrogacy-bill-wont-let-live-in-and-lgbtq-couples-become-parents-1979055.html>> accessed 5 June 2020

⁶³ The gendering of laws refers to the law covering only certain gender identities, particularly women, within its scope. For instance, rape laws recognize only (cis) women as victims of the offence. Gendered drafting of laws on the other hand are a form of drafting where all nouns and pronouns used in the

drafting of laws are male, thus presuming that the norm of humanity is male.

⁶⁴ PTI, “Nine-Month-Old Murder Mystery Solved, Police Claim” *Press Trust of India* (26 February 2014)

⁶⁵ ICJ, ‘Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity’ (International Commission of Jurists, 2017) <<https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>> accessed on 18 July 2020.

⁶⁶ s.354B, 354C, 354D, 375, 376, 376A, 376B, 376C, 376D, 509, IPC (IN)



criminal law⁶⁷. Justice Verma Committee, a government established advisory body and NGOs, have both advocated for gender-neutral laws for victims of sexual violence.⁶⁸ These serve as helpful examples of initiatives taken by lawyers and judges in favor of LGBTQ+ persons.⁶⁹

Lesbian, bisexual, cis-gendered women and transgender persons with a government-approved female identity document can also approach civil remedies under the domestic violence law, the **Protection of Women from Domestic Violence Act, 2005 (PWDVA)**.⁷⁰ The need for free and informed consent of the patient before conducting medical treatment is set out by the Supreme Court and High Court of Karnataka as well in the **Indian Medical Council Regulations of 2002**, which lays down the code of ethics to which medical professionals must comply with.⁷¹

Under the domestic Indian Law, forced detention in one's home or a medical center is a violation of one's right to life and liberty guaranteed under Article 21⁷². Moreover, if

⁶⁷A. Chatterjee, 'Loopholes in third gender law aid 4 rapists to get bail' *Pune Mirror* (Pune, 8 August 2017) <<https://punemirror.indiatimes.com/pune/civic/loopholes-in-third-gender-law-aid-4-rapists-to-get-bail/articleshow/59960595.cms>> ; PTI, 'Uttarakhand HC Seeks Reply from Police on Transgender's Plea Against Refusal of FIR On Rape Complaint' (*Live Law*, 9 January, 2019) <<https://www.livelaw.in/news-updates/uttarakhand-hc-police-transgenders-plea-refusal-fir-rapecomplaint-141982>> accessed 18 July 2020

⁶⁸ The Justice Verma Committee was set up to recommend amendments to the Indian criminal law to the Government in 2012, urged that sexual offence laws be gender-neutral with respect to victims.

Justice Verma Committee, *Report of the Committee on Amendments to Criminal Law* (2013) pt II para 3

⁶⁹ *Anamika v. Union of India* W.P. (CrI) 2537/2018; IPC, s.354A. High Court of Delhi

committed, it amounts to offenses of wrongful confinement and restraint as per the IPC, which carries sentences of up to three years under special circumstances.⁷³

There is a need for revision of existing laws for protecting the interests of the LGBTQ+ community, at the same time, it will not be feasible to amend every law. Hence, special laws should be enacted for a limited period until the mainstream society fully accepts them.

VII. CONCLUSION

By looking into history, it is evident that the Indians are not unaware of the existence of the LGBTQ+ people. However, most of the people are inhospitable towards them. It is explicitly clear from the survey that a lot of people are willing to accept the people of the LGBTQ+ community as a part of society. However, due to the lack of interaction between both the communities, there is a difference of opinion about the changing outlook of the society towards the LGBTQ+ Community. There is a lack of government intervention & initiation of progressive measures for the furtherance of the

⁷⁰ PWDVA is a female victim-centered federal civil law which provides a gamut of civil remedies to women victims of domestic violence. It has a wide ambit, covering a broad range of abuses or threats of abuse – physical, sexual, verbal, economic and emotional. PWDVA, s.2&3, perpetrators of domestic violence may include any person the female victim is related to by “consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.”

⁷¹*Dr. Ramcharan Thiagarajan Facs v. Medical Council of India* W.P. No. 11207/2013, paras. 4(g)-8 High Court of Karnataka and *Samira Kohli v. Dr. Prabha Manchanda & anr.* Appeal (C) 1949/2004, paras. 14-19 Supreme Court of India

⁷² art.21 of Constitution of India, 1950 (IN)

⁷³ s. 339-348 IPC (IN)



community's cause. From considering the extent of legal acceptance it is observed that the present laws and statutes are not effective enough to protect and safeguard the rights and interests of the community.

There hasn't been much improvement in the situation of the LGBTQ+ Community and society needs to be educated and made aware of gender identities through various sensitization programs and campaigns. The words such as 'Gay', 'Hinjara', 'Chakka' etc., should not be used in a negative connotation as portrayed in highly influential platforms such as movies and social media. After the 2018 Judgement of decriminalization of homosexuality, the next major step expected from the judiciary is to legalize same-sex marriage and grant adoption and surrogacy rights to homosexual couples. To conclude, although the survey data suggests that the majority of the non-LGBTQ+ people are supportive of the legalization of same-sex marriage and child adoption by homosexual couples but in reality, there is still a long way to go to achieve these basic rights.

