



## Gender Identity-Based Cultures and Legal Laws for the Third Genders

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### Abstract:

*India has achieved significant growth and development. It has improved on crucial human development indices such as levels of literacy, education and health. There are indications, however, that not all disadvantaged groups have shared equally the benefits of the growth process. Among these, the LGBTQ community, one of the marginalized and vulnerable communities in the country are seriously lagging behind on human development indices including education (Rajesh & Naved 2013). What is appalling is that despite affirmative action (reservation policies, Right to Education, etc.) the disparities remain substantial among the trans community in India. Majority of the population is uneducated or undereducated thereby excluding them from participating in social, cultural, political and economic activities. Along with teachers' apathy towards LGBTQ community, exclusion from society, poverty, continued discrimination, violence are some of the important factors which can be attributed to the poor participation of transgender persons in educational activities. This article deals with diversity of sexuality and gender identity-based cultures and legal laws for the third Genders.*

**Keywords:** Gender-Identity, Legal Laws, Third Genders, LGBTQ Community.

### Introduction:

LGBTQ is an acronym that stands for lesbian, gay, bisexual, transgender and queer. The initialism LGBTQ is intended to emphasize a diversity of sexuality and gender identity- based cultures and is sometimes used to refer to anyone who is non-heterosexual or non- cisgender. Whether or not LGBT people openly identify themselves may depend whether they live in a discriminatory environment, as well as the status of LGBT rights where one lives.

People from the Third Gender category are more likely to experience intolerance, discrimination, harassment and the threat of violence due to their sexual orientation, than those that identify themselves as heterosexual. This is due to homophobia (the fear or hatred against homosexuality). Some of the factors that may reinforce homophobia on a larger scale are moral, religious and political beliefs of the dominant group. In some countries homosexuality is illegal and punishable by fines, imprisonment and even death penalty.

Deeply-embedded homophobic and transphobic attitudes, often combined with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, expose many

lesbian, gay, bisexual and transgender (LGBT) people of all ages and in all regions of the world to egregious violations of their human rights. They are discriminated against in the labour market, in schools and in hospitals, mistreated and disowned by their own families. They are singled out for physical attack – beaten, sexually assaulted, tortured and killed. In several countries, laws against cross dressing are used to punish transgender people on the basis of their gender identity and expression. And in some 77 countries, discriminatory laws criminalize private, consensual same-sex relationships – exposing individuals to the risk of arrest, prosecution, imprisonment — even, in at least five countries, the death penalty.

Compared with LGBT young people who were not rejected or were only a little rejected by their parents and caregivers because of their gay or transgender identity, highly rejected LGBT young people were:

- More than 8 times as likely to have attempted suicide
- Nearly 6 times as likely to report high levels of depression
- More than 3 times as likely to use illegal drugs and
- More than 3 times as likely to be at high risk for HIV & STDs.

Many LGBT youth and those who question their identity fell like they have to hide who they are to avoid being rejected.

Our country has an estimated 40-50 lakh LGBTQ population, till date an extensive census has not been conducted on the LGBTQ community. It can be believed that every state of India has its fair share of the LGBTQ communities but acceptance level is variable in each state. Some states like Delhi, Sikkim and North- Eastern States are bit more open towards them than other states. Yet the apathy towards them is prevalent everywhere. In the 2011 census of the Third Gender population conducted by the government of India, West Bengal ranked fifth with a total of 30,349 transgender population, having literacy rate of only 58%. The current status of same-sex marriage in West Bengal is- Illegal. So far no same sex marriage has been documented here. According to Grindr for Equality (an online locator of sexual health, mental health and legal aid service providers for LGBTQ members across India), West Bengal, Tamil Nadu and Assam are states with maximum entries in the database. There was no record found about students belonging to the LGBTQ community in the educational institutions of West Bengal. Though the government of West Bengal has constituted a State Transgender Development Board in the year 2015 to address their issues and extend all developmental benefits to the third genders yet the main challenge is it's implementation at the grassroot level.

According to a report in The Wire (an online journalism platform) a victim of the police atrocities was wrongfully detained and victimized on false grounds and he spent the next two days reaching out to the Narayanpur police station (Kolkata), West Bengal Transgender Development Board and the Department of Women & Child Development and Social Welfare, Government of West Bengal “to inform them, urge them to initiate an inquiry and get a comment”. “Both the board and the department landline numbers were unresponsive,” he says. He got in touch with a few members of the board mentioned on the website. “They told me the board was non-functional as the contract of the members ended in 2018,” he says. This is the ground reality of the rights of the LGBTQs in West Bengal. Even the guardians of the citizens tend to work against the members of the LGBTQ community most of the times. If at all their reports are registered then they are asked inappropriate questions like- why do walk like girls?, why do you talk like a girl?, do you have a boyfriend/girlfriend? do you have body features like girls? etc.

Another main hurdle is the identification of such people as they hesitate and are afraid to cross the social barriers that exists. All these factors, restrains them from being open about their gender identity. The reason for trying to remain hidden is manifold and a study is needed to understand the problems faced by the students of the LGBT community in West Bengal and recommend ways that will help them to overcome these barriers. In 2019, Maharashtra recorded highest number of deaths by suicide followed by Tamil Nadu, West Bengal, Madhya Pradesh, and Karnataka. These five states together accounted for almost half of the total suicides recorded in India in that year. Surprisingly the male to female ratio of suicide could be found but LGBTQ suicide census could not be found in the online forum. Wikipedia reported only 17 LGBTQ deaths in the year 2019 which is utterly fallacious. Education is a fundamental right and no one should be excluded from it irrespective of their gender or sex. It is high time that the government of West Bengal in its quest to become the most literate state considers the education of the LGBTQ children too and keep a valid record for future references.

The investigator hopes that this study will be a wakeup call for the respective departments and officials of West Bengal and gear them up to identify and acknowledge the members of the LGBT community, providing them all the benefits that they are entitled to, especially in the field of education; to help them live a dignified life.

Hence it is imperative for an extensive study regarding the problems and issues faced by the LGBTQ students especially in the field of education and also recommend possibilities to overcome these hurdles so that the stigma associated with this community can be abolished through proper education and employment.

There are various forms of gender discrimination. Every year, a huge number of LGBTQ people face huge issues related to violence, sexual assault, unemployment, poverty and lack of healthcare. Prejudiced people have issues with the way people from the LGBTQ community lead their lives. As a result many of it's representatives are forced to live life which is demeaning in every ways. Vyjayanti Vasanta Mogli, a transwoman LGBT activist and public policy scholar at Tata Institute of Social Sciences, Hyderabad, has openly spoken about her abuse at school, says that lesbian women and trans-men in rural areas end up at the bottom of the hierarchy when it comes to basic human rights within the unit of family and village.

According to the survey conducted among the adult representatives of the LGBTQ community, almost 40% stated that they were not accepted by their family or even friends due to their gender identity or sexual orientation. Such situations cause serious problems in the Third Gender community, which can lead to depression, suicidal tendencies and anti-social activities. Mayock et al. (2009) in a large-scale Irish study report that young LGBT people as a whole are more vulnerable to psychological distress. They report that over 60% of respondents directly attribute stress and depression directly to their non-heterosexual identity. Some have been forced into loveless, sexless marriages; other couples have run away together or even died by joint suicide. "There are even horrific cases of what's called 'corrective rape,' in which lesbians are raped by men with the intention of turning them into heterosexuals," says Kanika K. Ahuja, PhD, an associate professor of psychology at Lady Shri Ram College for Women at the University of Delhi. Conversion therapy is not only the targeted intervention of unscrupulous professionals and quacks coercing, medicating and brain-washing LGBTQ+ people to feel they have to "correct" their sexual orientations and gender; it is also the latent and stealthy ways that they are conditioned to behave.

The first and the foremost right LGBTQs are deserving of is the Right to Equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, caste, sex or place of birth. Article 21, ensures right to privacy and personal dignity to all the citizens and article 21 (A) ensures education is a fundamental right to every Indian. The constitution provides for the fundamental rights to the equality and tolerates no discrimination on the grounds of sex, caste, creed or religion. The constitution also

guarantees political rights and other benefits to every citizen. Despite such laws in the constitution of India, the other sex (third gender) continues to be ostracized. LGBTQ people faced discrimination and harassment at family, school and community forces them to move to the other places. The nature of the harassment includes verbal, physical and sexual abuse which has serious impact on the mental health as well. In a democratic country like India most LGBTQs has no access to the social and political rights. They are not the part of any welfare scheme. Keeping this in view it can be concluded that there is an immense need to intervene at individual, community and policy level to safeguard the rights of the third genders.

### **Legal Laws for the Third Genders**

The fight for rights for the third genders started way long back, by the help of trans activists and advocated of the LGBTQ communities. Back from 1999, when group of 15 attendees, organised India's first ever LGBTQ parade, in West Bengal, Kolkata the fight for rights of Transgender people started.

In 2016, finally a bill was proposed in the Parliament of India regarding the protection of the transgender people, The Transgender Persons (Protection of Rights) Bill, 2016[4]. This bill didn't solve any of the problems which were actually faced by the people of transgender communities.

India is not a first country which has thought about the rights and protection of the people of transgender communities. Our neighbouring countries like Nepal and even Pakistan has laws related to the protection of the Transgenders. The Supreme Court of Nepal in the case, *Sunil Babu Pant v/s Nepal Govt. (2008)*[5], held that "The fundamental rights comprised under Part III of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the state. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizen of this country as well... Thus, the people other than 'men' and 'women' including the people of 'third gender' cannot be discriminated on the ground of sexual orientation. The State should recognize the existence of all – natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution."

Also, the supreme court of Pakistan in 2011 in the case of, *Dr. Mohammad Aslam Khaki & another v/s Senior Superintendent of Police (Operation) Rawalpindi & others*, held that "Needless to observe that eunuchs in their own rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected. Thus, no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at Federal and Provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens."

In India, the recognition of the transgenders as a third gender was accepted by the law in the year 2014 only. In 2014, the supreme court in the case of *National Legal Services Authority v. Union of India*, talked about the rights and protection of the transgenders in India and held that the transgenders are also citizens of India, therefore the Fundamental Rights which are given to the "citizens" and "people of India" would also be given to them and they would be treated equally. The Supreme court held that – "Article 14 has used the expression "person" and the Article 15 has used the expression 'citizen' and 'sex' so also Article 16. Article 19 has also used the expression 'citizen'. Article 21 has used the expression 'person'. All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self – identification, not on surgical or medical

procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.”

“We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.”

#### THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

After the judgement of The Supreme Court of India, in 2019 a bill was passed in the Parliament of India, for the enhancement of the living conditions for the transgenders in India. This bill was passed by both the houses, i.e., Lok Sabha and Rajya Sabha. On November 2019 Rajya Sabha passed the introduced bill, due to which on 26<sup>th</sup> November 2019 a new law was made, for the betterment of the transgenders in India, this law was named as; ‘The Transgender Persons (Protection of Rights) Act, 2019’.

The main purpose of this Act was to bring upliftment, protection and sense of equality which was ensured by the Supreme Court of India for the Transgenders. But on the other hand, this Act was completely vague in nature. The Transgender Protection Act, was not helping the transgenders in any way, the law was highly insufficient and was full of vagueness.

#### **Conclusion:**

India, which is termed to be as the world largest democratic country is a developing country that incorporates a minority of homosexuals. Indian constitution provides fundamental rights to its voters that embody right to life, equality, equity etc. However, the rights of LGBT particularly the Human Rights are violated in Republic of India because of the criminalizing of the same-sex relationships. Criminalizing of same sex activities isn't honest towards human rights of Republic of India on the idea as- Homosexuality in several countries has been legalized and also, several countries have amended their constitution to incorporate rights for them like South Africa. In Republic of India, such relationships have been criminalized as in our country it has been termed as unnatural. In Republic of India the problem of homosexuals has been a controversial topic that has been heatedly debated and has attracted the eye of general public likewise as our judiciary. Although Republic of India is a lively member of UNHR and has signed most of the resolutions, however homosexuality topic is yet not within the books. According our judiciary, these are unnatural offences and currently the discretion to repeal this section is on parliament.

India is a nation of various cultures, and here, completely different people have differing kinds of thinking and living. Legalizing the activities of homosexuals is modern trend over the world. In the ancient times, homosexuality has been adopted by different Gods and kings not solely in Republic of India however over the world. UNHR says each human has right to equality and every one are equal before law however their rights has been violated. Many researches have been conducted all over the world on homosexuals and it found that sexual orientation is because of the atmosphere nobody has adopted on such kind behavior and it's a natural cause.

In 172nd report of law commission it was term that criminalizing of such activities could term to the expansion of crime and HIV in privacy and these crimes embody rape and killing likewise. This report, in addition to this, recommended decriminalizing section 377 of IPC. On the basis of discussion, it leads to the conclusion that LGBT minority people who have completely different sexual orientation which ends in face discrimination within the family and society. However, clearly, they're the human creatures and so they're

entitled to all human rights likewise as fundamental rights in Republic of India. Lesbian, gay, bisexual and transgender folks have long been concerned in efforts for racial and economic justice. Today, LGBT organizers and groups are progressively drawing attention between the movements for LGBT their rights and therefore the movement for economic, social, political and racial justice. So nowadays there's requirement to safe-guard their rights as a human being within the society.

Further, homosexuality isn't a psychopathy. It's as natural as heterosexual. The human mind has no management of it. The case of LGBT community is worst in Republic of India. They're subjected to harassment, violence, and mockery. European countries have protected the sexual rights of the members of the LGBT community. The resolution elapsed international organization, UN, has created a positive impact everywhere. Stand of India at UN regarding LGBT issues has been so far very disappointing as India have been stigmatizing its own image as a democratic republic by persistently opposing LGBT rights at international level. It's vital to make people aware to the presence of LGBT community. Human rights are natural rights that are indestructible and inalienable, that are given upon man since birth. Homosexuals don't seem to be aliens, they're not sick, their sexual behavior is utterly in tune with the dictate of nature. The government of Republic of India ought to wipe out its conservative nature and take concrete steps for the welfare of sexual minority. Re-criminalization of sexual activities between homosexuals was the "biggest reversal to the movement of LGBT rights". One judgment severely affected the rights of the complete community inflicting large harm to shallowness and self-esteem of the LGBT Just and fair struggle for social recognition by LGBT will go on. The planet can evolve and sooner or later, it'd illuminate the dark age of reasoning. There is a need and requirement of 'Human Rights' and not men rights or women rights or gay rights because Women rights are human rights, Gay rights are human rights, Black rights are human rights and LGBTQIA+ rights are human rights. We're all humans, and an initiative should be to treat each other that way.

As is alleged by Tracey Ellis Ross, *"Human rights, race relations, gender politics, health care, and foreign policy – it's a lot to keep track of, and yet all of these things affect us in our daily lives. Making sense of everything requires meticulous unpacking of feelings, delicate navigation of social norms, and a community of love to help along the way."*

#### **Recommendations:**

After the research the researcher noticed that though our country guarantee human rights to its citizens but a minority of Indian population which term themselves to be LBGT's have been some where neglected. After concluding the judicial decision in researcher own views here are some humble submissions:

- Stringent actions against discriminations in educational, social and profession
- HIV/AIDS - AIDS have been found in MSM, this reason has been focused by our judiciary while criminalizing the same sex conducts. The researcher submits that every citizen has right to live with their own choice just because the percent of HIV has been increased due to MSM one cannot criminalize it. HIV use to find in heterosexual peoples also but in India many programmes used to be operated by government which spread HIV awareness. Daily in newspaper, in television, magazines, radio channel we found government awareness programmes or advertisement for the awareness of HIV. Not only in cities but in village also various camps use to be conducted by government of India who use to teach how one can get protected from HIV. Even in school and colleges students learn to protect them. Doctors and scientist said that the only way this virus spread by the means of sexuality is doing sex without protection. When government can spread awareness for normal individuals how to get protected from HIV then why not for

LGBTs. AIDS in LGBT can be controlled by making them aware, by distributing condoms to them by giving special privilege so they may stand equal to the society.

- Distribution of Condoms - Condoms should be distributed to LGBTs freely by government in villages, prisons etc. also awareness programme should be specially conducted for the homosexuals in schools, colleges, television and on radio.
- Privilege to LGBT's - In education, employment and other activities a special privilege should be provided to LGBT's, so that they may stand equal to society. As today criminalizing of same sex activities created hatred towards the homosexuals by the society which leads discrimination in public places, employment, schools etc. due to which homosexuals create suicide. It is the duty of government to provide privilege to them so that they may bring equality to the society.
- Prohibition for their personal rights should be stopped - Homosexuals are not by their choice it's because of the environment or their gene. So, prohibiting them for their personal sexual rights should be stopped as if you will be going to interfere in their personal lust, they will going to fulfill their needs in privacy which may convert that into criminal activities such as rape, killing, sexual abuse etc.
- Safer body process - Promotion of sexual health, replica of LGBT ought to be inspired for safer body process.
- State needs to shield their elementary rights with none discrimination.
- Special laws ought to be enacted.
- Provide opportunities in social and economic activities.
- Need to shield human rights.
- Need to require preventive measures in family, public and violence.
- Government ought to take initiatives to support employers in creating geographic point and geographic point culture a lot of auxiliary and inclusive of LGBT folks.
- Need to vary social angle toward LGBT Minority folks.
- Further researchers need to be conducted in this regard especially at the grassroots level.

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