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# A Critical Analysis on Treatment of LGBTQ Community Post Decriminalization of Section 377 of the Indian Penal Code in Work Places

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## ABSTRACT

*Lesbian, gay, bisexual, transgender and questioning individuals consists a minority and unwarranted group with distinctive character which are actually identified in paper but even today when it comes to reality, they remain deliberately unrecognized in the strata of the society. Prior studies have shown that these underrepresented social groups face unconcealed and stealthy workplace biasness, lack of professional success and workplace dissatisfaction. They are yet to come out freely in the society and walk with their heads held high in their work place without the fear of being degraded and judged. This post decriminalization period is yet to take into account and accept what the law has decided for this naturally inherited sexually oriented people and take necessary actions. Socio economic degradation, workplace prejudice and societal unfairness have made this people do informal jobs for their livelihood. Despite increasing social acceptance and lessening disapproval, many individuals are still disagreeable working with lesbian, gays, transgender, bisexual peers. We are yet to solve this problem being faced by this community people in the workplace as well in their daily life. We are yet to bring in action to what is written in papers to real life after this post decriminalization. Although, the decriminalization of section 377 of the Indian Penal Code is done on paper, the acceptance by society is yet to take its course. The judgment was just the start to the battle towards recognition of identity of the community and the community still faces a lot of discrimination, unemployment and harassment in workplaces. There are several laws shielding their identity from such sufferings but the society is far from complying with those provisions. Hence, it should be an eye opener for the society that LGBTQ community is a legalized community and should be equal opportunities as other citizens.*

## I. INTRODUCTION

Homosexuality has always been a very controversial topic from the ancient times and has been

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always in the picture up till now. Homosexuality, although very vocal in this century, has always prevailed in India from the very beginning. Although it was veiled due to societal issues, it never lost its prevalence. The LGBTQ community has been one of the most frequent sufferers in the hands of society and hence, even today, people are finding it very hard to be vocal about their homosexuality. The character of the LGBTQ community was looked down to such an extent that it was deemed to be illegal under section 377.<sup>3</sup>

If we go into the merits of the section, the word “order of the nature” itself speaks that homosexuality was considered to be abnormal and against order of the nature. There was no perfect explanation as to why a human could not be gay, lesbian, bisexual or transgender since they do not voluntarily gain those characteristics; these features are naturally embodied within them. The degree of sanction of imprisonment of ten years made homosexuality a heinous offence which suppressed the LGBTQ community even more.

Fewer provisions of the sections was removed by Delhi High Court in July, 2009 but it was overturned by the Supreme Court on 11<sup>th</sup> December, 2013 in the landmark judgment<sup>4</sup> on the ground that constitutionality of the section has to be dealt by Parliament<sup>5</sup>. The Supreme Court, in 2018, condemned discrimination and stated that the question of sexual orientation lies at the very core of fundamental right and the rights of LGBTQ community are real and constitutional. The Supreme Court in unanimity declared section 377 unconstitutional on the grounds that, “it criminalizes between adults of the same sex<sup>6</sup>.”

This was indeed a historic win for the LGBTQ community but the victory was on papers but in reality, the LGBTQ community still faces a lot of hurdles regarding their homosexuality especially in work places. Before this judgment, people from the community hardly had jobs but after decriminalization, the community is getting a chance to represent themselves in corporate sectors. However, they still face ample troubles. Therefore, this article will aim at the treatment of LGBTQ community at work places.

## **II. LEGAL PROTECTION OF LGBTQ COMMUNITY IN WORKPLACES**

Decriminalization of section 377<sup>7</sup> sure was one of the most historical steps towards the advancement of the LGBTQ<sup>8</sup> community but it was just the start of the battle. There were two reports posted by to UNESCO, the United Nations Education Agency, the International

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<sup>3</sup> INDIAN PENAL CODE.sec.377

<sup>4</sup> Suresh Kumar Kaushal v Naz Foundation, Civil Appeal No. 10972 of 2013(India).

<sup>5</sup> Justice K.S Puttaswamy and Anr. v Union of India and Ors., Writ Petition (Civil) No. 494 of 2012(India).

<sup>6</sup> Navtej Singh Johar v Union of India, Writ Petition (Crl.) No. 76 of 2016(India).

<sup>7</sup> INDIAN PENAL CODE. Sec 377.

<sup>8</sup> Lohana Vasantlal Devchand And Anr. v The State, A.I.R. 1968 Guj 252(India).

Commission of Jurist to make people aware regarding experiences of gender and sexual minority in Indian schools and workplaces and reports of difficulties faced by LGBTQ community. ICJ also found that LGBTQ community was not provided with ample training and educational opportunities.

### **A. Treatment of sexual and gender minority in educational institutes**

UNESCO again conducted survey in 2018 on 371 sexual and gender youth minority and accumulated information by focusing on 60 through focus groups in Tamil Nadu. The reports showed a staggering 84% of participants subjected to bullying by other students and one fifth of them were by a male. This shows that while legal changes are important, it is way more important to let the LGBTQ communities live without discrimination and with dignity. Human Right scholars have stated that transforming India into a nation that aims at protecting gender and sexual diversity will require action by multiple agencies and ministries at national and state level.

### **B. Discrimination and Harassment in work places**

Even after decriminalization of section 377 of IPC, there is no proper law that protects the LGBTQ community in workplaces from discrimination. The legislation The Sexual Harassment of Women at Workplaces (Prevention, Prohibition and Redressal) Act or the POSH Act is itself gender specific and aims at protecting women only. This automatically excludes the LGBTQ+ people from the ambit of the act making them more prone to harassment and discrimination at workplaces. Absence of any legislation two years post decriminalization shows the very intention of the Government that the interest of LGBTQ community is not on their priority list. Moreover, Article 15(1)<sup>9</sup> prohibits State on the basis of sex, caste, race and religion<sup>10</sup> and since transgender is a legal recognized third gender, it is protected under Article 15<sup>11</sup>.

### **C. The POSH Act and the changes needed**

The POSH Act or the Sexual Harassment of Women at Workplaces (Prevention, Prohibition and Redressal) Act, 2013 is one of the few legislation that exists and aims at protecting a particular group from sexual harassment at workplaces<sup>12</sup>. This Act originated from the very famous Vishaka guidelines which made it compulsory for employees throughout the country to undertake certain steps to protect the female employees from sexual harassment in

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<sup>9</sup> INDIAN CONST. art 15(1).

<sup>10</sup> Parul Jain v State (India).

<sup>11</sup> Vasantha R. v Union Of India and Ors (2001) I.I.L.L.J. 843 Mad.(India).

<sup>12</sup> Vishaka v State of Rajasthan, A.I.R 1997 S.C. 3011(India).

workplaces. Apart from 354 of IPC, this Act gave a specific protection to women at workplaces. The main demerit of POSH Act is it is not gender neutral. The very title of the act clearly states that the relief under this act can only be claimed by women in workplaces and specifically focuses on the right of the women. The discussion regarding gender neutral Act was brought before the Parliament in 2011 but it generally focused on the neutrality of law between “Men and Women” and the legislation was made gender neutral legislation on the grounds that women have always been in disadvantageous position in work places.

In 2014, the Supreme Court recognized the plight of transgender people and recorded several instances of discrimination and gave a very inclusive and progressive judgment and since then there has steady occupation of transgender in public and private organization. There were reports of transwomen being appointed as a judge in Kolkata, employed as police in Chennai and a clerk in Karnataka government secretariat. However, transgender still face ample amount of difficulties and harassment in workplaces.

In 2016, Transgender Person Protection of Right Bill was introduced before the Parliament and was in fact passed by one of the House of Parliament but there has to be specific legislations proposed and passed for protection of LGBTQ+ community in workplaces that will work parallel to and resonate with the idea of POSH Act. Article 21<sup>13</sup> provides Right to livelihood<sup>14</sup> as one the basic and important Fundamental Right provided to human and it is one the basic Fundamental Right provided to the LGBTQ community as well. Therefore, the society should strive to remove all the difficulties faced by the community and provide them the very right to have a decent livelihood both in home and workspace.

### **III. DISPARITY IN WAGES OF LGBTQ COMMUNITY IN WORKPLACES**

Discrimination is not unknown in India when it comes to insertion of LGBTQ people in the society, especially in terms of Employment and Employment Opportunities.

After the consonant efforts by the activists over the past several years, it has led to some good results for this Community. Keeping an eye on the discrimination being meted out to the transgender in India, particularly in sectors such as education and employment, the Supreme Court in the Judgment<sup>15</sup> asserted that the Fundamental Rights under the Constitution of India will be applicable to transgender people as it is applied to other citizens.

But even after all these judgments are made there are still various loopholes in employment

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<sup>13</sup> INDIAN CONST. art 21.

<sup>14</sup> Bhagwati Charan Shukla v Provincial Government, A.I.R. 1947 Nagpur 1(India).

<sup>15</sup> National Legal Services Authority v Union of India, Writ Petition (Civil) No. 400 of 2012(India).

and there are various wage discrepancies in the system regarding LGBTQ community that will be discussed below.

### **A. Law governing disparity**

Article 16<sup>16</sup> states about equal opportunities and appointment in workplace<sup>17</sup>. Article 38(2)<sup>18</sup> aims at decreasing disparities in income and strive to eradicate disparity in facilities, status and opportunities<sup>19</sup>. Now, Article 39(d)<sup>20</sup> states that there has to be equal pay for equal work for every gender.

Almost 45 years have passed since the Central Government has passed the Equal Remuneration Act, 1976 and it became a law for everyone to follow. This act was passed with the sight of providing equal remuneration to both men and women to nullify the bias on the basis of gender on the matters in respect to employment in work place and other employment opportunities. This act aimed at preventing discrimination on the grounds of sex against women in the workplaces and equal pay for the same work or work of similar nature<sup>21</sup>. This act was basically to treat the women in a fair and just manner.

In a case<sup>22</sup> the Supreme Court held that principle of 'equal pay for equal work' as a law which is obligatory on all courts in India and applies to all interim employees.

In another case<sup>23</sup>, the Supreme Court held that although the principle of 'equal pay for equal work' is not expressly mentioned in our constitution as a Fundamental Right, it is one of the main goal under Articles 14<sup>24</sup>, 16<sup>25</sup> and 39 (c)<sup>26</sup>. This right therefore can be imposed in cases of unequal paying of wages. There are even various other acts relating to the waging system in India like Minimum Wages Act, 1948, Equal Remuneration Act 1976 etc.

### **B. The new Code of Wages**

This new code of wages was formed because the existing labor laws were very ancient, they are absolute laws and therefore in order to replace them with new laws and to cope up with a current scenario, this new code of wages was formed. So that in the ease of ranking business India can have growth. Secondly, in the earlier acts, only 40% of workers were covered

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<sup>16</sup> INDIAN CONST. Art 16.

<sup>17</sup> M.Nagaraj & Others v Union Of India & Others, Writ Petition (civil) 61 of 2002(India).

<sup>18</sup> INDIAN CONST. Art 38(2).

<sup>19</sup> Mackinnon Mackenzie and Co. Ltd v Audrey D'Costa & Anr, 1987 A.I.R. 1281(India).

<sup>20</sup> INDIAN CONST. Art 39(d).

<sup>21</sup> Additional Commissioner of Income Tax v Dargapandinath Tuljayya and Co., 1976 (1) A.P.L.J. 43(India).

<sup>22</sup> State of Punjab v Jagjit Singh, (2017) 1 S.C.C. 148(India).

<sup>23</sup> Randhir Singh v Union of India, 1982 A.I.R. 879(India).

<sup>24</sup> Kumari Shrelekha Vidyarathi Etc. v State Of U.P. And Ors, 1991 A.I.R. 537(India).

<sup>25</sup> INDIAN CONST. Art 16.

<sup>26</sup> INDIAN CONST. Art 39(c).

including specific schedules and specific salary range. Thirdly, all the four acts defined the same matter differently because of which it got difficult to get appropriate results in the court hearings and leads to conflict and so to avoid confusion, this code was formed. Lastly, there were earlier 2000 types of minimum wages which now have been reduced to 300 to create ease in the compliance.

The first set of provisions of the Code of Wages mentions equal opportunity, the prohibition of discrimination against employees on the ground of gender in the matter relating to the payment of wages. The code of wages also prohibits any sort of prejudice while appointing any employee and in conditions of payment, except in cases where employment of women in such work is prevented under law.

There is a major difference between the ERA and the Codes of Wages Act that is the ERA comprises of prevention against the prejudice against women and between men and women workers, whereas the code of wages act forbids discrimination on the grounds of gender, thereby covering the LGBTQ category as well.

### **C. Wage difference between LGBTQ workers and other workers**

In comparison to the heterosexual counterparts the people of the LGBT Community are paid less. They complain that irrespective of having so many acts and bill passed there are still so many problems they yet face relating to wage distribution being the third gender or one from the LGBT community.

There are also a few shreds of evidence proving this:-

- In Chhattisgarh, the transgender people, who were a part of a leadership development project, are found to belong below the poverty line. Many of them involved in begging, sex work etc to earn their living.
- A study was conducted of Kothis in 5 Indian cities and in one of the cities in Bangladesh found that 64% of the people who responded had income less than Rs. 5,250 per month.
- A sample was taken in community basis in Chennai leading to the fact that two-third was living in income below Rs. 112.5 per day.
- As per a study, about 96% of the transgender are denied Jobs because of which they mostly are below the poverty line and also 60% have never attended schools proving to be a demerit for their community.
- According to the recent Indian census, 38 % of the transgender people who responded had paid work, lower than the rest of the population (46%).

Going by the statistics, according to socio-demographic details the main source of income of the 54.2% of transgender people were beggars in the train, 12.5% were involved with private organization and only 5.6 % owned a business. An average income was Rs.11000/ per month and 26.4% of them had income greater than equal to 20000/ per month which created a huge wage gap with the heterosexual counterparts.

#### **IV. LACK OF REPRESENTATION OF THE LGBTQ COMMUNITY IN WORKPLACE**

Apart from facing discrimination and sexual harassment in workplaces and facing huge disparity in salary as compared to other employees, there is an adequate lack of representation of LGBTQ community in job sectors post the decriminalization phase. Along with lack of proper housing, a lack of proper job has an adverse impact on the basic human rights on the LGBTQ community. Throughout the world, there is ample unemployment or non representation of LGBTQ community. According to the report of World Bank SOGI Task Force, “LGBTQ community belongs to bottom 40%” of the economic strata of population. In 2011 census, only 38% of the LGBTQ people had paid works as compared to other people who 46%. In 2017, that is post decriminalization, study by National Human Rights Commission of India found increased and high level of unemployment in transgender person which compelled them to indulge in low paid work.

##### **A. Right to Work**

The very principle on which Right to Work is based is non discrimination which should be realized by every group and special consideration has to be taken into account for groups who are marginalized and at a disadvantageous position. Article 7<sup>27</sup> of the ICESCR (International Covenant on Economic, Social and Cultural Rights) provides that minimum essential rights for favorable working conditions which are:-

- Prohibits discrimination on the basis of sexual orientation, sex, inter sex status and gender identity.<sup>28</sup>
- Ensure employment.<sup>29</sup>
- Combats Gender discrimination in workplace.
- Non discrimination on minimum wages.

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<sup>27</sup> M/S. Steel Authority Of India Ltd v S.U.T.N.I. Sangam & Ors, Civil Appeal No. 3874 of 2006(India).

<sup>28</sup> Mohd. Ahmed (Minor) v Union Of India & Ors., Writ Petition 7279 of 2013(India).

<sup>29</sup> Arun Kumar Bhadoria v State Of Uttarakhand And Others, Writ Petition (P.I.L) No. 48 of 2017(India).

- Legally prohibit discrimination.<sup>30</sup>
- Legally define minimum work standards.

ICESCR uses the phrase “sex, sexual orientation, inter sex status and gender identity”. Hence, Article 7 clearly prohibits discrimination on grounds of sex and since transgender is an identified sex, they are protected under this Article and should have all possible accessibility to employment.

Under the Indian Constitution, Right to Work is not expressed in any of the Article but there is right to “practice any profession, or carry any occupation, trade or business”<sup>31</sup> under Article 19(d)<sup>32</sup>. Although there is no expressed provision of Right to Work, the Directive Principles of State policy has a direct reference of “Right to Work”. Though Directive Principles are not as binding as the Fundamental Rights and are not directly enforceable, for Right of livelihood under Article 21 to breath, it requires the assistance of the Directive Principle 39, 41, 42.<sup>33</sup> The Supreme Court, in another judgment stated that, if there is an obligation on State to confirm Right to Work, it would be absurd, arbitrary and wrong not to include right to livelihood under Article 21 under it<sup>34</sup>. Therefore, transgender have the right to work and equal representation in work place under Article 7 of ICESCR, Directive Principle of State Policy and Article 21 of the Indian Constitution.

Even after such law provisions providing Right to Work to transgender people, LGBTQ people are often subjected to denial of jobs due to their sexual orientation. In jobs such as army, navy or air force is gender specific in nature and still has not created transparency for transgender community. The reason why transgender community are mostly accumulated in the sex works because of their lack of employment in formal sector hence compelling them indulge in informal sector which are also poorly guided and poorly paid leading them towards poverty.

## **B. Case Study**

In the case of Sabi Giri, who was dismissed after serving navy for seven years after converting to a transgender, filed a petition for wrongful termination before the court. The Navy took the stance that the termination was not discriminatory under section 9(2) under the Indian Navy Act, 1957 which states that the post is only available to men. Sabi Giri’s lawyer challenged the

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<sup>30</sup> State Of Maharashtra v Mr. Charudutta Pandurang Koli And Anr., Writ Petition No. 14102 of 2018(India).

<sup>31</sup> NK Bajpai v Union Of India, (2012) 4 S.C.C. 653 (665) : A.I.R .2012 S.C. 1310(India). See also Mohammed Ajmal Mohammed Amir Kasab v State of Maharashtra, A.I.R 2012 S.C. 3565 (3662): (2012)9 S.C.C.(India).

<sup>32</sup> INDIAN CONST. Art 19.

<sup>33</sup> Bandhua Mukti Morcha v Union of India and Ors. (1984) 3 S.C.C.161(India).

<sup>34</sup> Olga Tellis and Ors. v Bombay Municipal Corporation and Ors., 1986 A.I.R. 180(India).

constitutionality of the provision as in the case of *NALSA v UOI*, the court declared transgender as a legal third gender and the Navy Act does not recognize transgender as an identity. The petition stated that the act violates Article 21 and Article 15 since it is discriminatory and deprives a person of his personal life and liberty and demanded that Sabi should be reinstated and paid for damages.

Just like this case, there are various state policies denying recognizing transgender as a separate legal gender and hence when a person having intersex seeks to join policy force, they are to be recognized either as men or women ultimately resulting in non-employment. Hence, even after decriminalization of section 377, there is still a hesitation in recognition LGBTQ community resulting in non-employment and non-representation in working sectors.

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