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# **SOCIAL STIGMA AS AN IMPEDIMENT TO THE EFFECTIVENESS OF THE LEGAL PROTECTION FOR LGBTQ+ IN INDIA**

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## **ABSTRACT**

The decriminalisation of Section 377 by the Supreme Court of India in 2018 was a revolutionary moment for LGBTQ+ rights. However, the absence of comprehensive anti-discrimination and family rights laws leaves LGBTQ+ individuals vulnerable to societal stigma, discrimination and exclusion. This paper examines the evolving legal progress, including recent landmark judgments such as *Navtej Singh Johar v. Union of India* (2018), *National Legal Services Authority (NALSA) v. Union of India* (2014), and *Deepika Singh v. Central Administrative Tribunal* (2022), which expanded the deliberation on gender identity. Despite these advancements, the lack of enforceable rights in areas like marriage, adoption, and workplace inclusion perpetuates inequalities. Using a comparative analysis with countries that have implemented legal protections and accrued rights, the paper highlights how social change can catalyze effectualization of legal protections and legal rights. Recommendations include introducing anti-discrimination laws, recognizing same-sex marriage, and integrating judicial directives with societal sensitisation programs with intervention in the education system primarily and groundwork approach. This study underscores the urgency of aligning legal advancements with broader societal acceptance to achieve substantive equality and justice for LGBTQ+ communities in India.

**Keywords:** LGBTQ+ rights, Social Stigma, Gender identity, legal rights, same sex marriage, Social acceptance

*“The human rights of all LGBTIQ+ people, as equal members of the human family, must be respected.”<sup>1</sup>*

## INTRODUCTION :

Shakespeare in his renowned play ‘Romeo and Juliet’ has underscored the significance of the recognition of individuality and the fundamentality that lies in one’s true identity and character i.e., true self, through one of his characters in the play, which says — Rose may have a different name but the distinction of the name will not alter its distinct aroma which is only associated with only that distinct flower.

The existence of people with distinct gender identities other than heterosexuality and sexual orientation in society has existed in nature and society, since time immemorial but its social stigma and marginalization evolved with time in the contemporary society.

The Indian legal system inherently protects the individual human beings and their liberty from the individual, **society** and State by the means of the Constitution of India. It guarantees the equality ( by **Article 14<sup>2</sup>** , **Article 15<sup>3</sup>** and **Article 16<sup>4</sup>**) by giving specific guidelines, giving mechanism for the enforcement in different fields of life including educational institutions along with in case of employment and appointment in both the central and state services. The Constitution of India nurtures the liberty of the citizens of India through Article 19<sup>5</sup> and ensures no one’s personal life or liberty can be taken without the procedure established by law by the virtue of Article 21<sup>6</sup>. In fact, the enforcement of the Fundamental rights are ensured by institution Article 32<sup>7</sup> as not only fundamental right but also including it into the ambit of Basic Structure<sup>8</sup> of the Constitution of India.

Indian Constitution though recognizes only **Religious and Linguistic minority** for the purpose of the protection of the culture and the diversity of different communities and India, it has not explicitly defined the term “Minority” which paves the road for the inclusion of the new named

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<sup>1</sup> Volker Türk, UN High Commissioner for Human Rights, last accessed on 17 May 2023

<sup>2</sup> Constitution of India, Article 14, *Equality Before Law*

<sup>3</sup> Constitution of India, Article 15, *Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth*

<sup>4</sup> Constitution of India, Article 16, *Equality of Opportunity in Matters of Public Employment.*

<sup>5</sup> Constitution of India, Article 19, *Protection of Certain Rights Regarding Freedom of Speech, etc.*

<sup>6</sup> Constitution of India, Article 21, *Protection of Life and Personal Liberty*

<sup>7</sup> Constitution of India, Article 32, *Remedies for Enforcement of Rights Conferred by Part III of the Constitution*

<sup>8</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India)

“gender minority”<sup>9</sup>. The distinct characteristics of the Indian Constitution of being the Living Document<sup>10</sup> opens a new door of hope for the protection of the interest of the people belonging from this community.

## WHAT IS LGBTQ+?

The diverseness of sexual orientation and identity is explicit in the term that includes everyone who is not a heterosexual human being. The list is not restricted to the following categories

**Lesbian-** a woman who is sexually attracted to another woman

**Gay-** a man who is sexually attracted to another man

**Bisexual-** A person who is sexually attracted to both a man and a woman

**Transgender:** it is the opposite of cisgender; who does not identify oneself to the gender associated with birth sex

**Queer:** they are neither heterosexual nor cisgender.

But with the virtue of “+,” the list becomes exhaustive and includes anyone other than them and a person of heterosexual identity e.g., asexual, Pan sexual.

India, the decriminalization of Section 377 of the Indian Penal Code, 1860<sup>11</sup> (Bhartiya Nyaya Sanhita has excluded the provision of the mentioned section) or gave sexual autonomy to non-heterosexual people.

Subsequently, the broader aspect used under **Section 2(f) of Protection of Women from Domestic Violence Act, 2005**<sup>12</sup> can include their living relationship within the meaning of “**domestic relationship**” for the purpose Domestic Violence, which is defined under the provision as, 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

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<sup>9</sup> Sarah H. Ramirez, *Expanding Title VII Protections for Gender Minorities: A Case for Transgender Inclusion*, Volume 45, Harvard Civil Rights-Civil Liberties Law Review, Page 580, Year 2010

<sup>10</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 2nd ed., Oxford University Press, 2000, at 15-20

<sup>11</sup> Indian Penal Code, 1860, § 377, Act No. 45 of 1860, § 377 (India)

<sup>12</sup> Protection of Women from Domestic Violence Act, 2005, No. 43 of 2005, § 2(f), Acts of Parliament, 2005 (India)

relationship in the nature of marriage, adoption or are family members living together as a joint family.

Legislature has given rights e.g., Rights of self perceived gender identity, Right to certificate for Identity, right to Gender affirmative Surgery, alongwith legal protection from discrimination in the various fields of life by **THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019**<sup>13</sup>.

However judicial intervention and legislative intent has not yielded the desired results from the societal lens of inclusion. But the existing loopholes, e.g., no marriage right till now, no right for adoption, and non-inclusion in **The Sexual Harassment at Workplace Act, 2013**<sup>14</sup>, makes the rights partial in enforcement and enjoyment that form the base of the foundation and give the scope of their social discrimination, non acceptance and non inclusion.

The discrimination faced by them is not of single category but multifaceted; from ostracization from the family members and events to different fields and events of society, the stigma attached to them as being non natural, psychopath or labelling the gender identity or the sexual orientation as the alterable personality trait and the non belongingness, continues very deeply in the society, discrimination for the public facilities e.g., public toilet or gender selection for any formal form filling up .

### **Objective of this study :**

This present study presents the empirical survey in the question of the social stigma as an impediment towards materialization of the legal rights for the people belonging to the LGBTQ+ community.

- 1) This study throws light on the role played by society in the materialization of the legal rights accrued to the people from this community.
- 2) This study tries to find the loopholes in judicial intervention, legislative endeavor and executive and enforcement action in the pursuit of societal acceptance and non-

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<sup>13</sup> Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019, Acts of Parliament, 2019 (India)

<sup>14</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14 of 2013, Acts of Parliament, 2013 (India)

marginalization of the people from this community.

- 3) This study tries to find recourse for the issue of societal non-acceptance for the materialization of the legal rights accrued to the people.

### **Limitation of the study :**

This study has been conducted

- A very small group of people
- Mostly from Urban and Tier 1 cities
- Mostly either pursuing or has completed higher education.
- The age range is 21-41year.

The result might be different if conducted on a broader sample, people from rural India, including Tier 2 and 3 cities and people belonging to socially economically and educationally backward sections.

### **Evolution of the Legal recognition and legal rights of the people belonging to LGBTQ+ community:**

#### **History :**

- As per French Historian Foucault, the modern categorisation of the sexes' bipolarity was initiated in Europe's Nineteenth Century<sup>15</sup>.
- In ancient India, we can witness the positive attitude and tolerance of people towards sexual diversity and its manifestation is in the various sculptures, and scriptures which hold its cultural expression and attributes.
- Kamasutra and Rig Veda mention about three forms of sexuality, or Prakriti (human nature) i.e., Pums Prakriti (male nature), Stri Prakriti (female nature) and Tritiya Prakriti

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<sup>15</sup> Foucault, Michel. *The History of Sexuality*. Vol. 1. Vintage Books, 1990

(third nature) that can be interpreted as sexual autonomy<sup>16</sup>.

- In Indian Mythology, we can witness the mention of Mohini (an incarnation of Vishnu), Ardhanariswara (the half-male and half-female avatar of Shiva) Sikhandi and Brihannala (the renowned eunuch characters of Mahabharata), the birth of Raja Bhagirath (in Valmiki Ramayana)<sup>17</sup>
- The archaeological site of Khajuraho and Konark contains several images of woman embracing their homosexuality.<sup>18</sup>
- Several other works of ancient India e.g., Panchatantra by Vishnu Sharma, and Kamasutra By Vatsayan etc are also worth mentioning for their depiction of queerness as normal in Sexual orientation.<sup>19</sup>
- In medieval India, one of the most faithful slave Malik Kafur's closeness to Alauddin Khilji has been depicted in the work of Amir Khusru<sup>20</sup>
- In 1860, when Macaulay framed the penal code for the British India, he inserted Section 377 of the Indian Penal Code 1860<sup>21</sup>, which legally criminalised homosexuality, and termed it as "unnatural Sex", can be attributed to the dominance of catholicism and the influence of the "Law of Manu" over the legal system.

### Struggle for Rights :

- Despite the nascency of the Indian struggle for the rights of the people of LGBTQ+, but it has been consistent and gradually widespread which began in the 1990s .
- The **first instance** was witnessed in 1988, when two policewomen Lila Namdeo and Urmila Srivastava engaged in wedlock through Gandharva vivah<sup>22</sup>.

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<sup>16</sup> Dasgupta, K. Rohit. "Queer Sexuality: A Cultural Narrative of India's Historical Archive," *Rupkatha Journal on Interdisciplinary Studies in Humanities*, vol. 3, no. 4, 2011

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Amīr Khusraw Dihlavī, *Khazain-ul-Futuh* (Wahid Mirza ed., 1975)

<sup>21</sup> Supra note 10

<sup>22</sup> Gay Angst, *India Today*, June 29, 1993, <https://www.indiatoday.in/magazine/indiascope/story/19930630-gay-angst-756034-1993-06-29>

- Subsequently, the ‘**AIDS Bhedbhav Virodhi Andolan**’, which is popularly known for its recommendable role in spearheading the protection rights for the queer community, published its report titled “**Less Than Gay: A Citizens**” Report on the Status of Homosexuality in India” which was the first report of the independent India on the rights available for the homosexuals in 1991<sup>23</sup>.
- It was a cushioning moment for the common people of India when the **Gujarati Prince Manvendra Singh Gohil** came out of the closet and revealed his sexual identity publicly<sup>24</sup>.
- The year 1999-2012 was a watershed moment for Indian Queer Community when India saw several pride marches in several cities, Kolkata was the first to initiate, the distribution of Pink magazines (Pink Pages, Bombay Dost ), Queer Rainbow Festivals, which received support from common people, media and celebrities.

#### **Rights and the Protections :**

- **Rights under Constitution of India:** Indian Constitution guarantees the individuals equality, liberty, justice and fraternity irrespective of the religion, race, caste, sex, place of birth, decency etc.
- **Article 14**<sup>25</sup>: as a human being and a person present within the territory of India, they must not meet any inequality i.e., any action so arbitrary in itself that it cannot be conducted by any fair-minded person
- **Article 15**<sup>26</sup> ensures there must not be any discrimination based on sex of the citizens of India regarding use of public space, hotel, restaurants, roads, well, bathing ghat, tank etc. under this article the woman, children, people belonging from the socially and

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<sup>23</sup> *Less Than Gay: A Citizen's Report on the Status of Homosexuality in India*, <https://s3.amazonaws.com/s3.documentcloud.org/documents/1585664/less-than-gay-a-citizens-report-on-the-status-of.pdf>

<sup>24</sup> First Openly Gay Indian Prince Talk About Coming Out of the Closet, *News18*, <https://www.news18.com/news/buzz/watch-the-first-openly-gay-indian-prince-talk-about-coming-out-of-the-closet-1214307.html>

<sup>25</sup> Supra note 1

<sup>26</sup> Supra note 2

educationally class and economically weaker section are given reservation during admission in the educational institutions.

- **Article 16<sup>27</sup>** ensures no citizen can be discriminated against based on their sex for the appointment or employment in the centre and state services. The state can make reservations for the underrepresented socially and educationally backward classes of people.
- **Article 19<sup>28</sup>** ensures freedom of speech and expression for the citizens of India alongwith right to assemble, associate, move, reside and settle within the territory of India.
- **Article 21<sup>29</sup>** ensures no person within the territory of India to be deprived of their right to life and personal liberty except by the procedure established by Law, whereas the procedure is just, fair and reasonable.
- **Article 32<sup>30</sup>** and **Article 226<sup>31</sup>** deals with issues of writ, directive and orders for the enforcement of the fundamental rights. While the former is in itself a fundamental right, both have been included within the Basic Structure of the constitution.

- **Rights and Protection by Statutory Means:**

**Transgender Persons (Protection of Rights) Act, 2019<sup>32</sup>**: the legislative intent beyond the enactment of this legislation was to ensure equal opportunities and treatment, inclusivity and prevention of discrimination based on the gender identity and the sexual orientation of the individuals.

**Meaning of Transgender Person** : under **Section 2(k)<sup>33</sup>** of the said the “**transgender person**” is defined as follows:

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<sup>27</sup> Supra note 3

<sup>28</sup> Supra note 4

<sup>29</sup> Supra note 5

<sup>30</sup> Supra note 6

<sup>31</sup> Constitution of India, art. 226, 1950 (India)

<sup>32</sup> Supra note 12

<sup>33</sup> Supra note 12, § 2(k), Transgender Persons (Protection of Rights) Act, 2019



- a person whose gender does not match with the gender assigned to that person at birth
- This term includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy)
- This term includes person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

The **protective and inclusive measures** for the protection of the members of this said community and their identity, undertaken in this act discussed below:

- **Right to self perceived gender identity** as male, female, or transgender irrespective of the gender assigned at birth.
- **Legal framework that allows them to change their gender in the official documents** e.g., birth certificates, passports, educational certificates
- This act **prohibits the discriminatory practices in various areas** e.g., education, healthcare, employment, housing, health care and public services.
- It provides for the **welfare measures** addressing to the individuals from this community e.g., healthcare facilities, access to HIV prevention, counselling services, vocational training and rehabilitation programmes.
- It allows to take step forwards to provide **inclusive public space** e.g., separate public toilets and changing rooms
- It provides for the establishment of the **National Council for Transgender Persons**, a statutory body, that consists of various members from Government Department and Transgender Community with the following functions regarding the issues faced by the transgender individuals:
  - Policy formulation
  - Monitoring implementation of the policies and the enforcement of the statutory provisions

- Addressing grievances
- This act **criminalizes** various offences against transgender individuals eg., forced eviction, physical and sexual abuse and denial of rights and alongwith penalizes with imprisonment and fine.

### **Judicial Pronouncement and Intervention :**

The legal battle for the recognition of legal rights for the people of the said community began in 1994 by a group called AIDS Bhedbhav Birodhi Andolan, which was working upon HIV/AIDS filed a petition only to meet the fate of dismissal<sup>34</sup>. In 2001 Lawyers Collective filed a petition on behalf of the Naz Foundation challenging the constitutionality of the section 377 of the Indian Penal Code, 1860 in the Delhi High court.

- In the 2009 case of **Naz Foundation v. Govt. of NCT of New Delhi and Others**<sup>35</sup>, the Delhi High Court held **consensual homosexual relationship cannot be brought within the ambit of “unnatural sex”**, as doing so tantamounts to violation of equality before law under Article 14 of the Constitution of India thus brought consensual homosexual relationship out of the ambit of “unnatural sex” i.e., Section 377 of the Indian Penal Code, 1860.

But the resentment among the public was palpable with this judgement, which culminated through filing several petitions against it. The main bone of contention was the fear about the influence it holds over the sexual behaviour of the young people and the future of institution of marriage. The argued that the extension of the right to privacy must not extent to immune penal offences.

- Consequently in the face public rage and disappointment, in 2013, the Supreme Court overruled the Delhi High Court decision in **Souresh Koushal v. Naz Foundation**<sup>36</sup>. and held the **court does not have the jurisdiction to decriminalize homosexuality, parliament has the exclusive authority over it**. Though the court acknowledged the

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<sup>34</sup> Supra note 22

<sup>35</sup> Naz Foundation v. Government of NCT of Delhi and Others, (2009) 6 SCC 712, 2010 Cri. L. J. 94 (India)

<sup>36</sup> Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563 (India).

targeted attack on the gender minorities in the society but held that the said section does not target a specific group of people but certain “acts”

Against this judgement several curative petitions were also filed with the plea of reconsideration of it.

During that time period in 2016 five personnel, renowned Bharatanatyam dancer Navtej Singh Johar, restaurateurs Ritu Dalmia and Ayesha Kapur, hotelier Aman Nath, and media person Sunil Mehra filed a fresh writ petition with the object to repeal the whole provision specially for the consensual homosexual relationship.

- In 2014 **National Legal Services Authority (NALSA) v. Union of India**<sup>37</sup>, the supreme court of India while **recognising the “third gender” legally** based on Article 14, article 19 and article 21 of the constitution of India. It upheld the **right of self-identification of gender** for the individuals who do not belong to the binary of male and female on the basis non dependence of the gender identity on the biological characteristics rather one’s innate perception of identity. The court included **“self expression” within the meaning of “dignity” in the Article 21 of the constitution of India.**
- The judgement of **K. S. Puttuswamy v. Union of India in 2018**<sup>38</sup> was a groundbreaking moment for the rights of the people from this said community. The court recognised the **Right to Privacy within the ambit of Article 21 of the Constitution of India** and formed the **nexus between right to dignified life and right of self-determination in respect to one’s gender, sexual orientation, family, marriage and other meaningful aspects of life.**

*“Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one’s mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity.”*

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<sup>37</sup>National Legal Services Authority (NALSA) v. Union of India, AIR 2018 SC 4321 (India).

<sup>38</sup>Justice K.S. Puttaswamy v. Union of India, (2018) 10 SCC 1 (SC)

- **Navtej Singh Johar v. Union of India**<sup>39</sup> was ultimate epoch changing judgement given by the Supreme Court, which not only decriminalised the section 377 of the Indian Penal code but also given the sexual autonomy to the people from the gender minority in the society of India. It legalized the consensual homosexual intercourse on the basis of the followings:
  - Article 14 and Article 15 give equality before law and equal protection of law. It does not discriminate against human beings based on gender identity and sexual orientation or preference
  - Article 19 ensures freedom of speech and expression which also includes expression of one's identity. Though it must subject to the checks and balances given within the provision.
  - Article 21 provides the Right to Life and Personal Liberty and no person can be deprived of this right except by the procedure established by law, given the procedure is fair, just and reasonable. Thus criminal prosecution against an individual for consensual homosexual relationship only on the basis of their sexual orientation and preference amounts to violation of one right to dignity, choice and personal autonomy.
- In **Shafin Jahan v. Asokan K.M. and others 2018**<sup>40</sup> the apex court held the constitutionality of the Right to Marry based on Article 16 of the Universal Declaration of Human Rights and the Puttaswamy case.
- In **Shakti Vahini v. Union of India**<sup>41</sup> (), the apex court held right to choose a sexual partner is within the ambit of the fundamental right to freedom of expression under article 19(1)(a).
- Supreme court while facing a conflict between the integrity of the conventional marital institution and multiple petitions for the legalisation of homosexual marriage as the right of self-determination held by a 7-judge bench in **Supriyo@Supriya Chakraborty v. Union of India**<sup>42</sup>, it cannot “read words” of the Special marriage act

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<sup>39</sup>Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (NSC)

<sup>40</sup>Shafin Jahan v. Asokan K.M., AIR Online 2018 SC 1136 (India).

<sup>41</sup>Shakti Vahini v. Union of India, AIR 2018 SC 160

<sup>42</sup>Supriyo and Ors. v. Union of India (UOI), (2023) 17 SCC 1155 (SC)

for the purpose and bestowed the decision on the legislature to decide as the constitution of India does not explicitly recognise neither right to marry and nor marriage equality.

It's **impact** was multifaceted-

- The majority decision was contradictory to the progressive decisions taken in cases like Navtej Singh Johar<sup>43</sup> and K. Puttaswamy<sup>44</sup>.
- The homosexual couple were denied the right to marry, adoption, surrogacy, employment and retirement benefits.
- This decision was against the provision of the **International Conventions**;
  - 1) Article 16(1) of the **Universal Declaration of Human Rights (UDHR)**<sup>45</sup>
  - 2) Article 23(2) of the **International Covenant on Civil and Political Rights (ICCPR)**<sup>46</sup> which says that "the right of men and women of marriageable age to marry and to found a family shall be recognized."
- It was even contradictory to the decision of **Vishaka vs State of Rajasthan (1997)**<sup>47</sup>, where the court held, "Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."

#### **Legal Lacunae that Catalyses the Discrimination :**

- **Special Marriage Act, 1954 and Foreign Marriage Act, 1969**: Section 4(C) of the both of the said acts is Gendered in nature i.e., it explicitly requires the parties to be "bride" and "bridegroom"<sup>48</sup>

In the Supriyo case, for the confusion regarding the marriage between an Indian

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<sup>43</sup>Supra note 39

<sup>44</sup>Supra note 38

<sup>45</sup>Universal Declaration of Human Rights, art. 16(1), Dec. 10, 1948, G.A. Res. 217 A (III)

<sup>46</sup>International Covenant on Civil and Political Rights, art. 23(2), Dec. 16, 1966, 999 U.N.T.S. 171

<sup>47</sup>Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India)

<sup>48</sup>Special Marriage Act, 1954, No. 43 of 1954, § 4(c), Acts of Parliament, 1954 (India); Foreign Marriage Act, 1969, No. 33 of 1969, § 4(c), Acts of Parliament, 1969 (India)

national and a foreign national, the apex court held that the non-binary couple can be married in a foreign state but will remain unmarried within the territory of India.

- **Juvenile Justice (Care and Protection of Children) Act, 2000** :which deals with the adoption and rehabilitation of the children, does not allow same-sex couple adoption right of the child. If the man or woman adopts a child as single partner, the other partner not to have any parental rights over the child.<sup>49</sup>
- **Central Adoption Resource Authority (CARA)** through it's guidelines issued in 2022, has made the same sex couple ineligible for adoption explicitly by the following mandates :

**Section 5(3)** mandates 2 years of a stable marital relationship prior to the application for adoption

- This guideline also excludes couples in live-in Relationships from the ambit of eligibility<sup>50</sup>.

- **Bhartiya Nyaya Sanhita, 2023 and Indian Penal code, 1860:**

This criminal substantive and penal statute are gendered biased i.e., only assumes woman as the victim for the purpose of Rape under Section 63 of Bhartiya Nyaya Sanhita,2023<sup>51</sup> and Section 375 of Indian Penal Code,1860<sup>52</sup> and Sexual Harassment<sup>53</sup> (section 74 to 79 of the Bhartiya Nyaya Sanhita,2023))

- **Protection of Women from Domestic Violence Act 2006**<sup>54</sup> does not include any individual from the said community for the purpose of protection under the said act explicitly. It is the broad interpretation of the of the word “Domestic Relationship” that includes a woman from a same sex relationship of domestic nature.
- **Sexual Harassment of Women at Workplace (Prevention, Prohibition and**

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<sup>49</sup>Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56 of 2000, Acts of Parliament, 2000 (India)

<sup>50</sup>Central Adoption Resource Authority, Guidelines for Adoption of Children, 2022, § 5(3) Ministry of Women and Child Development, Government of India

<sup>51</sup>Bhartiya Nyaya Sanhita, 2023, No. 11 of 2023, § 63, Acts of Parliament, 2023 (India).

<sup>52</sup>Indian Penal Code, 1860, § 376, supra note 10

<sup>53</sup>Bhartiya Nyaya Sanhita, 2023, §§ 74–79, supra note 51

<sup>54</sup>Protection of Women from Domestic Violence Act, 2005, No. 43 of 2005, Acts of Parliament, 2005 (India)

**Redressal) Act, 2013**<sup>55</sup> : this act by section 2(a)(Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 2(a)) includes only Woman as aggrieved, and assumed victim for the purposes of the offences at the workplace.

But court in **Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College**<sup>56</sup>, interpreted the word “respondent” under section 2(m)(Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 2(m)) as a “a Person” against whom an aggrieved woman can file a complaint for the sexual harassment under section 9. Thus this act takes a gender binary and gender specific approach in addressing the Sexual harassment

- **Transgender Persons (Protection of Rights) Act, 2019**<sup>57</sup> (Transgender Persons (Protection of Rights) Act, No. 40 of 2019, India Code (2019)) : though this act is meant and enacted with the purpose of protection of rights and integrity of the transgender individuals.
- The provision for the **issuance of certificate by the District Magistrate opens the door for discretion by him, refusal and discrimination. This provision is violative of Article 19**<sup>58</sup> **of the Constitution of India.**
- The penalty under this act for the offended against the transgender individuals is less stringent than different other gender binary statutes where the woman is assumed to be the only victim e.g., rape or sexual offences. The definition, level of protection and consultative process fails to provide sufficient protection against discrimination, full range of challenges and systemic violence.<sup>59</sup> ()

**Criminal Law (Amendment) Act, 2013**: though this act aims to address sexual harassment as offence irrespective of place and time, but it is a gender specific law which assumes only a woman to be victim of the said offense<sup>60</sup>.

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<sup>55</sup>Supra note 13

<sup>56</sup>Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College, 2020 SCC OnLine Cal 3262

<sup>57</sup>Supra note 12

<sup>58</sup> Supra note 8

<sup>59</sup> Sudha B., LGBTQ Rights in India: A Comprehensive Analysis, 12 Int'l J. Creative Rsch. Thoughts f485 (2024)

<sup>60</sup>Criminal Law (Amendment) Act, No. 13 of 2013, India Code (2013)

Justice Verma committee<sup>61</sup> that formed in the wake of Nirbhaya Rape case, suggested to make Sexual offences as gender neutral, by interpreting the word “ sex” under Article 15 to be inclusive of “sexual orientation”<sup>62</sup>. But the amendment act ignored the gender neutral suggestion and made the rape law only stringent.

### **Discriminatory practices in society:**

Though historically India has taken an inclusive approach towards to diverse gender identity and sexual orientation as evidenced by various mythology, ancient books and sculptures, but the contemporary society undertakes marginalised and discriminatory approach towards it terming it as unnatural.

Social stigma, ostracization, discrimination and marginalization in the fields of family, society, healthcare, education, employment and housing is the worth of mentioning and most palpable.

Family rejection, coercion to Heterosexual marriage, force to endure the painful conversion therapy, societal pressure to conform the traditional heterosexual norm and marriage, emotional abuse, strained relationship with family and friends, hate crimes which include not only verbal abuse and physical abuse but also murder attempts and murders play a significant role in non ascertainment of their individual autonomy and happiness, leads to self censorship and hiding their identities.

In fact lack of awareness and sensitivity in the field of healthcare about their rights leads to lack of proper care and discrimination<sup>63</sup>.

**Instances of discrimination:** among many other instances only a bare minimum of it can be given below:

- A 21 year old Anjana Haries allegedly committed suicide in the course conversion therapy in Kerala.<sup>64</sup>

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<sup>61</sup>Report of the Committee on Amendments to Criminal Law, Govt. of India (2013)

<sup>62</sup>Mukesh v. State (NCT of Delhi), (2017) 6 S.C.C. 1 (India)

<sup>63</sup>Supra note 59

<sup>64</sup> *The Kerala Student Dies in Goa: Death Puts Focus on Inhuman Conversion Therapy for Queer People*, THE NEWS MINUTE (May 15, 2020), <https://www.thenewsminute.com/kerala/kerala-student-dies-go-death-puts-focus-inhuman-conversion-therapy-queer-people-124683>



- The disagreement of the Centre, on the basis of sexuality and marriage status on the appointment of the First Gay Judge in the Indian judicial system, recommended by Supreme court.<sup>65</sup>
- A 17 year old sustained murder attempt from the family while revealing his sexual identity.<sup>66</sup>

### **International position :**

The rights for the individuals belonging from the said community is diverse and affected by various factors and determinants through the lens of global perspective.

Though every state is under the obligation to protect and promote human rights without discrimination under International Human Rights Laws, there are as many as 60 countries criminalizes private, consensual same sex relationships.<sup>67</sup>

### **Case Study:**

**Population:** A small group of men and women belonging to the age range 21-41 including both Heterosexual and non heterosexual people.

Homosexual individuals:

Heterosexual individuals :

**Methodology:** This study has been conducted with the help of survey and in depth questions and by accessing various reports, research articles and journals and books.

The survey has been conducted with both objective and descriptive questions. The qualitative question was related to the societal non acceptance and stigma attached, it's reasons and

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<sup>65</sup> SC Collegium Reiterates Recommendation to Appoint Sr Advocate Saurabh Kirpal as HC Judge, THE INDIAN EXPRESS (Jan. 20, 2023), <https://indianexpress.com/article/india/sc-collegium-reiterates-recommendation-to-appoint-sr-advocate-saurabh-kirpal-as-hc-judge-8392343/>

<sup>66</sup> India LGBT Couples: 'My Parents Were Ready to Kill Me for Their Honour', BBC NEWS (July 19, 2023), <https://www.bbc.com/news/world-asia-india-66245194>.

<sup>67</sup>Office of the United Nations High Commissioner for Human Rights, About LGBTI People and Human Rights, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> (last visited Jan. 26, 2025)

possible recourse as per the opinions of the participants.

**Number of People participated in the Study : 14**

**Central question :**

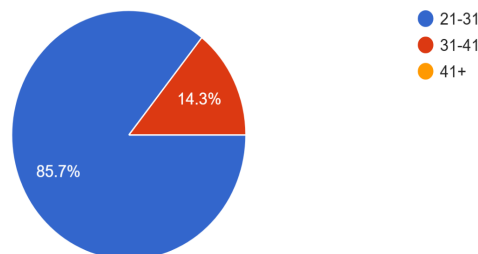
- 1) Whether social stigma impede the non-materialisation of the legal rights for the people belonging to the LGBTQ+ community?**
- 2) Whether any recourse available to ensure societal acceptance for the materialisation of their legal rights ?**

**I will try to answer my questions in the following manner based on my empirical study.**

**Question 1: Age :**

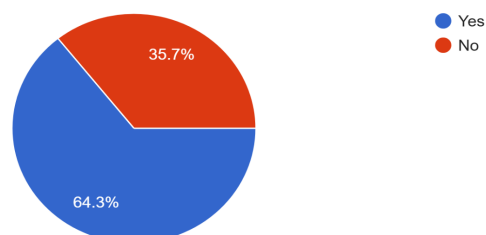
**Explanation :** Most of the participants belonged to the age range between 21-31 years old

You age  
14 responses



**Question 2 : Do you identify yourself as a member of the LGTQ+ community? --**

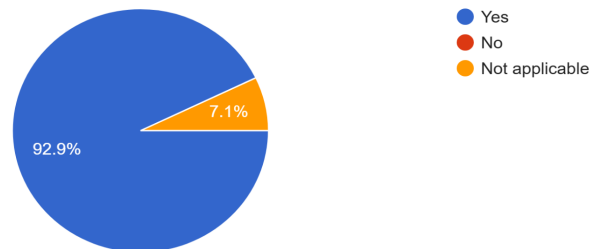
Do you identify yourself as a member of LGTQ+ community?  
14 responses



**Explanation:** Most of the participant belonged to the LGBTQ+ community.

**Question 3: Have you shared your gender identity with anyone?**

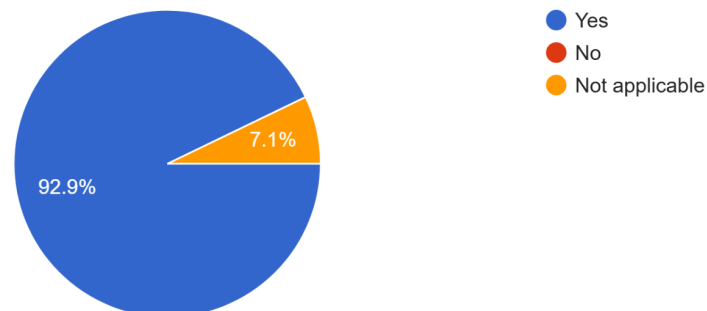
Have you shared your gender identity with anyone?  
14 responses



**Explanation :** amongst the participants, every individual belonging to the community has shared their gender identity.

**Question 4 : Have you shared your gender identity with your parents or in society ?**

Have you shared your gender identity with your parents or in society ?  
14 responses

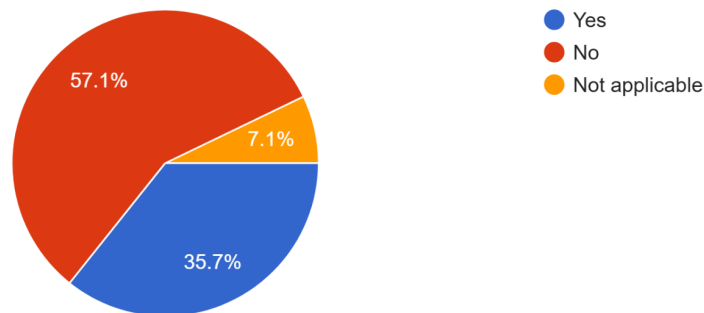


**Explanation:** the participants who belonged to the community has shared their identity with the family and the society.

**Question 5: If yes, have there been any constraints on revealing your gender identity in the society ?**

If yes, have there been any constraints on revealing your gender identity in the society ?

14 responses

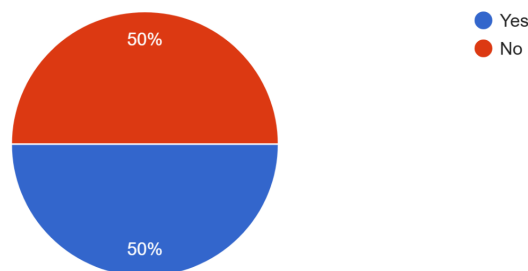


**Explanation :** amongst the participants share of the individuals from the community, who have not faced any constraints to reveal their identity has more share by a mere number than the individuals who have faced constraints.

**Question 6 : Are you aware of the legal rights of the people belonging to LGBTQ+ community?**

Are you aware of the legal rights of the people belonging to LGBTQ+ community ?

14 responses

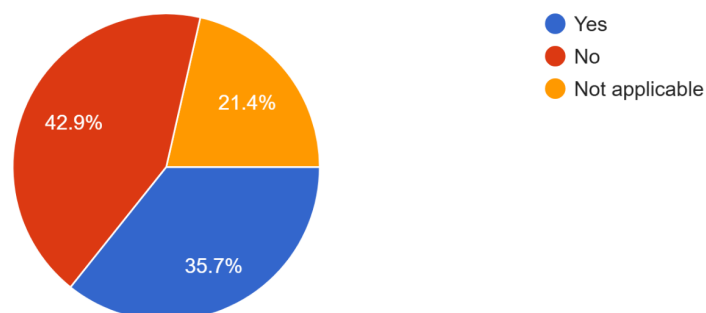


**Explanation :** only half of the participants has the awareness of the legal rights for the people belonging from the said community

**Question 7 : Have you faced any discriminatory treatment based on your gender identity?**

Have you faced any discriminatory treatment based on your gender identity ?

14 responses

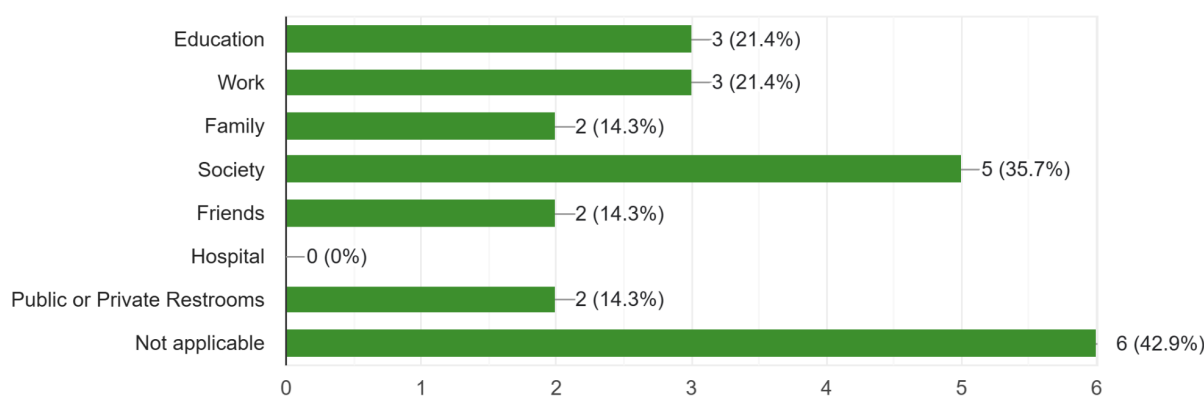


**Explanation :** the number of the participants belonging to the said community who has not faced any discriminatory treatment has more share by mere number than those who has faced the discrimination.

**Question 8 : If yes, in which field of life you have faced discrimination or someone known to you belonging from the community has faced?**

If yes, in which field of life you have faced discrimination or someone known to you belonging from the community has faced?

14 responses



**Explanation :** None of the participants has faced any discriminatory treatment based on their gender identity at hospital.

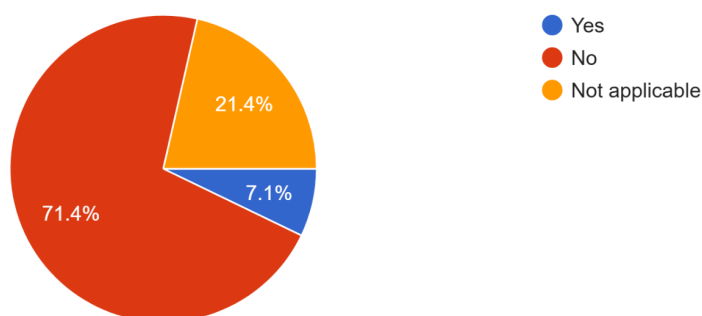
But, the society is a dominant source of discrimination for those who have faced it.

Non application for the discrimination has been opted by both participants those belonging and non belonging from the said community

**Question 9: Has the discriminatory treatment restricted you from enforcing your legal rights?**

Has the discriminatory treatment restricted you from enforcing your legal rights ?

14 responses



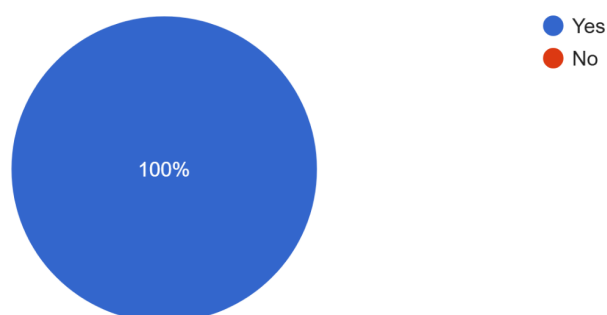
**Explanation:** Most of the participants were able to enforce their legal rights in spite of the prevalent discrimination.

Very few members have failed to enforce them for the prevalent discrimination.

**Question 10: Do think India should legalize marriage other than between heterogenous couple?**

Do think India should legalize marriage other than between heterogenous couple?

14 responses

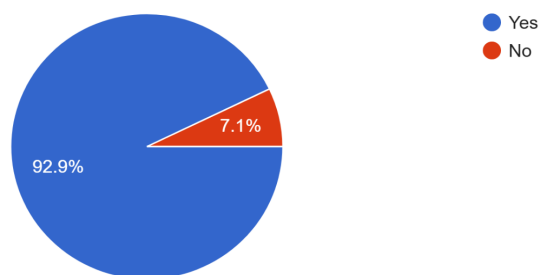


**Explanation :** All the participants irrespective of their age range, sexual orientation and gender identity has unanimously favoured the legalization of married for non heterosexual couple

**Question 11: Do you think decriminalization of section 377 of IPC, 1860 (decriminalisation of gay sex) without the provision for marriage rights or adoption rights equals to a mere token gesture for recognizing the gender identity of LGBTQ+ community?**

Do you think decriminalization of section 377 of IPC, 1860 (decriminalisation of gay sex) without the provision for marriage rights or adoption rights e...ognizing the gender identity of LGBTQ+ community ?

14 responses

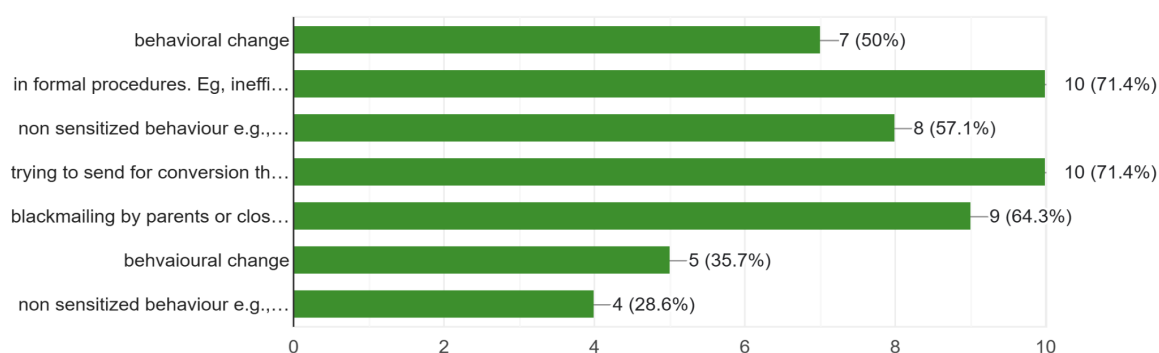


**Explanation :** most of the participants believe the decriminalization of the above mentioned provision without further rights e.g., marriage rights or adoption rights amounts to token gesture only .

**Question 12: Primarily what type of discriminatory behaviour do you think is faced by the people from LGBTQ+ community ?**

Primarily what type of discriminatory behaviour do you think is faced by the people from LGBTQ+ community ?

14 responses

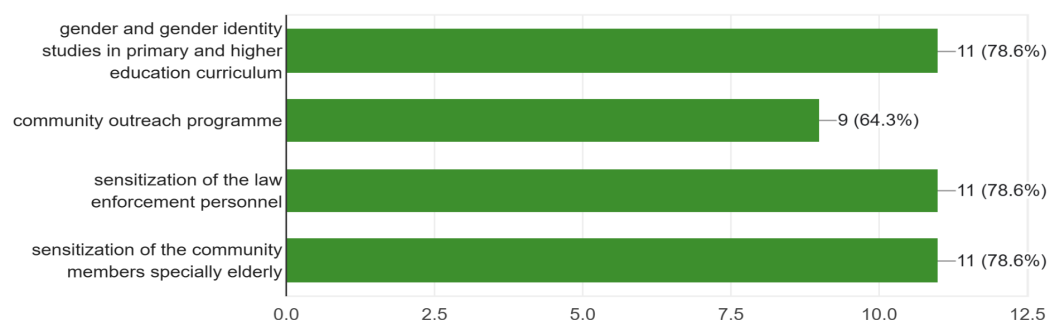


**Explanation:** the participants have mainly faced discrimination in the fields of formal procedure and incurred the forcings to be send for conversion therapy i.e., a non scientific reformative therapy.

**Question 13: As per your opinion what should be the recourse for the discrimination faced by the people from LGBTQ+ community ?**

As per your opinion what should be the recourse for the discrimination faced by the people from LGBTQ+ community ?

14 responses



**Explanation :** most of the participants believe the recourse lies in intervention into the education system, sensitization of the law enforcement members and elderly members of the society.

**Question 14: What is the potential extent of intervention in the education system ?**

**Answer:** most replied answer was,

The intervention must not be a lip service and must be deep, broad and wide. It must not be prevailing sex education in the school which is limited to only Good touch-Bad touch and Menstrual cycle.

Most of the people of this generation have no clear idea and concept about non heterosexuality. Unclear concept leads to deformed concept, which requires clear understanding of this natural phenomena.

**Question 15: What should be focused more intervention into the education system or the sensitization of the elderly members of the society though community outreach programme?**

**Answer:** The brain of a child along with the progression of the generation and the modernity makes the task easier for incorporation of the concept with clear idea and understanding about the gender diversity and non heterosexuality to a child than an elderly in the society.



**Question 16: What can be the reason of the intolerance shown by the elderly people in the society against the people from the said community ?**

**Answer :** The replies focused on the three aspects namely, the procreativity attached to the heterosexual wedlock, The position of dominance, influence and power position of the elderly in the family.

The comfortness of the families to follow the conventional norm of heterosexual marital relationship.

**Question 16: What approach should be taken for the sensitization of the elderly people in the society ?**

- In stead on imposing the idea of naturality of gender diversity and different sexual orientations, the elderly members must be given the oppurtunity to give the reasons for favouring heterosexual as normalcy. Untill they are given the oppurtunity to be heard they cannot be pursued towards the tolerance to non heterosexuality.
- None otherthan their children can clear the concept about the naturality of the genral diversity and sexual orientation.

**Question 17: Can you name any other potential threat to their acceptance, inclusion and stigmatization ?**

**Answer :** Like pseudofeminism, there are people who without actually exploring their ownselfes and introspection, under influence of various externalities i.e., men dressing up as eunach for money, social media trend claim to be a person of this community. It can be attributed to the partial and disputed knowledge about the gender diversity and sexual orientation. Restricted discussion on this matter due to conservatism, unavailability of enough education materials and the family's negative approach towards this potentially makes the children susceptible to the disformed concept. It can destroy the progress till now made by the activists for their rights and may lead to self destruction if not taken care at the nascent stage.

**Decision:**

From the analysis we can witness,

Irrespective of the sexuality and gender specification,

- Most of the participants know the legal rights entitled to the members of the said community.
- But both the groups are aware about the social discrimination, marginalization, social stigma attached to this community.
- Social discrimination can amount to hate speech, hate crime, bullying, ostracization, sexual abuse, verbal abuse, physical abuse even murder attempts and murder also.
- This discrimination affect the mental health and psychological wellbeing which can lead to suicidal attempts, withdrawal syndrome, denial of self identity and non acceptance of sexual identity.
- The few participants has shared their experience of being force to endure the painfulland nonscientific conversion therapy
- The awareness about the naturality of the sexual diversity and gender identity is still yet to reach the elderly groups of our society.
- The non sensitized behaviour of the Police personnel as law enforcement entity is a big barrier towards the enforcement and enjoyment of the legal rights entitled to the individuals of the said community.
- Some participants has also shared their experience on ageism in the family and the gender. According to them, their viewpoint about this natural phenomenon is refused to be heard by the elderly and the male members irrespective of age are more rigid about their ideology on this specific topic of gender and sexuality.
- As some participants has pointed out, the influence of the social media and lack of proper education and awareness can lead the children towards deformed notion of sexual liberty and gender diversity and deprive them from the actual understanding of the naturality.
- The education on sexuality and gender science must be incorporated within the curriculum of the education from primary level is a suggestion but as pointed out by

some participants, it must not be inadequate and insufficient like sex education.

- On the matter of Same Sex Marriage participants has provided affirmative viewpoint. Legality of the same is required for the materialisation and enforcement the union and relationship of non heterosexual nature.

### **Recommendation:**

In my opinion, based on the studies I have undertaken, the societal issue of non-acceptance of the non-heterosexual couple is deeply entrenched and guarded by conservatism, patriarchy and conventionality of the heterosexual marriage which helps the families to sustain the bloodline and progress accordingly. Thus it needs more than legislative enactments and judicial interpretation rather there must be piecemeal and groundwork based approach.

- 1) **Constitutional interpretation and legislative enactments:** As the constitution has not explicitly defined the word “minority” the individuals can be brought into the garb of “Gender Minority” and specific protection for their existence and individual integrity can be granted accordingly.
- 2) **Affirmative action:** The constitution provides reservation for the socio economically and educationally backward group and class of people in cases of admission in the educational institution and appointment and employment in various state and central services. But if the intent is equal representation of every class, race and community in the public sphere then this reservation can be extended to these individuals also.
- 3) **Role of public figure:** the elderly's interest lies with the public representative, religious leader primarily. They must spearhead the the process of their acceptance in the society.
- 4) **The Intersectional Approach:** various activists must find the way to include the discrimination faced by them in their interest for the society.
- 5) **Community outreach programmes:** when problem of non acceptance is arising in the society and becoming an impediment to the enforcement of the legal right and individual integrity, outreach programs must be undertaken frequently not only the Govt but also by various NGOs and the individuals in the said community and must

actively ignore the conflict of the ideas of sexuality. There must be more persuasive approach to deliver the viewpoint to the majority members of the community.

- 6) **The Education Sector:** Gender science and jurisprudence must be incorporated into the education system from the primary level with adequate pedagogical care rationality and an analytical approach.
- 7) **Sensitization of the family:** though at the community level and at public space the various assembly, pride parade and magazines are spread, but no other than a child can pursue the parents about the naturality of their identity.
- 8) **The role of the Media Person:** As we have seen in various movies e.g., Shubh Mangal Zyada Sabdhan, Baadhai Do, Kapoor & sons, the attempt to normalize this natural phenomenon has been undertaken. This endeavor must continue with more prompt audience targeting.
- 9) **Social media:** It is a place where disinformation and hatred can spread like wildfire. The owners and executive body must take appropriate measures against them.
- 10) **Sensitization of the enforcement agencies:** though it's difficult, time, and capital-consuming the hate crimes and discriminatory practices against the said community is similarly grave as any other crime inflicted on any other group of people on the scale of equity. Quick and prompt action against the violence inflicted upon them and treating them as any other individual human being in this country at the temporary level can help with the discriminatory treatment faced by them.

## **Conclusion:**

This study with analysis of the effectiveness and lack of effectiveness of the legislative enactments and judicial interpretation has endeavored to examine the social position of the individuals belonging to this community and their nonacceptance in the society in the context of India. Their nonacceptance in society has been evaluated for the purpose of enforcement and enjoyment of the legal rights entitled to them. Though we have few legislations with holistic protections and positive rights accrued to them, the nuanced complexities of their acceptance in society must be addressed accordingly for the true unshackling from the clutches of the conventional and conservative societal norms.

**REFERENCES:**

*Constitution of India* (1949)

*The Indian Penal Code* (45 of 1860)

*Bharatiya Nyaya Sanhita* (Act No. 20 of 2023).

*Transgender Persons (Protection of Rights) Act*, No. 40 of 2019, India Code (2019)

*Protection of Women from Domestic Violence Act*, No. 43 of 2005, India Code (2005)