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Sexual Orientation and Gender Identity Issues in the Contemporary Era

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Abstract: Sexual orientation and the gender identity issues in the Contemporary era includes the discrimination and other practices against individuals on the basis of their sexual orientation and gender identity which are very serious violations of the human rights. The basic human rights issue for homosexual, bisexual and transgendered individuals is the freedom from discriminatory practices and acts of violence, decriminalisation of same sex relationships and marriage equality. The Draconian law criminalising consensual same-sex acts between adults continue to exist in many countries including India. The present work seeks to elucidate the causality of such grievous violations in almost all the parts of the world. The critical analysis of various provisions of the International Human Rights law and other legal systems has provided an insight into the lacunae existing in the present legal system.

Keywords: Homosexuals, Transgenders, Gender issues, Legal rights, Sexual minorities.

Introduction

Every society has its own values regarding appropriate or inappropriate sexuality and gender. Previously most of the societies condemned homosexual, bisexual and transgendered individuals and considered them as against morals or people suffering from some mental or physical disorder. Many societies also imposed the sanction on such people. At present also there are many States which penalise same-sex relationships and also consider homosexual, bisexual and transgendered individuals against morals. Homophobic or transphobic discriminatory practices and violence is, therefore, a serious predicament, in which basic rights of individuals are neglected. And privation of fundamental rights including the right to privacy and family life, the right to social security etc. foster stigmatisation for the community and consequently other human rights abuses against them[1].

Almost everywhere, people experience violence, discrimination and violations of their basic rights in the form of killing, rape, verbal or physical assault, arbitrary detention, denial of right to assembly, speech and expression, discrimination in the sphere of education, health employment etc. on the basis of their actual or perceived sexual orientation and gender identity which makes such people vulnerable. And

1 Adnan, H., (2017). The paradox of recognition: hijra, third gender and sexual rights in Bangladesh, Culture, Health & Sexuality. An International Journal for Research, Intervention and Care, 62(5), 1-17.

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when it comes to children who are already vulnerable due to their tenderness, young age and physique, they become easily accessible to various kinds of human rights abuse due to the stigmatisation and being labeled as LGBT. Family exclusion, verbal or physical harassment, corporal punishments, bullying in the form of name calling and also physical assault is very common among LGBT children. In fact, in order to fit those among the heterosexual population or the people whose gender identity and gender role conform to anatomic sex, parents often force such children to undergo various reparative therapies in order to alter their sexual orientation and gender identity which further amounts to child abuse. All these discriminatory practices and acts of violence adversely affect the physical and mental health of the LGBT community and also result in the alarming rate of suicidal tendencies, substance abuse, HIV and sexually transmitted diseases. Despite the gravity of the given situation seldom attention has been paid to this serious issue[1].

Review of Literature

1. Douglas Sanders, Sexual and Gender Diversity, Encyclopedia of Human Rights (Ed. David P. Forsythe.) Volume 4, Oxford University Press, (2009) – In this article, the author asserts that nowhere in the body of United Nations treaties and declarations is there any reference to homosexual, bisexual, transsexual, intersexual or transgendered individuals. The author has further discussed the problem of discrimination against homosexual, bisexual, intersexual and transgendered individuals in the light of UN treaties, Convention and various case laws.

2. U.N High Commissioner for Human Rights, Discriminatory Laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, U.N. Doc A/HRC/19/41, Nov 17 2011- The given report of the special rapporteur analyses the obligations of the states to prevent discrimination and violence based on sexual orientation and gender identity under the international bill of human rights and also suggests the ways for the protection and mainstreaming of the community.
3. Siddharth Narrain, Crystallising Queer Politics- The Naz Foundation Case and its Implications for India's Transgender Communities, 2 NUJS L. Rev. 455 (2009) – In this paper, the author has discussed the impact of the Naz Foundation Case on the legal status of transgendered individuals in the Indian society.
4. Caitlin Ryan., Supportive families, healthy children- Helping families with lesbian, gay, bisexual and transgender children. San Francisco, CA: Marian Wright Edelman Institute, San Francisco State University, (2009) - This report deals with causal sequence of family rejection of LGBT children. It also discusses about quandary related to the self-awareness of sexual orientation and gender identity among children.
5. Robert Wintemute, Same sex love and Indian Penal Code Sec-377: An important Human Rights issue for India, 4NUJS L REV 31(2011) – This paper discusses the repercussions of criminalisation of same sex sexual activity under Section 377 of the Indian Penal Code in the light of various mandates of International Human Rights law and also examines the development of the rights of LGBT community on international front.

6. Danish Sheikh, The Road to Decriminalisation: Litigating India's Anti Sodomy Law, 16. YALE Hum. Rts. & Dev. L.J. (2014) - This paper reflects the struggle of homosexual, bisexual and transgendered individuals in India. It also discusses the impact of Naz foundation judgement in India.

1 Aengus, C., (2016). A world survey of sexual orientation laws: criminalisation, protection and recognition, International Lesbian, Gay, Bisexual, Trans and Intersex Association. State Sponsored Homophobia, 50(2), 10-16.

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7. Geetanjali Misra, Decriminalising homosexuality in India, 17 Reprod. Health Matters (2009) – This paper examines the fight against the provision in Section 377 of the Indian Penal Code that penalised private consensual sex between adults of the same sex. It concludes that further legal and social changes are needed for LGBT individuals to gain full acceptance and equality within Indian society.
8. Alok Gupta, Section 377 and the Dignity of Indian Homosexuals, 41 Econ.Polit.Wkly.46 (2006) - This paper seeks to explain the provision related to criminalisation of consensual same sex sexual activity under Section 377 of the Indian Penal Code, 1860. It further discusses the aftermath of such criminalisation and its impact on the sexual minorities.
9. Lucie Cviklova, Advancement of human rights standards for LGBT people through the perspective of international human rights law, 3 Journal of Comparative Research in Anthropology and Sociology 2 (2012) - The article examines the development and responses of various religious and legal systems towards the reconstruction of the concept of sexuality and gender. It also seeks to appraise the role of international human rights framework in the augmentation of the rights of homosexuals and transgenders.

Objectives

1. To identify the causal nexus of repudiation and discrimination against homosexuals and transgenders.
2. To examine the various provisions of existing international and national human rights framework in order to determine the lacunae that engenders discrimination against sexual minorities.
3. To determine general trend of development of the rights of homosexuals and transgenders in the light of emerging responses of various nations towards homosexual, bisexual and transgendered population.

Methodology

1. Research Methodology

The legal research methodology adopted in the study. The nature of work is both analytical and descriptive. The research design of the given study is exploratory and experimental. The present study is based on the projective and predictive model of legal research in order to anticipate the effect of the proposed legal measure. Both primary and secondary material sources of law are used in the present study.

In the present study, comparative research method is also used to draft a bill for the protection of the rights of sexual minorities and transgendered individuals by comparing the concerned laws of various countries.

2. Sample size and Sampling technique

Not applicable

3. Tools for collecting data

Both primary and secondary material sources of law are used in the present study as the research methodology adopted in the study is doctrinal.

4. Analysis and interpretation of data

Inferring causal relations.

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5. Anticipated results

The present international and national legal framework needs to be updated in order to meet the challenges of changing social order and developing theories related to sexuality, genderism and other ancillary matters. Homophobic or transphobic discriminatory practices and acts of violence persists to be a global threat. Governments and other state agencies have mostly neglected or even justified, in some cases, violence and discrimination based on sexual orientation and gender identity in the name of religion, culture and moral values.

The Issues and Challenges Unique to Homosexual, Bisexual and Transgender

Unlike other children, homosexual, bisexual and transgendered children are exposed to various issues and risks such as family rejection or non-acceptance by the family, homophobic bullying, hate crimes, unique health risks etc. which are discussed below: -

1. Family rejection

In order to prevent their homosexual or transgendered children from stigmatisation, harassment and abuse related to their sexual orientation and gender identity, many parents and guardians try to place their children in the heterosexual population and with the other individuals whose gender identity and gender role conform to their anatomic sex. Such parents often try to change their children's sexual orientation or gender identity through certain therapies and may also prevent their children from having access to various groups or resources related to homosexuality or transgenderism, from where such children may learn about homosexuality or transgenderism for a positive development[1].

Parents of such children justify their unacceptability towards homosexuality or transgenderism and their resorting to various methods to alter the behaviour of their children in the name of love and care towards their children. On the other hand, such children may feel completely rejected which adversely affects their mental or physical health.

This further leads to pressurise such children to conceal their sexual orientation or gender identity under the fear of rejection or unacceptability of the society members including parents who believe that homosexuality is against moral values and even against religion. This concealment has serious implications on the development of homosexual or transgender youth as it leads to lowering of self-esteem of such individuals.

It was also observed that the family rejection based on sexual orientation and gender identity is detrimental to the mental and physical health of such individuals. The homosexual or transgendered youth rejected by their families are more likely to commit suicide and report high levels of depression and not only this such individuals are also exposed to higher risk for substance abuse, HIV and other sexually transmitted diseases[2].

Some parents may also inflict corporal punishment when they come to know that their child is homosexual or transgender. They may also prevent their children from having access to various programmes designed for the LGBT community. And this family rejection may also result in social

1 Against Nature an exhibition on animal homosexuality, Natural History Museum (2009, February. University of Oslo, Norway. Retrieved from http://www.nhm.uio.no/besok-oss/utstillinger/skiftende/againstnature/index-eng.html

2 Alison, S., & Shimmer, D., (Eds.) (2017). German Parliament Approves Same-Sex Marriage [Special issue]. Gender Studies, The New York Times.

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exclusion when the parents prevent their homosexual or transgender children from attending family or other social events out of embarrassment.

Furthermore, many homosexual and transgender youth are forced by their parents to undergo reparative therapy, which is a method of psychotherapy and attempts to alter homosexuality by converting them into heterosexuals. As per the report of American Academy of paediatrics the various therapies intended to change sexual orientation can lead to high levels of anxiety and depression with the null probability of changing the sexual orientation.

2. Homelessness

Homosexual, bisexual and transgendered youth are overrepresented in the homeless population. Most homosexual, bisexual and transgendered youth become homeless because of family abuse, neglect, or conflict over their identity. Many homeless homosexual, bisexual and transgendered youth are kicked out of their homes while others ran from foster and group homes because of being mistreated or harassed. Homosexual, bisexual and transgendered children while living on the streets are at a greater risk of physical and sexual exploitation at the hands of adults, police and other street children.
Street children who are often subjected to abuse, neglect, exploitation etc. become more vulnerable when labeled as homosexual, bisexual and transgendered. In addition, they are more likely to report being asked by someone on the streets to exchange sex for money, food, drugs, shelter, and clothing than heterosexual homeless youth. Unfortunately, many homosexuals, bisexual and transgendered homeless youth resort to trading sex to meet their basic needs[1].

3. Bullying in School

The significance of the right to education cannot be overlooked and also it is considered to be an inseparable part of the right to life. It is one of those basic rights which not only helps in acquiring knowledge but also aids in the development of the individuals. Learning environment plays a crucial role in the psychological and physical development of children. However, bullying in school is one of the biggest obstacles that not only prevents the development of children but also violates the right to education[2].
It is widely believed that bullying in school is a frivolous part of the system. However, according to the report of the United Nations on Violence against children, bullying is a severe threat to the educational systems throughout the world. Bullying in educational institutions can be in various forms

such as calling names, physical or verbal assault, social exclusion etc. Disabled children or the children belonging to a particular minority group or specific socio-economic background are more susceptible to bullying in educational institutions. It has been observed that bullying not only adversely affects the health of children but also their learning capacity. In worst cases, it may also result in suicidal tendencies, depression and low self-esteem.

Such type of bullying is mostly initiated by the students in the educational institutions but in some cases it is also perpetrated by the teachers and the other staff members. In a research conducted in five

1 Barbara, L., (2004). Sexual Orientation and Adolescents, American Academy of Pediatrics Committee on Adolescence. (pp.- 117- 120).

2 Bryan, N., (2002). Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian Bisexual, and Transgender Homeless Adolescents with their Heterosexual Counterparts 92 Am J Public Health. (pp. - 773-777).

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universities of Lebanon, it was found that the homosexual or transgendered students were more likely to be bullied by the other students but in some cases also by the staff members including teachers. In few cases it has been reported by the LGBT children that their teacher did not allow them to sit in the class and consequently they were isolated by their class mates too for their sexual orientation and gender identity[1].

Impact of homophobic bullying on mental and psychological health

Bullying based on sexual orientation and gender identity not only affects education and future career prospects of the LGBT youth but also has an adverse effect on their mental and psychological health. It is clearly evident from the studies that homophobic or transphobic bullying is strongly associated with lower self-esteem, depression, anxiety, low level of confidence, disturbed sleep and disturbed pattern of daily routine. The victims of such homophobic or transphobic bullying are more likely to commit suicide as compared to other young people[2].

It is also established through various studies that the individuals who have been a victim of homophobic or transphobic bullying are more likely to use illegal drugs and also, they are more likely to engage in such sexual behaviours which may increase the risk of HIV and other sexually transmitted diseases.

1. In a research conducted in Ireland, it was established that bullying based on sexual orientation and gender identity is strongly associated with high levels of suicidal tendencies. It was also observed that the average age in which children become aware of their sexual orientation, i.e., 12-16 years, was also the average age at which such children were more likely to cogitate suicide.

2. In another research, it was found that the homosexual men who were the victims of homophobic bullying, were more likely to have been diagnosed with poor mental health and also have been referred to the health counsellor for having attempted to commit suicide. In the UK also a research conducted on bullying revealed the similar facts. It was found that more than 50% of the LGBT population were more susceptible to suicidal tendencies.

3. In a study conducted in USA it was established that there is a very strong connection between homophobic or transphobic bullying and suicidal tendencies. The victims of such specific bullying were more likely to attempt committing suicide. In another study it was found that more than 30% of the transgendered population had attempted to commit suicide due to discrimination in the form of bullying based on sexual orientation and gender identity[3].

4. In another study conducted in the Netherlands, it was found that more than 10% of the LGBT youth have attempted to commit suicide at least once. It was also found that more than 50% of the LGBT population reported suicidal tendencies.

Bullying based on sexual orientation and gender identity not only adversely affects the mental and psychological health of the victims of such bullying but also that of the bullies. Those who are involved

1 Caitlin, R., & Rafael, M., (2005). Family responses as a source of risk & resiliency for LGBT youth, Child Welfare League of America.

2 Convention relating to the Status of Refugees, (2007, December) @ohchr. Retrieved from http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx

3 How many African states outlaw same-sex relations? (2015, November). Africa check. Retrieved from https://africacheck.org/reports/same-sex-relations-illegal-in-34-african-states- likely-35/

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in such specific form of bullying as perpetrators are more likely to suffer from depression and other psychological problems as compared to the other peers involved in the other delinquent acts. As per the various psychological studies, the children involved in bullying including both the victims and the culprits, are more likely to suffer poor mental health as compared to other peers. Homophobic or transphobic bullying has an adverse effect on everyone involved in such a discriminatory act including other non-participant bystanders[1].

Homosexual, Bisexual and Transgendered Children in Child Welfare or Juvenile Justice Agencies

In the present scenario, a considerable number of LGBT children is apparent in the various institutions of the society such as families, cultural or religious communities, educational institutions and also child welfare or juvenile justice agencies[2]. Many LGBT adolescents end up in such state agencies due to their delinquency which is directly attributable to the discrimination and non-acceptance based on sexual orientation and gender identity. Because of being neglected or not accepted by their parents and society at large, LGBT children may engage in certain activities which are not legal. And consequently, such children end up in the state care agencies related to child welfare and juvenile justice system. Social exclusion and marginalisation are directly proportional to juvenile delinquency and a higher risk of involvement in such state care agencies. However, the state care agencies entrusted with the care of children fail to address the special needs of LGBT children. Most of these agencies have not developed understanding related to the sexual orientation and gender identity issues of the children and continue to neglect the special needs and care of LGBT children which further amounts to discrimination based on sexual orientation and gender identity.

Almost, all the state agencies charged with the care and administration of justice related to juveniles have overlooked the special needs of the LGBT children according to their sexual orientation and gender identity. These agencies often try to fit such children in the need of care amongst other adolescents whose needs may be different as compared to them. The ignorance and the lack of guidance related to sexual orientation and gender identity issues of adolescents result in discriminatory practices based on the homophobic or transphobic attitude of the public at large[3].

The failure of state agencies, charged with the care of children in the need of care or conflict with the law, in addressing the needs of the LGBT children is clearly evident from certain common practices such as:-

1. Many state agencies consider homosexual adolescents unfit for adoption because of their sexual orientation.

2. The staff members of the state agencies often blame the homosexual transgendered youth who have been harassed or discriminated for their distress because most of them believe that such homosexual

1 Henry, M., (2015). Ireland becomes first country to legalise gay marriage by popular vote, Article, Retrieved from https://www.theguardian.com/world/2015/ may/23/gay-marriage-ireland-yes-vote

2 Henry, M., (2015). Ireland becomes first country to legalise gay marriage by popular vote, Article, Retrieved from https://www.theguardian.com/world/2015/ may/23/gay-marriage-ireland-yes-vote

3 Hard, S., (1993). Homosexuality and Adolescence, Journal of Pediatrics. (Pp-75-77).

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or transgendered youth himself invited such a discriminatory treatment by being open about their sexuality or transgenderism.

3. Despite the adverse effects of reparative therapies as explained by various medical associations including the American Association of Paediatrics, many state agencies refer homosexual adolescents to the counsellors for administering therapies on them in order to fit them among the heterosexual population. Such therapies may lead to various serious psychological disorders such as depression, low self-esteem, suicidal tendencies etc[1].
4. Foster parents of the homosexual or transgendered children in the need of care often resort to various ways such as verbal abuse, corporal punishments, and exclusion from the family engagement etc. to fit such children among so- called 'normal' population.
5. The state agencies for the welfare of children mostly neglect the need of separate washrooms for the transgendered adolescents.

Most of the homosexual or transgendered adolescents in the state care agencies do not disclose their sexual orientation or gender identity due to the stigmatisation and also under the fear of non-acceptance and other discriminatory practices associated with sexuality and transgenderism. The nondisclosure of sexual orientation or gender identity makes it impracticable to ascertain the actual number of LGBT adolescents in such state care agencies.

Mistreatment of homosexual, bisexual and transgendered adolescents in the State care agencies and Juvenile justice system

Homosexual and transgendered youth continue to be exposed to various forms of discriminatory practices and violent acts even in the state care agencies and juvenile justice system. These adolescents are also deprived of stability and permanent home or shelter because of frequent shifting forced by the rejection and discrimination in various forms including physical or sexual abuse and other violent acts. In a study, it was found that more than 75% of the homosexual and transgender population in the state care agencies were either relocated or ran away due to the non-acceptance of their sexual orientation or gender identity[2]. A considerable number of homosexual and transgendered adolescents, who were subjected to various discriminatory practices and violent acts including sexual abuse, criminal intimidation, assault etc. were also prompted to abscond from their placements due to the rejection and ongoing discriminatory treatment based on their sexual orientation and gender identity.

Majority of the homosexual and transgendered youth in the state care agencies and juvenile justice system also report sexual assault by the other adolescents and the staff members. The adolescents who end up in such state agencies and juvenile justice systems because of the rejection, neglect and discrimination based on sexual orientation and gender identity, continue to go through much worse in such agencies. Generally, homosexual and transgendered adolescents who are not convicted or guilty of a sex offence are also placed with others convicted of a sex offence. These adolescents are often wrongly labeled as sexual offenders and also they are seen as the ones having trouble with 'sexuality 'or having some 'sexual problem', by most of the members of juvenile justice system and reformatories who have limited understanding of sexual orientation and gender identity. These discriminatory practices and labelling are detrimental to the interests of such adolescents. Being labeled as sexual offenders not only

1 Ian, M., (2005). Legal Theory, Palgrave Macmillan. (pp-35-65).

2 Jack, D., (1998). I'm Your Handyman: A history of Reparative Therapies, J homosexuality. (pp-25-31).

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adversely affects the future career prospects and development opportunities but also may cause lethal damage to the psychology of such adolescents[1].

Most of the staff members and other inmates of the state care agencies and juvenile justice system lack the basic understanding of sexual orientation and gender identity issues and in fact, the staff members are not even trained to provide appropriate service to homosexual and transgendered youth. Therefore, most of the homosexual and transgendered youth, who report their grievances to the adults relating to the protection against discrimination based on sexual orientation and gender identity, are often ignored and blamed for their being victimised.

Moreover, the staff members and other adults of such agencies also frequently relocate or even try to isolate such adolescents as a response to the abuse, harassment or other discriminatory practice based on sexual orientation and gender identity. Instead of addressing and protecting adolescents from various discriminatory and violent acts, most of the adults find placing the victim in isolation as an easier solution to protect further victimisation of such homosexual or transgendered adolescent. The whole act of placing the victim in isolation and away from the other inmates is a punishment to the victim instead of the abuser and further causes mental trauma to the victim.

The other Problems Faced by Homosexual, Bisexual and Transgender Adults

1. Marginalisation and Social Exclusion

Homosexual and transgendered individuals belong to the marginalised section of the society. Such population face marginalisation in multiple forms including racism, sexism, poverty etc. The stigma attached to homosexuals and transgendered individuals of all the ages pushes them to the margins of society because they are seen as transgressing the norms related to heterosexuals and non-transgendered individuals. Due to marginalisation, LGBTs are often excluded from various aspects of the society. Such individuals may face exclusion from various support groups and structures including family; they may also face exclusion or discrimination in having an access to various inevitable services such as medical care, education, and legal aid. Marginalisation along with the homophobic and transphobic attitude of the general public also may prevent such homosexual and transgendered individuals from having an access to basic public services such as healthcare and housing. Exclusion and being unable to access basic services is further detrimental to the overall health of such individuals. Due to the exclusion from the family and society and marginalisation, homosexual and transgendered individuals are often forced to indulge into criminal activities such as trafficking, sex work, drug peddling etc., which further deteriorates their living conditions[2].

2. Impact of Exclusion and Discrimination

The exclusion and discrimination based on sexual orientation and gender identity adversely affect the lives of homosexual and transgendered individuals. Such exclusion may further result in the following;

1. Homosexual or transgendered individual being forced to leave family and society.

1 K.,P., Saikiran, (2016). Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, The Gully online magazine. (Pp-25-35).

2 Kaustav, C., & Rajarshi, G., (2013). The Indian concepts on sexuality, Indian Journal of Psychiatry, (S250–S255).

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2. Exclusion may also act as an impediment in finding a suitable job.

3. Being marginalised may also result in being ignored and isolated from the society.

4. Exclusion and marginalisation may also result in lack of support from the society. Such exclusion may also act as an impediment in having an access to various basic public services.

5. Due to exclusion and discrimination, homosexual and transgendered individuals often migrate to other countries for seeking acceptance and safety.

6. Homosexual and transgendered individuals are often rejected by the religious or cultural groups.

7. Exclusion and marginalisation in the society may also result in aggravating suicidal tendencies.

8. Due to the ongoing exclusion and discrimination in the society, homosexual or transgendered individual often marry other people who are not suitable according to their sexual orientation and gender identity. Such marriages are performed due to family pressure but often end up in divorce.

3. Criminalisation

Still, in many countries including India homosexuality is illegal and punishable by fines, imprisonment, life imprisonment and even the death penalty as a result of which most of the homosexual and transgendered individuals hide their sexual orientation and gender identity from the society which is further detrimental to their mental as well as physical health. Moreover, homosexual couples do not have same rights as heterosexual couples.

4. Legal injustice

Homosexual and transgendered individuals also face discrimination in having an access to justice. Nonetheless, LGBTs are often exposed to violence and discrimination at the hands of law enforcement officials. There is a significant number of documented instances of police brutality and violence directed towards homosexual and transgendered individuals in almost all the parts of the world. There is lack of sensitivity and proper training and expertise among the officials of police departments. More so, such excluded homosexual and transgendered individuals have to struggle for justice. Police departments continue to be ignorant and insensitive towards violence and discrimination based on sexual orientation and gender identity. In fact, such homosexual and transgendered victims of violence are often blamed for being a victim due to their own personal characteristics. In police custody, homosexual and transgendered individuals are at a greater risk of being abused or ill- treated by police officials. In prisons also, homosexual and transgendered individuals remain a soft target of abuse. They continue to be abused and treated more inhumanly, when behind the bars.

Other issues related to homosexual and transgendered individuals also include but are not limited to discrimination at the workplace, poor economic condition, name calling etc.

Critical Analysis of the existing India legal

Homophobia or transphobia is still prevalent in the Indian society. Nonetheless, homosexuality and transgenderism are not new to the country. In fact, the oldest and the first criminal code of India, Manusmriti, also referred to the homosexual acts but did not consider the same as a crime. But the Code considered homosexual acts to be something that needed to be regulated. In the light of ancient texts, it

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is clear that homosexuality is a part of sexual behaviour since time immemorial but its acceptance in the Indian society is still controversial. Homosexuality and never received a warm welcome, rather there were norms providing punishments for the homosexual acts.

The same is true for the transgendered individuals who are also not accepted by the society and considered as gender deviant or transgressing the established gender norms. After so many years of scientific advancement still homosexuals and transgendered individuals are mostly considered as a case of mental illness or some sort of mental or physical disorder. Recently one of the past president of the Indian Psychiatric Society, Dr Indira Sharma called homosexuality as 'unnatural', thus aggravated the controversy concerning the sexual minorities. She further added that the manner in which the homosexuals discuss their rights and sex in public is offending and unnatural, as for heterosexual population do not discuss sex in public keeping it a private matter[1]. Following this statement, the agitated individuals belonging to the sexual minorities submitted the matter before the Indian Psychiatric Society, which disaffirmed the previous statement given by Dr. Indira Sharma. In fact, the President and the General Secretary of the Indian Psychiatric Society further made a statement that there is no scientific evidence on the basis of which homosexuality could be considered as an illness or a disease. Section 377 of the Indian Penal Code enacted in 1860 outlaws same-sex sexual-acts and behaviour and also prescribes punishment for the same. In fact, it is alleged that the law criminalising homosexuality has been often used to harass, coerce and also to arbitrarily detain the members of the sexual minorities.

Hijra Community in India

The term 'Hijra 'is popularly used in South Asia to refer to the transgendered individuals. Hijras also face discrimination and rejection from the society, similarly like homosexuals. Hijra is also a community consisting of transgendered individuals. Most of the Hijras live in a community and resort to begging or sex work for their survival. The community is open to the transgendered individuals of all ages and has existed since time immemorial. The Hijra community also adopts young transgendered individuals rejected by their families.

Till recently, the community remained in deprivation of many civil and other rights. Furthermore, the law of the land was also discriminatory towards them. The history of discriminatory laws towards the Hijra community began with an amendment to the Criminal Tribes Act of 1871 which was introduced by the British Parliament in India. This amendment was specifically applicable to the Hijra community. During those days Hijra community was seen as a tribe and as per the discriminatory law, all the members of the mentioned tribe or castrated men were to register themselves with an appointed authority and also their actions were subjected to certain restrictions. Besides that, in the year 1908 special colonies were created for the community where they were subjected to perform hard labour. Jawaharlal Nehru, in his speech at Lahore in 1936, addressed the Criminal Tribes Act as a 'monstrous provision of law 'and also asserted that such a discriminatory law should be repealed. He further said that a legal provision which describes a tribe as criminal is against all the basic principles of criminal justice and an attempt should be made to repeal the same. The discriminatory piece of legislation was repealed in 1951 but the stigma still remains attached to them. Even after the repeal of the law labelling

1 Ken, P., (2015). Cosmopolitan Sexualities: Hope and the Humanist Imagination, Polity Press.

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transgendered individuals as a criminal tribe, the harassment and abuse of the community continue till date. In fact, the colonial attitude towards the Hijra community continued even in the legislations of the post-colonial era. Nonetheless, the discriminatory feature of the Criminal Tribes Act was resurrected in the form of legislations like the Bombay Habitual Offenders Act, 1959[1].

Since then, the community is looked down as a tribe of criminals. Often, they are also suspected of the offences such as kidnapping, sexual offences, and castration of children etc. and also required to register their names and place of residence with the police authorities244. The stigmatisation and labelling of the community, is the most crucial impediment in the mainstreaming of the transgendered individuals in the society and is also a reason of the violation of their basic rights. The case of Khairati is a perfect example to show how the community has been harassed and abused on the basis of their gender identity. In the given case, Khairati was a eunuch belonging to the Hijra community and was accused of dressing and singing as a woman in public. He was also under a close observation, in accordance with the then Criminal Tribes Act, 1951, when he was caught singing and dancing dressed as a woman among other women. Khairati was also subjected to a medical examination where it was found that his orifice was deformed to a wedge-shape. It was also found that Khairati had also contracted syphilis. On the basis of this medical examination, he was convicted for committing unnatural offence as explained under section 377 of the Indian Penal Code. Although the accused admitted his being habitual to dress as a woman but denied to have been subjected to unnatural intercourse and also alleged that he was not dressed as a woman when the police authorities found him. Khairati was convicted under Section 377 by the lower court but later on, his conviction was quashed by the Allahabad High Court on the basis of vague evidence.

The Hijra community has been targeted by the police authorities since the colonial era. In the present time as well, the community is often seen with suspicion by the state authorities. In an incident in Bengaluru in the year 2008, whole Hijra community was targeted due to a single case of alleged abduction. The police authorities also directed the land-lords to not to rent out their homes to the members of Hijra community on the grounds of their involvement in immoral acts. Following the same, a considerable number of hijras were evicted. The community is also alleged to forcibly castrate young boys, which in itself is a serious allegation that attracts charges of kidnapping, attempt to murder and grievous hurt. However, it has been observed that the authorities did not act cautiously to investigate such cases in fact in many cases members of the Hijra community are already presumed to be the offenders which is totally against the principles of criminal justice and human rights. Nonetheless, the cases in which the young boy's approach Hijra community for voluntary castration are often ignored by the authorities. Young transgendered adolescents tend to run away from their homes and approach the community to become a part of it largely due to family and societal rejection. Hijras are often convicted for the offence of extortion and begging, apart from being booked under Section 377 of the Indian Penal Code[2].

The Naz Foundation Case

The Naz foundation case 255marks the beginning of a new era in the history of the rights of the sexual minorities in India. The case somehow seems to have opened the gates to various debates related to the homosexual and transgendered individuals in India. The case appears to deal with the issue of

1 M., Jain, (2010). Indian Constitutional Law, Lexis Nexis Butterworths Wadhwa, (pp-38-45).

2 Nika, M., (2017). Remembering Slain Transgender Teen Gwen Araujo, Newark Patch. (pp-22-44).

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criminalisation of consensual same- sex acts and behaviour under the Section 377 of the Indian Penal Code but it also addresses the discrimination based on sexual orientation and gender identity. The Judges in this case also mentioned the jurisprudence of International Human Rights which provides for the protection of human rights without any discrimination based on sexual orientation and gender identity. The Court also relied on the Yogyakarta Principles, which is the compilation of the principles relating to the sexual orientation and gender identity issues256. It was held by the Delhi High Court that the law criminalising consensual same-sex acts and behaviour between the adults to be unconstitutional. The judgment was welcomed by the International Human Rights organisations, various civil societies and also by the members of the sexual minorities.

However, on Dec. 11, 2013, the Supreme Court, in Suresh Kumar Koushal's case, reversed this significant ruling of the Delhi High Court given in the Naz Foundation case stating that there are not sufficient instances to hold Section 377 as unconstitutional and discriminatory towards the members of the sexual minorities. In the given case, the Supreme Court held Section 377 to be Constitutional. Furthermore, the Supreme Court also rejected the review petition in Suresh Kumar Koushal's case. This said decision is discriminatory towards the sexual minorities and also reflects the homophobic attitude.

Following the Apex Court's rejection of the review petition, Naz Foundation filed a curative petition in the Supreme Court to rectify the judgment of Suresh Kumar Koushal's case which criminalised consensual same-sex behaviour between adults. Naz Foundation is the original petitioner in the case which challenged the constitutionality of Section 377 of the Indian Penal Code. The curative petition filed by the Naz Foundation maintains that the present case is fit for the Court's curative jurisdiction as the human rights of the sexual minorities are at stake and justice should prevail on the notions of Rule of Law 261. The petitioners also maintained that in the decision of Suresh Kumar Koushal's case, the most serious error was neglecting the fact that the amendment in the criminal law in 2013, prohibits nonconsensual penile vaginal and penile-non vaginal sexual acts between man and woman which implies that consensual penile vaginal and penile-non vaginal sexual acts between heterosexual adults is permitted. However, such sexual acts between consenting homosexual adults is prohibited. Therefore, the law criminalising consensual same-sex acts and behaviour is discriminatory and violative of Article 14 and 15 of the Constitution 262. A three-judge Bench comprising of the Chief Justice of India T.S. Thakur, and Justices Anil R. Dave and J.S. Khehar accepted that the law criminalising consensual same-sex activities between adults may lead to discrimination and denial of other basic rights such as the right to privacy and dignity. The bench, however, referred the petition further to a Constitutional bench to be set shortly for hearing this petition. The bench did not admit the petition and also did not issue any directions thereto and referred it to a Constitutional bench, as it was pointed out by the Court that the petition poses certain questions of law which are Constitutional in nature[1].

Conclusion

Discrimination against children on the basis of sexual orientation and gender identity remains a global threat. Most of the homosexual, bisexual and transgender children are subjected to hostile treatment not only by the society at large but also by the family members. However, bisexual individuals remain invisible as they can easily hide their sexual orientation.

1 Satya, P., (2014, April 08). Gay sex: Naz Foundation files curative petition in SC, Hindustan Times, pp. A1, A4.

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Even in schools, other educational institutions, foster care and State care institutions, children are subjected to homophobic or transphobic bullying, discriminatory behaviours and other violent acts. These discriminatory practices and acts of violence affect the physical and mental health of the children badly. Although few States have taken initiatives to curb the discriminatory practices and acts of violence against children based on sexual orientation and gender identity but still the problem persists across the globe. Governments and inter-governmental bodies have mostly overlooked violence and discrimination based on sexual orientation and gender identity, against children. United Nations Convention on the Rights of the Child, which is the most important Convention for the protection of the rights of children, does not take into account the rights of homosexual, bisexual and transgender children[1]. In Article 2 of the United Nations Convention on the Rights of the Child which provides that it is the obligation of the States Parties to respect and ensure the protection of rights enumerated in the Convention without any discrimination based on ethnic or social origin, birth, sex, colour, race, language, political or other opinions, nationality, disability, or other status. The Convention does not explicitly include sexual orientation and gender identity as a prohibitive ground of discrimination. Similarly, the prohibitive grounds of discrimination referred to in Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights also do not include sexual orientation and gender identity. Despite no explicit mention of sexuality and transgenderism as a prohibitive ground of discrimination, it has been held by the Human Rights Committee that the prohibitive grounds mentioned in the provision of non-discrimination also includes sexual orientation and gender identity.

In India homosexuality still remains a taboo and so is the transgenderism. Consensual sex among the adult members of the same sex is also an offence under Section 377 of the Indian Penal Code which has a worse impact on homosexual, bisexual and transgender children. Most of the homosexual, bisexual and transgender children hide their sexual orientation and gender identity from their family and society under the fear of stigmatisation and rejection from others. Subsequently, the cases of discrimination against children on the basis of sexual orientation and gender identity do not come into light. And in a case, if a child discloses that he or she is a homosexual or transgender, then most of the parents do not accept this fact and rather they take their ward to psychiatrists considering being homosexual or transgender as some sort of mental illness. Nevertheless, homosexuality is still being labeled as 'unnatural offence', despite the fact that homosexuality is discoverable in nature i.e., it is also found in other animal species.

Indian Constitution also prohibits discrimination on the grounds of religion, caste, place of birth (Article 15) but does not include sexual orientation and gender identity as a prohibitive ground. The Apex Court of the country also overturned the verdict directing decriminalisation of consensual same-sex activities between adults, and hence restored homophobia in the Indian society. The judgment attracted condemnation from many human rights activists and the members of sexual minorities. Although the Apex Court gave legal recognition to the transgender community and also considered them within the category of the other backward classes, the homosexual individuals are kept distant from the given verdict and it has been further maintained by the Court that the given judgment is not applicable to homosexual and other members of the sexual minorities except transgender community. The legal reforms and efforts for the mainstreaming of the sexual minorities are largely inclined towards the transgender community. There are lesser no. of convictions based on consensual same-sex behaviour and the major cause of discrimination and non-acceptance of the LGBT community is 'social inclusion'. Social inclusion of the sexual minorities cannot be achieved only with the help of law reforms but through other tools such as awareness programmes and sex education in educational institutions.

1 Shara, A., (2011, November 27). Unhappy parents look to 'cure 'gay kids, Hindustan Times, pp. A1. A4.

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Suggestions

The following are the suggestions in the given study;

1. The International Human Rights Mechanism should explicitly include ‘sexual orientation ’and ‘gender identity ’within the prohibitive grounds enumerated in the non-discrimination clause of various Conventions, such as the Universal Declaration of Human Rights, United Nations Convention on the Rights of the Child, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights etc.
2. The State authorities and various Governmental organisations should adopt appropriate measures to ensure the protection of basic human rights and freedoms to the individuals irrespective of their sexual orientation and gender identity and also should take adequate steps in order to prevent discrimination and violence based on sexuality and transgenderism. The cases concerning discrimination or other violent acts including hate crimes targeted on the sexual minorities should be investigated expeditiously.
3. The States should adopt appropriate and comprehensive legislation for the protection of the sexual minorities against discrimination based on sexuality and transgenderism. Also, sexual orientation and gender identity should be included among the prohibitive grounds of the non-discrimination clause of the Constitution and other statutory acts.
4. The State authorities should promote various training programmes for the sensitisation towards sexual minorities and also support public information campaigns to create awareness and impart knowledge to the general public in order to root out homophobia and transphobia.
5. The National Human Rights mechanisms and institutions should also adopt appropriate measures on the lines of International Human Rights law, to prevent discrimination based on sexual orientation and gender identity.
6. The grievance redressal mechanism for the sexual minorities should be established in all public or private undertakings along with the educational institutions.
7. Appropriate sex education and information related to sexuality and gender issues should be included as a part of the curriculum in schools, colleges, and other higher educational institutions in order to root out the popular misconceptions regarding sexuality and transgenderism.
8. Educational institutions should also adopt appropriate measures in order to ensure the protection against homophobic or transphobic bullying to all the individuals of all ages.
9. The proper training should be given to the medical experts and other staff members of the agencies concerning the welfare of the individuals, such as child welfare and juvenile justice agencies, regarding sexual orientation and gender identity issues so that they understand the unique requirements of sexual minorities.

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