



Paper : P-6- Rights of Minorities and other Marginalized Groups

Module : U-2, M-20: Challenges Relating to Protection of Sexual Minorities



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1. Learning Outcome

The purpose of the module is:

- To provide a broad overview of issues and concerns faced by LGBT persons in India.
- To identify areas and institutions that perpetrates violence and discrimination against LGBT persons in the country.

2. Introduction

LGBT persons have been fighting for their rights since many years. They face multiple marginalization and have been denied access to basic fundamental rights. Each of the identities that are encompassed within the spectrum of LGBT identities have specific concerns as well as problems that cuts across these identities. Broadly speaking LGBT persons are questioning assumptions of heterosexuality and conception of gender as a binary. These assumptions lead to a situation where they are forced into marriages, unable to continue or pursue their education, denied access to healthcare and are subjected to harassment by the police. The lives of LGBT persons are vulnerable and they live in constant fear of persecution and prosecution. Instances of police brutality and extortion highlight the problems faced by LGBT persons. In this chapter we will look into some of the broad sweeping concerns faced by LGBT persons. However, it is important to understand that identities are intersectional *i.e.* LGBT persons also belong to other marginalized groups. For instance, a person maybe lesbian and from the working class or a gay muslim man or a dalit transwoman. As a result LGBT persons may face double and triple marginalization as a result of intersectional identities.

A poem by Revathi¹ –

Mother didn't accept

Father didn't accept

Society didn't accept

We have no property. No happiness.

No home. No work.

I want to be a mother

A daughter, a sister, a grandmother, a granddaughter

Our world is a separate one.

¹ Arvind Narain & Alok Gupta, PROPERTY AS SELFHOOD, A HIJRA EXPERIENCE – REVATHI; Law like love, 2011.

*We are struggling people.
Our family is the hijra family
Rowdy's blackmail. Police Violence. False cases. People's
ridicule.
We beg. We do sex work. We go through torture on a daily
basis.
We too love. We too feel.
All we want to do is live like humans with dignity.*

*(This is an excerpt from Revathi's poem which appeared in
Law like Love.)*

3. Marriage

Marriage continues to be an important institution and it is looked at as necessary for every individual to get married. Marriage ensures that private property, lineage and caste purity are carried forward. LGBT persons face a lot of pressure to get married to individuals they are not attracted to. For instance, gay men enter into marriages with straight women thus making both of them victims of a patriarchal society that mandates that a man and woman are married.

Even in cases where parents know that their child is gay or lesbian, they still force them to enter into traditional marriages mainly because of social conformity. Consequently, many of them are forced to live a double life and this 'sanctity of (forced) marriage' is built on silence and pain wherein the individual choice of the son or daughter is disregarded by the parents. Lesbian women face double marginalisation on entering these forced marriages. Sexual pleasure is considered to be a "luxury" not allowed to women as a whole so the desires of lesbian women are seen as incomprehensible and a threat to the moral fabric of the society. Lack of economic independence and fear of social ostracism make it difficult for lesbian woman to even speak of their sexual preferences in what still remains a mainly patriarchal Indian society.

Ravi, a gay man, narrates how gay men enter into marriage to avoid the dreaded rumours of impotency. Marriage, he says, provides a convenient misapprehension which helps him to avoid the

barbed questions and the insults of the community. Faced with social constraints he had to enter into this lifelong charade.²

Thus, in order to conform with societal norms, the family usually pressurizes their gay son or lesbian daughter or transgender child to enter into a marriage. As per statistics with the Crisis intervention team of LGBT Community there have been around 15 instances in Telangana wherein sexual assault is used as a means to “straighten” queer behaviour. The perpetrator of such heinous act is usually a family member due to which victims generally refrain from seeking any kind of legal remedy. This is undertaken as a disciplinary project to “cure” the homosexuals of their sexual preferences.

"It's usually a cousin who's roped in for this 'project'. In some communities in South India, marriages amongst cousins are common. Many times, a girl's parents may decide that she would be married off to a cousin (i.e. her father's sister's son or mother's brother's son) soon after her birth. Now, if this girl happens to be queer and if it is found out that she is in a relationship with another girl, elders in the family believe having sex with the 'would-be', even if it's forcibly, will cure her," Vyjayanti explains.³

4. Harassment at Workplace

LGBT persons lack job opportunities and in the event they get employed, they face implicit and explicit discrimination and harassment at the workplace. For instance, many transgender persons are unable to get employed despite being well qualified. It is important to have diverse and inclusive workplaces. Currently, the law on sexual harassment at the workplace in India which is the Sexual Harassment of Women at Workplace (Protection, Prohibition and Redressal) Act, 2013 recognizes only women as victims of sexual harassment. However, many international conventions follow a gender neutral approach i.e. a victim need not be only a woman but can be someone from the LGBT community as well. For instance, the UNHCR Guidelines on dealing with sexual harassment at workplace, International Labour Organisation's rules for its staff union regarding sexual harassment at workplace, National Institute of Health (United States) all follow a gender neutral model. Thus, it is

² Betwa Sharma, GAY INDIAN MEN SPEAK OUT, 19th April, 2014, www.huffingtonpost.com/.../gay-indian-men-speak-out.

³ Rupam Jain, PARENTS USE CORRECTIVE RAPE TO STRAIGHTEN GAYS, TNN, June 1st, 2015, timesofindia.indiatimes.com.

important that the Indian law should also recognize same sex discrimination and not ignore the harassment that LGBT persons face.

As per a research study by Nam Cam Trau and Hartel (2004), gay men were often subjected to harassment at their workplace more often than not in the form of veiled jokes from colleagues. Such jokes invariably lower their self esteem causing everlasting psychological damage.⁴ This in turn then impacts their performance and success at work.⁵ In order to escape from this form of harassment, an individual generally chooses not to disclose his or her sexual identity forcing them to hide behind secrecy.⁶

This problem can be tackled to some extent if the organisations adopt a victim - gender neutral approach, that is, where the victim of sexual harassment can be of any gender but the perpetrator is a male person. Another way to tackle the issue would be to have an all encompassing policy like those given in the UNHCR Guidelines which provide forth on a policy to deal with not just sexual harassment but harassment in general and also abuse of authority at workplace.⁷

5. Mental and psychological wellbeing

Non-acceptance and violence from family, pressure to marry, hostile work environment and the constant fear of facing persecution or misuse of laws against them puts LGBT persons under tremendous mental stress. For instance, the prevalence of section 377 of the Indian Penal Code (discussed in details in a later section) has resulted in a lot of fear and anxiety amongst LGBT persons.

After the Supreme Court upheld the constitutional validity of section 377, many mental health professionals filed affidavits before the Supreme Court. One of the affidavits was by Dr. Shekhar Seshadri, Professor of Psychiatry, National Institute of Mental Health and Neuro Sciences. In the affidavit, Dr. Shekhar Seshadri states that since adult consensual homosexual relationships are criminalised by the law and since there is a lack of a support system, his LGBT clients feel isolated,

⁴ Macasieb, Dru., LGB IN THE WORKPLACE : A REVIEW OF LITERATURE ON THE HISTORY, CHALLENGES AND POSSIBLE SOLUTIONS, Brandman University; ONCE, CAREER, TWO IDENTITIES: AN ASSESSMENT OF GAY MEN'S CAREER TRAJECTORY. *Career Development International* (7), 627-637; Retrieved from <http://www.emeraldinsight.com.libproxy.chapman.edu>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ UNHCR Policy on Harassment, Sexual Harassment and Abuse of Authority at Workplace, United Nations High Commissioner for Refugees, April 2005, [www.un.org/.../\(UNHCR\)policy_on_harassment.pdf](http://www.un.org/.../(UNHCR)policy_on_harassment.pdf).

alienated and helpless.⁸ He fears a greater rise in mental health issues like depression, suicidal tendencies etc among members of the community mainly because of the stigmatisation and multiple levels of discrimination that the LGBT community is subjected to on a day to day basis in their families, community and work places. Various forms of violence both from within the family and outside (by society) disempowers the LGBT community affecting not only their productivity at work but also the very quality of their life.⁹

In *NALSA v. Union of India*, the judgment that affirmed the rights of transgender persons under the constitution, the Supreme Court laid down broad directions asking the Centre and State Governments to take steps to create public awareness so that Transgender people ‘will feel that they are also part and parcel of the social fabric of life and not be treated as untouchables; to take measures to regain their respect and place in society; and earnestly address the problems such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies and social stigma.’¹⁰ Apart from this, the MSJE Expert Committee Report also gives recommendations like setting up of crisis centres, gender sensitization in institutions etc.¹¹ However, unfortunately these have remained mere rules on paper and have not yet been effectively implemented.

The implementation of these recommendations and guidelines is extremely important as it is the “society” which requires being sensitive towards the LGBT community since more often than not it is the society which is responsible for creating an unequal and unwelcoming space for the LGBT community. It is only when inclusion becomes a way of life and not merely legal guidelines that inroads can be made to improve the mental and psychological wellbeing of all members of the society regardless of their sexual identity and preferences.

6. Family support and advocacy.

The experience of LGBT persons over the years has demonstrated that families can also be perpetrators of violence and harassment on their children by not accepting their differences. There

⁸ Coalition for Sex Workers and Sexuality Minority Rights (CSMR), DIGNITY FIRST ONE YEAR OF RESISTANCE TO RE-CRIMINALISATION OF LGBT LIVES, December 2014.

⁹ *Ibid.*

¹⁰ *NALSA v. Union of India*, Writ Petition (Civil) No. 400 of 2012].

¹¹ MSJE Expert Committee Report.

are numerous instances where families have disowned their children and have often resorted to physical violence to make them conform. Family members wish to cure LGBT persons and take recourse to prohibited medical practices like administering electro convulsion therapy and other questionable medications.

The Suresh Kumar Koushal judgment by the Supreme Court that criminalises adult consensual homosexual acts, has provided ample ammunition for hostile families and neighbours to target the LGBT community. It induces trauma and fear in the LGBT community. Families who had started becoming supportive after the Naz judgment (the Delhi High Court judgment that had decriminalized adult homosexual acts) have effectively retraced their steps; even if families continue to be supportive, the judgment can be used as a tool of coercion by the community and hostile neighbours, forcing the LGBT community to conform to the societal norms¹². Thus the stigmatisations, ostracism being faced by the LGBT community and even their families (which support) have increased post this judgment. Effectively, the unreasonable prejudice which the society already had against homosexuals has now been legitimized by the verdict of the Supreme Court.¹³

A member of the LGBT community says that his father has repeatedly used the Koushal judgment as a tool to portray his negative bias against homosexuality. He says – *“My father uses threatening language to blackmail me emotionally and to attack my character and says that I am a threat to the society because of my homosexuality. My father also calls me a pervert in these threats.”*¹⁴

Laxman S.T. a HIV/AIDS outreach worker in Haveri, Karnataka also testifies to this fact:

*“I was accepted at home by my family before the Supreme Court delivered its verdict criminalising homosexuality. My father came for family counselling to my organization and was accepting of my identity as a kothi. However, subsequent to the judgment of the Supreme Court, there is immense pressure on me to get married.”*¹⁵

7. Education

¹²Supra, n.9.

¹³Ibid.

¹⁴Ibid.

¹⁵Ibid.

The transgender community is a vulnerable community perilously lagging behind on a number of human development indices including education. High level of stigmatisation, insensitivity and apathy of the teachers and peers towards them coupled with physical, sexual and emotional violence leads to most of them slipping out of the educational system¹⁶ The Expert Committee Report suggests that there has to be proper sensitization of the society especially of parents, teachers and peers.¹⁷ A better understanding of socio-cultural parameters and human rights aspects would help in attitudinal shift towards the transgender community.¹⁸ This is extremely important because transgender persons do not dropout from schools by choice but by force due to acute discrimination and abuse.

8. Public Health and Sanitation

Another issue that members of transgender community have to grapple daily is lack of separate public toilets or gender neutral toilets. As there are no separate toilet facilities they are prone to sexual assault and harassment inside these public facilities. Supreme Court has recognized this and has directed the Centre and State Governments to take proper measures to provide separate public toilets and other facilities for members from the community. Further, they have been directed to operate separate HIV/ Sero-surveillance measures for Transgender persons since they are susceptible to a number of sexually transmitted diseases and other ailments related to sexual health. Since most of these rules are still just on paper and have not yet reached the implementation stage, members of the transgender community have been left voiceless and defenseless, vulnerable and exposed to diseases and maladies.

9. Using Law as a tool for Harassment

In Jayalakshmi v. State of Tamil Nadu¹⁹, the petitioner's brother was arrested on the pretext of interrogation regarding a theft. The petitioner's brother was a transgender person who was subjected to harassment and inhuman activities in the police station and finally set himself ablaze.

This depicts the trauma and harassment a transgender or an LGBT person has to face in the

¹⁶ Ministry of Social Justice and Empowerment, REPORT OF THE EXPERT COMMITTEE ON ISSUES RELATED TO TRANSGENDER PERSONS, January 2014.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Jayalakshmi v. State of Tamil Nadu*, (2007) 4 MLJ 849.

hands of police who are supposed to be the 'guardian of law'.

9.1 Section 377 of the Indian Penal Code

Section 377 of the Indian Penal Code is the anti sodomy law in India. This section penalises adult consensual same sex relationships. The Delhi High Court in 2009 in the judgments of *Naz Foundation v NCT of Delhi* had held that this section is unconstitutional. However, the Supreme Court in the case of *Suresh Kumar Koushal v Union of India* held that section 377 is a constitutionally valid provision. There are many instances where section 377 has been used to harass LGBT persons. LGBT person face both persecution and prosecution as a result of section 377.

Recently, one instance of misuse of this provision was in Hassan, Karnataka. In 2013, even before the Supreme Court recriminalized homosexuality, the Hassan police arrested around 13 persons during a systematic raid on false charges of having 'unnatural sex' in public.²⁰ Now with the Supreme Court judgment, whereby Section 377 has been rendered valid, incidents where Section 377 is used as a tool to traumatize the community is increasing in number. One such incident occurred in October 2014 when a wife produced a video footage of her husband indulging in an affair with another man and later used it to register a criminal complaint against him.²¹ A detailed discussion of this provision is followed in the section titled Constitutional Validity of Section 377 of the Indian Penal Code.

9.2 Laws prohibiting beggary

A regional probation of beggary laws is also being used to falsely imprison or detain large number of people from the transgender community. Usually, this amounts to arbitrary and unlawful detention as the majority of those arrested would not have committed any offence under the Beggary Act. The Supreme Court, in the case of *National Legal Services Authority v Union of India*²² has affirmed the

²⁰ *Ibid.*

²¹ *Ibid.*

²² *NALSA v. UOI.*

rights of transgender persons and has affirmed their right to live with dignity. Despite this, anti beggary laws have been used against the transgender community. Members of the transgender community are forced to take recourse to begging and sex work as means of livelihood since there are no other opportunities created for them. While they are pushed to beggary on the one hand, they are disallowed to even beg and are detained in beggars home, a place which lacks basic infrastructure and is dangerous due to prevalence of medical malpractise.

On 26th November 2014, around 43 people from the hijra community were rounded up by the police and sent to Beggars Colony and booked under the Karnataka's Prevention of Beggary Act. While some of these people were arrested while they were going about their everyday business on the streets, others were picked up from their homes. Even the ones who went to enquire about their friends were unlawfully detained.²³

Akkai Padmashali, an activist for sexual minorities, recently recounted an incident to a group of students. 17 transgender were arrested on a train in Bangarapet. The police claimed that since many members of the transgender community usually were found begging on the train, the police had arrested them for enquiring about a robbery which had been committed on the train. Their stand was that the members of the community were aware about the identity of the robbers. When the Karnataka Sexual Minority Forum intervened, they were told by the police to "control" the transgender community members who were harassing people in train by their begging which is against law.

9.3 Immoral Trafficking (Prevention) Act

The Immoral Trafficking (Prevention) Act 1956 penalises those who run brothels and live on the earnings of prostitution or those who solicit in public etc. Though the requirement is that the sex worker should be caught in the act of soliciting, however the police use this law as a tool to harass transgender members involved in sex work. Ostracised by the society and humiliated by neighbours and family alike, many members of transgender community are forced into sex work in order to earn a living. However, here too they have to face harassment by police and goons who continue to threaten and harass them. Irrespective of whether actual lodging of FIR takes place or not, such laws are used as weapon to spread fear and to harass members of the transgender community.

²³ <http://paper-bird.net/2014/11/28/buggery-and-beggary/>

9.4 Kidnapping, abduction – Indian Penal Code Provisions

Other legal provisions being used to target the transgender community and the LGBT community as a whole are – Section 340, Indian Penal Code (wrongful confinement), Section 361, Indian Penal Code (kidnapping) and Section 362, Indian Penal Code (abduction). Usually when two women who are in love with one another run away from their family so that they can live together, the families usually charge the girl's partner under these legal provisions. There is a rampant confusion in courts when it comes to matters involving two women.²⁴ A lot depends on the sensitivity of the judge. Some judges have been known to send back adult women back to their own homes (from where they escaped) or to shelter homes etc. In many cases, Section 377 is directly quoted. Even if no legal action is taken, these threats themselves are enough to cause substantial emotional harm and sense of fear.²⁵

9.5 Police Act

The Karnataka Police Act through Section 36A seeks to regulate, prevent or suppress the undesirable activities of eunuchs. Part of this act is derived from the Hyderabad Eunuchs Act which in turn is derived from the Criminal Tribes Act which is a pre colonial law that deemed members of certain tribes as a criminal.²⁶ The mere presence of this provision empowers the police to use it as tool for threatening and harassing eunuchs. Such draconian laws become powerful weapons for blackmailing and threatening the entire community of sexual minorities.²⁷

Often living on the fringes of the society, in many cases alienated even from their families, life is struggle for most members of the community. Societal norms and prejudices make it difficult to lead a normal productive life. Toothless laws and regulations add to this misery, making members of the community lead a life bereft of respect or equality.

10. Challenges Relating to Protection of Sexual Minorities

In light of the above issues and problems discussed, the challenges before the LGBT community may be summarized as follows:

²⁴ Priya Thangarajah & Ponni Arasu, QUEER WOMEN AND LAW IN INDIA, Law like love, Arvind Narain and Alok Gupta, 2011.

²⁵ *Ibid.*

²⁶ Sexuality, Law and Activism in Karnataka, <https://karnatakapoliceact.wordpress.com/>.

²⁷ AD Rangarajan, FIGHTING FOR TRANSGENDER RIGHTS, March 5, 2015, www.thehindu.com.

10.1 *Decriminalization*

The Delhi High Court, in its path breaking decision had decriminalised adult, same sex relationships. However, the Supreme Court has over turned it thus rendering LGBT persons as criminals. The Supreme Court has however suggested that the legislature should step in and make due amends if the need be. Therefore, it is vital that section 377 be read down to not apply to adult same sex relationships. Criminalization has resulted in a lot of persecution of LGBT persons who live in constant fear. It has also impacted HIV intervention projects.

10.2 *Discrimination*

Currently, there are no safeguards for discrimination against LGBT persons. Constitutional safeguards under articles 14, 15 and 21 will apply primarily to the State and its agencies (the government and its institutions). However, a large number of work forces are currently employed in the private sector and are outside the purview of the constitution. Therefore, a comprehensive anti-discrimination law must come into force that tackles discrimination of marginalized groups across a spectrum of identities.

10.3 *Implementation*

The NALSA judgment has affirmed the rights of transgender persons and has also accepted the elaborate recommendations of the expert committee on the rights of transgender persons. The Supreme Court had directed the central and state governments to implement the recommendations of the report within a period of six months which has now lapsed. However, the central government has filed a clarification petition seeking an extension of time to comply with the recommendations. Non implementation of the recommendations would be a great disservice to the transgender community. Further, one of the recommendations of the committee is that the law commission should look into the need for a separate legislation that will govern the rights of transgender persons. Subsequently, a private member bill introduced by Tiruchi Siva, an MP in the Rajya Sabha has been passed unanimously by the upper house and is now waiting for it to be discussed and passed by the Lok Sabha. The Rights of Transgender Bill, 2014 was passed by the Rajya Sabha on 24th April, 2015 and looks at the 'Rights and Entitlements' of all transgender individuals, i.e. those whose gender does not match with the gender assigned at birth, within eight clauses which includes substantive rights such

as the right to equality, life, free speech, community, integrity, family, along with rights against torture and abuse.²⁸ Thus, the bill seeks to implement the fundamental notion of being 'sex blind' as stated in our constitution and should come into force at the earliest.

11. Conclusion

Thus, it is amply clear that members of the LGBT community face rampant discrimination and violence at the hands of various institutions like family, police, medical institutes etc. Further, there are many challenges ahead for the true realization of the rights of LGBT persons.



²⁸ Danish Sheikh, A PRIMER ON THE TRANS BILL, April 2015 (Available at altnlawforum.org/.../a-primer-on-the-transgender-rights-bill.)