

INCLUSION OF LGBTQ AT THE WORKPLACE IS STILL A WORK IN PROGRESS**Srishti Sinha**4th year B.B.A.LL.B (HONS.) Student,
Law College Dehradun, Uttarakhand University**ABSTRACT**

Success in business today depends on ensuring that initiatives to promote diversity, equity, and inclusion in the workplace include those who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ). Companies that embrace LGBTQ employees get the respect and support of not only that community but also other minority groups who see the initiatives as sign of a more inclusive workplace as a whole. Employers notice the good effects in practically every area of company, from hiring and retain staff to generating sales and profits.

It is not sufficient to have a documented policy. Even in a workplace where LGBTQ individuals are protected by internal policies, a company's culture may present employees from bringing their complete self to work.

Keywords

LGBTQ, discrimination, equality, workplace

INTRODUCTION:

From the early 1990s, the Indian constitution has regularly affirmed that cisgender, heterosexual people and LGBTQ+ people in India have equal rights. With the growth of Indian economy, concerns have been raised about whether the LGBTQ+ community in this rising nation has equal access to work opportunity, but discrimination in the private sector is still permitted. (1) Harassment at work hurts both individuals and the Indian economy. Although recent attempts in parliament to criminalise discrimination in the private sector failed, they are an essential first step toward establishing LGBTQ+ inclusive workplaces. The lack of state support for lesbian, homosexual, bisexual, transgender, queer (LGBTQ+) employment issues is significant human right issues in India. (2) Although there have been a variety of sexual orientations since at least ancient and mediaeval India, neither the government nor LGBTQ+ people have received adequate protection.

Despite the fact that sex-based discrimination is prohibited by the Indian constitution, LGBTQ+ Indians have just lately received this protection. The constitutional prohibition against "discrimination on the basis of sex" was gradually expanded by the supreme court of India in National Legal Services Authority (NALSA) v. Union of India (3) in 2014 to encompass discrimination based on sexual orientation and gender identity. The court noted that such discrimination against those who do not fit traditional assumptions of binary genders violates the constitution's protection of fundamental right to equality. Four years later, in Navtej Singh Johar v. Union of India, (4) the supreme court acknowledged that the capacity and freedom to select a self-defined sexual orientation and gender expression, including dress, language and traits, are at the foundation of one's identity.

Yet, the LGBTQ+ population in India still has to deal with economic discrimination and job abuse on daily basis. (5) Current rules smell of colonial prejudice and fail to take into account specific socioeconomic and cultural inequalities. Lack of employment anti-discrimination laws is indicative of state's continued disregard for the rights of its most marginalised minority groups.

Poor LGBTQ+ rights protection in private sector employment

The harassment of LGBTQ+ Indians at work is not new. They have encountered a variety of forms of harassment at work, including insensitive small talk, homophobic jokes, sexual insults, derogatory references to a person's sexual orientation, and even total exclusion. (6) It might be difficult for someone whose name and gender have been changed in official records to land a job. However, law enforcement organisations and other players in the criminal justice system continue to harass, mistreat and persecute them in public areas.

In addition to overt harassment, LGBTQ+ workers may also encounter implicit prejudice.

(7) Indian courts have already acknowledged indirect forms of discrimination at work, noting that due to pre-

existing structural disparities between communities, even measures conducted on “seemingly neutral” grounds might have discriminatory repercussions. Employers and co-workers who choose to overlook the unpleasant realities of the workplace pit the onus of sensitising others on LGBTQ+ persons who then have to make an effort to have meaningful talks with those who discriminate against them. (8)

Private employees are not entitled to the same constitutional protections, despite the fact that recent Supreme Court decisions now shield public employees from discrimination.

Current workplace harassment laws like sexual harassment of women at workplace (prevention, prohibition, and redressal) Act of 2013 and the Fair pay Act of 1976 do not take into account LGBTQ+ rights. (9) By failing to do so, they release private sector companies from any obligation to establish inclusive workplace policies. Private employees are not sufficiently protected by even the most recent anti-discrimination law, the transgender persons (protection of rights Act), 2019 and regulation, 2020. These laws use gendered language, require proof of a transsexual’s status, and provide no legal redress for violations. (10)

There are more vulnerable to economic exclusion due to the social stigma associated with LGBTQ+ rights, the dominance of cisgender men and higher socioeconomic classes in the workplace, and other factors. (11) Several members of the transgender community in India rely on begging and prostitution for a living. (12) Nevertheless, because they are already at risk of state violence, LGBTQ+ people are unfairly targeted by criminal status like beggary laws. India is not doing enough to defend the rights of LGBTQ+ workers, despite the fact that discrimination based on homosexuality and gender identity is an infringement of the right to freedom of expression under Article 19 and right to live a life of dignity under Article 21 of the constitution. (13)

Stigmatisation at work and economic loss

There are dangerous repercussions for India if the LGBTQ+ community is not provided with proper working benefits. In 2014, the World Bank discovered that a variety of homophobic practices cause India to suffer significant economic losses due to lower participation in the labour force, less economic output, and increased health and social costs relating to LGBTQ+ persons. (14) By publishing gender-neutral job descriptions, offering gender-neutral restrooms, paid leave, medical benefits, and health insurance, several firms and human resources departments have set good examples. Other places of employment provide periodic counselling sessions, peer support, and different diversity techniques.

Yet, companies have sole discretion to offer these remedies. According to research, inclusive workplaces function better than others. Prejudice against LGBTQ+ individuals, including indirect discrimination like a lack of accessible housing, can have a negative impact on economic results and decrease workplace productivity. Increasing transparency and honesty in hiring practices can also aid in altering social perceptions at work. (15)

Encouraging the enactment of a thorough equality law

According to Article 16(2) of the Indian constitution, “no person shall be disqualified for, or subject to discrimination in respect of any employment or position under the state on grounds exclusively of religion, race, caste, sex, descent, place of birth, residence, or any of them.” Regarding access to public areas, Article 15(2) also guarantees similar safeguards. These constitutional protections, however, only apply to public sector discrimination. (16) Indian LGBTQ+ employers because current laws do not define what these rights would entail private parties.

Protection from both direct and indirect discrimination in both the public and private realms was acknowledged in 2008 report by the Equal Opportunity Commission which is part of the Ministry of Minority Affairs. (17) It did not, however, make the legal case against such discrimination or offer workable solution to address specific transgressions. A law professor at Wadham College (Oxford) and Member of Parliament Shashi Tharoor, who holds a doctorate in international relations and affairs, introduced the Anti-discrimination and equality Bill in 2016. Tarunabh Khaitan had previously drafted a similar bill. The bill was rejected by the lower house of the parliament which included some members of

Tharoor’s party. It’s noteworthy that neither of these measures addressed structural or intersectional discrimination in the workplace.

A comprehensive and inclusive equality bill was recently written by Centre for Law and Policy Research in 2019

to fill in the gaps left by earlier attempts. (18) Several protected characteristics, such as sex, sexual orientation, gender identity, gender expression, handicap, marital status, political convictions, linguistic identity, or a combination of these are guaranteed protection from direct or indirect forms of discrimination under this bill. The bill also suggests establishing “equality courts”, designated district courts with exclusive jurisdiction over cases involving infringements of its provisions and authority to grant civil remedies. Such courts can support the development and expansion of existing equality jurisprudence as well as fill in precedent gaps if they are properly operationalized with judicial officers who have received prior training and sensitization.

Discrimination at work committed by private employers is expressly addressed in chapter iii of the equality bill. Eliminating discriminatory hiring and firing practices, offering fair pay and working conditions, forbidding the classification or segregation of employees in a way that denies them employment opportunities, and forbidding the distribution of work in a way that stereotypes based on one or more protected characteristics are all examples of this. However, sec 11(5) of the bill acknowledges that employment practices based on “bonafide occupational qualification reasonably necessary for the normal operation” of a workplace are not unlawful in order to prevent unduly encroaching on the rights of private employers. Employers might abuse this exceptions is such exceptions are not carefully examined. This is especially true when companies demand a seeming valid qualification for employment that may actually have ulterior objectives based on personal traits.

Let’s suppose an illustration, a company with high proportion of female employees can specify that a certain job type does not require young moms and pregnant women to perform the night shift. Due to India’s lack of legal recognition of same sex adoption, this policy may unfairly disfavour lesbian employees. The employers must be able to demonstrate that such requirement is reasonable in the given circumstances and does not discriminate against people based on any protected characteristics, perhaps to encourage young mothers to return to work or by showing that there are an equal number of non-LGBT women working the night shift. Uncertainty exists regarding the definition of a “reasonable” standard and the proper method of striking a balance between the interest of employers and employee. Therefore, it is important to be clear about how the burden of proof and intentions, as described in chapter ii, will be decided in situation when there has been indirect or seemingly unintentional discrimination.

In particular, migrant workers, contract workers, healthcare workers and transgender people experience heinous types of occupational discrimination, which the COVID-19 pandemic has brought to light. Under sec 2(m) and 2(o) of the equality bill, the definition of “employee” and “employer” are expanded to cover certain categories of workers in the unorganised sector such as domestic workers. The protection of the rights of non-standard workers, such as self-employed individuals, street vendors, and other gig economy workers, has drawn criticism from academics. For instances, several government welfare programmes offer chances for self-employment to help transgender people. As a result, there is still some uncertainty regarding these people’s right under the bill, if it becomes law, can alleviate egregious disparities in the private employment sector.

The future route

The Supreme Court left the door open for people to challenge unfair employment practises against the LGBTQ+ community in the business sector by highlighting the need to embrace an intersectional understanding of how prejudice functions. The judiciary’s is restricted to interpreting existing law; however, in accordance with the idea of the separation of powers, therefore it cannot take part in specific-law-making. The right of LGBTQ+ Indians at workplace currently lack effective execution of court decisions and are in urgent need of legislative support. It is possible that the administration won’t reach a political agreement on whether to implement such a law. In such a case, it may be necessary for attorney, activist, research groups, and non-governmental organisation to collaborate to create an antidiscrimination statute. Future legal action can help to adjust unintended results and make the required adjustments to conform to evolving standards.

It is crucial to keep in mind the notable differences between rural and urban responses to those who identify as queer. Many LGBT people in rural India hide their sexuality because they are bullied and shunned by both their families and societies as a whole. Due to conservative views about a women’s sexuality, lesbian couples, especially rural women, experience double prosecution. They too would rather remain hidden in order to avoid suffering “corrective rape” or possibly taking their own lives. LGBT persons are unable to look for employment in such situations because poverty already pervasive.

Therefore it is crucial to alter attitudes and foster better acceptance of LGBT individuals everywhere, not just

in urban areas. With the decriminalisation of homosexuality and increased awareness and sensitivity to LGBT issues in India, the movement is currently gaining ground. The passage of an anti-discriminatory law by parliament will unquestionably be a positive move. However, merely passing laws won't make life better for LGBT Indians. We must first wage a difficult struggle by eradicating our ingrained prejudices toward alternative sexualities and other gender identities in order to assure the LGBT community's actual acceptance in workplaces across India.

LGBTQ+ EMPLOYMENT RIGHTS ACKNOWLEDGED IN INDIA

In *NALSA v. Union of India*, the Indian Supreme Court recognised transgender individuals as belonging to the "third gender" as defined by the Indian Constitution in 2014. It acknowledged the discrimination transgender persons experience in a variety of spheres of life, including the workplace, and declared that it is against the law to discriminate transgender persons experience in a variety of spheres of life, including the workplace, and declared that it is against the law to discriminate on the basis of gender identity. The Transgender people (Protection of Rights) Act, 2019 was enacted by the Indian Parliament as a result of this verdict (Transgender Act).

According to Section 3 of the Transgender Act, it is unlawful for both the government and private individuals to treat transgender people unfairly in employment situations, including by rejecting or terminating employment on the basis of gender identity. The Transgender Act's section 9 particularly grants protection from workplace discrimination.

Five years ago, the historic decision in *Navtej Singh Johar & Ors v. Union of India* decriminalised homosexuality in India as part of changes to safeguard against discrimination based on sexual identity. The *Navtej Johar* case recognised that sex based discrimination includes discriminating against homosexual and infringes on their fundamental rights to non-discrimination, equality, and dignity, as established in the Indian Constitution.

A person's sexual orientation is a private matter, and the right to individual privacy is fundamental right under article 21 of Indian Constitution, the supreme court unanimously decided in *KS Puttuswamy v. Union of India*, 2017 SCC(1) 10. Additionally, in this case of *Southern Railway v. Rangachari*, 1962 SCR (2) 586, the Indian supreme court held that article 16(1) and (2) of the Indian constitution explicitly forbid discriminatory practices in all matters of employment by the state.

INTERNATIONAL LAWS AND REGULATIONS

All people are equal before the law and have a right to equal protection from discrimination, according to Article 7 of the Universal Declaration of Human Rights (UDHR). In addition to the protection against unemployment, Article 23(1) of the UDHR also considers protection against unemployment by recognising the rights to employment, freedom of employment choice, and reasonable and favourable working circumstances.

Protection against discrimination based on sexual orientation and gender identity is a specific provision 32/2, which was enacted on June 30, 2016.

Additionally, article 2 of the discrimination (employment and occupation) convention, 1958 of the International Labour Organisation promotes equality of opportunity and treatment in regard to employment and occupation, with the goal of eliminating any discrimination in respect thereof through a national policy.

In the *Boston v. Clayton* decision, the US Supreme Court ruled that employees cannot be fired based on their sexual orientation or gender identity, which is a recent milestone for LGBTQ+ labour rights in the US. In addition, it was decided that Title VII of the Civil Rights Act of 1964 prohibits discrimination against transgender and homosexual people. This is because both groups are protected from harassment based on their sexual orientation.

INDIA'S DEARTH OF SPECIFIC PROVISIONS

Although the Transgender Act was passed in India to protect transgender people's legal rights, particularly those related to employment, it does not include any sanction for violating labour laws. This is against the

legal principle known as *ubi jus ibi remedium*, which literally translates to “where there is a right there is remedy”. The Transgender Act’s rights are hence somewhat theoretical and toothless.

Abuse of a transgender person physically or sexually is only punishable by a two year sentences under section 18 of the Transgender Act. The Transgender Act, however, contains neither a definition nor an explanation of what “sexual abuse” in this situation would entail.

Less than 6% of transgender persons are employed in the formal economy and nearly none in the government sector because transgender people are occasionally fired for engaging in “illegal behaviour,” “deviant mischief,” or just being non-stereotypical. Also, there are no regulations for the prevention of sexual harassment of transgender individuals in the workplace, in contrast to the regulation made by the Indian landmark case *Vishaka v. State of Rajasthan* which aim to stop sexual harassment of women in the workplace.

Regarding the LGBTQ+ population as a whole, there is no legislation that forbids discrimination on the ground of gender identity in the context of private employment or occupations outside of those related to public service. According to Article 13 of the Indian constitution, one can only use one’s fundamental rights against the government.

Unlike to nations like Australia, India does not have a distinct set of rules that forbid discrimination on the basis of sexual orientation.

LGBT EMPLOYMENT AWARENESS IN INDIA

In a ground-breaking decision, the Delhi high court decriminalised same sex partnerships between consenting adults in July 2009. This decision’s passing appeared to be an endorsement of inclusivity, prompting corporate India to revise its diversity strategy as needed.

Although the verdict was not well received by the Christian, Sikh, Hindu or Muslim groups, the Indian business community responded by creating new HR policies to handle a variety of lesbian, gay, bisexual, and transgender concerns under the banner of diversity and equality.

Several businesses are discovering the value of questioning out-dated beliefs, providing open and safe work environments, and assuring better chances for LGBT population becomes more prominent in corporate India. The first LGBT podcast in India, JWT (*jub we talk*), launched in May 2012 in response to the needs of rapidly expanding gay and lesbian community. JWT covers important topics and circumstances.

Recently, building inclusive workplaces for LGBT workers in India, a reference guide for companies, was published by Community Business, a non-profit corporate social responsibility consultancy. Being a major LGBT advocacy organisation, Mingle (Mission for Indian Gay and Lesbian Empowerment) contributed its expertise to this project, which also had active support from major global corporations like Goldman Sachs, Google and IBM.

This ground-breaking guide provides actionable advice on how businesses may provide disenfranchised LGBT employees with welcoming work environments. “building a culture where LGBT people are respected, enabled to think independently and encouraged to share oneself completely, free up our co-workers to think outside the box, creating spectacular and inventive results for our clients,” says Vanitha Narayanan managing director of IBM India.

The viewpoint of LGBT employees

Mingle successfully finished its first manual LGBT workplace diversity and inclusion survey in 2012 in an effort to provide an employee perspective. The poll included 455 LGBT professionals from 17 prestigious organisations (in engineering, software, and IT services, and finance), of whom 65% identified as gay males, 25% as lesbians, and 10% as bisexual. A third of the participants mentioned workplace harassment, and 80% admitted to overhearing homophobic remarks in their workplaces. Positively, the poll discovered that open LGBT professionals performed better in this area than closeted workers.

Up to 90% of the study respondents said that while deciding whether to join a company, diversity and inclusion policies had a role.

For their LGBT employees, a number of corporations, including Google, Infosys, and Goldman Sachs, have taken concrete action. It is interesting to note that IBM covered LGBTs in their equal opportunity policy after including it in the manager’s manual as early as 1984. By founding EAGLE (Employee Alliance for Gay, Lesbian, Bisexual, and Transgender Empowerment), a networking group that aims to provide senior

employees with reverse mentoring benefits on a variety of issues ranging from alternative sexuality to career advancement, the company has already made a successful move.

IGLU, or Infosys Gay Lesbian Employees and You, is a project that works to create a courteous and secure work environment for LGBT employees by holding exclusive events and awareness activities to promote an inclusive culture. Similar networks have been established in India by Google and Golman Sachs. In order to reach a wider collection of skilled candidates in their Bangalore and Mumbai offices, Wipro Technologies decided to include “ I do not wish to specify” and “ others” as options on their application forms, while JP Morgan Chase recently took a radical step by adding “not specified” as a third option in the gender column.

What’s emerging next?

It is true that managing and hiring LGBT employees poses additional difficulties for managers and employers, particularly given how strongly religion and customs influence and shape Indian culture.

Since that 90% of the revenue and clients of the IT sector come from Europe and United States, Indian HR policies, particularly in the IT sector, are changing gradually to accommodate the needs of the LGBT population.

It is hard to overstate the significance of having LGBT role models in addition to progressive HR practices. High- level business leaders who come out of the closet and create confidence in the community greatly assist LGBT workers in India as they attempt to overcome challenges relating to their sexual orientation. For the third consecutive year, Apple CEO Tim Cook has been ranked highest on Out magazine’s Power50 list, and media tycoon David Geffen continues to inspire workers at all levels.

Building a supportive, discrimination free, and secure work environment for the Indian LGBT community has enormous and far- reaching benefits. The young but persistent initiatives to abolish the threat of job discrimination through legislative changes are positioned to help recruit and keep the greatest personnel.

TOP LGBT FRIENDLY BUSINESSES IN INDIA

The corporate landscape in India is ever-changing. Companies are becoming more considerate of their workers and workings to foster culture of inclusion and diversity. Employees nowadays are more sensitive, watchful and considerate of their employees’ preferences than they were ten years ago as the businesses gradually adapt to the new norms. As a result of the progressive shift, businesses are slowly but steadily taking steps to support and celebrate its LGBTQIA+ (lesbian, gay, bisexual, transgender, queer, intersex as well as people of various genders and sexual orientations) employees.

TATA Steel IWEI (India Workplace Equality Index) named Tata steel as the leading employer for LGBT+ inclusion in 2020. The benefits that are available to TATA Steel’s LGBTQ staff members are no matter their gender or sexual orientation, such as med claim insurance, leave for new parents, diversity and inclusion programmes that guarantees everyone is hired with equal opportunity.

Razor pay without regard to their orientation, Razor pay is the first fin tech firm in India to provide health insurance to the partners of its employees. With the new terms, the health insurance now includes services including gender reassignment surgery, infertility treatments, and same sex and lives in partners. The company’s updated health policy is a ground – breaking first step in establishing an inclusive, diverse, and supportive workplace for its employees.

Tech Mahindra it is another LGBTQ+ friendly Indian businesses, tech Mahindra, has concentrated on creating a welcoming and discrimination free workplace for all of its employees. Some of the company’s activities make it excellent place for LGBTQ workers such as adoption leave for LGBTQ parents and up to 12 weeks of leave for single parent, benefits from the health insurance are available to same sex couples. Flexible working hours and work from home availability for new parents. Kaleidoscope is a programme for LGBTQ workers that allow them a free platform to interact with and inform a bigger audience.

Hindustan Unilever Limited it is one of Indian firms to be recognised as one of the top employers for LGBTQ individuals by the work equality index in 2020 is always working to create an environment that values diversity and inclusivity. Some activities of HUL are events and workshops to inform participants about the LGBTQ community, bathrooms that are gender neutral providing all marital benefits to couples who are the same gender, support for gender transition deliberate hiring from the LGBTQ talent pool.

Microsoft from the early 1990s, Microsoft has been a supporter of LGBTQ community and one of its earliest supporters. In fact, Microsoft was the first fortune 500 corporation to provide same sex partners similar benefits

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in 1993. The business also made an effort to educate its employees on discrimination against the LGBTQ + community and to create awareness of the issue through its policies. The business not only provides a welcoming and discrimination free workplace for its LGBTQ+ employees, but also donates to trusts and charities to help the neighbourhood.

Axis Bank first bank to establish LGBTQ employee's full inclusion in the workforce. Axis bank has provided full health benefits to partners, regardless of their gender identity, same like the other corporations on the list. Also, the business encourages staff to wear in accordance with their gender identity and expression. With all gender restrooms in large workplaces, Axis Bank also gives its LGBTQ workers the choice to use washrooms in accordance with their gender identity. Birthing parent leaves have taken the place of maternity leaves at the company. With this policy change, employees who are giving birth to child can take use of these leaves regardless of their gender identity. Similar to maternity leave, paternity leave is now known as leaves for partners of the birthing parent, enabling new parents of any gender to take advantage of these leaves and ease into parenthood.

SUGGESTIONS

It is suggested that changes be made to the Maternity Benefits Act and Equal Remuneration Act in order to accommodate LGBTQ+ employees. Regardless of gender identity or sexual orientation, everyone should receive equal compensation, and regulations must be in place to ensure equal opportunity and access to employment. The rights of LGBTQ+ individuals are gradually becoming recognised throughout the world. Several multinational corporations, like YouTube, Microsoft, Infosys, IBM, Sodexo India, and Barclays, welcomed the LGBTQ+ movements in India as legitimate friends rather than merely as supporters. In addition to building sustainable organisations, a diverse workforce promotes innovation. India currently needs to enact and alter specific legislation and regulations in order to safeguard the rights of LGBTQ+ population in the workplace. Particularly for the commercial sector, a specific framework that embraces the identity of every person and their rights is necessary. Steps must be made right now to strengthen protection, including awareness- rising campaigns and effective application of already existing rights. To promote equality in India's raising economy and society at large, access to a good standard of living and equal opportunities are essential.

CONCLUSION

While many businesses have offered steps to promote the LGBTQ community, some are still lagging behind. While the majority of businesses promote inclusivity and put an emphasis on fostering a diverse, discrimination-free workplace, some have yet to announce specific policies and observable changes. Rest assured, we can anticipate the establishment of a number of additional LGBTQ friendly businesses in India shortly thanks to the effort and initiatives of big corporates and employees.

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