9. SEXUAL ORIENTATION

9.1. Introduction

Sexual orientation at workplace is probably the most sensitive and the least discussed diversity dimension (MorBarak E M, 2005) throughout the world. Though many countries have made a lot of headway in understanding and accepting this particular diversity dimension, there still exists a great deal of apprehension and closed mindedness in acknowledging the existence of varied sexual orientations. This outlook of the society is reflected in the attitude of organizations while addressing the issue of sexual orientation within the workplace. Organizations downplay the existence of this diversity dimension. However, in today’s world of disclosure and candidness one can no longer ignore the issue of sexual orientation, both in society and the workplace.

9.2. Sexual Orientation – Definition and Meaning

The following definitions on sexual orientation explain perspectives on sexual orientation. The term sexual orientation is used in reference to a person’s sexual preference.16 A person's sexual orientation is defined by the gender to which he or she is sexually attracted. (Clinical Social Work Journal- 17)

The inclination of an individual with respect to heterosexual, homosexual, and bisexual behaviour is termed as sexual orientation (Merriam Webster’s). “Sexual Orientation” is understood to refer to each person’s capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender (Yogyakarta Principle)

16 Under conventional classification, in reference to sexual orientation, a person may be heterosexual (people whose sexual attraction is primarily towards people of opposite gender), bisexual (primary sexual attraction to both men and women) or homosexual (refers attraction to the same gender). This term sometimes also extends to include transgender and intersex persons
Sexual orientation refers to a person’s sense of personal and social identity based on those attractions, behaviours expressing them, and membership in a community of others who share them (American Psychological Association). “Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or Gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex”. (Cameron, 1993).

9.3.  Sexual Orientation – A Worldwide Perspective

The world has been an unfair place for people with non-traditional sexual orientations. Though regional and international declaration on human rights and treaties exist to ensure equal treatment, formal and informal discrimination exists in all rungs of society including workplace. Reactions towards people expressing non-conventional sexual orientation and gender identity vary from being tolerant to condemnation and criminalization but never complete acceptance.

The following statistic from the 2009 Annual report of The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reveals the attitude and polices worldwide towards people adopting non-traditional sexual orientation.

9.3.1.  Legality

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) in its annual report, 2009 states that homosexual acts are legal in one hundred and fifteen countries and unclear in two countries (Djibouti and Iraq). There are eighty countries worldwide that deem homosexuality illegal (e.g. Iran, Mauritania, Saudi Arabia, Sudan and Yemen), twelve northern states of Nigeria and parts of Somalia have a death sentence for homosexual acts.

9.3.2.  Prohibition of entry

Four countries prohibit the entry of Lesbian, Gay, Bisexual and Transgender people into their country (Lesotho, Swaziland, Belize, and Trinidad and Tobago)
9.3.3. Employment Discrimination

There are 48 countries, such as Israel (1992) and Nicaragua (2008), that prohibits employment discrimination based on sexual orientation (including parts of the U.S., but not all 50 states). Only 16 countries prohibit employment discrimination based on gender identity; in 2009, Sweden became the most recent country to enact legislation on this issue.

9.3.4. Rights of Marriage

Only seven countries allow marriage of gay couples: South Africa (2006), Belgium (2003), Netherlands (2001), Norway (1-jan-2009), Spain (2005), Sweden (1-may-2009), Canada (2005), and the following U.S. States: Connecticut (2008), Iowa (27-apr-2009), Maine (14-sep-2009), Massachusetts (2004) and Vermont (1-sep-2009). Eight countries give same-sex couples most or all rights of marriage, including Denmark (1989), Finland (2002), Germany (2001), Iceland (1996), Switzerland (2007), United Kingdom (2005), and New Zealand (2005). Another 12 countries give some, but not all of the rights of marriage.

Analysis of this fact sheet emphasizes on the existence of discrimination on the basis of sexual orientation, however many countries have made headway in bringing the issue into mainstream and formulating laws that would ensure equal treatment for people with varied sexual orientations in all spheres of life – society, employment, housing marriage rights etc. Gay rights started expanding in Europe in the 1960’s, in the United States in the 1970’s, and in Latin America in the late 1990’s.

9.4. Role of international organizations and treaties

Criminalization and condemnation of varied sexual orientation is increasingly recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all. There is a growing jurisprudence and other law related practices that identify a significant application of human rights law with regard to people of diverse sexual orientations and gender identities. This development can be seen at the international level, principally in the form of practice related to the United Nations – sponsored human rights treaties, as well as under the European Convention on Human Rights. The sexual
orientation and gender identity related human rights legal doctrines can be categorized as follows: (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity.

In December 2008, 67 of United Nations 192 member countries signed a historic UN statement against the criminalization of homosexuality. The statement endorsed by 67 States from around the world called for an end to discrimination based on sexual orientation and gender identity. The statement condemns violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity. It also condemns killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights on those grounds. The statement reaffirms existing protections for human rights in international law.17

9.5. **Yogyakarta Principles**

On 26th March, 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. The principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity. This was drafted by experts who came from 25 countries representing all geographical regions.

Yogyakarta principles recognizes that

- Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their

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17 An alternative statement was read out supported by 57 member nations rejecting the idea that sexual orientation is matter of genetic coding and condemned that the declaration delves into matters of domestic jurisdiction of states and would possibly lead to the legitimization of many deplorable acts like paedophilia
welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity

In interventions relating to sexual orientation and gender identity issues countries are increasingly referring to Yogyakarta principles. It is these international efforts along with the movement for LGBT\(^ {18} \) rights within India that provided the context and arguments for the decriminalization of homosexuality.

9.6. Sexual orientation at workplace

Bias and unfavourable disposition towards LGBT people leads to discrimination at workplace. Some organizations, earlier in the less tolerant times used to explicitly make it clear that LBGT people are not welcome. Several instances in history attest this. In US, gay people were forbidden to serve in military (Eskridge and Hunter, 1997). They were banned from working with children (Eskridge WN Jr and Hunter ND, 1997) Sexuality, Gender and Law, New York: Foundation press).

Even today when world has made strides in accepting sexual orientation as an extension of a person expressing their identity, the issue concerning sexual orientation is mostly overlooked in workplace. Workplaces though not belligerent on the topic mostly adopt the stance of “Don’t Ask, Don’t Tell” dictum and shrinks from acknowledging the issue openly. Employees are reluctant to reveal this part of their identity in fear or ostracism or retaliation. Discrimination at workplace manifests in forms of alienation, ridicule, denied opportunities, physical abuse, workplace vandalism, unequal pay or benefits (Badget Lee 1992., Durkin 1998., Fox Sarah D., 1999)

9.7. Sexual Orientation in Indian Culture and Social Life

Sexual orientation was never a subject of open discussion in Indian society till recently. Indian society in general considers discussions of any sexual nature a taboo if we trace through the

\(^ {18} \) The term LGBT further in the document stands for Gay, Lesbian, Gay, Bisexual and Transgender
years, there have been references that indicate that ban on homosexuality was a western import and Indian views towards homosexuality were lenient in the pre-colonial era (Transcripts from Manusmriti and excerpts from Kamasutra). Also in Indian (mostly south Asian) culture, we find “hijras” who are considered as people of third gender.

Though certain research papers (Arabsheibani Reza, Marin Alan and Wadsworth Jonathan, 2005) indicate differential employment rates, it is difficult to come to conclusion that these differentials reflect different discriminatory practices without further research in the area. A work atmosphere which tolerates such discriminatory practices and attitudes (LGBT jokes, gestures and rumours adversely affects the productivity and collective climate of an organization.

Though attempts have been made to quantify the number of gays, lesbians and transgender individuals in India it doesn’t seem to be accurate. The Government of India puts down the number of homosexual people around twenty five lakhs. The number of transgender and intersex people is said to be several lakhs as well. In another estimate by Humsafar Trust, number of gays, lesbians and transgender individuals totals up to seventy million. Estimated percentage of sexually active males in India who have had sex with men according to National Aids health survey is twenty five percent. This variation in the estimates might be attributed to the inconsistencies in sample selection. However it is clear that there exist a large number of people with non-traditional sexual orientation in India.


It was in 1860 when Indian penal code was drafted by Lord Macaulay, Section 377 which brought in the concept of ‘sexual offences against the order of nature’ was added. This section deemed homosexuality illegal in India.

#### 9.8.1. The Delhi Court Judgement (2009)

The judgment of the Delhi High Court in the Naz Foundation (A non-profit organization based in New Delhi) Vs Government of NCT of Delhi and Others is considered as a milestone in the jurisprudence on diversity and pluralism in India. Importantly, it paved way to further open
discussion on the diversity dimension of sexual orientation. The 2009 judgment bears
significance for the rights of lesbian, gay, bisexual and transgender people (LGBT) in India.

9.8.2. Excerpts from the judgment – 2009 Delhi High Court Ruling

The court declared that section 377, where it criminalized “consensual sexual acts of adults in
private” violated the fundamental rights to personal liberty. (Article 21 of the constitution,
Equality (Article 14), prohibition of discrimination Article 15). The court ruled that Indian
constitutional law does not permit the statutory criminal law to be held captive by the popular
misconceptions of who LGBT’s are. The court held the view that discrimination is the antithesis
of equality and that it is the recognition of equality which will foster the dignity of every
individual. The Court further elaborated that “Homosexuality is not a disease or a disorder and is
just another expression of human sexuality. Court’s reinterpretation of section 377 would hold
until parliament amends the law. Drawing on Dr. Ambedkar, “Constitutional morality is not a
natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it.”,
the court rejected the argument that homosexuality was contrary to public and popular morality
in India, upholding constitutional morality instead, the diffusion of which was contingent on Dr.
Ambedkar’s ideas of notional change, as evident in the lines quoted above. To quote from the
judgment: “The Constitution of India recognizes, protects and celebrates diversity. To stigmatize
or to criminalize homosexuals only on account of their sexual orientation would be against the
constitutional morality” (Para 80).

The court opined that criminalization of homosexuality condemns in perpetuity a sizable section
of society and forces them to live their lives in the shadow of harassment, exploitation, and
humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.
Section 377 IPC is considered to violate right to privacy and liberty embodied in Article 21
insofar as it criminalizes consensual sexual acts between adults in private. It again held that such
a law violated the right to privacy, and maintained that even a “consistent policy” of not bringing
prosecutions under the law was no substitute for full repeal attitude towards sexual orientation.

After the Delhi High Court order decriminalizing homosexuality, the National Law School has
asked the Centre to recognize "sexual orientation" as a source of discrimination against which
there should be statutory protection. The law school wanted the Centre to put "sexual orientation" in the list of `grounds of discrimination' requiring safeguard in the Equal Opportunities Commission.

9.9. Sexual Orientation in Indian Workplace

Sexual orientation at workplace was never before a topic of open discussion in corporate India due to the fact till recently under section 377 of Indian Penal code, homosexual acts were illegal in India. This section 377 of IPC was overturned in a landmark judgment by a Delhi High Court ruling (on July 2, 2009) legalizing and decriminalizing private consensual sex between adults of the same gender. This judgment is significant because addressing the issue of sexual orientation opened a new chapter in the realm of inclusivity. Unto the point of this judgment, most of the Indian companies who have international operations mention sexual orientation in their diversity statement only to comply with the international standards and host countries laws. But apart from meeting the concerned legal requirements sexual orientation was not openly discussed and never featured among the diversity topics in Indian corporate world including Indian IT-ITES sector. Human Resource managers always veered out of the topic citing the element of illegality concerning the issue. But after the 2009 judgement that the issue is out in open, criminalization aspect lifted and with the court identifying it as an extension of a person expressing his/her sexuality some organizations in Indian IT and ITES sector start addressing this diversity dimension (IBM - India, Infosys, Google –India). This includes, expanding the company’s diversity statement and support systems by adding sexual orientation as a diversity dimension and establishing policies and prompting initiatives in this regard.

9.10. Sexual Orientation in Indian IT and ITES Industry

When the topic of discrimination based on sexual orientation was introduced in the focused interview the respondents were not much aware of specific diversity initiatives targeted towards this particular diversity dimension. Majority of the respondents were of the opinion that open expressions of varied sexual orientations might lead to uncomfortable situation in the organization. When the fact that sexual orientation is quoted among the diversity dimensions in
the company policies and diversity statements was pointed out, all the respondents reacted that they haven’t been part of any sensitising training or have ever come across any active endeavours from the part of the organization in India.

When the query to elaborate on the policies and procedures to make the workplace a positive environment for employees of all sexual orientations, HR professionals responded that they do not have any active inclusivity initiatives or established policies addressing sexual orientation. The common response was that they haven’t come across any specific situation involving sexual orientation and if such a situation arises they will take steps necessary to ensure that discrimination based on sexual orientation doesn’t take place. One HR manager said that they do not have people with an evidently non-heterosexual orientation and therefore the opportunity to be dealing with any ambiguous situation has not been there. It was further added that however, in general if any employee feels harassed because of any reason they will take steps to control and correct immediately and therefore it should apply to people of any sexual orientation too.

Thus though the responses were that they provide equal opportunity to everyone irrespective of their difference, when asked about sexual orientation companies responded that, there is really no specific policy or procedure that is put down in black and white to make the workplace a positive environment for workers of various sexual orientations.

During an in-depth interview with an employee who self-identify having non-conventional sexual orientation requested anonymity while expressing his views. The interviewee’s opinion is that Indian workplace is still not attuned to realise and accept this diversity dimension in its full complexity. According to him the organizations still follow a ‘don’t ask, don’t tell’ policy when it comes to sexual orientation. For sexual orientation to be a diversity dimension addressed in full scale in the ranks of other dimensions like gender and disability the organizations will have to lay a lot of ground work, the first step stopping to be elusive on the topic of sexual orientation as a diversity dimension.

To gather information on the Indian IT and ITES industry’s stand on sexual orientation as a diversity dimension, the diversity initiatives in regard to sexual orientation in organizations in
Indian IT and ITES sector is studied in detail. The findings of the study are based on data compiled from 50 companies across Indian IT and ITES industry.

Policies and practices, diversity and inclusivity endeavours in reference to sexual orientation as a diversity dimension is looked into. Findings based on the studies relating to diversity dimension sexual orientation in Indian IT – ITES industry is elaborated below:

- Forty five percent of organizations included in the study recognizes and mentions sexual orientation their diversity statements or non-discrimination policies. The forty five percent positive responses in the study belonged mainly to Indian and foreign MNC’s. Even if mentioned in diversity statements, in these companies, diversity initiatives are not focused on sexual orientation. Gender, disability and national origin are the diversity areas on which the companies are most focused. No evidence to suggest active efforts addressing inclusivity of people of varied sexual orientations was found in any of these organizations in India.

- Companies who have operations only in India didn’t have any elaborate diversity statements.

- Majority of the multinationals of foreign origin (in the study) in their corporate diversity statements have included sexual orientation in their diversity statement or non-discrimination policies. Ninety five percent of the companies in study have portrayed themselves as Equal opportunity employers. Sixty percent has well established initiatives and policies and procedures addressing sexual orientation and gender identity as a diversity dimension. Initiatives targeted on sexual orientation and gender identity to make the workplace inclusive ranges from recognizing sexual orientation as a diversity dimension to formulating focused policies and interventions aimed at welcoming and assimilating people with varied sexual orientations. These practices include
  - Gay Lesbian Bisexual Transgender (GLBT) networks and affinity groups (Cisco, Accenture, Convergys, Microsoft, Oracle, SAP, Google,)
  - Same sex domestic partner benefits (Cisco, Accenture, Microsoft, Sun Microsystems)
  - Gender-correction surgery and other medical benefits (CISCO, Microsoft, Sun Microsystems)
o Tax-initiative program aimed at reducing the tax burden gay and lesbian couples (CISCO)

o Transparent recruitment efforts which reflect open acceptance of LGBT applicants (Accenture, IBM)

o CSR activities – Pro bono work for LGBT charities, public support and representation to various external LGBT focus events (Accenture, Microsoft)

o LGBT sensitization training

o Regular audit of policies and procedures to ensure they are inclusive of gay and lesbian employees (Accenture)

o Help line to report violations including that relating to sexual orientation. (Cognizant)

The above statistics and policies reveals the company’s organizational and corporate view on sexual orientation worldwide, however active endeavours in relation to this diversity dimension haven’t been pursued by any of these organizations in India. The legality factor and qualms about social rectitude concerning sexual orientation serve as a good explanation as to why the foreign MNC’s who have detailed and innovative policies regarding sexual orientation didn’t actively pursue it in India.

9.11. Observations based on the study

Indian IT and ITES sector is considered to be having one of the most diverse workforces. Indian IT and ITES sector have put forwarded many initiatives to address the matter of diversity among its workforce and to make it more inclusive. But these diversity initiatives and efforts doesn’t reflect in all quarters. While addressing diversity, when policies and support systems were formed to address diversity dimensions like gender and disability, sexual orientation was never a subject of discussion. Most of the prominent Indian IT and ITES companies in their diversity statements have mentioned that a person’s sexual orientation will never be a source of discrimination. This is mainly for the benefit of the host countries in which they operate. But apart from that discernible efforts in the form of awareness training or workshops have been lacking on the part of these organizations. Indian society’s and corporate worlds guarded and reticent attitude on dealing with such topics involving moral debate is replicated in the Indian IT
and ITES industry. Legal standing in India on homosexuality might be another reason why Indian IT and ITES industry didn’t explicitly delve into this diversity dimension.

Since majority of the players in information technology has their mark spread over the globe these organizations should ensure that their policies and procedures comply with the host counties legal stand on sexual orientation. Also a lot of Indian employees are deployed to foreign countries for onsite assignments and since a reverse deployment of foreign expatriates is common in IT- ITES sector it is necessary that the employees are given proper orientation through training on how to conduct oneself in a diverse environment where one might have to interact with people who openly professes their varied sexual orientation.

With changing times and attitudes in our society, more people are likely to openly express their sexual orientation. To avoid a situation which can lead to discrimination and harassment due to the conflict of thoughts and expressions in sexual orientation, Indian IT and ITES organizations should be prepared to address this diversity dimension. In India, apart from the provisions in the Indian constitution – Equality (Article 14) and prohibition of discrimination (Article 15) and there are no laws that deal directly with discrimination in workplace in reference to sexual orientation and gender identity. In most of the countries there is a scarcity or absence of law that prohibits workplace discrimination based on sexual orientation and gender identity or expression. Corporate sector in India had started some efforts in this regard. Goldman Sachs, IBM, Google sponsored a Resource guide for employers – Creating an Inclusive workplace for LGBT employees in India. These efforts coincided with the high court verdict of decriminalizing section 377.

Findings from the study make it clear that Indian company in IT and ITES industry doesn’t have specific inclusivity initiatives that address sexual orientation. Most of foreign MNC’s) and some Indian organizations have included sexual orientation in their diversity statement but policy and initiatives wise sexual orientation doesn’t find a place in the inclusivity agenda. Foreign counterparts of Indian MNC’s in this study started incorporating sexual orientation in their diversity initiatives in 1980’s and 90 are in the country of their origin. For these organizations extending their diversity statements to include sexual orientation was the starting point. Likewise
acknowledging the existence of this diversity dimension should be the first step for Indian companies in IT and ITES industry. But the legal grey area prevents organizations from addressing this openly.

9.12. Suggestions

Steps towards incorporating sexual orientation as diversity dimension is put together after studying the practices of organizations that address sexual orientation as a diversity dimension

1. First step while addressing sexual orientation in workplace is recognizing sexual orientation as a diversity dimension.

2. Inclusion of sexual orientation in the diversity statement or mission along with other dimensions can be the starting point.

3. Efforts should be concentrated to make sure that there is no scope for discrimination based on sexual orientation in employment decisions like hiring, promotions, compensation and benefits, transfers, termination.

4. Policies and practices shouldn’t give any scope for ambiguity. Review and if necessary revamp internal policies and procedures. Examine policies, guidelines, forms (including application form) to ascertain that they don’t form basis for discrimination and comply with the current anti discriminatory laws of the country in which the organization operates.

5. Next and the biggest challenge include creating awareness and building up an organizational climate which accepts sexual orientation as an extension of a person’s identity.

6. Consistent communication with employees educating them on the antidiscrimination policies and expected behaviour is necessary. This has to be reinforced through diversity trainings and workshops and effectiveness of these measures have to be monitored and evaluated.

7. Statements issued from the top management which makes clear the organizations stand on sexual diversity dimension will reinforce the efforts.

8. Trained HR and diversity personnel with relevant experience are important while dealing with issues and concerns which crops up with sexual orientation.
9. Establishing support systems like counselling, network and affinity groups helps in assimilating the diversity dimension sexual orientation in the organization.

10. Zero Tolerance policy – Ensure that the message, any discriminatory behaviour will be strictly dealt with and not tolerated is conveyed throughout the organization.