

ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

ON LAW & MULTIDISCIPLINARY ISSUES

VOLUME I, ISSUE IV

JULY, 2020

Website - journal.lexresearchhub.com

Email - journal@lexresearchhub.com



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UNSILENCING DISCRIMINATION OF LGBTQ COMMUNITY

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ABSTRACT

The discriminatory policies and the absence of proper civil rights for the community persons. It talks about the absence of marriage and adoption laws for the LGBTQ community. It voices out the criticisms of the Transgender Persons (Protection of Rights) Act 2019 and its regressive nature. Oppression and Discrimination of the community in various fields such as professional setup, personal health, living conditions, acts of bullying and harassment, etc. There has been a further line drawn with the constitutional provisions and how it stands in support of the LGBTQ community. The Article concludes on the note of various commentaries, statements, judgements surrounding the Queer Movement.

Keywords - LGBTQ, Civil Rights, Regressive Laws, Oppression, Discrimination

INTRODUCTION

Social Justice takes within its sweep the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities. The term "Justice without a doubt means Justice to the deprived and weaker sections of society bringing an egalitarian order under which opportunities are afforded to the weaker sections of society"¹

Infringement of Social Justice is something that is a direct attack on the individuality and the existence of a being in the society. Such violations are a set back to the society and the State.

Today India is a victim to many social wrongs, among them one of the major social wrongs is the oppression of the sexual minorities of the country. Lesbian, gay, bisexual, transgender, queer and people from other sexualities and gender are the people collectively called the LGBTQ+ community. These people of the sexual minorities are equally a part of the society and the State, they are no different from the other citizens and are equally protected by the Constitution of India.

“That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognized and protected by the Constitution”.

¹ Punjab National bank v. Gulam Dastagir AIR 1978 SC 481.

Opined by Dr. Dhananjaya Y Chandrachud, J in the case of Navtej Singh Johar & Ors. v. Union of India. Secretary Ministry of Law and Justice²

As Ms. Guruswamy told an interviewer at The Caravan magazine³:

“But you create constitutional principle. And then you build on it. India’s Supreme Court laid that foundation and has offered renewed hope in the power of democratic institutions to ensure that all people enjoy equal protection under the law”

In 2009, the Delhi High Court decision in Naz Foundation v. Govt. of NCT of Delhi⁴ found Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution. Section 377 stated thus:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine,", added explanation: "Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section"⁵ .

1 May 2018, In response to the court's request for its position on the petitions, the Government announced that it would not oppose the petitions, and would leave the case *"to the wisdom of the court"*. A hearing began on 10 July 2018, with a verdict expected before October 2018. Activists view the case as the most significant and *"greatest breakthrough for gay rights since the country's independence"*, and it could have far-reaching implications for other Commonwealth countries that still outlaw homosexuality.

Through the subsequent years, we see the struggle and the perils that the people of the LGBTQ community has gone through where to get their basic human rights as an individual. Merely someone’s sexual orientation or choice of partner could make them a criminal in the eyes of

² W. P. (CrI.) No. 76 of 2016

D. No. 14961/2016

³ A Win of LGBT , Sep 20, 2018, <https://www.nytimes.com/2018/09/20/opinion/editorials/india-gay-rights-supreme-court.html>

⁴ 160 Delhi Law Times 277

⁵ Sl No. 3 from judgement , “Within this Chapter Section 377 IPC is categorised under the sub-chapter titled ‘Of Unnatural Offences’ and reads as follows:”

the law, this itself was beleaguered and was in contradiction to the Art 14, 15 and 21. Such a situation is clearly negligence of social justice.

“Colleges and Universities in the past few years have taken major steps to prevent sexual harassment from taking place on campus, but students have reported violence due to their sexual orientation. Sexual harassment can include "non-contact forms" such as making jokes or comments and "contact forms" like forcing students to commit sexual acts”⁶.

Through the recent landmark judgment of 2018 in Navtej Singh Johar & Ors. v. Union of India the Secretary Ministry of Law and Justice⁷ there has been decriminalization of consensual same-sex but the atrocities of the community are still on the play. Due to the history of non-acceptance and derogatory law against the community the society has turned a back to the entire community.

DISCRIMINATORY LAWS, POLICIES, AND OPPRESSION

The society comprises of cis-gender and transgender individuals, the transgender ambit is a huge umbrella concept consisting of all the people of the LGBTQ community⁸ . And considering this in mind laws and policies to function the LGBTQ community and guide their way through proper civil rights are what should be done.

MARRIAGE AND ADOPTION

Same-sex marriage laws are still AMBIGUOUS in India and there are very limited civil rights that are offered to the people of the community. Civil unions have been observed in rare cases and mere provision of domestic partnership is offered to the people of the community but there are no MARRIAGE ACTS or LEGISLATIONS that are yet established for LGBTQ people. In 2011, a Haryana court granted legal recognition to same-sex marriage, involving two women.⁹ After marrying, the couple began to receive threats from friends and relatives in their village. Their lawyer said the court had served notice on 14 of Veena's relatives and villagers who had

⁶Pérez, Zenen Jaimés; Hussey, Hannah , Hidden Crisis: Including the LGBT Community When Addressing Sexual Violence on College Campuses , 2014-Sep-19

⁷ W. P. (CrI.) No. 76 of 2016
D. No. 14961/2016

⁸Jeff Johnston, Who is Included in the ‘Transgender Umbrella?’, pg 22

⁹ *"In a first, Gurgaon court recognizes lesbian marriage - Times of India". The Times of India , 2018*

threatened them with "dire consequences" that may even be honour killing which is very prevalent in that state. Living in a country that doesn't have any marriage laws for homosexual couples who are equal citizens of the country is nothing but turning a blind eye to the existence of the LGBTQ individuals of the society by the Government. Today with the wavering of anti-gay laws, the rights that they deserve should be introduced and implemented too.

On 11th October 2017, a group of citizens proposed a draft of a new Uniform Civil Code that would legalize same-sex marriage to the Law Commission of India¹⁰. It defines marriage as "the legal union as prescribed under this Act of a man with a woman, a man with another man, a woman with another woman a transgender with another transgender or a transgender with a man or a woman. All married couples in partnership entitled to adopt a child. The sexual orientation of the married couple or the partners not to be a bar to their right to adoption. Non-heterosexual couples will be equally entitled to adopt a child". There are currently several same-sex marriage petitions pending with the courts.

Legal recognition and protection to same-sex couples by legalizing marriage or civil union and must be included under special marriage act 1954 so that the partner can be listed as a dependent for an inheritance, alimony in case of divorce, etc.

Non-existence and non-recognition of certain rights are also an attack on social justice.

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

Transgenders; They have been a part of a country that did not give them any proper citizenship, identity as Indians, therefore, no ration cards, voting rights, employment or any financial benefit from the government, In the 1850s, the British "discovered" a community of transgender eunuch performers, the hijras, and legislated for their surveillance and control under the Criminal Tribes Act (CTA) in 1871 until The Rights of the Transgender Persons Bill of 2014 with a motive to end discrimination faced by the transgenders in India. Although there is an act introduced the struggle and oppression has not stopped existing.

¹⁰ Progressive UCC Draft: One Marriage, Divorce and Adoption Law, and Dissolution of HUF , oct 2015
<https://thewire.in/government/uniform-civil-code-draft-law-commission>,

The Transgender Persons (Protection of Rights) Act, 2019, which was initially introduced to Parliament as a bill in August 2016, was re-introduced to Parliament in late 2017. Some transgender activists have opposed the bill because it does not address issues such as marriage, adoption, and divorce for transgender people. Akkai Padmashali (2018) criticized the act's definition of transgenderism, which states that transgender people are "based on the underlying assumption of biological determinism". The Act seeks to set up a tedious procedure for obtaining an identity certificate, which will

- 1) require an application being moved in the office of the District Magistrate,
- 2) the application is sent to the screening committee,
- 3) the screening committee reviewing the application (and in all likelihood the applicant) and giving its recommendation back to the District Magistrate,
- 4) the District Magistrate then issuing the identity certificate, which will entitle one to protection under the law.¹¹

The entire concept of GENDER gets violated here as gender is not something that one is assigned during birth, it is the biological sex that one is given¹².

The plea filed by advocate and trans activist Swati Bidhan Baruah challenged the validity of the Transgender Persons (Protection of Rights) Act, 2019, arguing that it treats the trans community with suspicion and reinforces prejudices against them. The petitioner said the Act, instead of furthering or protecting the rights of trans persons, violates their right to equality, life, and privacy under Articles 14 and 21 of the Constitution¹³.

Given the history of negligence and ill-treatment, the transgender people have had they are still in a miserable state. Transgender communities like *hijras*, *kothis*, *jogtis*, *shivashaktis* etc have been sustaining lives through begging and sex work, the quality of their life is very low which means low hygiene, sanitation, food, shelter, medical and financial privileges.

¹¹ Section 4-6 of Transgender Persons (Protection of Rights) Act, 2019

¹² AN INTRODUCTION TO GENDER – STANFORD UNIVERSITY,
<https://web.stanford.edu/~eckert/PDF/Chap1.pdf>

¹³ Supreme Court notice to Centre on plea against transgender act, (Jan 28, 2020 06:04 IST),
<https://www.hindustantimes.com/india-news/supreme-court-notice-to-centre-on-plea-against-transgender-act/story-HfBrPZBTFmum9theecWoL.html>

In April 2014, Justice KS Radhakrishnan declared transgender to be the third gender in Indian law, in a case brought by the National Legal Services Authority (Nalsa) against Union of India and others

“ Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change. ”

Transgenders face poverty and also face death due to the lack of diagnosis or treatment with proper medical care. A study conducted in a Mumbai STI clinic reported a very high HIV seroprevalence of 68% and high syphilis prevalence of 57% among Hijras. In Southern India, a study documented a high HIV seroprevalence (18.1%) and Syphilis prevalence (13.6%) among Hijra's¹⁴.

“Transgenders drop out of mainstream schools at a very early age because of the prejudice they face from the people around them. While the intention of opening this school is noble, the ultimate aim should be to integrate transgenders into society. That won't be easy,” Anjali Gopalan, a LGBT activist¹⁵

"All my colleagues turned against me. Most of the students, too, were opposed to me. I always tried to create an atmosphere conducive to studies in the college, but they didn't like it," said In May 2015, Manabi Bandopadhyay became India's first transgender college principal.

There have been many reports of abuse, harassment, and violence over the years directed against LGBT people. In 2003, a hijra was gang-raped in Bangalore, and then gang-raped by the police. Testimonies provided to the Delhi High Court in 2007 documented how a gay man abducted by the police in Delhi was raped by police officials for several days and forced to sign a "confession" saying "I am a gandu [a derogatory term, meaning one who has anal sex]". In 2011, a Haryana lesbian couple was murdered by their nephews for being in an "immoral" relationship. In early 2018, a lesbian couple committed suicide and left a note reading: *"We have left this world to live with each other. The world did not allow us to stay together."*

¹⁴ Swati Bisen, GNLU , Statistics and Survey on Hijras, February 13, 2015

¹⁵Murali Krishnan, 03.01.2017, (New Delhi), <https://www.dw.com/en/indias-first-transgender-school-opens-but-discrimination-remains/a-36986873>

Figures released by the National Crime Records Bureau, which tracks police complaints, suggest that many more cases are lodged, lawyers said. In 2014, the first year the bureau says it started tracking Section 377 cases, 1,148 complaints were filed. In 2016, the number had nearly doubled to 2,187. That year, over 1,600 cases were sent for trial.

NCRB has been reporting cases Between 2014 and 2016, there were 4,690 cases of persons being booked under the then Section 377, and ended up being applied even to consensual homosexual sex between adults booked under this section since 2014. However, the number of cases do not reflect its underlying unfairness, because such laws lend themselves to arbitrariness, allowing police to harass citizens based on their sexual preference.

It is said that the LGBTQ people need to ask for the basic rights that they are entitled to as Indians. They are not asking for special privileges but their basic human rights as an Indian from India.

CONSTITUTION AND OTHER PROVISIONS FOR LGBTQ COMMUNITY

Mr. Justice K. Ramaswamy has expounded the concept of social justice In Consumer Education Research Centre v. Union of India¹⁶ and observed: “The Preamble and Article. 38 of the Constitution of India is the supreme law that envisages social justice as its arch to ensure life to be meaningful and liveable with human dignity. The concept of social justice which the Constitution of India engrafted, the concept of diverse principles essential for orderly growth and development of the personality of every citizen. Social justice' is thus an integral part of justice in a generic sense. Justice is a genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the deprived sections of the society and to elevate them to the level of equality to live a life of dignity of the person.”

In the landmark judgment of National Legal Services Authority v. Union of India¹⁷ the Supreme Court of India, which declared transgender people to be a 'third gender', affirmed that the fundamental rights granted under the Constitution of India will be equally applicable to transgender people, and gave them the right to self-identification of their gender as male, female or third-gender. This judgment is a major step towards gender equality in India.

¹⁶ AIR 1995 SC 929 (938)

¹⁷ WP (Civil) No 604 of 2013

Moreover, the court also held that because transgender people were treated as socially and economically backward classes, they will be granted reservations in admissions to educational institutions and jobs.

Article 15 in The Constitution Of India 1949 ensures the Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth. Art 15 (4) states that Nothing in this article or clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes.

Article 16 in The Constitution Of India 1949 says Equality of opportunity in matters of public employment, Art 16 (1) mentions There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State art 16 (4) says Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Article 21 in The Constitution Of India 1949 ensures Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to the procedure established by law. Also, the scope of Art 23 is to be considered as protection from trafficking is to be given to a large section of transgender society who are exploited in this very trade as well.

In consistence with the above articles, we can derive that exploitation or discrimination towards Queer Community is unjust, unlawful, and cannot be justified. From casual bullying to heinous crimes towards the LGBT persons should be voiced out in support of the constitutional provisions that the law of the Land provides us with.

Measures to address bullying, violence, and harassment of gender non-confirming and LGBT students, staff and teachers in educational spaces, enforcement of UGC anti-ragging policy amendment (2016) that addresses harassment on the basis of sexual orientation or gender identity. safe corridors and bathrooms for trans, intersex, and gender non-conforming students, staff and faculty.

Nine years later to the case of the University of Kerala Vs Council, Principals', Colleges, Kerala & Ors¹⁸ UGC has updated its anti-ragging policy, in June 2016, which got inclusive of Sexual Orientation and Gender Identity.

With the help of the constitution of India a line of rights must be created for the LGBTQ community as this would be beneficial to diminish the human rights violation that they go through every day.

SUGGESTIONS AND CONCLUDING STATEMENTS

As per multiple personal interactions, the common statement learned is that the existence of DISCRIMINATION, specifically a kind of stigma or taboo attached to being homosexual. The society is not unaware of homosexuality but they are non accepting, ignorant and choose not to validate it. A law can definitely prove to be of help to the community but law can barely change the mindset of the people. Acceptance is not mechanical, it comes internally and a lot of societal and emotional factors are attached to it.

” I remember a lecturer in the common room once throwing a paperweight in my direction and hitting me in the chest. I couldn't go to the toilet. My access to the women's toilet was barred and I couldn't use the male washroom. So I had to wait till I reached home to relieve myself.”

Says Manabi Bandyopadhyay to The Caravan ¹⁹India's first openly transgender college principal and first transgender person to hold a Ph.D.

Furthermore, on summing up different interviews the common statement was that although there are few emerging rights for the LGBTQ community there is discrimination in the workplace, discrimination is in the form of mocking, bullying, non-acceptance. On introspecting the problem and as per the interrogations it can be concluded that gender education, sensitization regarding sexual orientations should be taught in educational institutions so people have knowledge of it, this might curb the homophobia to a great extent. These discriminations stand tall with the existence of hetero-normative laws infringing social justice in the community and this is where we should take care of the infringement of such

¹⁸ (with SLP(C) No.24296-99/2004 & W.P. (CrI) No. 173/2006 and SLP(C) No.14356/2005)

¹⁹MONOBINA GUPTA , “My harassers belonged mostly to the educated, urban, middle classes”: An Interview with Manabi Bandyopadhyay, India's first transgender principal , The Caravan ,07 December 2015
<https://caravanmagazine.in/vantage/my-harassers-educated-urban-middle-classes-an-interview-with-manabi-bandyopadhyay-indias-first-transgender-principal>

social justice. Awareness regarding HIV, STDs, and STIs should be held by NGOs and govt programmes among the LGBT and especially the hijra communities to keep them safe and healthy.

A 2017-2018 survey of young people (15 yrs-34yrs) in 19 states conducted by CSDS and the Konard Adenauer Stiftung found that just 28% said society should accept same-sex relationships while 46% disagreed to it, and the rest chose to remain silent on it.²⁰

From this data, we learn that just behaviour and sensitization is needed.

In the case of Navtej Singh Johar & Ors. v. Union of India the Secretary Ministry of Law and Justice²¹ Justice Indu Malhotra opined;

“History owes an apology to these people and their families. Homosexuality is part of human sexuality. They have the right to dignity and free of discrimination. Consensual sexual acts of adults are allowed for [the] LGBT community”.

While the modern and progressive India is growing the authorities must not miss out on the implementation of proper laws and policies, give visibility to the community and create space for Civil Rights that have judicious and appropriate locus standi to the LGBTQ community.

²⁰ Rukmini S. , Homosexuality in India: What data shows, 14th Sep 2018 ; livemint.com

²¹ (2018) 6th sept