

Rainbow Community: A Legal Challenge in India¹

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Abstract The rainbow community in India has been facing several problems in India which has become the issue of human rights which is indeed a need of the hour to discuss and find the solution to establish a just society in which everyone lives with peace and according to the will of oneself hence this abstract tries to understand the role of constitutional principles, human rights treaties, and court rulings in shaping legal outcomes for transgender people. By analyzing current legal trends and debates, this study underscores the importance of clear, consistent, and rights-based legal frameworks to ensure equality before the law. Understanding transgender legal issues is essential for policymakers, legal professionals, and educators seeking to promote fairness, reduce discrimination, and uphold fundamental human rights.

Key words Rainbow community (LGBTQ), Section 377, Transgender, Homophobic, Transsexual

Introduction

The total population of transgender in India is around 4.48 Lakh as per the 2011 census in which the top largest Transgender population are found in the Uttar Pradesh, Andhra Pradesh, Maharashtra respectively. Which is indeed not a small number that is why it becomes important that their issues which are very often refrained from the discussion in mainstream society as it is prevalent fact this is a section which is discriminated by all walks of life be it at social, political or economic level which makes them more vulnerable group within the society. However, there are attempts which have been taken by the Indian state itself in order to uplift their condition in society for an example the election commission's directive in 2009 which provided the updated option for registration form in which "Other" option was made available allowing transsexual individual to avoid male or female identification. That was steps towards reforming and giving them opportunity to accept themselves in society as other if they don't want to be in the male or female binaries. In fact, in 2014 the Supreme Court of India recognized the transgender people as the Third gender emphasizing it as a human right issue.

There are several issues which are faced by transgender in India as Indian society is a homophobic society in which living with the identity as someone being transgender or homosexual becomes a huge problem to survive. In the India society as this act is considered as sin and unnatural in the eyes of people as it results into their marginalization and exclusion from the society which leads to limited opportunities for social participation that is to some extent lower their self-esteem and is reason of isolation. In the public spaces like restrooms and shelter often fails to accommodate transgender people which exposes them to harassment, marginalization. Because of their identity transgender face bullying and exclusion in the educational spaces which results as higher dropout rates from the educational institutions as per the survey transgender literacy rate is of 46% compared to national average which is 74%. In fact homelessness as well is a big problem which is faced by transgender people as they are rejected by their families leads to lack of housing options forcing them to live in stress. Facing abuse, mental health issue and drug addiction in which they may be involved as it is evident that most the people in India transphobic due to which transgender individual are often subjected to violence, harassment and discrimination as society is intolerance and transphobic as Transphobic stands to negative attitude fear, hatred, or prejudice against the transgender people as the transgender individual experiences significant psychological distress including anxiety, depression, and suicidal thoughts due to lack of support of system in which not only society but the media and social media so does cinema not much represent the transgender people in media and public spaces even if they show it's in a negative or a kind of perpetual stereotype which is fuel with societal rejection and violence.

The decision of Navtej Singh Johar vs Union of India by the Supreme Court of India in the year 2018 provided rights and protection to the transgender community against their exploitation, sexual harassment and violence. This resulted in the abolition of Section 377 of the Indian Penal Code in relation to the transgender community, ensuring activism of the LGBT communities and restoration of their dignified lives. This decision changed the way gender, sex and sexuality are understood. The Court expanded the definition of sex within the Constitution and defined the understanding of gender and sexual orientation in it. What will be the long-term implications of this decision? Can gender be understood beyond binary constructs Male and Female propagated stereotypes and standardized social roles? On the basis of this decision, which is considered a milestone in the life of the LGBT community, can it be assumed that the transgender community has achieved complete equality in terms of rights? Or is the struggle for their existence

still going on beyond Section 377? The proposed research is a study of the history of legal battles of the transgender community in India, their current status and possible options. It analyzes the status of the transgender community among the three main jurisdictions of the country: India's criminal law system, judicial system and constitutional provisions. That is, after the certification received as third gender and the abolition of Section 377, will the transgender community also be included in the category of women and minors in the protection from non-consensual sexual offenses under the criminal legal system of India? Under Article 14 of the Constitution is equality provided before law? And to what extent have the country's judicial system and constitutional provisions been successful in providing and protecting the fundamental rights of the community? Apart from this, it is also the duty of the state to implement the decisions passed by the judiciary in a just manner, thus this research also reviews the transgender rights protection bills passed by the government. There are two arguments involved in this, first, in theory, has Indian democracy proved to be inclusive for the transgender community, second, has this inclusivity in practice been able to provide public policy benefits to transgender communities?

Historically in the West, sexual intercourse by same-sex couples was outlawed both in Judaism and Christianity, since the offenses relating to them were decided by the ecclesiastical courts (laws governing the affairs of the Christian Church). As a result of England's Henry VIII breaking with the Roman Catholic Church, the Buggery Act of 1533 (Section 377) was introduced prohibiting and criminalizing anal penetration, bestiality, and homosexuality (in a broader sense). Drafted by Thomas Macaulay this law defines 'buggery' as an unnatural sexual act against the will of men and God. As per Macaulay's original draft, anybody who touched or was touched (with consent) by any person, or any animal intending to gratify unnatural lust, would be penalized and punished with imprisonment of which may extend to 14 years and not be less than 2 years (Article 361). Anyone who touched any person without that person's free consent, for the same above-said purpose would be penalized and punished with imprisonment extending to life and not be less than 7 years (Article 362). After several reviews of the draft, the Indian Law Commission concluded the Draft Penal Code to be sufficiently complete. The revised edition was forwarded to the Supreme Court and Sudder Court Judges at Calcutta in 1851 and the Committee of Sir Barnes Peacock finally sent draft of Section 377 for enactment. It was only after a long 150 years the deletion of Section 377 was recommended by B. P. Jeevan Reddy, J's Law Commission Report of 2000 (172nd Report), consequent to the changes made in preceding sections clarifying that anal sex would not be penalized in the presence of consent, regardless of being same-sex or otherwise.

The actual legal battle for (L.G.B.T.) rights began in 2009 with the Delhi High Court judgment in Naz Foundation vs. Government of NCT of Delhi, which struck down Section 377 as unconstitutional. In this decision, for the first time homosexuality was seen in the context of intimacy, love, affection and desire. In the Naz judgment the court clearly stated that India is rooted in an inclusive tradition of constitutional democracy, and hence the fundamental rights of all individuals are non-negotiable. But this decision was challenged by several parties, and in the 2013 decision Suresh Kaushal v. Union of India, the Supreme Court overturned the Delhi High Court decision, arguing that it was Parliament's right to decide on the decriminalization of homosexuality. Subsequently, as a result of the rapid activism in the LGBT rights movements, in the National Legal Services Authority (NALSA) judgment in April 2014, the Supreme Court recognized the transgender community as the 'Third Gender' in Indian law. Declared and academic. Also called for reservations for transgender people in institutions, jobs and government welfare programs as well as abolition of gender identity. As a result, individuals could now legally declare themselves as female, male or third gender. Individuals could use a category called 'Third Gender' for the purpose of obtaining an electoral ID card for the first time, along with some other legal benefits, and also got a separate category as transgender in new documents such as a Unique Identification Number. In this way, by providing them advanced justice, their legitimate, natural and constitutional rights were ensured. This judgment revived the challenge to Section 377. After this, in 2017, the Supreme Court gave another major decision in the Puthuswamy vs. Union of India case, under which privacy inherent in life, equality and liberty was declared a constitutional right. In continuation of these decisions, the Supreme Court rejected Section 377, which criminalizes homosexual relations between two adults, in the Navtej Johar vs Union of India case of 2018. The Court saw this as a violation of the fundamental rights of equality, privacy, right to life and liberty with dignity. Thus, all these decisions have proved to be a milestone in getting their recognition in the society. Navtej Johar is a relatively new decision after the NALSA decision, but the practice of creating a legal framework for exercising the rights of the transgender community by the government began in the year 2014 with the Transgender Protection of Rights Bill. This bill was introduced in the Rajya Sabha in December 2014 and passed in April 2015. This bill was completely based on the NALSA decision, under which all the guaranteed rights like non-discrimination to life and personal liberty, freedom from torture, exploitation and violence or education, employment and social security were also included in the bill. But this bill could not be passed in the lower house of Parliament. Subsequently, the Transgender Rights Protection Bill was introduced in 2016, a redrafted version of the previous bill, which included protection of rights and welfare schemes and programs of the community. But the word transgender is not defined correctly. Due to this and the lack of provision for reservation of the community as an Other Backward Class, this bill had to face strong criticism. After this, the Transgender Rights Protection Bill of December 2018 also remained a failed attempt.

The controversial bill passed by the Lok Sabha was passed by the Rajya Sabha without amendments on November 26, 2019, as (Transgender Rights Protection Bill 2019), criticizing which transgender activists argue that this bill does not contain anything in the name of protecting rights. But there is a possibility of discrimination and stigma. Thus, a contradictory situation is exposed between the Indian judicial system and the governments towards the transgender community. There has been criticism self-

determination: This is one of the controversial clauses of the bill. The LGBTQ community believes that the need for an identity card by DM negates the principle of the right to self-determination. While the government is of the view that, since benefits from the state are linked to 3rd gender, they have to attain an identity card in fact there is no review mechanism. The Act does not provide a mechanism for appeal or review of the decision if a transgender person is denied a Certificate of Identity by the District Magistrate. . It does not make provisions for positive decisions in employment or education despite the Supreme Court mandate in NALSA Judgement

Aim and Objective of the Study

The proposed research is a study of the relationship between the legal status of the transgender community in India and their real needs. It also examines patterns of discrimination and exclusion based on gender and sexual identity. That is, it analyzes the role of the state and society in relation to these people who face discrimination, deprivation and social stereotypes in every sphere of their lives and thus this research examines the legal, political, social and social rights of these groups which have been banned for a long time. Emphasizes the need to be fully inclusive in economic sectors. Apart from this, this research will help the policy makers to prepare appropriate framework for policies related to transgender community and providing equal opportunities for them.

Research Methodology

In the presented research, qualitative method as well as descriptive and analytical method has been used to reach the conclusions. Also, the legal status of the transgender community and their socio-economic level has been used .for analysis, various transgender activists and eminent scholars, who have been mainly associated with the issues and movements of the transgender community in India, will be interviewed through snowball sampling. Apart from this, Government Reports, Constitutional Provisions, Judicial Decisions and Committee Reports will be examined for primary sources and books, magazines, newspaper articles will be examined for secondary sources. will be used.

Review of Literature

1.Rajesh Talwar in his book Third Sex and Human Rights(Gyan publishing house 1999) demonstrates to human rights activists, social researchers, lawyers, and concerned subjects a similar investigation of the human rights mishandling and legal issues looked at by people of the third sex in India petitions field testing the criminalization of homosexuality, challenges relating to marriage reception and sexual status, with significant and vital archives, and concentrates from global human rights treaties.

2.DevduttPattanaik in his book called "The Man who was a Woman and Other Queer Tales from Hindu Lore" (Harrington Park Press 2022) is an anthology of traditional Hindu tales, with a focus on sexual politics and identity in the modern world. In addition to the captivating tales, readers will find a discussion on the all-encompassing nature of unusual reports, using examples from mythology (such as Greek) and folklore (such as Irish fables). examination of the Hijras, who are often believed to be the "third sex" in India, their possible origins, and their place within Hindu culture, with an eye on how the Hindu holy text reacts to unconventional sexuality.

3. Susan Stryker, the Transgender Studies Reader, (New York, Routledge, 2006) The book focuses on transgender identity and their marginalized sexuality. It refers to anything that disrupts and disintegrates the normative structure of society. The author examines transgender identity as an alternative category of gender transitioning or gender non-conforming people. He argues in the book that using the term transgender as a descriptive term for a heterogeneous class of phenomena is merely taking a political position.

4. Piyush Saxena, Life of Eunch, (Navi Mumbai, Shant Publishing House, 2011) The author traces the life stories of transgender people in his book, examining all aspects of the community such as their legal status, their existence in practice, their deities and rituals and the actual conditions of their lives. The book focuses on various aspects of female to male and male to female gender transition, and also discusses the socio-economic impacts of gender transition.

5.. Amartya Sen, Social Exclusion; Concepts, Application and Scrutiny, (New Delhi, Critical Quest, 2004) In the present book, Sen focuses on the relationship of the idea of social exclusion with ideological notions established in the literature of poverty and deprivation. Exclusion from social interactions leads to other deprivations, and limits opportunities. Due to which humans remain in a constant state of poverty. Sen presents capability deprivation as a new approach to understanding poverty and emphasizes the role of relational features. That is, lack of capability due to lack of relational characteristics gives rise to the experience of poverty. Therefore, it is necessary to encourage social relations with humans to enhance their capabilities.

6. India Exclusion Report, (Book for Change, 2013-2014) The transgender community has been portrayed as a highly excluded group in the India Inequality Report (2013-2014). According to the report, transgender communities are rejected in the society. The situation of these communities continues to be fragile due to discriminatory social and cultural practices and poverty, illiteracy and limited employment opportunities. The same Indian law has also remained silent for a long time regarding the demands of these people for citizenship and equality. But in recent years, the Indian Judiciary has shown activeness towards their rights and has recognized them as the third gender in the society. The report also discusses the progressive efforts taken by the state for the transgender community.

Government Initiatives for Transgender Empowerment

Transgender Persons (Protection of Rights) Act, 2019: Safeguards transgender rights, ensures inclusion in education and employment, and mandates welfare measures. National Council for Transgender Persons: This statutory body advises the government on policies affecting transgender individuals, ensuring their rights and welfare are prioritised.

SMILE Scheme: The SMILE scheme offers rehabilitation, medical facilities, counselling, education, skill development, and economic support for transgender persons.

Garima Greh: To provide shelter to transgender persons with basic amenities like food, medical care, and recreational facilities

Ayushman Bharat TG Plus: This health insurance scheme offers transgender persons coverage of ₹5 lakh per year, including gender-affirmation surgeries and other medical treatments.

Skill Development and Training Programs: The government offers skill training for transgender individuals to enhance employability and create sustainable livelihood opportunities.

National Portal for Transgender Persons: A digital platform for transgender individuals to access welfare measures such as scholarships, skill development, health benefits, and identity certificates.

What can be the way forward

A multi-prolonged approach with focus on public awareness campaigns is needed to eliminate the social stigma associated with the transgender community. And the large-scale sensitization needs to happen starting from the school level to accept the transgender community integral component of societal life. In fact, legal and the law enforcement systems need to be empowered and sensitized on the issues of Transgender community. It is very important while the stringent criminal and disciplinary action must be taken against the people who commits violence against Transgender. And to establish National Council for Transgender Persons which seeks to increase awareness and inculcate sense of respect and acceptance for transgender community, is a welcome step. However, only with the effective functioning of the council whether it will be able to identify the issues faced by the transgender community and accordingly advice the government. Apart from policies and regulations, there is also a need for an inclusive approach, sensitizing legal and law enforcement systems towards the issues of transgender community. The negative attitudes held by people can help us understand the barriers faced by them in gaining social acceptance there is a need for future awareness programs which focus on removing these barriers. bringing better understanding of the problems and challenges faced by transgender will help in bringing about the changes in policies and give them their due rights

Empowerment and Legal Reform: The government must adopt a more inclusive approach in policymaking, ensuring that transgender people are not excluded from decision-making processes. This inclusion can help address their grievances and increase opportunities for their public participation.

Access to Education: Schools should adopt anti-bullying and anti-ragging policies specifically targeting transgender students to reduce instances of exclusion and harassment.

Addressing Social Concerns: The government must ensure that access to essential services such as free legal aid, supportive education, and social entitlements is available at the grassroots level.

Economic Opportunities: Providing liberal credit facilities and financial assistance will enable transgender individuals to start their own businesses or careers as entrepreneurs.

Combating Transphobia: Public education campaigns should aim to reduce societal intolerance and raise awareness about transgender issues, challenging harmful stereotypes and promoting acceptance.

REFERANCE

- 1.(2018) <https://indiankanoon.org/doc/168671544/> Jayna Kothari, "Section 377 and Beyond: A New Era for Transgender Equality"
- 2."Gender Identity and Sexual Orientation" In Our Bodies Our Selves, A New Edition for a New Era, (Women Unlimited, An Associate of kali for women, 2008), p.
- 3.Amartya Sen, Social Exclusion; Concepts, Application and Scrutiny, (New Delhi, Critical Quest, 2004)
- 4.Piyush Saxena, Life of Eunch, (Navi Mumbai, Shant Publishing House, 2011)
- 5.Susan Stryker, The Transgender Studies Reader, (New York, Rutledge, 2006)
- 6.Arvind Narrain, Vacillating between Empathy & Contempt: The Indian Judiciary & LGBT Rights, (University of London Press, 2018)
- 7.India Exclusion Report, (Book for Change, 2013-2014)
- 8.Kalki Subramaniam, We Are Not The Others: Reflections of a Transgender Artist(nation press media 2021)
- 9.Mark. A Yarhouse Understanding Gender Dysphoria - Navigating Transgender Issues in a Changing Culture (chritian association of psychological studies book 2015)
- 10.Manobi Bandhopadhya, A Gift of goddess Lakshmi (Random House India 2017)
- 11.Rute Vanita, Love's Rite: Same Sex Marriage in India and the West (Penguin Book India 2005)
- 12.Devdutt Pattanaika ,The Man Who was a Women and Other Queer Tales from Hindu Lore (Harrington Park Press 2002)
- 13.Rajesh Talwar ,The Third Sex and Human Rights (Gyan Publication 1999)

