



LAW ET JUSTITIA LAW REVIEW

VOLUME 1 ISSUE 1

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“THE PLIGHT OF LGBTQ+: IS INDIA IN CONUNDRUM?”

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Link to paper: <https://www.lawetjusticia.com/volume1-issue1/the-plight-of-lgbtq-is-india-in-conundrum>

Link to Volume 1 Issue 1: <https://www.lawetjusticia.com/volume-1-issue-1>

ABSTRACT

India has been oblivious of LGBTQ+ plight since time immemorial. The community, in the 21st Century, has become independent yet is maltreated and oppressed socially. In majority instances, they are disowned from their families even before the social milieu. It is a lament situation that India being a developing country continuously imposes exasperating socio-economical setbacks on them. The community observing such impudence from the people has availed their self-esteem, respect, and recognition in the society through long-drawn legal battles and have mended their position in society. It is imperative to unveil the stoicism of the community by recalling their plight and evaluating its occurrence in the first place. The community in its movement cannot be separated from law and government, affecting the community in one way or the other. The Government in this process has proved itself to be heedless mostly by introducing the Transgender Act, 2019 which proved to be deleterious for the Transgender community, a pillar of the LGBTQ+. The only solution to curb such iniquitous facets of society is to obtain prudent education for the sake of formulating a progressive future for the community. This article deals with the reality of India after the decriminalization of Section 377 of the Indian Penal Code and its further extensions and how the Transgender Act,

2019, social welfare legislation fails to protect the rights of one arm of the LGBTQ+ community and pays only lip service.

Keywords: LGBTQ+, discrimination, plight, social exclusion, government, failure

INTRODUCTION

LGBTQ+ community if seen through society's social, cultural, or ethical lens are not considered as normal variants of human sexuality, rather considered a blot on the prestigious Indian patriarchal family. Criminalization of homosexuality and societal bias makes the member of the community effectively unapprehend felons and social pariahs. In many places criminal laws hang over the community like dark clouds, making them the most marginalized, persecuted, or at risk. While the Indian judiciary made a historical judgment by decriminalizing homosexuality which even celebrated by the people as the victory, it underscores the work to be done in ending the scourge of homophobia from the society and acknowledging them as any other equal human beings. There still lies a long way to go to make the Indian society an inclusive place for the members of the LGBTQ+ community.

TIMELINE TO INDIA'S BATTLE TO LGBTQ+ RIGHTS

The issue of Section 377 of Indian Penal Code, 1860 (herein referred as IPC) was first raised in 2001 by Naz Foundation, an Indian NGO working with HIV-AIDS sufferers, argued that the said section criminalizes consensual sexual acts between persons of same-sex, hence violating the fundamental rights guaranteed under Article 14, 15, 19 and 21 of the Constitution of India. The landmark judgment of Delhi High Court declared the section unconstitutional as violative of fundamental rights "insofar it criminalizes consensual acts of adults in private."¹ In 2013 the Supreme Court in the case of *Suresh Kumar Koushal v. Naz Foundation*² overruled the Delhi High Court judgment saying that it was the parliament to have the call to decriminalize homosexuality rather than the courts³ and held that the members of the community form only a minuscule fraction of the population, concluding that "this cannot be made a sound basis for declaring the section ultra vires the provision of Article 14, 15 and 21 of the Constitution."⁴

¹ Naz Foundation v. Government of NCT of Delhi, (2009) 111 DRJ 1 (DB).

² Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

³ *Id.* at ¶ 56.

⁴ *Id.* at ¶ 43.

Seventeen years later, in 2018, a five-judge bench in the case of *Navtej Singh Johar v. Union of India*⁵ unanimously decriminalized Section 377, putting an end to the criminalization of homosexuality and accorded LGBTQ+ Indians all protections under the Constitution. The Court held that gender identity is an integral part of personal identity which is inherent to a person⁶ and includes the right to freedom to express one's chosen gender identity through varied ways.⁷ The court relied upon its judgment in *K.S. Puttaswamy v. Union of India*⁸ and held that sexual orientation is an attribute of privacy and right to privacy cannot be denied even if there is a minuscule fraction of the population which is affected, thus ending a long drawn legal battle.

UNVEILING INDIA'S SITUATION

On 6th September 2018, India celebrated the Supreme Court judgment where the court struck down Section 377 of IPC, putting a ban on the criminalization of homosexuality, reversing a relic of British oppression. While the members of the community treated the verdict as a welcome victory, found huge relief, and embraced their sexual orientation with the ruling of the Court, it did not necessarily mean they are fully perceived as equals among the fellow citizens as their acceptance within the society remains minimal.

The picture of LGBTQ+ youth is bleak and distressing in India as they face an incessant struggle for normalcy in all areas of life. Lack of adequate legal protection against discrimination based on their sexual orientation and gender identity coupled with a deeply instilled homophobic attitudes of the society have ostracized the LGBTQ+ community. On May 12, 2020, the stigma and violence persist, homophobia claimed the life of 21-year-old bisexual woman, *Anjana Harish* from Kerala who was forced by her parents to undergo conversion therapy.⁹ *Avinshu Patel* took his own life because the society did not accept him

⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁶ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, ¶ 68.

⁷ *Id.* at ¶ 65.

⁸ *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1, ¶ 80.

⁹ 'Kerala student dies in Goa, death puts focus on inhuman 'conversion therapy' on queer people', The News Minute, (last visited May 16, 2020, 3:30 P.M.), <https://www.thenewsminute.com/article/kerala-student-dies-go-a-death-puts-focus-inhuman-conversion-therapy-queer-people-124683>.

that he was gay.¹⁰ A spate of violence against Transgenders claimed 11 lives in India between 1st October 2018 to 30th September 2019.¹¹

These incidents put a spotlight on the systematic oppression of the LGBTQ+ community from the straight world. Unscientific and cruel practices like aversion therapy, heavy medication, and hormonal treatments are still being followed by some mental health practitioners, amplifying physical and mental abuse for the community members. The underlying assumption behind these practices is that sexuality is a mental disorder that can be 'cured'. In February 2014, the Indian Psychiatric Society officially rejected pathologizing homosexuality.¹² Justice Nariman in the Navtej Singh Johar case¹³ emphasized in Section 2(1) (s) of the Mental Health Care Act, 2017¹⁴ which recognizes that homosexuality is not a mental illness. Further, mental illness cannot be determined based on social status¹⁵ or non-conformity with social, cultural or political values, or religious belief prevailing in a person's community.¹⁶ Even after the decriminalization of a draconian law, there remain many creases in the legal framework that needs to be ironed out. Section 5 of the Hindu Marriage Act¹⁷ states several conditions to be fulfilled by both the parties to solemnize a marriage. One of them being "the bridegroom has completed the age of twenty-one years and bride the age of eighteen years at the time of marriage."¹⁸ The same has been laid down in the Christian Marriage Act¹⁹ and Special Marriage Act²⁰, confining itself to men and women only. These fallacies in the Indian legal framework are not only inherently discriminatory but also deny the right to marry one's choice which is an integral part of Article 21 of the Constitution.²¹

¹⁰ Jayanthi Pawar, 'Not my fault I am gay': Youth commits suicide in Chennai alleging homophobia, The New Indian Express, (last visited May 16, 2020, 3:35 P.M.), <https://www.newindianexpress.com/cities/chennai/2019/jul/09/not-my-fault-i-am-gay-youth-commits-suicide-in-chennai-alleging-homophobia-2001348.html>.

¹¹ *Transrespect versus Transphobia worldwide- Transday of remembrance* 2019, (last visited May 16, 2020, 6:15 P.M.), https://transrespect.org/wp-content/uploads/2019/11/TvT_TMM_TDoR2019_SimpleTable.pdf

¹² 'Homosexuality not an illness: Indian Psychiatric Society', The Hindu, (last visited May 17, 2020, 4:50 P.M.), <https://www.thehindu.com/news/national/homosexuality-not-an-illness-indian-psychiatric-society/article24401307.ece>.

¹³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 ¶ 68.

¹⁴ Mental Healthcare Act, 2017, § 2 (1)(s), No. 10, Acts of Parliament, 2017(India).

¹⁵ Mental Healthcare Act, 2017, § 3(3)(a), No. 10, Acts of Parliament, 2017(India).

¹⁶ Mental Healthcare Act, 2017, § 3(3)(b), No. 10, Acts of Parliament, 2017(India).

¹⁷ Hindu Marriage Act, 1955, § 5, No. 25, Acts of Parliament, 1955 (India).

¹⁸ Hindu Marriage Act, 1955, § 5(iii), No. 25, Acts of Parliament, 1955 (India).

¹⁹ Indian Christian Marriage Act, 1872, § 60, No. 15, Acts of Parliament, 1872 (India).

²⁰ Special Marriage Act, 1954, § 4(c), No. 43, Acts of Parliament (India).

²¹ Shafin Jahans v. Asokan K.M. & Ors., 2017 SCC OnLine SC 1575.

Indian cinema has a tremendous influence on society but one aspect of Bollywood which has been pathetic is the depiction of the LGBTQ+ community on the silver screen. Barring a few rare exceptions, movies have failed to touch on the community realistically, and when made appearance are shown in homophobic light. *Boman Irani's* depiction of a gay guy in 'Dostana' or Rishi Kapoor's character in 'Student of the Year' reduces the character to offensive stereotypes about gay the persons. There lies a need for movies like 'Shubh Mangal Zyada Savdhaan', 'Aligarh' or web series like 'Made in Heaven' which have introduced LGBTQ+ characters in mainstream cinema, who are confident about their choices and persona and this to a certain extent helps in removing the awkwardness and stigma around the members of the community.

There remains much work to be done for the social inclusion of the community and to overturn the antiquated and repressive attitude of the society. Even if India celebrates its success for the decriminalization of homosexuality, there lies a long road to go to enjoy the sweet taste of equality for the community.

TRANSGENDER ACT, 2019: A NOTEWORTHY COVERAGE

Lack of adequate legal provisions protecting against the discrimination on the grounds of sexual orientation and gender identity has left the LGBTQ+ community vulnerable to blatant violations of their human rights. The government seems to be ignorant about the plight of the community and has taken a step forward to increase the misery of the LGBTQ+'s elementary pillar, the Transgender community, by defectfully hitting it with the introduction of Transgender Act of 2019, social welfare legislation, ought to be a step forward towards protecting the rights of the community but fails to do so and instead has profoundly proved to be deleterious for the community altogether. The Act was introduced in Lok Sabha on 19th July 2019 and passed by the Lok Sabha and Rajya Sabha on 5th August 2019, and 26th November 2019 respectively. To perceive the detrimental effects of this Act on the Community, it is imperative to understand the background of this Act.

BACKGROUND OF THE ACT

The Supreme Court of India in its notable judgment of, *National Legal Services Authority v. Union of India and others*²² (hereinafter referred to as 'NALSA judgment') has competently

²² National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

defended the rights of the Transgender Community. The Supreme Court, in its prowess, directed the Central and State government to structure a welfare framework, in accordance with Article 14, 15, 19, and 21 of the Constitution of India.

Scrutinizing such aspects of the NALSA judgment, the first Transgender rights Bill was introduced by *Dravida Munnetra Kazhagam MP Trichu Siva* in the Rajya Sabha in 2014, which was never tabled for discussion. In August 2016 the government in Lok Sabha introduced their own Bill which was criticized mainly on its definition of a Transgender Person. The Bill was then sent to a parliamentary standing committee for a review, but its report was rejected by the government in July 2017.

In December 2018 the Bill was introduced again, but when sent to the Rajya Sabha, it didn't pass and finally lapsed. However, the revised Transgender Bill of 2019 was successfully passed by both the houses of parliament, and yet again, it has its share of inadequacies.

A CRITIQUE ON THE TRANSGENDER ACT, 2019

Chapter I: Deficient pillars of fundamentalism

The Transgender Act of 2019 has proved to be a menace towards the community. The defect in the Act lies in its fundamentals such as its definition²³ of a 'Transgender person', conflating the definition of an intersex person. There is a clear demarcation between the two terms which the government has failed to be cognizant of while drafting the Act. It is pertinent to understand that, a Transgender person's sense of personal identity and gender doesn't correlate with the sex determined at the time of their birth whereas, an Intersex person is one who is born, having a blend of male and female biological characteristics. The Act in its entirety overlooks this rudimentary aspect and *interchangeably* uses 'intersex' and 'transgender'. The inculcation of intersex in the definition of transgender suggests, that the Act disregards the past of medical violence faced by the community and hence, effacing the intersex identity to be recognised separately.

Chapter II: Dearth of Safeguards

The Act addresses 'prohibition against discrimination'²⁴ where, it states all the conceivable discrimination that could occur upon a person belonging to the Transgender community, and how such discrimination, is prohibited. The only loophole being, that the Act falls short to provide safeguards, which 'shall' foster the community when it faces any form of

²³ Transgender Persons (Protection of Rights) Act, 2019, § 2(k), No. 40, Acts of Parliament, 2019 (India).

²⁴ Transgender Persons (Protection of Rights) Act, 2019, § 3, No. 40, Acts of Parliament, 2019 (India).

discrimination. In all, the Act doesn't enlighten the community upon the remedies that will be available when discrimination occurs, rendering the provision quite ineffective.

Chapter III: Proving identity or Imposing identity crisis?

The Act carries perceptible shortcomings when it directs a Transgender person to acquire a certificate from the District Magistrate to achieve recognition of a Transgender identity²⁵. Even though, the process laid down for obtaining such a certificate is contradictory to the landmark NALSA judgment in which Supreme Court gave recognition to the rights of Transgender persons to determine their identity without any interference of the medical branch on behalf of the government because the issuance of a certificate in such a way violates the community's right to privacy and self-determination. The court relied on *S. and Marper v. the United Kingdom*,²⁶ which also recognizes the aforementioned aspects and carries a global influence towards such other laws.

Chapter IV: A series of amorphous Welfares

The provisions have mentioned welfare and rights in the name of ensuring the right to residence, the prohibition of discrimination, right to participate in recreational activities, and promoting educational facilities but fails to inculcate steps in which it would provide such rights and welfare to the community. For instance, the community by referring the NALSA judgment exhorts that there shall be reservation in educational institutions for their elementary welfare but such essential welfare is absent about educational facilities that the Act promises to provide the community.

Chapter V: An obscured gratification

The Act permits the courts to relocate a Transgender person to a rehabilitation centre²⁷ if their family doesn't accept their true identity. It's a righteous thought but fails to bring precision upon the facilities that the rehabilitation centres would offer or what welfare activities would be facilitated by the government towards the community or what would be the procedure of training of employees, working at such rehabilitation centres. The community considering the image of rehabilitation centres being similar to agonizing prisons are hesitant to enroll themselves for such rehabilitation. Therefore, to curb such misconceptions, the Act shall overtly mention the structure and functioning of the Rehabilitation centres.

²⁵ Transgender Persons (Protection of Rights) Act, 2019, § 5, No. 40, Acts of Parliament, 2019 (India).

²⁶ *S. and Marper v. United Kingdom*, (2008) App nos. 30562/04, 30566/04 Eur. Conv. on H.R. 1581.

²⁷ Transgender Persons (Protection of Rights) Act, 2019, § 8(4), No. 40, Acts of Parliament, 2019 (India).

Chapter VI: Absence of prerequisite timeline from medical assistance

The provisions of this chapter, relating to medical facilities²⁸ being provided to the community are not expected to incorporate any defects, but it carries one when it doesn't establish a timeline for the community's health welfare programs. In reference to this, NALSA judgment directed the state to adopt such measures about six years ago but no affirmative action regarding the medical treatment of the community has commenced yet. Therefore, the timeline or intervals for medical welfare programs shall be decisively enlisted in the Act.

Chapter VII: A Council of Irony

National Council for Transgender Persons has also been given recognition that rightly reserves five vacancies for the Transgender person to be the members of this Council²⁹. The irony lies within the fact that this very provision made for uplifting the Transgender community doesn't vacate any ex-officio position for the transgender, permanently. The provision states that "a member of this National Council, other than *ex-officio* members, shall hold office for a term of three years from the date of his nomination³⁰" but it doesn't mention such a member inevitably to be a Transgender. Furthermore, the Council is established at a national level and does not extend its branches to form State or District councils where the prevention of atrocities upon the community can be deftly tackled on the grass-root level.

Chapter VIII: Penalties Joshing equality

A blatant criticism lies in penalty provisions confirming what penalty a person shall face while exercising any sort of atrocity on a Transgender. The penalty upon such an offender, to be imprisoned for not less than six months to two years and with a fine³¹, certainly defies the law of equality when compared to the punishment meted out to an offender for committing an offence such as rape towards a woman³². Therefore, from a rational mindset, this provision encourages objection to such an inequality practice.

The negation of civil rights

The indispensable social domains such as adoption, end of non-consensual surgeries, the inheritance of property and marriage are heedlessly absent from the Act. The Act fails to contemplate revolutionary judgments such as NALSA and *Arunkumar and Sreeja v. The*

²⁸ Transgender Persons (Protection of Rights) Act, 2019, § 15, No. 40, Acts of Parliament, 2019 (India).

²⁹ Transgender Persons (Protection of Rights) Act, 2019, § 16(g), No. 40, Acts of Parliament, 2019 (India).

³⁰ Transgender Persons (Protection of Rights) Act, 2019, § 16(3), No. 40, Acts of Parliament, 2019 (India).

³¹ Transgender Persons (Protection of Rights) Act, 2019, § 18(d), No. 40, Acts of Parliament, 2019 (India).

³² Indian Penal Code, § 376, (1860).

*State*³³, which has certainly tackled with the conundrum about who is to be called a bride when two transgender or intersex persons marry.

CONSULTATION PROCESS

Concerning the protests by the community against the Act, the government comprehends defects of the Act and has decided that it would invite the community or anyone to give recommendations³⁴ to make the Act more 'community-friendly'. Since this initiative has been introduced at the time of pandemic outbreak: COVID-19, the community is toiling to follow instructions of this initiative prudently.

The recommendation procedure amid this pandemic had solely been online and the majority of the people as per Census reports 2011³⁵, in the community are illiterate and hence, do not have any technical comprehension or access devices that would assist them to offer their significant recommendations. The language barrier has become another hindrance, the recommendations to be given online invites the recommender to offer the same in the English language only. This is a substantial limitation of this initiative as the majority of the community imperfectly follows the English language because of the lower literacy rate. It has to be remembered that the Constitution of India recognises 22 languages to be official³⁶ and therefore, freedom should have been given to the community to submit their recommendations in the language that they would prefer.

Also, this initiative undertaken by the government to rectify the drawbacks of the Bill disregards its pre-legislative consultation policy which "mandates that 30 days shall be given for the submission of comments when a law is being drafted,³⁷" which was unobserved as the government invited the comments on 18th April 2020 and set the last date for receiving them till 30th April 2020 and extended the date till 18th May 2020 only when it got endured with mounting pressure from the protestors.

³³ Arunkumar and Sreeja v. The State, WP(MD) No. 4125 of 2019.

³⁴ Ministry of Social Justice and Empowerment, *Comments/suggestions/feedback*, (last visited 16 May, 2020, 3:00 P.M.), <http://socialjustice.gov.in/UserView/index?mid=77866>

³⁵ Census 2011, *Transgender in India*, (last visited 18th May, 2020, 9:00 P.M.), <https://www.census2011.co.in/transgender.php>

³⁶ INDIA CONST. art. 344, 351.

³⁷ Policy on pre-legislative consultation, D.O. No. 11(35) /2013-L.I., ¶2 Appendix, (2014), <https://dot.gov.in/sites/default/files/o%26m1.pdf>

The Census reports of 2011 apparently indicate a low-literacy and employment rate³⁸ and it can be inferred, that the community has been living with an increased risk towards their safety, and the pandemic outbreak has made the situation more adverse than before. After having waged a prolonged battle for recognition by the government for their rights, the community wants to achieve holistic development, but the government amid the pandemic and otherwise, has exposed the community to pessimistic changes which place strenuous challenges upon the community to tackle.

CONCLUSION AND SUGGESTIONS

The LGBTQ+ Community have endured their plight with great fortitude so far. It is now a moral obligation of the citizens to ameliorate their ambition towards their progressing future. To achieve this triumph, the citizens, as well as the dignitaries, shall act as appendages to the community's efforts by inculcating thriving steps such as:-

- Encouraging LGBTQ+ Activism, which certainly gives a credence to the community's existence in society and makes them aplomb of their reputable place in the society. While following this step it is also imperative to celebrate the activists who mold activism into success.
- Inviting more leadership from the UN in this revolutionary era, it is highly recommendable for the UN to be proactive for the community's rights. UN should draft robust safeguards for the community just like CEDAW³⁹, which has proved to be an inviolable tool to guard women's rights around the globe.
- Unleashing parental counseling and workshops that broaden the identity of the community can curb the inequalities towards them. It is also suggestive that the school curriculum shall introduce sex education as a significant subject to be taught by a counselor and educating about the community shall be given special emphasis in it.
- Embracing unorthodox-expressive ideas that show compassion from society towards the community is a must. The citizens must inspire from Hiker Chiu, a Taiwanese, who

³⁸ Rema Nagarajan, 'First count of third gender in census: 4.9 lakhs', The Times of India, (last visited May 24, 2020, 7:30 P.M.), <https://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms>

³⁹ United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

initiated the “Global free hugs movement”⁴⁰ for intersex to stimulate solicitude towards the community.

- Using the film industry for advocating the community’s normality is a potent option. The society at large has never been able to shun the media therefore, it is a viable option through which predicament and perspective of the community can be understood and portrayed.
- Creating job opportunities is another safeguard for the community, but it is equally a formidable task. The community has always been restricted from certain jobs, therefore, to curb such facets from society, initiatives such as RISE⁴¹ (Reimagining Inclusion for Social Equity), Asia’s largest LGBTQ+ job fair, having a motive “career and identity don’t have to remain separate”, shall be overwhelmingly supported.
- Lastly, eradicating violence and homophobic, patriarchal ideologies is of immense importance. It can be countered if the citizens take a stand for the community, stand against any kind of atrocities on the community, and collaborate with the social organizations.

India has ostracized the LGBTQ+ community since time immemorial and failed to acknowledge them as respectable citizens of the country, who equally have the access to rights enshrined in the constitution as any other human being. The community is now traumatized from observing a differential treatment towards them and this trepidation has blatantly broken their spirit. Therefore, in this revolutionary 21st century, it becomes the responsibility of the people to be compassionate towards their struggles. The laws such as decriminalizing Section 377 of IPC or Transgender Act, 2019 cannot succeed in changing people’s dismissive approach towards them, unless they transform their stigmatic mindsets to liberal ones and emancipate the community altogether. Moreover, it calls for a joint effort by both the policymakers and citizens towards the betterment and progress of the LGBTQ+ community.

⁴⁰ HIKER CHIU OF OII-CHINESE ON TOUR, <https://intersexday.org/en/oii-chinese-tour-2015/> (last visited May 18, 2020, 3:30 P.M.).

⁴¹ Fiza Jha, *New Delhi latest LGBTQ+ job fair proves career and identity don’t have to remain separate*, The Print (last visited May 20, 2020, 4:00 P.M.), <https://theprint.in/features/new-delhis-latest-lgbtq-job-fair-proves-career-and-identity-dont-have-to-remain-separate/372088/>