

SEXUAL ORIENTATION AND THE TRANSGENDER: SEARCH FOR EQUAL DIGNITY

Pankaj Sarma

Assistant Professor, Kirori Mal College, University of Delhi

ABSTRACT

Gender non-conformity is always considered unconventional in our society. Being a marginalised community, the transgender in our society are subjected to various kinds of discrimination and hate crimes in their day to day lives. In an attempt to analyse the various discriminations encountered by transgender, this article focuses on the struggle faced by transgender community in seeking a respectable space in our society. The article argues that with the advent of international human rights law and the growing consciousness among the transgender, the advocacy for the protection and promotion of the basic human rights of the transgender gained its momentum. The article highlights the various steps undertaken both at national and international level for the promotion and protection of human rights of the transgender. Judicial activism has also played a crucial role in this regard. The article simultaneously interrogates the role of judicial interventions in upholding the basic human rights of the transgender community under various circumstances. Though liberal movement has brought a shift in the criteria for gender determination today, still choice of sexual orientation of an individual continues to be controversial if a person's gender identity does not confirm to one's sex assigned at birth. The article emphatically recommends the specific need for codified laws and policies guaranteeing both the rights and choice of the people with regard to their sexual orientation.

Keywords: Transgender, Gender non-conformity, Sexual orientation, Transsexual, Human rights, Same sex marriage, Adoption, Hate crimes, universality of rights.

Introduction

Gender of a person is assigned at birth and in the process of growing up, a person starts showing characteristics corresponding to his/her sex. There may be exception to this universal phenomenon in case of certain persons whom we call as transgender. A transgender is a person who expresses his/her gender identity that is different from the person's assigned sex at birth. However, despite the long history of existence of transgenders, they are not universally accepted either by society or by their family. Expression of gender non-conformity has always been

looked down upon in our society. This can also be for intersexed people whose body incorporate both male and female genital anatomy and physiology. Transgenders have always been subjected to hate crimes, harassments and criminal sanctions. Such victimization often compels them to launch their own struggle for equal space in the society respecting their sexual orientation. The rights of LGBT persons are increasingly interpreted in the light of the universality of human rights¹. Among human rights advocates it is now understood that while single-identity causes and identity politics have historically been instrumental in empowering the most disadvantaged identity groups, they have limitations, including in the case of advancing LGBT rights². Whether the equality principle can act as a shield in protecting the human rights of transgenders is a vital question for civil society today. The rights to equality and non-discrimination are integral to the notion of universality of rights, and are indispensable cross-cutting rights in the international human rights system. Therefore, a holistic approach to equality and human rights is needed to promote LGBTQ rights, both in terms of conceptual legal consistency and political solidarity.³

Meaning of transgender related terminologies

Sexual Orientation

Sexual Orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender⁴.

Trans or Transgender People

Most commonly used as an umbrella term for individuals whose gender identity and/or expression is different from the gender assigned to them at birth. Transgender people include individuals who are transsexual, genderqueer, agender, androgyne, demigender, genderfluid,

¹Dimitrina Petrova, "The use of equality and anti-discrimination law in advancing LGBT rights", in Corinne Lennox, Matthew Waites, (eds.), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth*, 477 (University of London Press, Institute of Commonwealth Studies, 2013).

² *Ibid.*

³ *Supra* note 1 at 477-478

⁴Siddharth Narrain, "Crystallising Queer Politics - The Naz Foundation Case and its Implications for India's Transgender Communities" 2 *NUJS Law Review* 456 (2009).

individuals who cross-dress or dress androgynously, and other individuals who cross or go beyond traditional gender categories.⁵

FTM: female-to-male

Female to male transgender indicates a transgender individual who was originally assigned the sex of female at birth but has claimed a male identity through clothing, surgery, hormones and /or attitude changes.⁶

MTF: male-to female

Male to female indicates a transgender individual who was originally assigned the sex of male at birth but has claimed a female identity through clothing, surgery, hormones and/or attitude changes⁷.

Gender Variant/ Gender Non-Conforming

Gender variant means displaying gender traits that are normatively associated with their biological sex. Feminine behaviour or appearance in a male is gender variant as is masculine behaviour or appearance in a female.⁸

Intersex

Intersex means an individual having hormones, chromosomes and/or primary sex characteristics including genitalia and/or internal sex organs that are different from what is typically considered to be biologically male or female.⁹

Transsexual

A transsexual person is one who has undergone physical or hormonal alterations by surgery or therapy in order to assume new physical gender characteristics.¹⁰

⁵ Transgender Terminology, available at: <https://hr.cornell.edu/sites/default/files/trans%20terms.pdf> (Last visited on September 9, 2019).

⁶ Common Transgender Definitions and Terms, available at <https://www.gsafewi.org/wp-content/uploads/Transgender-Terminology.pdf> (Last visited on September 7, 2019)

⁷Common Transgender Definitions and Terms, available at <https://www.gsafewi.org/wp-content/uploads/Transgender-Terminology.pdf> (Last visited on September 7, 2019)

⁸*Ibid.*

⁹*Supra* note 7

Crossdressers

Crossdressers are individuals who, regardless of motivation, wear clothing, makeup, etc. that are considered by the culture to be appropriate for another gender but not one's own.¹¹

Hijra

Hijra is a term loosely used to refer to male or female transgender persons. In South Asia, hijra is often used as a term to describe transgender and intersex individuals, who may identify as neither male nor female or as a combination of both.

Hate crimes and discriminations: human rights violation of Transgenders

Transgender and intersexed individuals are often singled out and policed in especially harshed ways because their existence reveals not just the social construction of sex role stereotypes but also the mutability of maleness and femaleness that predicate and anchor sex role stereotypes.¹²Treated as socially unaccepted members of community, transgenders are subjected to atrociousvariants of violence, social stigma and dangers in their everyday lives. Discrimination faced by a transgender often begins from their family itself. This is so because as unlike the common projection family is not always the first sphere of justice. Families generally do not accept their child who in the process of growing up starts behaving in a way opposite to the expected gender role. Such children are usually subjected to scolding and are also assaulted by the family. For crossing the assigned gender roles, families are even seen disowning their own child. Families fail to support a child who wants to opt for Sex Reassignment Surgery (SRS). Case of Bidhan Baruah from Assam is a classic example in this regard. Bidhan Baruah had moved to High Court of Bombay after his father threatened legal action against the doctor who agreed to perform SRS upon Bidhan Baruah. Court ruled that Bidhan Baruah is an adult who can decide to opt for surgery to change his sex.

Transgenders are also often seen being harassed in school either by the school officials or by the fellow students which force many transgender children to dropout from school and thus denying them an opportunity to pursue formal education. Such a situation in turn leads to illiteracy resulting in unemployment and poverty in the transgender community. They face indiscriminate

¹⁰SiddharthNarain, "Crystallising Queer Politics - The Naz Foundation Case and its Implications for India's Transgender Communities" 2 *NUJS Law Review* 456 (2009).

¹¹*Supra* note 5

¹² Heath Fogg Davis, "Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique"¹²*Perspectives on Politics*47 (2014).

discrimination while being turned down or denied jobs, housing and use of public accommodation based on their physical appearance or gender identity. Such a treatment is not just confined to India but indeed it is a global phenomenon. For example, in the case of *Pv. S and Cornwall County Council*¹³, when P informed her employer that she intended to undergo gender reassignment surgery, she was dismissed from service. P brought a sex discrimination complaint before Employment Tribunal. Tribunal referred matter to European Court of Justice (ECJ). ECJ pointed out that dismissal of a transsexual on the ground related to gender reassignment is a breach of Equal Treatment Directives. Tribunal thereby upheld the complaint and P was held entitled to compensation from her employers.

Transgender usually do not possess identity documents that match their gender presentation. Hence, transgender seeking health care facilities are subjected to unwanted questioning and discomfiture. Many times health care providers may not have adequate knowledge about the health issues of such sexual minorities. Also, poor economic condition of transgender coupled with exclusion of transgender from health insurance scheme makes their condition more vulnerable as they fail to access proper medical care for hormone therapy, sex reassignment surgery or any other kind of treatment. Incase of *Beger v. The Division of Medical Assistance*¹⁴, the implant removal of transgender was approved but her breast reconstruction was denied on the basis of state regulation that excluded medical coverage for any procedure related to sex-reassignment. The Massachusetts Superior Court ruled that the state could not refuse to cover a medically necessary procedure simply because the patient is a transsexual.

In country like India, transgender people are mass victim of HIV/AIDS. India's transgender communities are one among the most vulnerable groups towards the deadly HIV/AIDS and other sexually transmitted diseases since they rely on prostitution for livelihood¹⁵. When increasing cases of HIV/AIDS were reported during the 1980s, the transgender community nationwide was hardly hit with an infection rate leading up to 41%, that was nearly 100 times more than the national average of 0.36 %. They do not always choose the risky cash for sex trade by choice, but they end up risking their lives due to the innate gender misfortune.¹⁶

¹³C-13/94, [1996] IRLR 347

¹⁴CIVIL ACTION NO. 99-4613H

¹⁵Govindasamy Agoramoorthy, Minna J. Hsu, "Living on the Societal Edge: India's Transgender Realities", *54 Journal of Religion and Health* 1457 (2015).

¹⁶ *Supra* note 15.

However, though the social welfare departments of various countries provide social welfare schemes for the benefit of poor and disadvantageous people, yet there are no schemes specifically designed to cater to the needs of transgenders. At the same time, transgenders are not able to benefit by the general schemes for all because of stringent procedures and need of identity to address proof etc. to register for receiving the benefits of such schemes.

In many countries, transgenders have to face the consequences of penal laws providing punishment for homosexual activities and consensual same-sex relationships, which clearly violate rights to privacy and right to freedom from discrimination. Apart from this, transgender prisoners are often subjected to verbal harassment, physical violence and assault. In the name of interrogation, many transgender prisoners are sexually harassed and abused by officials. The case of *Jayalakshmi v. State of Tamil Nadu*¹⁷ is an example of such torture meted out to transgender prisoner. In the said case, a transgender prisoner was sexually harassed by the police officer and in the dying declaration, said transgender stated that he was unable to bear the torture and pain and he ended his life. The Madras High Court directed compensation as well as disciplinary action against concerned official for such ill-treatment meted out to transgender victim.

The hate crimes faced by the transgender community is a clear breach of their basic human right to life which includes right to live with dignity, right to education, right to employment, right to privacy, etc.. Where the Universal Declaration of Human Rights, 1948 provides that all human beings are born free and equal in dignity and rights, the same has become a distant dream for the transgender community with the kind of discriminations and harassment that they face on a routine basis. Despite all the reminders that right to life, liberty and equality guaranteed by international human rights laws are universal in application this marginalised section of our society continues to be deprived of the full enjoyment of their human rights and fundamental freedoms merely on the grounds of their sexual orientation and gender identity.

National and International stance on transgender rights

The coherent attempts of the transgender community along with the efforts of the transgender rights activists have brought the issues of the transgender to the limelight at both national as well as international level bringing certain changes worthy of attention. J. Kennedy in the case of *Lawrence v. Texas*¹⁸ had stated:

¹⁷(2007) 4 MLJ 849

¹⁸559 US 538 (2003)

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the state is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the state should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The United Nations General Assembly, in a series of resolutions, for example, resolution A/RES/67/168 has called on states to ensure protection of right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings including those motivated by the victim's sexual orientation and gender identity.¹⁹ In June 2011, the United Nations Human Rights Council (UNHRC) became the first UN inter-governmental body to adopt a wide-ranging resolution on human rights, sexual orientation and gender identity. Resolution 17/19 of UNHRC expressed the Council's 'grave concern' at violence and discrimination against individuals based on their sexual orientation and gender identity, and commissioned a study on the scope and extent of these violations and the measures needed to address them²⁰. In subsequent report, the UN Office for High Commissioner for Human Rights (UNHCHR) indicated patterns of human rights violations which require a response and acknowledged that governments have often overlooked violence and discrimination based on sexual orientation. It called upon countries to bring LGBT people within national human rights protection by repealing laws that criminalize homosexuality, abolishing the death penalty for offences involving consensual sexual relations and enhancing comprehensive anti-discrimination laws.²¹

In order to promote LGBT rights, the European Parliament in 2011 adopted a Resolution condemning fact that homosexuality, bi-sexuality, and trans-sexuality are still regarded as mental illnesses by some countries²². Said Resolution called on states to combat this discrimination, stressing need for de-psychiatrisation of transsexual, transgender, journey, for free choice of care providers, for changing identity to be simplified, and for costs to be met by social security

¹⁹ Fact sheet, International Human Rights Law and Sexual Orientation & Gender Identity, available at: <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> (last visited on August 8, 2019).

²⁰*Ibid.*

²¹ Bonny Ibhawoh, "Human rights for some: Universal human rights, sexual minorities, and the exclusionary impulse", 69 *International Journal*, 621 (2014).

²² European Parliament, *Human rights, sexual orientation and gender identity at the United Nations* Resolution (September 28, 2011) available at <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0427&language=EN> (last visited on June 28, 2020).

schemes²³. The Resolution also called on the World Health Organisation to withdraw gender identity disorders from list of mental and behavioural disorders and to ensure a non-pathologising reclassification in the negotiations on the 11th version of the International Classification of Diseases (ICD-11)²⁴.

In 1994, in landmark decision of *Toonen v. Australia*²⁵ the Human Rights Council (HRC) rejected the argument of the Australian government that laws criminalising homosexual acts were an issue of public morality and thus purely a matter of domestic concern. In this case, the HRC found that criminalising homosexual acts was a violation of right to privacy under article 17 of International Covenant on Civil and Political Rights, 1966. HRC however did not consider whether the specific non-discrimination article of the International Covenant on Civil and Political Rights, 1966, article 26 was also violated. Since then, however, the HRC has referred to article 26 of International Covenant on Civil and Political Rights, 1966 on numerous occasions when expressing concern about discrimination on the grounds of sexual orientation.²⁶

The UN Committee on Economic, Social and Cultural Rights (CESCR) has expressed concern over discrimination on grounds of sexual orientation in a number of general comments (UN Committee on Economic, Social and Cultural Rights 2000a, 2002a, 2006) and concluding observations (UN Committee on Economic, Social and Cultural Rights 2000b, 2001, 2002b). More significantly, CESCR has recently provided an authoritative interpretation of article 2(2) of International Covenant on Economic, Social and Cultural Rights, 1966 in General Comment No. 20 where it has explicitly stated that discrimination on the grounds of sexual orientation and gender identity are covered by the 'other status' clause of article 2(2) of International Covenant on Economic, Social and Cultural Rights, 1966.²⁷ In General Comment No. 4, the Committee on the Rights of the Child has asserted that article 2 of the Convention on the Rights of the Child, 1989 cover sexual orientation and health status.²⁸

²³*Ibid.*

²⁴*Supra* note 22.

²⁵Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992(1994)

²⁶Dimitrina Petrova, "The use of equality and anti-discrimination law in advancing LGBT rights", in Corinne Lennox, Matthew Waites, (eds.), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth*, 483 (University of London Press, Institute of Commonwealth Studies, 2013).

²⁷*Supra* note 26 at 483-484.

²⁸*Supra* note 26 at 484.

Countries at national level are also taking progressive approach toward gender recognition reform. In recognition of International Human Rights Day, on December 6, 2011 addressing representatives of governments from the entire globe, U.S. Secretary of State, Hillary Clinton delivered a historic speech at Palace of Nations in which she forcefully argued ‘gay rights are human rights’.²⁹

In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*³⁰, the South African Constitutional Court struck down sodomy laws on ground that their existence violated the constitutional right to equality.

Dealing with the issues of the infringement of transgender rights, the European Court of Human Rights in a number of cases reiterated that infringements of rights of LGBT persons guaranteed by European Convention on Human Rights, 1950 violates the non-discrimination provision under article 14 of European Convention on Human Rights, 1950. In 1999, in the case of *Salgueiro da Silva Mouta v. Portugal*³¹, the European Court of Human Rights emphasised that ‘sexual orientation’ was ‘a concept which is undoubtedly covered by article 14 of European Convention on Human Rights, 1950. The Court further recapitulated that list set out in article 14 of European Convention on Human Rights, 1950 is illustrative and not exhaustive, as is shown by the words ‘any grounds such as’. On January 22, 2008, the Court held that France had violated right to non-discrimination under article 14 in conjunction with right to private and family life under article 8 of European Convention on Human Rights, 1950 in refusing the adoption application of a lesbian woman³².

On 2 March 2010, in the case of *Kozak v. Poland*³³, the European Court of Human Rights found that a same-sex partner should be able to succeed to a tenancy held by their deceased partner. The Court held that the Polish authorities’ exclusion of same-sex couples from succession could not be justified as necessary for the legitimate purpose of protection of the family and was a violation of the right to non-discrimination under article 14 of European Convention on Human Rights, 1950.³⁴

²⁹ David W. Austin, “Sexual Orientation and Gender Identity”, 46 *The International Lawyer* (2012), 449.

³⁰ [1999] ZACC 17

³¹ Application no. 33290/96

³² *Supra* note 26 at 488-489.

³³ Application no. 13101/02

³⁴ *Supra* note 26 at 488-489.

Another progressive approach towards defending Transgender rights is the Declaration of Principles of Equality, launched by Equal Rights Trust in the year 2008. The Declaration is a holistic approach towards efficacious execution of the right to equality based on different grounds like gender, religion, nationality, disability, sexual orientation and gender identity, etc. Part II of the Declaration specifically lays down that right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality. While defining the word Discrimination, the Declaration provides that discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds. The Declaration of Principles on Equality addresses the complex and complementary relationship between different types of discrimination, and seeks to advance and level up the exercise of equal rights for those groups that have weaker protection from discrimination in international and/or national settings.³⁵

In May, 2012, Argentina's Senate unanimously approved Gender Identity Law with the aim of guaranteeing equality, respect, and dignity for transgenders. The Gender identity law permits a person to change their name, image and sex in the National Registry free of cost without any complex procedure. The law further recognises sex-change surgery as a legal right.

In 2015, the government of Malta adopted the Gender Identity, Gender Expression and Sex Characteristics Act. This Act aims for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person. It provides for a simplified procedure which respects the privacy of the person requesting that one's official documents be changed to reflect the person's gender. The Act further acknowledges the necessity of accepting the fact that gender identity is an inherent part of a person and that every individual has a right to make their decisions affecting their own bodily integrity and physical autonomy.

In Ireland, the Gender Recognition Bill, 2015 was the product of a 22-years legal fight by Lydia Foy, a now-retired dentist. Braving a gauntlet of legal procedures, she made her case to be recognized as a woman before Ireland's High Court in 1997, and again in 2007. Despite the

³⁵ *Supra* note26 at491-492.

consistent pressure, however, in 2015, after an overwhelming victory on a same-sex marriage referendum, government of Ireland instituted identity-based legal gender recognition.³⁶

In South Asia also, several countries have taken progressive steps in recognition of transgender rights. For instance, Nepal's Supreme Court, in 2007 by a ruling ordered the government to recognize a third gender category based on an individual's 'self-feeling'. The ruling rested largely on the Yogyakarta Principles. The activists successfully advocated with government agencies to include the third gender category on voter rolls (2010), the federal census (2011), citizenship documents (2013), and passports (2015).³⁷ Similarly, in 2009, the Supreme Court in Pakistan called for a third gender category to be recognized, and in Bangladesh, the cabinet issued a 2013 decree recognizing hijras as their own legal gender.³⁸

Thus, a brief survey of the international developments in this regard suggests that the most significant development in the arena of transgender rights actually came with Yogyakarta Principles developed by International Commission of Jurists and the International Service for Human Rights. This is the first document codifying international principles on sexual orientation, gender identity, and human rights published as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006.

The Preamble of the Yogyakarta Principles acknowledges human rights violations based on sexual orientation and gender identity, establishes relevant legal framework, and provides definitions of key terms. The Yogyakarta Principles specifically recognises right to universal enjoyment of human rights, non-discrimination and recognition before law. It provides that persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life³⁹. Right to human and personal security is another right guaranteed by the Yogyakarta Principle⁴⁰. Importantly, each Yogyakarta principle is accompanied by recommendations to state on how to end discrimination and abuse against LGBT people. For instance, principle 5 recommends the state to take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity. Another significant principle provides that no one shall be

³⁶NeelaGhoshal and Kyle Knight, "Rights in Transition, Making Legal Recognition for Transgender People a Global Priority" in Human Rights Watch, *World report 2016*23 (2016).

³⁷*Ibid.*

³⁸*Supra* note 37

³⁹ The Yogyakarta Principles, 2006, principle 3.

⁴⁰*Id.*, principle 5.

subjected to arbitrary arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise⁴¹. The Yogyakarta Principles specifically designed to protect the rights of transgender person also recognises several other rights which include freedom from torture and from cruel, inhuman treatment for reasons relating to sexual orientation or gender identity (principle 10), right to work and right to social security measures, right to decent and productive work (principle 12), right to adequate housing (principle 15), right to education (principle 16), protection from medical abuse (principle 18), Right to found a family (principle 24), etc. Thus, these provisions aim to protect the right to equality and dignity of transgenders along with basic human rights which they are entitled by birth. This project of securing equality and dignity of transgenders is carried through by outlining an international framework and legal standard in addressing the global patterns of abuse and violence perpetrated either because of actual or perceived sexual orientation or gender identity.

The Yogyakarta principles of 2006 were expanded in 2017 with the addition of 10 more principles. One of the principles expanded in 2017 provides that everyone, regardless of sexual orientation, gender identity and expression has the right to state protection from any kind of violence and discrimination⁴². Another additional principle further recognises that everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics⁴³. The additional principle 38 provides that state shall ensure the right to practice, protect, preserve and revive the diversity of cultural expressions of persons of all sexual orientations, gender identities, gender expressions on the basis of the equal dignity of and respect for all.

The Yogyakarta Principles addresses a very wide range of human rights standards with the aim of promoting and protecting the basic human rights of transgender persons. These principles may not be binding upon nation states of the world but nonetheless they do contain primary obligation and moral commitments of the states to implement these rights as part of their international commitment to rights and justice.

Indian context

In India, provision of section 377 of Indian Penal Code, 1860 was used as a weapon to criminalise private consensual sex between same-sex adults. Section 377 of IPC read as follows:

⁴¹*Supra* note 39, principle 7.

⁴²The Yogyakarta Principles plus 10 (YP plus 10), principle 30.

⁴³*Id.*, principle 31.

Unnatural offences - 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. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

However, challenging the constitutional validity of section 377 of IPC, a writ petition namely *Naz Foundation v. Government of NCT of Delhi*⁴⁴ was filed before High Court of Delhi on ground that section 377 of IPC so far it criminalises consensual sexual acts between adults in private is unconstitutional. On July 2, 2009, High Court of Delhi ruled that the provision in section 377 of IPC that criminalises private consensual sex between same-sex adults violates the spirit and promise of the Constitution and international human rights conventions and consensual sex amongst adults was declared legal.

With the *Naz Foundation* case, the issue relating to gender identity and sexual orientation became a topic of high inspired debate in the country. Though the decision in *Naz Foundation* case which legalised consensual homosexual act between adults was highly celebrated by lesbian, gay, bisexual and transgender (LGBT) groups and the progressive people, who saw it as a vital step towards their acceptance by the wider society, yet the same was criticized by many on the ground of morality.

In 2013, the decision in *Naz Foundation* case was challenged in appeal before Supreme Court in the matter of *Suresh Kumar Koushal v. Naz Foundation*⁴⁵ wherein the Apex Court overturned the decision of *Naz Foundation* case and reinstated section 377 of IPC. It was held that section 377 of IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of High Court is legally unsustainable.

Subsequently, a fresh petition was filed before Supreme Court of India in the case of *Navtej Singh Johar v. Union of India*⁴⁶ in which the constitutional validity of section 377 of IPC in so far as it criminalised homosexual acts as unnatural offence was challenged. Supreme Court held that:

section 377 of IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual

⁴⁴160 Delhi Law Times 277

⁴⁵Civil Appeal No. 10972 of 2013

⁴⁶W. P. (CrI.) No. 76 of 2016

orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.

Decriminalising consensual sex among adults, SC concluded that:

section 377 of IPC insofar as it criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of articles 14, 15, 19, and 21 of the Constitution of India, 1950. Court however, stressed that such consent must be free and voluntary in nature and devoid of any duress or coercion.⁴⁷

Hence, decision of *Navtej Singh Johar's* case is the landmark judgment recognizing rights of transgender in the country and thereby restoring it. Another, progressive steps taken in India recognising human rights of transgender is the passing of Transgender Persons (Protection of Rights) Act, 2019 by the Parliament of India. The Act aims to prohibit discrimination against transgender and provides procedure for social, economic and educational empowerment of transgenders by defining their identity and rights. Act defines transgender persons as person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities askinner, hijra ,aravani and jogta⁴⁸. Definition specifically asserts that a person would have the right to choose to be identified as a man, woman or transgender, irrespective of sex reassignment surgery or any therapy.

section 3 of the Act constitutes one of the very important provision which deals with prohibition of discrimination against Transgender. The section specifically stipulates that transgenders shall not be discriminated against by denial or unfair treatment or discontinuation in any educational institution, place of employment, in enjoyment or use of any goods, accommodation and service, facility dedicated to the use of the general public, etc. The Act recognises the right of every transgender person to reside in the household where parent or immediate family members reside.⁴⁹The appropriate government is entrusted with the responsibility to formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons⁵⁰, to

⁴⁷Navtej Singh Johar v. Union of India, W. P. (CrI.) No. 76 of 2016

⁴⁸Transgender Persons (Protection of Rights) Act, 2019, s. 2(k).

⁴⁹*Id.*, s. 12.

⁵⁰*Supra* note 43, s. 14.

provide for medical care facility including sex reassignment surgery and hormonal therapy⁵¹. Dealing with the right to identity, section 4 of the Act provides that a transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act. The Act has however provided a procedure for obtaining a transgender identity certificate. As per section 5 of the Act, a transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person and in case of a minor child, such application shall be made by a parent or guardian of such child. Such certificate shall be thereby issued by District Magistrate.

The Act further provides for setting up a National Council for Transgender. This Council is meant to advise central government on formulation of policies with respect to transgender persons, evaluate the impact of said policies and redress the grievances of transgender persons.

However, on analysis of Transgender Persons (Protection of Rights) Act, 2019 as a whole, certain lacuna can be identified and there are certain issues which the Act has failed to address. Firstly, provision of the Act which provides for requirement to obtain a certificate of identity from district magistrate has been severely criticised by Transgender community on ground that same is violative of the right to live with human dignity which provides right of self-identification. Also, Supreme Court's verdict in 2014 in case of *National Legal Services Authority v. Union of India*⁵² in a significant step towards gender equality held that transgender people have the right to self-identification of their gender as male, female or third-gender. Secondly, the Act fails to define terms such as trans-men, trans-women, persons with intersex variations and gender-queers, although same are included in its definition of transgender persons. Thirdly, the Act has failed to deal with issue which may occur if an identity certificate is denied to a transgender by District Magistrate. There is no provision for any appeal or review against the decision of District Magistrate who in any specific case may deny to issue identity certificate to a transgender. Fourthly, recognition as a 'transgender' or 'third gender' is a recent concept. There are several existing laws in the country in which only two categories of gender that is man and woman have been recognised. To bring the third category of gender within the ambit of such law may either require an amendment in the provision of such laws or a specific declaration under The Transgender Persons (Protection of Rights) Act, 2019 regarding equal applicability of such laws to transgender. But this Act failed to clarify how the third gender or transgender can be brought within the ambit of existing criminal or civil laws in the country. Fifthly, the Act has failed to make any special provision in the form of reservations in education and employment for the advancement of transgender community who are mostly socially and educationally backward

⁵¹Supra note 43,s. 15.

⁵²AIR 2014 SC 1863

class of citizens. Sixthly, the Act has failed to address the issue of right to marry and found a family as well as right to adoption of the transgender people.

Same sex marriage and right to adoption

Traditionally marriage has been limited between persons of opposite sex. However, with the march of liberal values towards gender determination or acceptance of sexual orientation, the question is whether there is justification for excluding same-sex couples from marriage in the name of tradition and values and whether such exclusion is in breach of fundamental right to marry. With the institution of marriage and the family having undergone massive transformation over the years, same sex marriage has gained currency to emerge as a significant point of global mobilisation today. The question then emerges whether the state marriage law should be reformed to make provision for legalising same sex marriage. Religious denominations play a strong role in structuring attitudes about the morality of homosexuality, and support for specific policies of toleration and non-discrimination.⁵³ As of the end of 2011, same-sex marriage was available nationwide in ten countries namely Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, Spain, South Africa, and Sweden⁵⁴. If sexual orientation of transgender people is accepted then extending marriage rights to homosexuals becomes important. One indicator of acceptability may be the growth of legally permissible adoption of children or the use of artificial insemination by same sex couples, which seems to signal an implied consent to homosexuals to form families, which then logically require the family court's governance⁵⁵. Such easy acceptance does not seem to be typical at present, but alternatives to marriage can protect the long-term interests of most homosexual cohabitants⁵⁶. With the march of liberal attitudes towards the institution of marriage, the procreation is not the only function of institution of marriage and as such, exclusion of the same sex marriage on the ground that partners to same sex marriage cannot procreate cannot be a rational view in any progressive society.

When it comes to the right to adoption of lesbian/gay couples, a Grand Chamber of the European Court of Human Rights has held by majority in *EB v. France*⁵⁷ held that it was a violation of

⁵³Darren E. Sherkat, Kyran Mattias de Vries and Stacia Creek, "Race, Religion, and Opposition to Same-Sex Marriage"*91Social Science Quarterly* 81 (2010).

⁵⁴David W. Austin, "Sexual Orientation and Gender Identity",*46The International Lawyer*451 (2012).

⁵⁵Antony W. DnesSource, "Marriage, Cohabitation, and Same-Sex Marriage", *12The Independent Review*96 (2007).

⁵⁶*Ibid.*

⁵⁷Application No. 43546/02 [2008] 1 F.L.R. 850

article 8 of the European Convention on Human Rights, 1950 taken in conjunction with article 14 of European Convention on Human Rights, 1950 for France to refuse authorisation to a 'single' lesbian applicant to apply to adopt a child. Her sexual orientation had appeared to be a decisive or determining factor in the decision.⁵⁸ Though some countries protected same-sex couples' right to adopt children, others expressly prohibited LGBT people from adopting or has no laws on this aspect. For instance in Mississippi, in the case of *Obergefell v. Hodges*⁵⁹ adoption-related issues were raised. The SC of Mississippi said case ruling explicitly held that gay couples have a constitutional right to marry and that one of the benefits of marriage involves adopting children.

Despite all such path breaking interventions and judicial pronouncements across the globe, the right to adoption by LGBTQ community continues to remain one controversial issue at the societal interactions. The controversy around it is created through some misplaced reasoning that children who are placed in same sex households will face problems due to their parents' sexual orientation. Nevertheless such misconceptions are often being thwarted in the process as homosexuals or lesbian couples have been effectively demonstrating examples of stable and healthy relationship thereby creating and offering a secure home with all the emotional support needed. Unfortunately, most of the countries in the world are yet to legalise same sex marriage and their right to adoption. In India too, though homosexuality is decriminalised this is only a partial achievement as the victory for the LGBT community will be victory in true sense only when they secure the right to marriage, adoption, inheritance and guardianship.

Conclusion

The gender and sexuality system is marching towards liberal values of self-determination. The liberal movement has brought a shift in the criteria for gender determination. Gender now is not limited only to sex assigned at birth but the criteria now also include a person's choice for gender which may vary from assigned sex at birth. Years of struggle by LGBTQ community and the activism by organisations working in collaboration and solidarity with transgender people, sexuality rights has become a topic of wider discussions bringing to forefront the human rights issues of transgender community. This has successfully led to some attitudinal changes, at least from the point of beginning, which in turn has inspired a remarkable shift in how people perceive sexuality and gender orientation.

Merely developing empathy towards LGBTQ or being conscious about their human rights violation is not sufficient enough to provide solution to the problems that the transgender people

⁵⁸ Andrew Bainham, "Homosexual Adoption", 67 *The Cambridge Law Journal* 479 (2008).

⁵⁹ 2015 U.S. LEXIS 4250

are battling against. There should be strict enforcement of codified laws and policies guaranteeing both the rights and choice of the people with regard to their sexual orientation. In this process, the transgender community should also be ensured equal and respectable space in our society. Efforts in this regard should be oriented to ensure that transgender people get proper health care as per their requirement. Equally important concerns involve changing the gender on identification documents and obtaining legal name and therefore, they should be made easier. Adequate efforts and institutional measures need to be taken to ensure the rights and safety of transgender people in prison and detention facilities. In the context of welfare state, a state which undertakes to protect health and well-being of its citizens, especially those in financial or social need, it is a deep responsibility of the government to ensure equal protection of law to this marginalised section of our society. In an age when the boundaries of sexual tolerance are shifting, the time is opportune for an active involvement of and collaboration with the transgender community⁶⁰. Strategies should be developed to bring the transgender community within the equality framework, thereby removing the barriers expressed in terms of violations of their basic human rights, and enabling them to grow socially and professionally.

⁶⁰ Editorial, "Gender Rights", *Economic and Political Weekly*, Jun. 21 - 27, 2008