



Review Paper

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Transformative Constitutionalism: Its Implication for the Rights of Sexual Minorities (LGBT) in India

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ABSTRACT

Traditional Indian society never gives respectable and dignified space to sexual minorities' i.e. LGBT communities. They never have been part of the mainstream of Indian society. They are socially and morally excluded from the societal framework. The constitution of India under the chapter of fundamental rights constitutionally gives LGBT community equality with the other section of society. To create a more progressive society that is more inclusive in all spheres and egalitarian in perspective, it attempts to make use of both constitutional protections and constitutional machinery. This is primarily done by working for what academics refer to as "substantive equality," which is practically manifested by the enforcement of socioeconomic rights. Particularly those defending minorities' interests – as well as through affirmative action policies. This research paper aims to develop a thorough knowledge of the growth of transformative constitutionalism with special reference to LGBT rights.

Introduction

"In the last fifty years or so, the human rights discourse has undergone a remarkable transformation. It has moved from the periphery to the center of the global conversation on critical issues and areas that affect human well-being. Going beyond an acknowledgement of its growing importance, some analysts have even claimed that human rights "have attained the status of a lingua franca of global moral discourse".

In 2011, "the United Nations issued its first-ever report on the human rights of LGBT people. The report issued by the Office of the High Commissioner for Human Rights (OHCHR) outlined a pattern of violations based on sexual orientation and gender identity that includes "killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education". The LGBT community was never accepted in Indian society. Their act and behavior were conceded as taboo in normal society. Moreover, Section 377 of IPC criminalized the unnatural relations. The voice for the normal human

right remained suppressed even after 60 years of Independence. Naz foundation an NGO raise the voice of the LGBT community and

challenge the Constitutional validity of Section 377 IPC which finally result in the movement for the human rights of the LGBT community. The decision of the court shows an acute understanding between the text and spirit of the fundamental right of the Indian Constitution. Transformation of the society lies in the heart and soul of the Indian Constitution. "In terms of international law, enforcing laws such as S. 377 that criminalized consensual same-sex activity and penalized individuals based on their sexual orientation are direct violations of international human rights law". "Even the United Nations Human Rights Committee, under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which India is a party, affirmed the violation of the "right to privacy" and "right to equality" for any law criminalizing same-sex relations between consenting adults".

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Review of Literature

Donald P. Haider- Markel (1996) "When gay and lesbian rights are not salient, the pattern of politics resembles that of interest group politics. If individuals opposed to gay and lesbian rights can expand the scope of the conflict, the pattern of politics conforms to morality politics". Thomas M. Keck (2009) "This article evaluates the widespread scholarly claim that the courtroom victories of the lesbian, gay, bisexual, and transgender rights movement have invariably provoked a counterproductive political backlash. Those victories have indeed provoked conservative counter mobilization, but that has not been their only or even their most prominent effect".

Svati P. Shah (2015) "Recent developments in Indian sexuality and gender politics concerning non-normative subjects must be understood through the critical lens that scholarship on neoliberalism offers. The conflation of gay identity with elitism, and transgender identity (when it is conflated with hijra-ness) with poverty, has characterized much of Indian public discourse on non-normative sexualities and genders. Emphasizing the vagaries of the daily lives of non- normative subjects, read through their geographical valences, is one way to disrupt this binary, while demonstrating the unique role of the urban imaginary in the discursive production of sexuality and gender-based activism in India". Kiran Vinod Bhatia⁹ (2016) "Through this paper an attempt has been made to understand how the LGBT community uses new media technologies to transcend the boundaries of the traditional public sphere to create a realm of self-identification in the virtual world.

The study focuses on a group of Indian citizens who identify themselves as members of the LGBT community, who are digitally active and have participated in activities to mobilize public opinion in favor of the legalization of their sexual preferences. The study delineates how the LGBT community translates online discursive practices into offline civic engagement activities through the process of community formation, mobilization, setting up agenda for collective actions and creation of a realm for expression by the marginalized other". Rishabh Agarwa (2019) "This research is based on studying both aspects of society the religious sentiments and LGBT community ideology, we can say that there is no logical or another effect on sentiments by an amendment in section 377 of I.P.C legalizing consensual sex between adults of the same sex. It is not like homosexuality is a modern concept it existed in the ancient period also and got recognition by our ancient people, but the ancient laws and customs are made by keeping in view about two genders only man and female".

Research Objectives

1. To analyze the role played by the Constitution of India toward the emancipation of the LGBT community rights in India.
2. To analyze the vision of the Constitution concerning the rights and freedom of marginalized communities.

Research Methodology

Doctrinal research methodology is used to complete the study.

1. Relies on established legal doctrines and principles
2. Examines the "law as it is" (lex lata) rather than "law as it should be" (lex ferenda)
3. Focuses on legal norms, rules and their systematic arrangement
4. Library-based research methodology
5. Deductive reasoning from legal principles
6. Analytical and interpretive in nature
7. Concerned with coherence and consistency in legal doctrine

Limitation of the research

While this research provides valuable insights into the transformative constitutionalism and its implications for LGBT rights in India, it is subject to certain limitations:

1. Reliance on Secondary Data:
2. Scope of Legal Analysis
3. Dynamic Nature of Legal Framework
4. Cultural and Societal Context
5. Limited Geographical Focus

The Judiciary's Role in Sexual Minorities' Emancipation

Despite the Constitution's goals of making Indian society more inclusive and equal, as mentioned above, the grim fact is that genuine equality for women and the LGBT Community in India is still a long way off. "Since the colonial era, laws criminalizing same-sex conduct as well as gender expression have sought to curb the right of lesbian, gay, bisexual, transgender (LGBT) persons to freedom". However, recent times have seen a more powerful use of the constitutional framework to articulate, contrary to the criminal law, the rights of LGBT persons to freedom. "A battle is now taking place between the old criminal law frameworks which shackle LGBT lives and the new constitutional" interpretations which seek to confirm the inherent dignity to which LGBT persons are entitled. The rights of these individuals now stand precariously poised between empathy and contempt. This research will "map this oscillation between empathy and contempt by discussing five emblematic cases". Two of them encompass the situation of LGBT people in colonial India, and the remaining three pertain to the contemporary era. They span the period between 1884 and 2014, and "the stories hidden within their interstices tell us how the law confines LGBT people in terrifying" and

“tragic ways but also how they challenge those confines in inspiring ways”. Two cases (Queen Empress v. Khairati and Nowshirwan v. Emperor), which date from India’s colonial history, presage patterns of persecution of LGBT persons in present-day India in important ways. They speak to Khairati’s and Nowshirwan’s aspirations for a better world in terms of the freedoms they sought, but which were denied by the law.

In the case of *Naz Foundation v. Government of NCT of Delhi and Others*, the Court held that the discrimination perpetuated by section 377 severely affected the rights and interests of homosexuals and deeply impaired their dignity. It found that the inevitable conclusion was that the discrimination caused to the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India. The High Court also found that section 377 violated Article 15 (right to non-discrimination) of the Constitution and concluded ‘that sexual orientation is a ground analogous to sex and that discrimination based on sexual orientation is not permitted by Article 15’ (*Naz Foundation v. Government of NCT of Delhi and Others* 2001, para. 104). A key strategy employed by the Naz Foundation in bringing this case was to emphasize the damaging effects that section 377 has on LGBT persons’ access to medical treatment – HIV/AIDS testing and treatment. This strategy contextualized the egregious nature of the criminalization provision and demonstrated its damaging and even life- threatening effect.

Indian Supreme Court stated in *National Legal Services Authority (NALSA) v. Union of India* that transgender persons have a right to select gender markers on identity documents based on self-determination. The judgment also directed the government to implement affirmative action programs to support transgender communities.

Navtej Singh Johar & Ors V. U.O.I. case the Supreme Court of India decriminalized homosexuality by declaring Section 377 of the Indian Penal Code unconstitutional. “Since 2014, transgender people in India have been allowed to change their gender without sex reassignment surgery and have a constitutional right to register themselves under a third gender”. Additionally, some states protect hijras, a traditional third-gender population in South Asia, through housing programmers, welfare benefits, pension schemes, free surgeries in government hospitals and other programmers designed to assist them. “They are also human beings and such treatment should be provided by the state to these people. In many instances, LGBT individuals are not legally protected from abusive and discriminatory actions”.

Suggestions and Conclusion

The Constitution of India irrespective of caste, creed, or gender gives the right to equality to its citizens. Discrimination towards the LGBT community is a social discrimination prevailing in society. Whereas section 377

criminalized only offensive sodomy its main aim is to protect small kids and innocent humans from unnatural sex. “The issue of inclusivity of the LGBT population remains complex”. As Indian society has transitioned from the colonial period, its values influenced by the British have stayed the same. Yet about homosexuality, a vast divide exists in a community that still lies at the crossroads between liberal religious doctrines and dogmatic cultural beliefs. The greatest factor that has contributed to this contested ground has been the clash among the citizens of the community: the non-Indians, whose perceptions and values of homosexuality have been heavily influenced by the implementation of Victorian ideals but who claim homosexuality is a “western import,” versus the Indians who claim that homosexuality was always existent in India and that Hindu traditions have always been receptive towards the same sex. The reinstatement of the criminality of homosexuality in 2013, for example, uncovered how deeply rooted these Victorian ideals have become within the Indian cultural belief system and continue to serve as a source of oppression for the LGBT community. More specifically, the Hindu mainstream society that marginalizes stigmatizes, and encourages LGBT violence and the legal sanctions that legitimize these human rights violations, sadly counter India’s very own religious standards and morals.

In the end, this research can be concluded with the following suggestions:

1. Social awareness programs

There is a dire need for social awareness programs to promote the social inclusion of people in this community. They are part of this society.

2. Education

Education is the key to all locks it can change the mind of society. An educated person from the LGBT community serves the nation and the mindset of the society, for example, “On 5 November 2015, K. Prithika Yashini became the first transgender police officer in the state of Tamil Nadu”. “Manabi Bandopadhyay became India’s first transgender college principal on 9 June 2015, In July 2017”, “Joyita Mondal was appointed to the Islampur Lok Adalat, becoming West Bengal’s first transgender judge”.

3. Political Representation

Political representation is also a platform to promote equality and freedom, “Shabnam Mausi is the first transgender Indian to be elected to public office. She was an elected member of the Madhya Pradesh State Legislative Assembly from 1998 to 2003. In 2000, Shabnam Mausi became India’s first eunuch MP”. “Transgender people were granted voting rights in 1994. Madhu Bai Kinnar was elected as the Mayor of Raigarh, Chhattisgarh”.

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