By amending Section 377, the Supreme Court had delivered a powerful riposte against the institutionalised disgust and contempt aimed directly at the LGBTQ+ community in India. Today, more than a year after this judgment the question remains - has it been enough? The longer we delay the construction of laws that tackles homophobia and transphobia, the greater the toll it will take on the LGBTQ+ members. There are loopholes that need to be addressed. With the advent of The Surrogacy (Regulation) Bill, 2019 and The Transgender Persons (Protection of Rights) Act what creates doubt is that, is our government willing to stitch these loopholes?

Every Indian knows the words that constitute the preamble of our Constitution; but whether the tenets of justice, liberty, equality, fraternity are followed not just on paper but in spirit as well requires introspection, and investigation. These principles were designed not keeping the majority in mind, but the oppressed minorities and the subaltern (Zahariadis, 1999). When seen in this context these words sound like an oxymoron, especially in this current milieu. The perpetuation of multiple systematic methods of marginalization destroys the ability of the said section of people to question the systems which have imposed these shackles on them (Sharma, 2008). The LGBTQ+ community carries upon itself a history of ostracization, and stands at a delicate point of time where it has to counter stereotypes from multiple spheres, by carving out its own space and narratives from the debris.

Betwixt the reality of hatred, the increasing global emphasis on human rights in the past few decades has spun into propulsion, advocacy and activism aiming to eradicate lop-sided hierarchies of existence. The demands of the LGBTQ+ no longer reverberate off in a deafening silence, as there are generations of people who are fighting to make this country a more inclusive environment for all of its citizens.

With the amendment of Section 377 of the IPC in September 2018, marking the criminalisation of the LGBTQ+ as unconstitutional, India witnessed a hallmark judgement. Reversing a relic of British oppression; the court created history by also ordering that LGBTQ+ Indian citizens be accorded all the protections of their constitution, but today, over a year after this judgment, the predicament is – is this enough? Rights like the freedom of marriage and divorce, or protection from abuse, continue to remain in a haze. A careful review of debates over gay rights Bamforth (1997) reveals the influence of various attributions on this sphere of public policy. Public opinion studies have consistently revealed that while traditional prejudice toward minorities has declined over time, support for policies that would reduce inequality has not increased in magnitude in American society (Bobo, 1988).

Utilising a similar approach on the Indian landscape, one can conclude that anti-LGBTQ+ laws stem from the socio-cultural fabric of the nation. It thus becomes imperative to question patriarchy, heteronormativity and homophobia by engaging in dialogue with society itself (Sharma, 2008). This is crucial from the perspective of agenda setting; as any intuitive investment in the process of initiating such a dialogue will only extend resources on multiple levels. It wouldn’t be limited to just raising awareness, but would also include rehabilitation of people to review and revisit their own stereotypes and myths, assistance to those who find it difficult to conform to the structures of hegemonic heterosexuality and thereby enable an informed choice regarding their own thoughts and actions. Eventually, such a process

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1 As a community, their status started degrading when the British rolled out the Criminal Tribes Act in 1871 which particularly targeted their existence. The Act was repealed in 1952, but the damage it caused is still visible. Transgenders, for the first time, were identified as the third sex only in the 2011 Census.
can be instrumental in developing a ‘national disposition’ that allows for a constructive discourse about sexual diversity.

Pluralisation of sexuality is important to challenge popular prejudice in order to make allies of people who may not identify as queer. Hence, the moods and motivations of people do matter, especially in a diverse democracy like ours. In this political schema, the country’s polity will cease to cater to all of its citizens, unless the inherent empathy and responsibility between the citizens themselves does not exist.

Along this trajectory of thought, the sociological perspective which deems public policy as the means that the government uses to intervene in a society to bring about change; is perceived to be for the common good of that society. The central assumption of this view would reflect a liberal-democratic bias that policy is a prescriptive mechanism designed by elected representatives and implemented in a subordinate manner by public officials (Ham & Hill, 1984). Policy decisions are thus equated with policy actions. The key to understanding this perspective would be to see the association of the state and its citizens through the lens of key concepts like control and compliance.

Despite having politicians like Dr. Shashi Tharoor, Priya Dutt, and Poonam Mahajan (Pink List India, 2019) who have spoken up in support of the community, the Congress and BJP manifestos mentioning their intentions to streamline the LGBTQ+ integration, is the parliament a friendly place for the community? How you acknowledge a community, shows how much you care about their welfare. The derogatory vocabulary that BJP has used to describe the LGBTQ+ community and the hurried passing of the Transgender Persons (Protection of Rights) Act 2019 and Surrogacy (Regulation) Bill, 2019 in the Lok Sabha, almost in continuation with the Kashmir ‘verdict’ speaks volumes.

The Surrogacy (Regulation) Bill, 2019, which has passed in the Lok Sabha, imposes morality by limiting a family to the confines of a heterosexual marriage. With commercial surrogacy heavily regulated in many western countries, India had become a hub for the same and undeniably several incidents of women being exploited or coerced have been reported (Ghosal, 2018). However, this bill is a shrewd attempt to end such exploitation and bring regulation into the realm of ‘altruistic surrogacy’ while completely banning commercial surrogacy. Experts argue that the bill is inflexible and privileged an ‘archaic family system’ that is not in sync with present realities (Ghosal, 2018). The parliamentary committee, for instance, that analysed the bill had opposed an outright ban, arguing that the bill in the present form was ‘morality’. Harish Iyer, Queer India, added that the lack of consideration given to the LGBTQ community resulted in the “denial of equal rights” for the community and argued that the bill was “highly prejudiced”. He said, “If the sole intention had been protecting the rights of surrogate mothers and to steer against making wombs-on-rent a norm, there would have been a plan to rehabilitate and integrate surrogate moms into our societal framework. There is no plan whatsoever in this direction. Instead, we get a bill that almost brings surrogacy to a standstill” (Ghosal, 2018).

Furthermore, the ill-intentions of the state are exhibited in the passing of the Transgender Persons (Protection of Rights) Act in the Lok Sabha and then in the Rajya Sabha on 26th November. The transgender community in India refers to this day as the ‘Gender Justice Murder Day’. To begin with, activists pointed out that it is inappropriate to include the intersex community in the definition of
transgenders, which the bill does. Additionally, the rights of transgender citizens are diluted; there is absolutely no discussion regarding reservations in public jobs and educational institutes. Alarmingly, the penalty for raping transgenders ranges from just six months to two years in stark contrast to the seven years to life imprisonment awarded for raping a cis-gendered woman. The community has raised a concern that crimes against them are considered and penalised as mere petty crimes. Finally, and most importantly, the act recommends one national level committee consisting of only five representatives from the transgender community, in a committee of thirty members. This is a blatantly unfair representation of the transgender population.

As far as public policy goes, starting from one single vote right to the parchment being passed around in the legislative assembly, each cog matters. The Multiple Streams approach is appropriate in disassembling the entire mechanism that operates behind systematic discrimination. It refers to an approach that attempts to understand how policies are made by understanding agenda setting (Kingdon, 1984). According to Kingdon, there are three main process streams – problems, policies and politics; that are flowing within the system which determine which issues are accepted for negotiation. Many ideas that may approach the same issue from different perspectives are just hovering about, for the attention of the policymakers at any given time (Kingdon, 1984). Out of the large spectrum, only a few receive the attention of the policymakers and even fewer are selected for action (Kingdon, 1984). In this scenario, while the problem areas have been identified, both the bills are very tokenistic in engaging with their solutions. For example, the only data used to make the Transgender Persons (Protection of Rights) Act 2019 is nine years old (Census 2011) which is not inclusive of several parameters like educational background or income status, etc (Nambiar, 2018). So how does this Bill intend to empower a section of people without knowing their present condition?

Overall, the Transgender Persons (Protection of Rights) Act 2019 is the only one that is even aiming at talking about LGBTQ+ rights, however it still lacks the means to achieve them. The right to residence, the prohibition of discrimination, inclusive education, livelihood, protection at the workplace, and healthcare are discussed but how it will happen is missing. Without the inclusion of the suggested amendments, instead of social, economic, and educational empowerment, the bill will only result in anguish against the government among the community members; as is being witnessed in reaction to the passage of the Transgender Persons (Protection of Rights) Act (Reddy, 2019).

Out of the 8% of our population (Reddy, 2019) that belongs to the LGBTQ+ community, most have to wake up to face a warped reality; one where society is disgusted by their birth and doesn’t just verbally discriminate against them, but rather subjects them to bigotry, cruelty and unthinkable physical abuse. To top this, even when they are wronged against, they don’t have the means to report it. A 2003 report by a civil liberties group in Bangalore narrates a gruesome testimony of a hijra sex worker who was first gang-raped by a group of men and then gang-raped by the police (PUCL-K, 2003). Hence, there should be an urgency to make provisions in the IPC that make these laws gender neutral, and inclusive of all people; because whether an individual identifies as male, female or transgender, everyone is vulnerable to assault, sexual violence, and rape. For true equality to prevail, these rights must be explicitly and fully extended to LGBTQ+ people; because violence in this world identifies weak cogs in the society and then attacks. Justice Indu Malhotra appropriately articulated during the Navtej Singh Johar & Ors. v. Union of India, 2018 judgement, “history owes an apology to the members of this community and their families” (Rajagopal, 2018). With individuals being subjected to ‘corrective’ rape, corporates clearly outing the community, and the system of insensitivity that has rendered the eyes of law (a.k.a. the police) to be blind – the gravity of the situation is pressing. The longer we delay construction of laws that tackle homophobia and transphobia, the greater the toll it will take on the mental health of the LGBTQ+ members. We need laws that address the ambiguity surrounding issues like queer marriage and adoption rights; and also delve into the constitutional complications of nominating your same sex partner for insurance (that can be easily contested by any family member) (Shekhar, 2019). There are loopholes and we need to fill them out. But the larger question that creates doubt, lies in whether our government is willing to stitch these loopholes?
References


