

TRANSWOMAN AS A ‘BRIDE’: DISCUSSING THE REPERCUSSIONS OF THE ARUN KUMAR CASE

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ABSTRACT

The Madras High Court in a path-breaking judgment, normalized the marriage between a cis-man and a transgender-woman.¹ It interpreted the word ‘bride’ under the Hindu Marriage Act, 1955, thus widening its scope. The court quoted Mythological epics and took the aid of past judgments in order to recognise the right to self-determination, and the domain of personal autonomy.

This comment argues that this judgment has re-affirmed the right to privacy. The right to choose a life partner is dependent upon the capacity of the individual to make choices. This verdict also sets up a precedent to legalize same-sex marriages, and provides an opportunity to dispel arguments that restrict the same. It re-affirms the principle of progressive realisation of rights, which should be able to alter legislations in order to protect the LGBT community’s fundamental rights. The comment also analyses the right to self-identification/ right to self-determination, in alignment with the new Transgender Persons (Protection of Rights) Act.

Keywords: Marriage, Arun Kumar Case, Transgender persons, Discrimination, Right to self-determination

FACTUAL BACKGROUND

Arun Kumar got married to Ms. Srija (a trans-woman) at Arulmighu Sankara Rameswara Temple as per the hindu rites and customs. Though the temple authorities permitted the registration of marriage, they declined to vouch for it. The parties submitted a memorandum for the registration of marriage under Rule 5 (1) (a) of the Tamil Nadu Registration of Marriage Act 2009 before the joint registrar. The Joint Registrar refused to do the same, which was further supported by the district registrar. The petitioners filed the petition, challenging this refusal to register their marriage.

ISSUES UNDER CONSIDERATION

The first issue that came before the court, was that whether the marriage committed by the parties would be considered as valid in terms of the concerned section (section 5 of the HMA). In order to declare that the marriage is a valid marriage, it would be vital to ascertain that the marriage took place in accordance with the personal law. The Respondent argued that the meaning of the expression “bride” was not construed, and thus the marriage was not legitimised with any custom, usage or tradition.

Section 5 of the Hindu Marriage Act states that in order for the marriage to be legally valid (essentials for the solemnisation of marriage), the bride should have completed the age of 18 years. Srija, on the other hand was labelled as a transgender and hence, was contended to not come under the bracket of women.

The Second issue dealt with the abridgment of Srija’s fundamental rights. Whether her fundamental rights were violated by the decision of the inspector general of registration or not. The fundamental rights in question were her right to equality under article 14, right to live with dignity under article 21, and right to freedom under article 19 of the Indian Constitution.

The right to equality promotes equal treatment of all individuals before the law. The right to freedom of speech and expression counters all those mechanisms that qualify as a reasonable restriction on an individual’s freedom of speech and expression. Article 21 includes the right to live with dignity, the right to privacy and the right to personal autonomy. ⁱⁱ

JUDGMENT: A LANDMARK VERDICT

The Madras High Court delivered the verdict in favour of Srija, and the petitioner. The judgment sought redressal from the constitutional provisions, in order to avert the transgenders from languishing in the margins again. It first declared that Gender is different from sex, then it re-constructed the meaning of 'bride' and lastly, re-affirmed the right to self-identification. By all this, it never meant to break any new-ground, it just stated the obvious.

Gender is different from Sex

Gender and sexuality were held to be two interlinked concepts. Gender is about the social construction shaped by cultural processes. Even if nature has created biological diversity, human-kind have created hierarchy in sexes, thus only labelling two binary sexes- male and female. The court stated that a person's sex is biologically determined at the time of birth, not so in the case of gender.

Mythological instances were cited in order to substantiate the claim of an existence of a third category (outside the male-female binary)-Transgender persons. These were entitled to legal protection of laws in all spheres of state activity.

The Judgment stated that *"Transgender persons fall within the expression 'person' and hence entitled to legal protection of laws in all spheres of State activity as enjoyed by any other citizen of this country."*

'Bride' was given a wide connotation

The expression of 'Bride' was given a wide interpretation. It was stated that the term shouldn't have a static or immutable meaning, otherwise the social sanctity would be defeated.

"Therefore, the expression "Bride" includes not only a woman but a trans-woman. It would also include an intersex person/ transgender person who identifies herself as a woman. Consideration will be given on how the person identifies herself."

Srija identified herself as a transgender woman, and therefore would come under the ambit of 'woman'. As the HMA, requires a bride to be a woman, Srija perfectly fit into the category.

Transgenders have a Right to Self-identification

Transgender persons have the right to decide their self-identified gender. After the landmark supreme court ruling in 2014, transgenders were entitled to the legal protection of laws in all spheres and thus enjoyed fundamental rights available to any other citizen.ⁱⁱⁱ Gender-identity lies at the core of personal identity, which is protected under article 19(1)(a) of the Constitution. Self-determination of gender falls within the realm of personal liberty, and thus is crucial for the shielding of personal autonomy.

Justice Swaminathan remarked on the role of the government to launch an awareness campaign on this right to self-identification, and also promote this in order to tackle the societal pressure that makes this issue a matter of embarrassment/shame. “*Time has come when they should be brought to the mainstream*”, he said while discussing the status of inter-sex children into the folds of their families. Also, he directed the need to ban sex re-assignment surgeries for inter-sex babies. This initiative

The efforts of Gopi Shankar (Gender rights activist) should be lauded, as he highlighted the menace of forcible “corrective surgery”.^{iv} The Ministry of Health dismissed shankar’s complaint and took the benefit of consent. The court asserted that the consent of the parent/guardian could not come under the umbrella of the consent of the child. This “corrective surgery” can only be made in conformity with their preference.

WHAT DOES THIS MEAN FOR THE LGBT COMMUNITY?

While, *K.S. Puttaswamy v. Union of India* stated that denying the LGBT community of its right to privacy on the ground that they are a minority, would be detrimental for their fundamental rights.^v Hence, this denial would constitute a violation of their right to life, equality and freedom. Another judgment, *Shafin Jahan v. Asokan K.M* reaffirmed that an adult’s right to “choose a life partner” is purely a facet of individual liberty, and thus is protected under the realm of the Indian Constitution.^{vi} The *Navtej Singh Johar* Judgment was considered as great victory for the LGBTQ community, and held that any ground of discrimination which is sought to be a particular understanding of the term “sex” would be constituted as discrimination.^{vii}

All these judgments respectively hold a special place in re-affirming the fundamental rights for the LGBT Community. In this particular Judgment, the court validated the marriage between a

cis-man and a transgender woman which means that it is willing to interpret beyond the heteronormative understanding of “consummation”.^{viii} The court took a directive on intersex genital mutilation. It also voiced concern over the plight of transgenders, and issued an order in banning sex-reassignment surgeries.

This decision is a stepping-stone towards combating all the discrimination faced by the LGBT community. It redefines the institution of marriage, and comes outside from the spectrum of unconventional cis-man and cis-woman marriage.

CAN IT BE CONSIDERED AS A STEP TOWARDS SAME-SEX MARRIAGES?

Marriage is everywhere, in every country, in every religion across the world. India itself has an ocean of cultural diversity, major chunk of it being marriage^{ix}

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. The right to marry, should be something that caters to the right to privacy. Privacy caters the capacity of each individual to make choices.

Nonetheless, this verdict makes marriage socially acceptable. It has set a precedent for transgender persons to get married without being discriminated against. Also, it has built a platform to dispel arguments that restrict same-sex marriages. There is a pertinent advance in lesbian, gay, bisexual and transgender rights. Changing the mindset of the people would require a long-time span. Hence, it's high time that same sex marriages should be legalized in India in order to transform the social stigma.^x

ONE YEAR LATER: HAS THE SPECTRUM CHANGED?

Another couple married on February 14, 2018 couldn't register their marriage, as back then 'transgender woman' did not find its place in the Hindu Marriage Act.^{xi} However, after this leading judgment, the inspector general of registration office in Chennai clarified that the act would be applied to trans-persons also. In February 2020, they felt that their marriage had been accepted and legally valid. Surekha told the media, that she would use the marriage document in order to be financially secure, and will avail loans.^{xii}

This can demonstrate how the judgment has altered the lives of other alike couples. It has instilled a sense of acceptance in transgender-women (particularly), and other members of the community.

Discrimination still persists

However, the principal issue that the LGBT community faces is of acceptance from the “mainstream community”. It would a misnomer to say that blatant negative labelling and slurs have ceased to exist. Gender discrimination still finds a considerable place in the “modern society”.

Their right to privacy, employment, education, access to judgment, freedom of movement all are under a questionable position. Their dignity and worth can be outplayed any-time in the form of “social morality”.

Legislation as a hurdle

While the judgment has taken a directive on right to self-identification, the new Transgender Persons (Protection of Rights) Act which was passed at a later stage does not promote “self-perceived” gender identity. The objective of this act is to prohibit discrimination, and thus mandates the constitution of a council for transgender persons.^{xiii} Despite many amendments to the 2018 bill, the act has failed to incorporate the principles from this verdict, and the *N.L.S.A* verdict likewise. The provision mentions the right to “self-perceived” gender identity, however it adds on that a transgender person must make an application to the district magistrate for a “certificate”. Then, a certificate-holder can apply for a change in the documentation, even if they have provided a proof of surgery (sex-reassignment surgery).

This very loophole puts the right to self-identification into the government’s arbitrary control. On top of this coercion, the government official must be satisfied with the “correctness of the certificate”. The transgender persons’ right to decide their self-identified gender should be without any mandatory intervention. Governments’ should fully recognize their citizens’ self-defined gender identity, and should not pose medical requirements or impose discrimination on any grounds.^{xiv}

Nevertheless, the Supreme Court has issued a notice that Swati Bidhan Baruah, a human-rights activist has challenged the constitutionality of the 2019 legislation.^{xv} We can still anticipate the access to justice, and the affirmation of fundamental rights.

CONCLUDING REMARKS

I would like to highlight the principle of *progressive realisation of rights* that was initiated in this judgment. Also, reinstate that the human rights of the LGBT community are protected, regardless of the fact that the majoritarian perspective disapproves it. The judgment can promote further progressive alteration in laws with respect to issues pertaining to surrogacy, adoption and more. Most community members feel the need to adopt a child, and aspire for a family.

As India progresses towards a liberal era, where economic, educational and social developments are on the rise, there are contradictions that lie within the fetters of beliefs, customs and traditions. The progression definitely would not take place overnight. It is crucial to support the notions of equality, liberty and justice- the allegiance. All citizens deserve the right to have an opportunity to perform an action, whether it is of sexual intimacy, or a sacred institution like marriage.

There is freedom of choice, and liberty is the fundamental part of the constitution. The Transgender Persons (Protection of Rights) Act should be amended, and should suitably allow legal gender recognition, not just inflict abusive preconditions like medical procedures, and authoritarian administrative documentation. Right to recognition is a fundamental aspect of asserting the worth of a person.

The orthodox notions of gender-identity have to be prevailed with the spirit of transformative constitutionalism and constitutional morality. This can be attained by not only '*physical vision in the eye but also love in the heart*'.^{xvi}

ENDNOTES

ⁱ Arun Kumar v. Inspector General of Registration, (2019) WP(MD) No.4125

ⁱⁱ Const. of Ind, Art 21.

ⁱⁱⁱ National Legal Services Authority of India v Union of India, (2014) 5 SCC 438.

^{iv} Manuraj Shunmugasundaram, *Breaking new ground* (2019), The Hindu, April 26 2019, available at <https://www.thehindu.com/opinion/op-ed/breaking-new-ground/article26946299.ece> (last visited on 19 April 2020); Manu Sebastian, *Transwoman a 'bride' under Hindu Marriage Act: Madras HC Also Bans sex re-assignment surgeries on intersex children*, Live Law, April 23 2019, available at <https://www.livelaw.in/news-updates/transwoman-regarded-as-bride-madras-hc-bans-sex-re-assignment-surgeries-intersex-children-144467> (Last visited on 19 April 2020).

^v K.S. Puttaswamy v. Union of India 10 SCC 1.

^{vi} Shakti Vahini v. Union of India, (2018) 7 SCC 192; Shafin Jahan v. Asokan K.M., AIR 2018 SC 1933

^{vii} Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

^{viii} Arijeet Ghosh, "How Can Families be Imagined Beyond Kinship and Marriage?" *Eco. & Pol. Weekly* (2018) Engage, available at <https://www.epw.in/engage/article/how-can-families-be-imagined-beyond-kinship-and-marriage>. (Last Visited on 20 April 2020).

^{ix} Priyanka Thukral Mahajan, 'Indian religious concepts on sexuality and marriage' *Indian J Psychiatry*. 2013 Jan; 55(Suppl 2): S256–S262.

^x S Tripathi, *decriminalizing gay sex is a huge victory. But India still faces many challenges*, *New Statesman*, September 6 2018, available at <https://www.newstatesman.com/world/asia/2018/09/decriminalising-gay-sex-huge-victory-india-still-faces-many-challenges> (last visited on 20 April 2020)

^{xi} <https://www.dtnext.in/News/TamilNadu/2020/02/15015333/1215309/Valentines-Day-gift-Transwoman-marriage-registered.vpf>. (Last visited on 20 April 2020)

^{xii} *Id.*

^{xiii} THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT 2019

^{xiv} Kyle Knight, *India's Transgender Rights Law Isn't Worth Celebrating*, *HRW*, December 6 2019, available at <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating> (last visited 22 April 2020)

^{xv} Ashish Tripathi "Supreme Court notice to Centre on plea against Transgender Act, 2019". *Deccan Herald*. January 27 2020. (Last Visited on 23 April 2020)

^{xvi} With reference to Arun Kumar v. Inspector General of Registration, (2019) WP(MD) No.4125.... "This Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart," (per J. Swaminathan).