

INTERNATIONAL JOURNAL OF LEGAL STUDIES AND SOCIAL SCIENCES [IJLSSS]

Volume 1 | Issue 1 [2023] | Page 15-23

© 2023 International Journal of Law Legal Studies and Social Sciences

Follow this and additional works at: <https://www.ijlsss.com/>

In case of any queries or suggestions, kindly contact editor@ijlsss.com

CLOUDS OF PREJUDICE MAKE THE RAINBOW INVISIBLE: HATE CRIME IN INDIA

-Adv. Kuriachan Josey¹ & Adv. Gautham Vishnu N²

ABSTRACT

Hate crime is a prejudice-motivated crime which occurs when a perpetrator targets a victim because of the latter's Race, Ethnicity, Religion, Political affiliation, Caste, Gender, Sexual Orientation, Economic prosperity etc. Globally, it is considered a gross crime against mankind which was condemned and criticized by International and National legal instruments. However, going to the reason of the crime being deeply rooted in the societal structure measures to eradicate the same largely did not succeed much. When we consider the crimes against the LGBTQIA+ community in particular, we can find it has been there in huge numbers for ages. Thus, to deal with hate crimes in addition to curative measures like punishing the wrongdoers, many preventive measures such as addressing political, economic and social inequalities coupled with disparities on the grounds of Caste, Creed, Gender and Ethnicity must be ensured especially for LGBTQIA+ community, the separate mechanism should be adopted in the form of penal provisions as well as awareness programs. This paper intends to deal with Hate Crimes in general and to highlight Hate Crimes against LGBTQIA+ community in particular.

Keywords : *Hate crime, LGBTQIA+, Ethnicity, Race, Sexual orientation*

1. INTRODUCTION

“Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. Society is something that precedes the individual.”

- Aristotle

¹ Final Semester LLM, Law Department, Central University of Kerala (Thiruvalla campus)

² Final Semester LLM, Law Department, Central University of Kerala (Thiruvalla campus)

Throughout the history of mankind, we can see that humans are inherently social. Being social allowed us to create culture, and with it cultural adaptations. It also fostered the very sophisticated ability to communicate that characterises the human species, and also allowed for knowledge to be stored and accumulated throughout the generations. But along with the interaction between humans, different classes among humans also arose and it led to a division between primitive humans. In the early stages of human history, the majority of members in a given society have similar access to wealth and power, with only a few members displaying noticeably more or less wealth than the rest.

As time goes on, the largest share of wealth and status can begin to concentrate around a small number of the population. When wealth continues to concentrate, pockets of society with significantly less wealth may develop, until a sharp imbalance between rich and poor is created. As members of a society spread out from one another economically, classes are created. When a physical gap is added, a cultural rift between the classes comes into existence, an example being the perception of the well-mannered, "cultured" behaviour of the rich, versus the "uncivilised" behaviour of the poor. With the cultural divide, chances for classes to intermingle become less and less likely, and mythos becomes more and more common between them (i.e. "the wrong side of the railroad tracks"). The lower class loses more of its influence and wealth as the upper class gains more influence and wealth, further dividing the classes from one another. Later this division was aided by many factors like wealth, income, race, ethnicity, gender, occupation, social status etc. and people who belong to the upper strata of the system began to exploit others. This led to the inception of Hatred among humans and this in turn led to the primitive form of Hate Crimes. One of the worst version of hate crime is the criminal act which is against a certain group of people because of their *Sexuality*³. The conventional thinkers always think that there are two types of people present here; Men and Women and their sexual orientation⁴ should be always towards the opposite sex and the people who deviate from these stereotype life principles are considered to be doing a sin and they are being punished by the mob. This attitude of the society is actually the sin which needs correction.

³ Way in which the people experience and express themselves sexually.

⁴ Pattern of romantic or sexual attraction to persons of the opposite sex or gender, the same sex or gender, or to both sexes or more than one gender.

2. HATE CRIME: GLOBAL SCENARIO

“Hate crimes are the scariest thing in the world because these people really believe what they’re doing is right”

-Cher⁵

The terms hate crime and bias crime were coined in the United States during the 1980s, as journalists and policy advocates groped for new terminology to describe bigoted violence directed against *Jews, blacks, and homosexual groups*. Moreover, the term refer not simply to acts of violence, but also to crimes involving destruction of property, harassment, or trespassing. Though the term “hate crime” is used across jurisdictions, disciplines, and contexts, it is perhaps surprising that there is no uniform understanding of the term. For this reason, scholars, policymakers, and legislators can often speak at odds when discussing the issue, even within practice silos. For some, a “hate crime” is a phenomenon that reaches across the spectrum of hostilities that are manifested towards minority communities generally, ranging from what (from a legal perspective) would be considered criminal acts, to discrimination, to hate speech, to microaggressions. For others, the term “hate crime” is a narrow construct applicable only in the context of criminal acts. There is no accepted definition at an international level as to what constitutes a hate crime, from organisations such as the *United Nations, the Council of Europe or the European Union*. Not only that, but there is no agreed conceptualisation of the term across jurisdictions. For these reasons, I believe that it is now appropriate that we reflect on what we understand and mean by the term “hate crime”. Whilst I do not suggest that it is appropriate for a standard definition of hate crime to be utilised across jurisdictions and domains, I believe that the definitional boundaries of a hate crime can and should be agreed. These boundaries of a hate crime will allow for different disciplinary and jurisdictional understandings of the construction of a hate crime.

LGBTQIA+ is one of the targeted sections of the society even in so called developed countries like US and UK. Racism is impliedly present in almost every varieties of Hate crime particularly in US and UK. A white homosexual person doesn’t have to face the threat of the same degree

⁵ American Singer

which a black homosexual have to face. So in that case, the so called people who themselves considers as the 'societal protectors' is having more than one reason to punish the latter. A British survey called *Gallup*⁶ in 2020 showed that about 80% of respondents in the trans community reported they had suffered from *Transphobic*⁷ hate crimes. Research related to young adults in the U.S. indicate that more than three in five transgender youth reported they were attacked. In India, even though the exact data is not available, from the given circumstances, we could easily assume that the crime rate will be much higher than U.K and U.S.

3. HATE CRIME IN INDIA

When we go through the history of India, we can see instances of Hate crimes even before the inception of the country. The country was born in the throngs of the tragic Partition in 1947 which led to more than two million deaths. Since then, there have been hundreds of incidents of what in India are often described as 'communal riots'. The social fabric of the country which is knit on the basis of caste system adds more thrust to such incidents. Recently, the frequency of these incidents is increasing due to the changing mind set of the people. In July 2018, the former Chief Justice of the Supreme Court, *Deepak Misra*, warned against India turning into a 'mobocracy'.⁸ In modern India, LGBTQIA+ are considered to be abnormal and need psychological treatment by society. But in ancient India which we call 'uncivilised', they were respected just like any other person and that is evident from the ancient paintings and cave carvings which display men and women having sexual activities with the same sex which ranged from women erotically embracing each other to men having sexual intercourse with each other. But when the colonisation of our country happened, it led to the criminalisation of same-sex offences and thus the common notion began to change.

Even the Indian law or our system didn't recognized them as normal human beings till the last decade and our judiciary to an extent, identified their existence in the course of *Navej Singh Johar*⁹ judgment. So we must say that the society has slightly began to civilize in a way that at least to a smaller extent, they began to accommodate the LGBTQIA+ community. But the hate crime

⁶ To measure the core elements needed to attract, focus and retain the most talented employees in the managerial level.

⁷ Having or showing a dislike of or prejudice against transsexual or transgender people

⁸ *Tehseen S. Poonawalla v Union of India & Others* (2018) 9 SCC 501

⁹ *Navej Singh Johar v. Union of India* (AIR 2018 SC 4321)

against them still exist as evil in our society since the attitude of the public didn't changed much and the hate crimes are spreading like a pandemic in our society. The revolution against *Sec 377*¹⁰ of IPC started in 1980s and it has gone through many hardships. Amidst of that, even judiciary were not having a clarity of whether it's right or wrong. After the 2018 Navtej Johar judgment, more LGBTQIA+ Indians come out and claim spaces, the more vulnerable they become to hate crimes. And it create serious physical and mental harm to them which make them indulging into self-harm, eating disorders, depression and becoming suicidal in nature.

Last year, one of India's first trans radio jockeys, *Ananya Kumari Alex*, died by suicide after a sex reassignment surgery gone wrong. Subsequently, in October last year, an elderly trans woman was killed by a young man after he sexually assaulted her. In 2020, in the capital city of New Delhi, a trans activist was shot dead in front of her home. Despite multiple instances of violence toward the queer community, the *National Crime Records Bureau* has no firm statistics on violence against queer people in India. They turn a deaf ear and a blind eye to the acts of people who are affected with '*Queerphobia*¹¹'. Roots of this culture can be traced from our educational institutions where they are supposed to provide good life lessons and values. But instead, a toxic culture of bullying and harassment continues to thrive unchecked in our educational institutions and no steps have been taken by the government to prevent it. The traditional minded teachers didn't know the third gender aspect in the complete sense and they tend to have an opinion which belittle transgenders intentionally or unintentionally and they would influence the minds of their students who later became the decision makers of the society.

There has also been an increase in the number of crimes taking place via dating apps. Since the lockdown, several people with criminal intentions have joined queer dating apps only to dupe and loot members of the community. There have been many problems with gay dating apps before, such as profiles seeking women. These profiles try to take over our safe spaces and drive us out of where we belong. In 2020, a gay man was murdered in Delhi by two men he met on a

¹⁰ Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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

¹¹ Fear or hatred of Queer people

dating app. Luckily, the police caught them overnight, but that's not always the case. Very recently in Kerala, a transwomen in Kozhikode complained against Circle Inspector of Police to the District Police Chief alleging that she was humiliated and abused by him. LGBTQIA+ people endure violence and hate every day just for living their lives. Most of them don't report it to the police or tell anyone. It is not because they have no interest to address their issue. Police brutality and vilification by them against LGBTQIA+ people is a serious problem. When they go to police, the latter will treat them badly as they shows an impression that it is because of the former's mistake alone, they are facing the hatred. In fact, they will have to face more shocking hate from police than the other public. Because, police is supposed to be their saviours and when they stand against them, it will be creating more mental trauma them.

The protectors of the society cannot be the perpetrators of the hate crime. So that, the people especially the more responsible ones like Police, Teachers etc. should reform and should be more inclusive with their mind that LGBTQIA+ are also normal human beings who are entitled with all the rights which a normal man or women usually possess. To combat this, sensitisation of the media and law officials is crucial. Unless queer and trans people are empowered to report what's happened to them, the systems won't change. But for that to happen, we need a significant change in how the police and the media deal with queer stories. Generally, the media people are always seems to be too impulsive in nature and they should show their spirit in the socially needed circumstances. They should not only follow the exclusive news alone. Especially, when they address an issue of queer group, they should ensure that they follows it properly till the very end or till when they attain justice. Along with them, the community should really open its eyes and look for immediate red flags when a queer person got harassed physically or mentally in front of them. There is a famous saying that '*Willful ignorance is the lazy man's Hate Crime*'. Every day, we wake up to gruesome stories of rape, murders and violence and nobody is doing anything. LGBTQIA+ are also an important component of the society and being a marginalised section, the privileged section have an obligation to make and feel them normal.

And when it comes to the Government machinery, they are also considering this particular section of people as sub-standard whose rights are not meant to be protected or guaranteed. It is clearly evident from the act which India abstained from the resolution that renewed the mandate for an independent expert to monitor the protection of LGBTQIA+ rights at the *United Nations*

*Human Rights Council*¹². The resolution was adopted with 23 countries in favour, 17 against, and seven abstentions. It was one of the most keenly-fought resolutions in recent times at the UNHRC¹³, with 13 amendments brought by the bloc of Islamic countries to modify the text. And it shows that our country is not yet ready to be a progressive one even though we are trying to be a developed one. The Centre is also delaying the recognition of equal marriage rights to all citizens irrespective of their gender and it is so ashamed to say that we live in a world where queer people can't even donate blood. With the end of June, we bid farewell to another pride month full of *Rainbow Washing* and *Tokenism*. It is literal irony that we are allotting a full month to celebrate the rights of a certain group of people when their rights are actually non-existent in our society.

4. LEGAL SAFEGUARDS

Hate Crime is a Social control mechanism rooted in power structures of the society. It's survivors are attacked because of the violation of norms of the society. In the mind of conventional thinkers, one's gender display is always considered as their sexuality. So this act being an attempt to punish the gender non-conformity, it is not only a way to enforce gender conformity, but also it's an attempt to restrict homosexuality. They should always be conventional in nature. So, in short, homophobic violence can be fully understood only by the context of a racist, male dominated and capitalist society. The hate crimes are done on them just because of how they dress, talk, walk and live. The kind of tone the society set on them is too hard to digest. Just like in any other issue, the privileged class is spared here somehow and the sufferers are always the commons. Hence, law is the only resolute for the aggrieved. The case of *Naaz Foundation v. Govt. of NCT of Delhi* was a landmark case of 2009 decided by two-judge bench of Delhi High Court stating that treating consensual homosexual activity between adults as a crime was against the Fundamental Rights guaranteed within making Sec 377 of IPC unconstitutional. This made LGBT people more secure in the society, hate crimes were decreased as they could stand for their Constitutional Rights. Later, in the case of *Suresh Kumar Koushal v. Naaz Foundation* in 2013, Supreme Court re-criminalised homosexual activities

¹² The United Nations Human Rights Council, in a defining vote, adopted a resolution on June 30, 2016, on "Protection against violence and discrimination based on sexual orientation, and gender identity," to mandate the appointment of an independent expert on the subject

¹³ United Nations Human Rights Council

making Sec 377 constitutional over turning the judgment made by the Delhi High Court. Re-criminalisation of homosexual activities led to increase in number of arrest against homosexual couples and this in turn, led to an increase in crime rate against them. In 2014, they were recognised by the judiciary as third gender and court held that they are entitled to all the rights guaranteed under Indian Constitution just like any other person. In 2018, in the case of Navtej Singh Johar v. Union of India, their consensual sexual act got decriminalised again and in 2019, an act called Transgender Person's Act, 2019 was passed by the Central Govt. Abusing transgenders become a punishable offence with a jail term of six months to two years under Sec 18¹⁴ of the Transgender Protection Act, 2019.

5. CONCLUSION

There's always a light at the end of the tunnel and there should be. There's so much work still to be done. Marriage equality may be a progressive step for the community since different landmark Supreme Court judgments like *Shakti Vahini v. Union of India*¹⁵ clearly announce that choosing life partner is one's Fundamental right which is also an exclusive right to that person alone. But there are other pressing issues as well, such as an anti-discrimination law and greater acceptance of queer individuals who live outside of cities. In major cities, they become new normal human beings in the modern day. But the rural areas are still shows the reluctant signs to accept them as humans through their attitude and behaviour. The possibility of queer futurity is deeply subdued in the Indian context and our society needs to get up from its wake and do something. Rainbow is a phenomenon where there exist only one colour, but which presents seven different colours to the outside world. Rainbow itself denotes India's evergreen concept of 'Unity in Diversity'. We may be of different in colour, Sex, Sexual orientation, Caste, Creed, Ethnicity, Religion etc. to the outside view. But when you go inside, it's all conceived as one and so that no one is having an option to dominate or discriminate another. So we should have a wish that those discriminations

¹⁴ Whoever,— (a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government; (b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use; (c) forces or causes a transgender person to leave household, village or other place of residence; and (d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

¹⁵ *Shakti Vahini v. Union of India*(2018) 7 SCC 192

inside our society may pour heavily as rainfall as soon as possible and let the rainbow shines again with all it's colours shining in their inherent nature.

“Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that”.

- Martin Luther King Jr.¹⁶

¹⁶ American Baptist minister and activist, one of the most prominent leaders in the civil rights movement from 1955.