On the Margins

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By Abhinav Mehrotra

While the issue of minority rights has been recognized under the Constitution, it is the categorization that may require some rethinking. Similar sentiments were echoed by Justice D Y Chandrachud during the 13th BR Ambedkar Memorial Lecture, 2021, on "Conceptualizing Marginalization, Agency, Assertion & Personhood".

These views were expressed in connection to those belonging to a particular gender or identifying with a specific sexual orientation i.e., specific cases with respect to women in Permanent Commission in the armed forces and the unconstitutionality of Section 17.

There is a need to specifically analyze how the outcome of these cases come into being and what could be expected with the rigidity of these groups as per the constitutional provisions laid down in Article 14.

Keeping with the landmark judgment of the Supreme Court – The Secretary, Ministry of Defence v Babita Puniya & Ors. – that provides equal opportunity to women in the army and equal treatment with men counterparts engaged in Short Service Commissions (SSC) in seeking parity to obtain Permanent Commission.

This judgment has been hailed as a victory for women officers in their fight against gender discrimination as well as enforcement of their rights to equality of opportunity and equal access to appointment and engagement in the Indian army, as recognized under Article 16. While delivering the judgment, the division bench comprising Justice DY Chandrachud and Justice Ajay Rastogi emphatically stated that

> "the time has come for a realization that women officers in the Army are not adjuncts to a male dominated establishment whose presence must be 'tolerated' within narrow confines".

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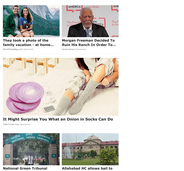
This issue of women in the army includes matters pertaining to appointments, posts, service categories, cadres, remuneration and criteria for grant of Permanent Commission to SSC officers. In the past, women had no pension benefits, no six service perennial status, no six service personnel contributory health benefits, no provision for re-employment and a meagre encashment of only 90 days leave as compared to 300 days for men.

Generally, these matters invite limited judicial review because they constitute policy decisions and be exclusively within the domain of executive functions as per Section 12 of the Army Act, 1950, and Article 33 of the Constitution. The latter allows Parliament to determine to what extent any of the rights conferred by Part III of the Constitution, dealing with fundamental rights, is applicable to members of the armed forces.

Section 12 of the Army Act, 1950, states the ineligibility of females for enrollment or employment in the army except as the government may notify. However, from 1991 onwards, women were commissioned as officers in the army and inducted under SSC as officers into various corps such as law, logistics, education, architecture, engineering and executive cadres. These were created for a period of 10 years and were granted the rights to Permanent Commission by a notification in 2008 issued by the ministry of defence.

From a comparative perspective, the UK is a similar example. Although women have been serving in the military since 1901 there, their role was confined to cooks and nurses during the 20th and 19th centuries. Their defence policy restricted women from serving in combat till 2015 despite their equal participation with the World Wars and Vietnam. but their role was not for peace time.



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This kind of thought process has been challenged by the UN by observing that women peacekeepers broaden the range of skills and capacities among all categories of personnel, enhance the operational effectiveness of all tasks and improve the mission's image, accessibility and credibility vis-a-vis the local population. Such an approach may also act as a guide for India in the years ahead to enhance the role of women in the army.

Coming to the unconstitutionality of Section 17, historically this barrier and similar bars were drafted at a time when the concept of "sexual orientation" did not exist and was imposed by British India. This was with the aim to civilize the Indian population based on the moral standards of the Victorian era where sexual activities were considered sinfully. Its persistence. It was assumed that any individual who engaged in prohibited sexual activity had on their own accord chosen to deviate from social norms and such participation had to be considered as a mental illness. Such an outdated understanding was done away with in Navtej Singh case, which came after a series of other such cases.

The foremost issue seen with Article 377 was its labelling of sexual activity against the "order of nature". This is vague, arbitrary and violates Article 14 of the Constitution.

The chronology of cases challenging Section 377 started from Naz Foundation v wrt petition in 2001 that stressed the harmful effects of Section 377 on public health, i.e., protection against HIV infection for "men who have sex with men". The petition sought the doing away of this Section to promote HIV/AIDS prevention. This was not possible because Section 377 violates the dignity of sexual minorities. However, this petition was dismissed by the Delhi High Court because Naz Foundation did not have the standing to challenge the Section. However, this ruling was reversed by the Supreme Court and sent back to the Delhi High Court which then held that consensual sexual acts of adults in private were violative of Articles 21, 14 and 19 of the Constitution.

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This decision was challenged in Suresh Kumar Koushal & Anr v Naz Foundation & Ors on December 11, 2013, before the Supreme Court. In contrast to the Delhi High Court, the Supreme Court held that Section 377 "does not suffer from unconstitutionality" and that the declaration made by the Delhi High Court was legally unacceptable. It went on to hold that Section 377 does not criminalize particular people or identity or orientation, what it does is merely to identify certain acts which if committed would constitute an offence and that does not deny "equality before the law" or "equal protection of the law" or discriminate on the ground of sex under Articles 14 and 15 respectively.

Finally, in 2018, in the Navtej Singh case, Supreme Court unanimously ruled that Section 377 was unconstitutional as far as it penalized any consensual sexual activity between two adults, be a homosexuals, heterosexuals or lesbians. The Supreme Court categorically ruled that even though the number of persons belonging to the LGBT community was low, courts must step in whenever there is a violation of their fundamental rights, even if the right of a single individual is at stake.

There cases show that justice delayed is not always justice denied. In some cases, it is better than no justice at all.

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