

RESEARCH ARTICLE ON DECRIMINALIZATION OF HOMOSEXUALITY AND LGBT ACTIVISM IN INDIA

Written by *R. Divya Meenakshi** & *Tarunya Sharath***

** 2nd Year BA LLB Student, School of law, Christ (Deemed to be University)*

*** 2nd Year BA LLB Student, School of law, Christ (Deemed to be University)*

Abstract:

With the advent of the 21st century, which happens to be a time of innovation and progression, where modernization is at the helm of the world, industrialization and globalization have contributed to material progress, there is still much scope for change with respect to certain beliefs and notions, on account of the conservative ideology imbibed in the minds of many, who have not been able to accept certain aspects of the transformed world. In the Indian context, in spite of technical progression, there has been social regression in certain areas, and the outlook towards the LGBT community is one such area. The blatant violation of human rights of this section of the population cannot be overlooked, and one could not possibly ignore the hatred, prejudice and discrimination that they have subjected to. The characteristics of the social and political background of the issue and the viewpoint that law as an institution takes to address it are analyzed in this essay. The socio legal contradictions and the need for the recognition of their rights is also put forth. The LGBT community's struggle for acceptance and equality as a part of the general public, the type of difficulties that they face are to be noted and on account of these issues, decriminalization of Section 377 of the Indian Penal Code, which punishes homosexuality is definitely justified, with reference to the Supreme Court's recent judgement in which the Victorian law was held to be unconstitutional. So this article attempts to furnish how the verdict is an epitome of rationalization, given the stigmatization that has been observed in the conservative Indian society.

Introduction:

Same sex marriages in India have been a stigma for years especially while considering the fact that the Indian outlook towards this had undergone much change only during the colonial era.

The influence of British ideologies upon the Indians during their rule, had resulted in the Indians absorbing these ideas, as a result of which opposing heterosexual monogamy and such practices started becoming common, on account of the conservative notions possessed by the Indians along with the British perceptions. Hence section 377 was incorporated in the Indian Penal Code which criminalized sexual activity “against the order of nature”.

Historical Background:

Lord Macaulay was the author of Section 377 in the Indian Penal Code, who was also the President of the Law Commission of India in 1860. The section reads as follows: “Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”¹

The Indian population was still dealing with the difficulties of a law drafted approximately 150 years ago, without any logical base, until the recent decision in the case of *Navej Singh Johar and Ors. v Union of India*.² Ironically, while the British drafted Section 377 of the IPC, they were actually replacing a tolerant Indian attitude towards sexuality with a highly oppressive one, though this law was repealed in the UK eventually. It must be noted that before the advent of industrialization the prevalence of homosexuality was ventured upon and accepted in the economically and socially weaker sections, while it was morally condemned by the upper class population. The instances of queer relationships in pre modern era as depicted in poetry, paintings and even in historic figures such as Leonardo da Vinci, Plato, Alexander the great, Hadrian, Christopher Marlowe and Virgil, Michelangelo were centered upon same sex orientation.³

¹ Misra, G. (2009). Decriminalising homosexuality in India. *Reproductive Health Matters*, 17(34), 20-28. Retrieved from <http://www.jstor.org/stable/40647442>

² WRIT PETITION (CRIMINAL) NO. 76 OF 2016

³ Babur, A. (2015). LGBT Rights: In the Dark Age of Reason. *Journal of Global Research Computer Science & Technology*.

Homosexuality has been a prevailing phenomenon for many years. Stories in Hindu Mythology point towards instances of same sex orientation. The religious texts and literature of Hindus, Muslims and Buddhists attest this, by way of portrayal of same sex love in different forms, over the years. There are references denoting the existence of homosexuality in Manu Smriti, Arthashastra, Kamasutra, Upanishads, Puranas and other ancient texts. There is evidence to point out that same sex activity did take place among sanyasis who were not to undergo marriage. So India as a nation was never new to the conception, until the British brought about such a conservative, draconian law that deprived rights of the LGBT community. So we can conclude that history consists of plenty of instances to prove the practice and acceptance of homosexuality during the earlier times, until it happened to be criminalized.⁴

Social Activism in favor of homosexuality:

Gay rights activists have been battling against Section 377 for over a couple of decades now. In 1994, lesbian and gay groups filed a petition challenging the law in the Delhi High Court. The case had dragged on for five years and had evoked strong reactions. In 1996 even members of the Indian lesbian collective Stree Sangam made a presentation on domestic-partnership laws to a government conference on marriage and family law. It was "perhaps the first time that a lesbian/gay group [attempted] to create public opinion on the issues in such a forum," the group said in a letter to the gay magazine *Trikone*. In February 1990, there was the second national LGBT conference which was the Indian National Gay Conference YAARIAN -99. The constant harassment faced by the LGBT community and attacks on the films 'Fire' and 'Girlfriend' have led a number of organizations to set up the campaign for Lesbian Rights.⁵

AIDS Bedhbhav Virodhi Andolan's (ABVA) movement against discrimination of gay people, in the form of a demonstration, was one of the first ways of expression of dissent with respect to the injustices suffered by the LGBT community. This was one of the first instances of protests against the non-acceptance of queer relationships being brought openly to the public eye. It was a way of opposition and demand for equal treatment for those who had an inclination

⁴ Ibid.

⁵ Vanita, R. (2002). *Homosexuality in India: Past and Present*. *Liberal Studies Faculty Publications*.

towards same sex interaction. ABVA then brought forth a revolutionary report on gay rights, called as *Less Than Gay*, which portrayed the gay community's sufferings in new light, by referring to how gays and lesbians were subject to all forms and violence and discrimination in the society, which was intolerant to the desires of these people merely on account of their conservative beliefs. It provided a base for the later struggles that came up, in favour of the LGBT groups, by way of attracting the nation and other countries' attention, regarding the issue.⁶

The most recent legal challenge came from the Naz Foundation Trust, New Delhi. The organization had filed a writ petition challenging Section 377 in the Delhi High Court on December 7th, 2001 on the grounds that Section 377 was violative of the right to life and personal liberty, the right to equality and the right to freedom guaranteed to all citizens as Fundamental Rights under Chapter III of our Constitution.⁷ Meanwhile other gay and lesbian groups like Hamsafar of Mumbai, Sahayathrika of Kerala, etc., were in the process of spreading awareness about the inequitable, discriminatory nature of the Victorian law manifested in section 377.

The Court reiterated the test set by Article 14 that any distinction or classification must be based on an intelligible differentia which has a rational relation to the objective sought to be achieved by way of implementation of that law that was pointed out as unfair or unjust. Section 377, the Court said, does not distinguish between public and private acts, or between consensual and non-consensual acts, thus does not take into account relevant factors such as age, consent and the nature of the act or absence of harm. The Court stated that such criminalisation in the absence of evidence of harm seemed arbitrary and unreasonable.⁸ In considering the legal principles imposed by Article 14 of the Constitution the Court took into account the *Declaration of Principles of Equality* "as current international understanding of Principles on Equality". Drawing on Principles One (right to equality), Two (equal treatment) and Five (definition of discrimination) the Court emphasised the need to include sexual

⁶ Ibid.

⁷ Denial of Rights to Sexual Minorities. (2008). *Economic and Political Weekly*, 43(43), 6-7.

⁸ Urs, P. (2013). Making Comparative Constitutional Law Work: "Naz Foundation" and the Constitution of India. *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 46(1), 95-101.

orientation among protected grounds of discrimination and build indirect discrimination and harassment into any consideration of the right to equality.⁹

Thus, dealing with the argument that Section 377 was neutral, as submitted by the MHA, the Court stated that although the provision on its face is neutral and targets acts rather than persons, in its operation it unfairly targets a particular community, resulting in a conclusive notion that all gay men were to be criminalised. This led the Court to conclude that Section 377 discriminated against a particular community and hence violated Article 14 of the Constitution.¹⁰

In the case of *National Legal Services Authority v. Union of India*¹¹, the Court held that there could be no discrimination on the basis of sexual orientation and gender identity, and the importance of elevation of position of transgenders in the society was dwelled upon. The *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union Of India and Ors.*¹² Case, also known as the “privacy case” had ruled that sexual orientation is a facet of privacy, and must be constitutionally protected.

Instances of unwelcome reactions:

Indian society is a traditional, multicultural, diversified and integrated society, wherein Hinduism is the religion of the majority. For Hindus, marriage happens to be an enduring heterosexual sacrament. Other Indian communities also share this opinion and consider marriage as a heterosexual institution. This is supported by Vishwa Hindu Parishad Party, whose president believed that for Hindus, such behavior was not just against nature, it was against the Indian culture. Even Shiv Sena members attacked theaters in New Delhi and Bombay where the films that portrayed the difficulties of the LGBT community were being

⁹ Srivastava, S. (2014). Disciplining the 'Desire': 'Straight' State and LGBT Activism in India. *Sociological Bulletin*, 63(3), 368-385.

¹⁰ Vimal Balasubrahmanyam. (1996). Gay Rights in India. *Economic and Political Weekly*, 31(5), 257-258. Retrieved from <http://www.jstor.org/stable/4403740>

¹¹ Suresh Kumar Koushal & Ors. v. Naz Foundation & Ors. Civil Appeal No. 10972 of 2013, (SLP (c) 15436/2009)

¹² WRIT PETITION (CIVIL) NO 494 OF 2012

screened. They tore down posters, smashed furniture and organized violent protests. The party advocated that the film, which features the same sexual relationship was an affront to India's centuries-old Hindu culture. But at the same time lesbian groups and women's rights organizations took part in rival protests to demand the screening of the movie. Many people deny the existence of sexual minorities in India, dismissing same-sex behavior as a Western, upper class phenomenon. Many others label it as a disease to be cured,-an abnormality to be set right or a crime to be punished. While there are no organized hate groups in India as in the West, the persecution of sexual minorities in India is more insidious.¹³

The Indian Courts over a certain period of time, have indirectly expressed a view that "carnal intercourse against the order of nature" can also be inclusive of certain non-procreative sexual acts, though the above phrase has not been given a proper definition as such. This gives way to unfair ambiguity.¹⁴ Another discrepancy arises when it is seen that when a man and woman get involved in such condemned acts, the idea of homosexuals who undertake such activities attracts more attention on the basis of its illegality, given the traditional approach of looking down upon this phenomenon.¹⁵

At large, gay men were not accepted in the Indian society, due to social stigmas and as a result they have been extremely closeted. However after the inception of the 21st century, there has been a comparatively liberal mindset and the homosexuals' population has moved into and flourished on what has probably been the most accepting space they could have ever hoped to find, the Internet. Helplines have been set up to offer mental support for their kind, NGOs have sprung up for their aid and strategies are being formulated for their recognition and well being. Today, on account of many renowned personalities coming out as lesbian or gay themselves, and given their respectable position that they have worked for, the support for homosexuality has substantially increased.¹⁶

¹³ Trivedi, I. (2014). The Indian in the Closet: New Delhi's Wrong Turn on Gay Rights. *Foreign Affairs*, 93(2), 21-26.

¹⁴ Gupta, A. (2006). Section 377 and the Dignity of Indian Homosexuals. *Economic and Political Weekly*, 41(46), 4815-4823.

¹⁵ Vanita, R. (2009). Same-sex weddings, Hindu traditions and modern India. *Feminist Review*, (91), 47-60. Retrieved from <http://www.jstor.org/stable/40663979>

¹⁶ Srivastava, S. (2014). Disciplining the 'Desire': 'Straight' State and LGBT Activism in India. *Sociological Bulletin*, 63(3), 368-385.

However when one examines the reality of the situation, it can be noted that sexual minorities in India are still socially disempowered and looked down upon, culturally, politically and often legally and economically, according to numerous social scientists and activists. Hence choosing to remain isolated, apprehensive and hesitant and avoiding normal participation in the society, has become prevalent among them. Adolescents, especially due to this this feeling of isolation have often accustomed themselves to self-loathing and confusion while attempting to perceive their future. Thus LGBT rights' activists and homosexuals started demanding social and legal recognition of homosexuality over the years, because of their faultless and firm opinion that legal protection is probably the only way by which homosexual community can be guaranteed social rights, rights against exploitation and more importantly, health rights.¹⁷

State action:

In support of the LGBT rights and social activism against discrimination of homosexuals, the 42nd Report of Law Commission of India had stated, "Indian society by and large disapproves of homosexuality and the disapproval is strong enough to justify it being treated as a criminal offence even if adults indulge in it in private."

So it has recently been more widely accepted and recognized that it is the duty of the state to take action with a view to protect the fundamental rights of the LGBT community on account of the discrimination that they face. The government must enact special laws to ensure their welfare, due to the presence of the duty conferred upon them to protect human rights in general. Government should take initiatives to support employers in making workplace and workplace culture more supportive and inclusive of LGBT people. The social attitude towards treatment of the LGBT community must undergo change, in order to remove the stigma of homosexuality and related issues. Awareness must be created about their rights to enhance their position in the society.¹⁸ The Supreme Court, taking cognizance of such issues discussed above has

¹⁷ Dave, N. (2011). Abundance and Loss: Queer Intimacies in South Asia. *Feminist Studies*, 37(1), 14-27. Retrieved from <http://www.jstor.org/stable/23069881>

¹⁸ Jawale, K. (2016) Issues and challenges of 'LGBT' minority people in India. *International Journal of Applied Research*, 2(6), 408-410.

recognized how homosexuals have in fact been treated as “less than equals”, while emphasizing upon the need to accept divergence and heterogeneity present in the Indian society.

Conclusion:

Social activism in favor of LGBT rights was not welcomed by the State and the conservative sections of society, and there has been oppression by those entrusted with the responsibility of law enforceability. This set of people have been marginalized on account of archaic laws and beliefs, this has led to them being harassed and ill-treated among the general public. There have been many tragic incidents on account of such instances. However LGBT activism has come a long way now, resulting in the very recent decision of the Supreme Court, delivered on 6th September, 2018. The phenomenal message from the Supreme Court’s landmark judgment decriminalizing homosexuality has proved that social morality triumphs over conservative ideologies and archaic laws that certain sections of the population still support. Human rights have been upheld over religious opposition, and this reinstates the belief of the people, in the government.