

Decriminalization of Section 377: The Attitude of the Indian Society towards Homosexuality.

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ABSTRACT:

In light of the recent Supreme Court ruling on Section 377 of IPC¹, this article explores the concept of homosexuality and gives an idea about the arbitrary, irrational colonial era law, the penal punishment given and the numerous constitutional rights that have been encroached. It highlights the observations of the five judge bench of the Supreme Court and also traces the legal battle regarding this particular section from the first attempt made to question the constitutional validity and takes the judgments by the Supreme Court judges in the case of *Navtej Singh Johar and Ors. v. Union of India*² as its base and explores the legal, moral, ethical and social restrictions posed on the LGBT community. It further explores the history of homosexuality in India before the British colonization and mainly concentrates on the attitude of the Indian society towards the LGBT community after the judgment and their preconceived notions and rigid stereotypes. It talks about the acceptance from the society, peers and more prominently from the family. It highlights the representation of the LGBT community or lack thereof in the Indian films and television. It talks at length about how the judgment though gives a spark of hope for the better treatment of the LGBT community; we as a society still have a long way to go to make it a safe place for them where they are not discriminated or prejudiced against.

Millions of Indians belonging to the LGBT community and their numerous supporters waited anxiously for the Supreme Court ruling on Section 377 of IPC, a law that was made in the colonial era and still continued to prevail in the modern and liberal India, where it had no place. For decades, countless people belonging to the LGBT community were smothered by the vague and archaic stipulation that homosexuality is against the order of nature.

Section 377 of the IPC states:

“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 term which may extend to ten years and shall also be liable to fine.”

In simpler words, this section states that other than penile-vaginal intercourse, any other form of intercourse is considered unnatural and the consenting adults who engaged in such intercourse should be held criminally liable and be given a punishment tantamount to committing heinous crimes such as rape or culpable homicide. This statute criminalizes *anal sex* and *oral sex*. While this statute to a certain extent has an effect on the physical intimacy between heterosexual partners, the effect is far worse on homosexual partners. Although this section makes no specific mention of homosexuality, the people belonging to the LGBT community were

¹ Indian Penal Code 1860.

² W.P. (CrL.) No. 76 of 2016.

considered an abomination and discriminated for involving in sexual activities that are allegedly against the order of nature even though it was consensual and in the confines of their own rooms.

In the recent case of *Navtej Singh Johar and Ors. v. Union of India*³, the five judge bench of the Supreme Court headed by the Hon'ble Chief Justice of India, after a long scrutiny and contemplations, decriminalized Sec 377 of IPC. The Court delivered its verdict declaring portions of the law relating to punishment for consensual sexual acts between adults unconstitutional in a unanimous decision. However, other portions of Section 377 relating to sex with minors, non-consensual acts, and bestiality remain intact.

Chief Justice Deepak Misra started the judgment by quoting the words of the great German thinker, Johann Wolfgang von Goethe "*I am what I am, so take me as I am.*" He observed that the Court found criminalizing carnal intercourse to be irrational, arbitrary and manifestly unconstitutional. In his collective judgment with Justice A M Khanwilkar, it was further stated that:

"Section 377 fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction," they said.

Human sexuality and gender identity cannot be confined to a binary.⁴ Homosexuality is neither an aberration nor is it against the order of nature. On the contrary, many animals in the wild that comprise a part of nature show traits of homosexuality and humans are no exception. What nature gives is natural and the natural identity of an individual is absolutely essential to their being. Therefore, that part of the personality of an individual should not be despised. The first attempt to question the constitutional validity of Section 377 of IPC was made by a Delhi based NGO called Naz Foundation, in the case of *Naz Foundation v. Govt. of NCT of Delhi*,⁵ in which the Delhi High Court held the present section to be unconstitutional. Later, in an unfortunate turn of events, the judgment was overruled by the Supreme Court and Section 377 was re-criminalized.⁶

This section clearly infringed their basic human rights and the Right to Equality under Article 14, Right against discrimination under Article 15 and Right to live with human dignity and many other rights that fall within the ambit of Article 21 of the Constitution such as Right to Privacy. The rights proclaimed in the Constitution apply to all the citizens regardless of their age, gender, race, caste etc. The Constitution has provided the same inherent rights to every citizen. The Constitutional Bench observed that LGBT people in India are entitled to all the Constitutional rights protected by the Constitution. The choice of partner, the ability to find fulfillment in

³W.P. (CrI.) No. 76 of 2016.

⁴ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

⁵W.P(C) No. 7455/2001.

⁶*Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*, Civil Appeal No. 10972 of 2013.

sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation. The judgment upheld the right to personal autonomy and choice which includes within its ambit, right to choose one's partner, right to sexual autonomy and agency, right to love and live one's life with dignity.

The above mentioned rights and liberties are not just confined to the four walls of the home but extend to the public places. In relation to this, Justice Chandrachud voiced his concerns on limiting the judgment to sex alone and stated,

“A relation between two adults includes not only sex but a large number of other issues which are intrinsic to right to privacy and in turn right to life. If two gay people are walking down a road, hand in hand, we do not want any moral policing to stop them from doing that.”

The decriminalization of this age old law was received with tears of joy, hope and euphoria. The stance of the judges on this issue was applauded and appreciated by millions of people in the country and all over the world. This path breaking judgment has become a beacon of hope and a soothing reassurance for many young people. It had proved to the many LGBT activists that their struggle had not been vain. Justice Indu Malhotra acknowledging the prejudices and hate crimes faced by the community, stated:

“History owes an apology to the members of LGBT community and their families for ostracisation and persecution they faced because of society's ignorance that homosexuality is a natural trait, its penal suppression infringes a host of fundamental rights.”

While this historical and landmark judgment was celebrated for validating the rights and liberties of LGBT people, it has also shed light on the ugly and intolerant attitude of the people who are against homosexuality. Certain sections of our society are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes and bigoted perceptions.

It is ironic that the main argument against homosexuality is that it is against the religion, when the Hindu mythology has in its various scriptures mentioned homosexuality or traits of homosexuality. The sculptures on the sacred Hindu temple Khajuraho depict various acts of carnal sexual intercourse and homosexuality and ancient Hindu scriptures such as Kama Sutra, talk about people of the 'third nature' and their desires. While such desires were considered deviant in other parts of the world that now embrace homosexuality, ancient India was one of the few exceptions that contended the acts of homosexuality as natural. A trend of gender fluidity can be traced in many of the Hindu mythological stories. Further, 18th century Muslim poet, Mir Taqi Mir wrote openly about male-male love and transgender were given high positions in the Mughal Courts. After the colonization of our country by the British, these acts were made out to be against the order of nature and a sin.

Furthermore, the biggest opposition against homosexuality in most of the parts of our country is family, which is mainly considered to be heterosexual and patriarchal and restricts the growth of individuality of a person. A Delhi High Court judgment in 1984 ruled that equality and freedom have no place in family. Such oppression often forces the members of the family to suppress or hide their sexual preferences and as a result, they get married to people of opposite sex not just destroying their lives but also the lives of their spouses. Those people who come out and express their sexual orientation are often shamed, belittled and abused. They are kicked out of the houses and are considered an embarrassment. Due to the societal, ethical and religious pressures parents silence the voices and opinion of their children. Such attitude from one's own family led to suicide of many people from LGBT community.

With the withering of the joint family system, the dynamics of the family are slowly changing. In metropolitan cities of our country, the way of thinking of the parents has been liberalized and they are more accepting of their children's sexual orientation. In fact, such parents celebrated this historic verdict by the Supreme Court and expressed their elation and relief that their child would not be termed a criminal anymore and can live life with the dignity and respect they have always desired.

India is a country that has a very regressive approach towards sex. The awkwardness and shyness surrounding the topic of sex serves as a perfect example of irony considering the huge population of our country. When the society is not ready to accept pre-marital sex, we cannot be naïve enough to think that it would readily accept the decriminalization of consensual sexual acts between same sex couple. In a survey conducted by the Centre for the Study and Developing Societies and Konrad-Adenauer-Stiftung, only 25% of Indian youth approved of homosexuality in April 2017. Therefore, the main aim of the judgment which was to not lean on majoritarian social morality was very much welcomed by the LGBT community and its supporters. The Bench held that the law cannot be a mute spectator to the struggles of people who are often subjected to humiliation, discrimination and violence not just by the State and the society but also their own families.

The wave of online abuse directed towards the LGBT community and its supporters highlights the ignorance the people are drowning in. Some people misunderstood the judgment or the circumstances in which it was given but were quick to jump to conclusions while some others did not even bother to try and understand and stuck to their pre conceived notions. Some claimed that the western culture is ruining our precious traditions while some men feared that from now on they would also be taken advantage of. This judgment has surely challenged the toxic masculinity predominant in our society. It highlighted that no matter how the laws might change, society would still take its own course of time. Although the judgment has ushered in a new dawn and gave a spark of hope, it might not guarantee dignity in the public space for members of the LGBT community as there are no specific and strict laws that prescribe punishment for hate crimes committed against LGBT

community. The judgment also covered this aspect in which Justice RF Nariman observed that government must take up initiatives to uphold the judgment and create awareness in the public concerning discrimination, violation and prejudices directed towards the members of the LGBT community. The Government choosing to stay hush on this topic is going to be a license for the bigots to continue with their prejudices and hostility.

Indian society is heavily influenced by the movies and television programs. The affect these movies and television programs have on the minds of their viewers is astounding. For a medium that has so much power, it is unfortunate that nothing has been done to educate the viewers regarding the rights and liberties or the discrimination faced by the people of the LGBT community on a daily basis. Even if there is a miniscule representation, it creates more misconceptions in the minds of people rather than mitigating them. In most cases, homosexuals are portrayed in a bad light as someone with ulterior motives and ready to take advantage of an unsuspecting victim or someone who constantly preys on innocent lives.

The attitudes and mentality of the people should change to accept the distinct identity of individuals and respect them for who they are rather than compelling them to become who they are not.

On the bright side of things, a child would not have to grow in constant denial and confusion. They would not have to think that their sexual orientation or preferences makes them a criminal. And they can confidently and proudly tell their parents and family who they are. With strict laws and guidelines we can put an end to any form of violence, discrimination or prejudice towards the LGBT people. Educating children at an early age and molding them to be accepting of all kinds of people would reduce the bullying and make school a safe haven for young LGBT kids.

Social exclusion, identity seclusion are still stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards the full development of their personality that we can call ourselves a truly free society. While this judgment has the given hope, respect, equality and dignity to the LGBT people in the legal sphere, it lies in the purview of the people and the society to accept them and give them the respect and dignity they deserve in the society. We have to bid farewell to the stereotypes and social norms deeply ingrained in our mindset so as to usher in acceptance in all spheres and empower all citizens alike without any kind of discrimination because in the end, love is love and it comes in all shapes, sizes, colours and genders no one should be humiliated or judged for it.