

Section 377: An Insight into Controversy

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ABSTRACT:

The historical judgment of partially decriminalizing section 377 was highly acclaimed by the people of India in 2018. The prolonged legal battle of social activists made the Supreme Court to give a verdict in the favour of LGBT community, whose rights were violated by this section. This rule was the inkling of centuries old British tradition which was prevailing in India since the advent of final court verdict. This section was discriminating homosexuals from heterosexual on the basis of their identity for doing the same conduct.

After prosecuting thousands of people under this section, the Supreme Court finally came up with a verdict to partially decriminalize it whereas legislative had failed to perform its duties, as mentioned in my paper.

Abolishing section 377 is a huge thumbs up for humanity and equal rights because after all love is genderless, it never sees who gonna do and with whom you gonna do.

I. INTRODUCTION

Homosexuality India is a home of 1.3 Billion people with a population of 699 million males and 653 million females. Among these two genders, there is also transgender community who shares almost 4.9 lakh in total Indian population¹. Transgender is an umbrella term refers to all the people who can't identify their gender at birth. Transgender people have existed in every culture, race and class since the human life came to exist. The word Gay is commonly used to address them. The term Gay was first introduced in English language during 12th century from the old French word 'GAI' which means joyful and carefree.²

II. FORMATION OF LGBT COMMUNITY

In 1975, an organization called American Psychological Association invited Psychologists to take part in a meeting with a motive to remove the prejudice that transgender people were experiencing in their daily life at that time. The seclusion from a society was causing negative impact on their psychological health. The organization gave rise to a term called Sexual Orientation and divided it into three categories i.e. Heterosexuals, those having sexual attraction to members of different sex, Gay or Lesbian, those who have sexual attraction to member of their own sex and Bisexuals should be those who have sexual attraction towards both men & women. Thus people belong to Lesbian, Gay or Bisexual (LGB) made their own particular community and started raising themselves separate from other minority groups to support their identity.³

¹ Andy Kang, *India's census counts transgender population for first time*, GLAAD (June 4, 2014 2:14 PM)

<https://www.glaad.org/blog/indias-census-counts-transgender-population-first-time>

² <https://en.wikipedia.org/wiki/Gay> (Visited on Oct. 14, 2018)

³ *Sexual Orientation and Homosexuality*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Visited on March 28, 2019)

III. THE ADVENT OF SECTION 377

In the year 1860, when India was under the British colonial rule, the separate penal code was framed which is known as Indian Penal Code (IPC) nowadays. The sections in the IPC were the amalgamation of British laws which were applicable at their time for the punishment of different crimes. Section 377 was first introduced by them in 1861 which was having the resemblance with the Buggery Act of 1553. The Buggery Act was first passed by the England parliament under the reign of King Henry VIII. The term Buggery is synonymous to an 'unnatural' sex and the same term also defines bestiality, a sexual activity between human and animal. Under this Act, Buggery was considered as an offence which has the punishment of death penalty. It was later taken into the IPC after the recommendation of first law commission of India, under the aegis of Lord McCauley and thus started considered under Section 377 of Indian Penal Code.⁴

IV. SECTION 377 DEFINED UNDER IPC

Section 377 under IPC states that whoever voluntarily have carnal intercourse against the order of nature with any man, woman or animal, and the authorities in power have also decide that particular act is against the order of nature, shall be considered illegal and would be punishable with imprisonment for a term which may extend to 10 years. It is cognizable as well as a non-bailable offence under IPC.⁵ The Indian courts defined unnatural offence as an indulging in sexual activities which does not have accordance with the contemporary principle of the society that is why 'against the order of nature' is used in defining this section. This seems like now law has also been started interfering in the personal sexual life of an individual thus Section 377 considered as the most controversial law and challenged several times in a court for the violation of basic fundamental rights of citizen and especially LGBT community.

V. SECTION 377 AS A VIOLATION OF FUNDAMENTAL RIGHTS

This section was highly criticized and challenged by many organizations, human right activists and people from LGBT community in different court rooms all around India as petitioners believed that criminalization of Section 377 is the violation of the fundamental rights of transgender and it is isolated them from other citizen of India in order to enjoy the basic right of freedom within the ambit of their own country. They considered the criminalization as a violation of their Article 14 which provides equality before the law to every citizen of India but this section shows a clear discrimination between Homosexual & Heterosexual and deprived them to enjoy their sexual life like Heterosexuals. Article 15 Clause 1 and 2 prohibits the state from discrimination of any citizen on the basis of any religion, race, caste, sex, place of birth but we all are well aware that how society

⁴ Prabhaskar K Dutta, *Section 377: How Buggery Act of King Henry comes a full circle in Supreme court*, INDIA TODAY (Sept. 6, 2018, 2:34 AM), <https://www.indiatoday.in/india/story/section-377-history-supreme-court-1333075-2018-09-06>

⁵ *Universal Law Publishing*, THE INDIAN PENAL CODE, 153 (2018)

discriminates transgender. In April 2014, the Indian Supreme court considered transgender people as a third gender. It can be seen that nowadays transgender are also deprived from taking admissions in schools and colleges but in last 2-3 years many states are coming forward to work hand in hand for their rehabilitation and to assist them in education and other fields so that the awful image that they have in the society can be removed. On 3 February, 2017 Bihar Government for the first time introduced third gender category in Bihar School Examination Board (BSEB) as so far BSEB only display two categories in exam form i.e. Male and Female, this step of Bihar government helped many students to give there exams under third gender category.⁶ Kerala Government also for the first time employed 23 transgender in Kochi metro and on 4th April, 2017 Tamil Nadu became first state to appoint Prithika Yashini as India's first transgender Police officer. These news shows that Government is also trying its best to upgrade the standard of transgender in the society as nowadays they are fighting many social dogmas and gender bias to fulfill their dreams in the present society.⁷

VI. CASES PERTAINING TO SECTION 377

After a long battle of 27 years since 1991, India has now become 25th nation who legalized homosexuality; However 72 countries still continue to criminalize same sex relationship. Indian equal right activists have fought a long and arduous battle in Indian courts to decriminalize same sex relationship. The first legal challenge to section 377 grew out after increasing number of HIV/AIDS cases and male sexual health issues in India. According to Global information and education on HIV and AIDS, in 2017 the prevalence of HIV among transgender was 3.1% and it also estimated that around 68% transgender in India are aware of their HIV Positive status⁸. The story began earlier in 1991 when NGO named ABVA (AIDS Bhedbhav Virodhi Andolan) filed a petition in Delhi High court for the annulment of Section 377 because Superintendent of Tihar jail, Kiran Bedi refused to allow the workers of NGO to distribute condoms to male prisoners in jail as she thought that it would encourage Homosexuality because few days back two-third of all inmates had indulged in sexual activities in Tihar jail which was not permitted in the jail premises and NGO workers witnessed it as a repression of same sex love for which they organized several demonstration in New Delhi to show their empathy with HIV/AIDS victims. The ABVA had also published a report named "Less than Gay: A Citizen" to show the status and debates on Homosexuality at that time in India. This report pointed out the demand of Right to Privacy as a fundamental right under Article 21 of the Constitution i.e. Right to Life. After a long battle ABVA was failed to follow with its petition which later got dismissed in 2001 then NAZ foundation entered and filed a petition in the Delhi High Court that challenged the constitutionality of this section, they want to

⁶ Amarnath Tewary, *Bihar introduces third gender category in school exams*, THE HINDU, February 3, 2017

⁷ Pramod Madhav, *Prithika Yashini, India's first transgender police officer, wins acceptance*, INDIA TODAY (Oct. 16, 2018 3:01 PM), <https://www.indiatoday.in/india/story/prithika-yashini-india-first-transgender-police-officer-tamil-nadu-969389-2017-04-04>

⁸ <https://www.avert.org/professionals/hiv-around-world/asia-pacific/india> (Visited on April 07,2019)

legalize a consensual homosexual relation among adults. Like ABVA, Naz foundation was also an NGO which was working on sexual health for men having sex with men and filed a PIL in Delhi High Court under the case of “Naz Foundation vs. Govt of NCT of Delhi & Ors” which three years later, a two judges bench of Chief Justice BC Patel and Justice Badar Durray Ahmad dismissed on the ground that the petitioner i.e. Naz Foundation, was not affected by Section 377 and hence had no Locus Standi to challenge the law. The review petition was also filed which again later got dismissed. In 2006, many voices were started coming against decriminalizing petition of Section 377 filed in court, even Ministry of Home Affairs under Shivraj Patil and NACO (National Aids Control Organization) filed separate affidavits arguing that criminalization could delay the efforts to control HIV/AIDS as transgender do not come up to seek treatment as they feared of the law. On July 2, 2009 Delhi High court bench comprises of Chief Justice Ajit Prakash Shah and Justice S Maralidhar in a historic judgment declared the criminalization of consensual sexual acts of adults in private is the violation of Article 14, 15 and 21 of the Indian Constitution and decriminalized Section 377. However the court ruled that the provision of IPC will continue to govern non consensual sexual acts which involve minors. Another case was filed “Suresh Kaushal vs. Naz foundation org” of 2013 in which Supreme Court challenged the prior order of Delhi High court and again recriminalize section 377 by overruling Delhi High court 2009 judgment. The Supreme Court bench of GS Singhvi and SJ Mukhopadhaya gave powers to parliament to decide on the deletion of Section 377 or to amend it and again criminalize Homosexuality as it was before 2009. Later in 2014 the review petition filed in “Naz foundation vs. Union of India” was also quashed. Finally in 2016, the case “Navtej Singh Johar vs. Union of India”, where 5 petitioners again challenged the validity of the section in the Supreme court and filed a writ petition which paved the way of Right to Privacy as a fundamental right and that helps in partially decriminalizing of section 377. The bench headed by CJI Dipak Misra with four other judges gave a final verdict that ‘a section of people who exercise their choices should never remain in a state of fear’ and partially decriminalized homosexuality in its landmark judgment on 6 September, 2018.⁹

VII. POLITICAL REMARKS ON SECTION 377 JUDGMENT

After Supreme Court delivered the historical judgment, while Congress was celebrating the results, Modi Government had chosen to remain tight lipped on the verdict. Despite the reaction from two BJP Rajya Sabha MP, there was no comment came on the public domain from the party. Even Prime Minister Narendra Modi who tweeted within minutes after the triple talaq verdict on August 22, 2017 kept himself mum to respond on this judgment. No statement came from Union Law Minister Ravi Shankar Prasad and Home Minister Rajnath Singh side. BJP Rajya Sabha MP Subramanian Swamy expressed his disappointment by saying that

⁹ Shalini Nair, *Many ups and downs in battle against 377*, THE INDIAN EXPRESS (Oct. 16, 2018, 3:15 AM), <https://indianexpress.com/article/explained/many-ups-and-downs-in-battle-against-ipc-section-377-homosexuality-lgbtq-5019604/>

decriminalizing of Section 377 can create many drastic consequences and surge in number of HIV cases in India. It shows that BJP government was not ecstatic with the court orders. Congress party appreciated the judgment because priorly Congress MP Shashi Tharoor two times attempted to introduce a Private Member's Bill to amend Section 377 but everytime defeated in Lok Sabha without even having a discussion on it.¹⁰ Dr. Shashi Tharoor exclaimed that "We shouldn't have a law in a book that can be used to oppress and harass innocent people conducting their lives in private. What two people do to express their love and desire for each other should be strictly between them. The Government has no place in India's bedroom".¹¹ He also said that the law should be amended, as it is drafted in 1860 according to British relics and it has no place in 21st century.

VIII. CONCLUSION

Finally, Supreme Court five judge bench headed by CJI Dipak Misra after hearing petitions for four days filed by 32 individuals, including celebrities, 20 IITians and LGBT activists gave 493 pages judgment to partially decriminalize the section but not totally scrapped it as same sex marriage is still not applicable in India which is right because if section 377 entirely goes away it may leads to crimes of forced unnatural offences. Homosexuality is also considered as a sin in Christianity and Islam but there is no as such in Hinduism. Muslim Holy book, The Quran says that men having sex with men should be punished but not tells how¹² similarly, the Bible declares Homosexuality as an abomination and the act of sodomy is a most contemptuous sinful act.¹³ But there is no such theories written in Hinduism, even very ancient Khajuraho Temple in Madhya Pradesh depicts many erotic sculptures in it carves which contain several homosexual activities. Multiple characters in Mahabharata changed their genders like a character named Shikhandi, who was born female but identifies as male and married a woman.¹⁴ After all partially decriminalization of section 377 gave a huge smiles on LGBT community because this law was nothing but used as a tool to harass, persecute and blackmail the sexual minorities of India and Supreme court ruling made it clear that the personal sexual preferences of adults was indeed as nature made them and that is lawful for them to be themselves.¹⁵

¹⁰ SHASHI THAROR, WHY I AM A HINDU, 248-249 (Aleph Book Company 2018)

¹¹ Ibid. 248

¹² <https://www.haaretz.com/middle-east-news/islam-and-homosexuality-what-does-the-koran-say-1.5395747>

¹³ N Renganathan, *Gay Sex is not a crime*, THE TIMES OF INDIA (Oct. 16, 2018 6:35 PM)

<https://timesofindia.indiatimes.com/india/gay-sex-is-not-a-crime-says-supreme-court-in-historic-judgement/articleshow/65695172.cms>

¹⁴ https://en.wikipedia.org/wiki/LGBT_rights_in_India (Visited on Oct. 15, 2018)

¹⁵ SHASHI THAROOR, THE PARADOXICAL PRIME MINISTER, 151-152 (Aleph Book Company 2018)