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Has Decriminalisation of Section 377 really changed the lives of the LGBTQIAs community?

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ABSTRACT

The decriminalisation of homosexuality was a huge step towards equality in India and created a huge impact in the lives of homosexuals who could now be free and finally identify as themselves in public. But did it have a real adverse impact on the lives of homosexual individuals? The decriminalisation of Section 377 may have given homosexuals the right to exist but how has it really impacted homosexual individuals as other laws continue to ignore the LGBTQIA community? This article questions the inclusiveness of other laws that govern the citizens of India but still ignore the LGBTQIA community.

I. INTRODUCTION

Section 377 was first introduced in India by the British in 1961. This aversion towards homosexuality was definitely a colonial idea introduced in India in the 19th century. From ancient temple carvings that depict homosexuality in Konark, Ajanta-Ellora and many more to the mention of it in various scriptures and mythology, there are various instances that show that homosexuality was accepted in ancient India. Then why did it take us over 150 years in decriminalising a law that was made by the British?

The conversation about decriminalising homosexuality started in 2001 with the case of NAZ Foundation v. Govt. of NCT of Delhi². This case first brought up the question of decriminalising homosexuality. The judgement in 2009 held that living with dignity and privacy was a fundamental right under article 21 and criminalising homosexuality was violative of article 14 and 15 and it leads to “unreasonable discrimination”. It further stated that article 15 prohibits discrimination on the basis of sex, and this does not only include biological sex, but also sexual orientation. This journey hit a major setback with the Suresh Kumar Koushal v. NAZ Foundation³ case in 2013. The judgement stated that the right to privacy should not be extended to such an extent that individuals can commit offences in their private space. Moving

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² NAZ Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi High Court. 2001).

³ Suresh Kumar Koushal & Anr vs Naz Foundation & Ors, SLP NO.10972 of 2013 (Supreme Court of India. 2013).

on to 2017 and the Justice K.S. Puttaswamy v. UOI⁴ case. This judgement held that “sexual orientation is an essential attribute of privacy” and must be protected at all platforms. In 2018, homosexuality was finally decriminalised in India with the Navtej Singh Johar v. UOI⁵ case. It upheld the decision of Delhi High Court in 2009 and further stated that section 377 infringes upon the fundamental right to life by denying an individual the right to express one’s sexual identity.

II. ANALYSIS

Although the decriminalisation of homosexuality was a much-warranted step in the acceptance of homosexuals in India, it might not have had the impact that it aimed to do. The judgement might have made Indians finally talk about homosexuality, but at the same time might not have led to the absolute acceptance of them in society. The social stigma about homosexuality still exists in society. There is barely any awareness about how sexual orientation is a perfectly natural phenomenon. With Indian society refusing to talk about it at large, and the larger sentiment that sees this as unnatural or a disease that can be cured, homosexuals still go through social ostracisation even though the law has been decriminalised. Although the Fundamental Right to Equality guarantees rights against discrimination on the basis of sex, but not against sexual orientation. For example, we have an act that protects women against sexual harassment at work, but there is no such provision for the LGBTQIA community. The laws in India can also be quite gender biased in nature. There have been quite a few instances of homosexual men and transgenders being raped because of the virtue of their sexual orientation, but there is no remedy for it because Indian law recognises rape only for women.

Although the judgement has decriminalised homosexuality, it has only decriminalised the existence of homosexuals. Homosexual couples can get married by following religious and cultural rituals but cannot get their marriage legally registered. Marriage acts still refer to both the parties as “husband” and “wife” and there is no mention of alternate forms of couples. The Central Government too has time and again reiterated that marriage laws exist only in a heteronormative sense. Although the case of Arun Kumar and Sreeja v. Inspector General of Registration⁶ affirmed the right of transgenders to marry in Tamil Nadu, the same is yet to be done for homosexual couples. Marriage is considered a social sanction of sexual relations in India. The law, while giving people the right to govern their sexual relations, has on the other

⁴ Justice KS Puttaswamy v. Union of India, 10 SCC 1 (Supreme Court of India. 2017).

⁵ Navtej Singh Johar v. Union of India thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 (Supreme Court of India. 2018).

⁶ Arun Kumar and Sreeja v. Inspector General of Registration and Ors., WP(MD)No.4125 of 2019 (Madras High Court. 2019).

hand denied them from having a social sanction for their relationship. This further stigmatises homosexual relations in society. The Supreme Court in the judgment of *Lata Singh v. State of Uttar Pradesh*⁷ has held that the right to marry is a part of article 21 of the constitution but the same right has not been given to homosexual couples yet.

The Surrogacy (Regulation) Bill, 2019⁸, bans single parents and homosexual couples from having children through surrogacy. The Indian adoption Acts also have no provisions for homosexual couples to adopt children. A heterosexual couple, or a single male or female can adopt a child, but a homosexual couple cannot adopt a child together. Regulation 5(3) of the Adoption Regulations of 2017⁹ by the Ministry of Women and Child Development clearly states that only married couples can adopt, clearly barring homosexual couples from adopting. Furthermore, there are individual rules for single men and women to adopt, clearly stating that a transgender cannot adopt. In addition to this, the Maternity Benefit Amendment Act¹⁰ only allows benefits for females. This clearly specifies that the law does not recognise the existence of alternative forms of family and is not sensitive to the needs of the LGBTQIA community.

The *Navtej Singh Johar v. UOI*⁴ judgment is largely seen as a win for the entire LGBTQIA community, but in fact, it does not affect the entire community at all. The LGBTQIA community is a combination of different communities including the lesbian, gay, bisexual, transgender, queer communities and many more. Yes, it does make sexual relations between gays legal, but at the same time, it does little for the transgender community. The *NALSA v. Union of India*¹¹ was a landmark case that identified the existence of the third gender in India and gave the right of self-determination by giving citizens the right to choose their own gender identity. It also protected them against discrimination and accepted that laws in India were gender binary until now. The Transgender Persons (Protection and Rights) Act, 2019¹² denies a trans person the right of self-determination. They need to obtain a certificate from the District Magistrate who will examine them. Furthermore, the authorities do not need to clarify any reason for denying this certificate, and no further procedure is mentioned. The punishment for sexual abuse of a trans person is fixed at a period of 6 months-2 years while the same for women is 7 years-life imprisonment. This itself is gender discriminatory. The transgender

⁷ *Lata Singh v. State of Uttar Pradesh & Another*, Writ Petition (crl.) 208 of 2004 (Supreme Court of India. 2006).

⁸ The Surrogacy (Regulation) Bill, Bill No. 156-C of 2019.

⁹ The Gazette of India : Extraordinary, "Ministry of Women and Child Development Notification", Part II—SEC. 3(i),(2017).

¹⁰ The Maternity Benefit (Amendment) Act, No. 6 of 2017 (28th March 2017).

¹¹ *National Legal Ser.Auth vs Union Of India & Ors*, Writ Petition (Civil) No.400 of 2012, (Supreme Court of India. 2014).

¹² The Transgender Persons (Protection and Rights) Act, Bill No. 169 of 2019 (5th December 2019).

community is one of the most ostracized communities in India, who are often denied educational and employment opportunities. Even then, the Act specifies only an amount of one crore for their welfare. In 2014, Delhi University reserved seats for trans people but sadly it was of no use. In 2019, only one transgender student applied for admission¹³, and this might have been due to certain fundamental issues. In 2014, the University amended its sexual harassment rules to apply to only women whereas transgender students might also be susceptible to discrimination and sexual violence. Furthermore, there is no provision for separate toilets within colleges for trans people which might act as a deterrent. This issue surfaces in most public spaces as there is no provision of separate washrooms for trans people, which in turn makes them more invisible in public spaces.

The Indian LGBT Workplace Climate Survey in 2016¹⁴ showed that 40% of LGBTQIA persons are subject to harassment in the workplace because of their sexual orientation. Two-thirds reported hearing homophobic comments in the workplace and one-fifth reported facing discrimination by their own seniors. This shows that Individuals from the LGBTQIA community might be more susceptible to discrimination and harassment in workplace but there is no legal provision for their redressal. Indian law only provides women protection from sexual harassment at the workplace. This further exposes members of the LGBTQIA community to harassment and abuse. Moreover, the Equal Remuneration Act, 1976¹⁵ guarantees equal remuneration to “men” and “women” and no such provision has been made for trans people yet. Trans people often have poor access to education and a lower level of literacy. They also might face more violent forms of discrimination in the workplace, that is, if they have access to employment opportunities at all. This often makes them resort to begging and sex work which leads to more problems for the community as both these occupations are prohibited under Indian law.

III. CONCLUSION

The decriminalisation of homosexuality was a much-needed step for Indian society, although a little too late. But it cannot be missed that the whole contention against homosexuality highlighted a colonial morality than was not present in India from the start. This was probably one of the biggest influences that the British had on India, which was imbibed by Indians as an effort to modernise themselves. The LGBTQIA community still struggles for acceptance and

¹³ India Today Web Desk, "DU admissions: Only one transgender applicant to Delhi University this year", *India Today*, June 24, 2019, <https://www.indiatoday.in/education-today/news/story/du-admissions-only-one-transgender-applicant-to-delhi-university-this-year-1554954-2019-06-24>.

¹⁴ Mission for Indian Gay & Lesbian Empowerment, *The Indian LGBT Workplace Climate Survey* (2016).

¹⁵ Equal Remuneration Act, Act 25 of 1976 (8th March 1976).

representation even today. The decriminalisation of section 377 has initiated the much-needed conversation about homosexuality which has led to various media forums coming forward to represent the LGBTQIA community on screen as well as in other print and social media forums. Although decriminalisation is a huge step towards acceptance of LGBTQIA individuals in society, it should come with various other measures that help with the facilitation of acceptance of these individuals. There are huge loopholes when it comes to laws in our country and they often refer to a gender binary, which must be investigated, and we must aim to change these to gender-neutral ones. There must be more provisions made to empower and support other members of the community in addition to homosexuals. This must be followed with greater awareness about the LGBTQIA community. Only then will there be greater acceptance for this community in larger society.
