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LGBT Rights in India

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ABSTRACT

The topic “LGBT Rights in India” has been a debatable topic for a period of many years. The idea of human rights is based upon the concept of equality. It is believed that all the human rights are equally provided to all the citizens. It follows that all humans have dignity and all humans should be treated as equals. The human rights of LGBT are coming into sharper focus around the world. The word LGBT Stands For Lesbian, Gay, Bisexual And Transgender. Earlier these were referred as the Gay Community but later to include other types of homosexual people also, this was named as LGBT. The Preamble of the Indian Constitution mandates justice- social, economic and political equality of status for all.

This article starts with a brief introduction of what is LGBT and who they are. It is followed by the difficulties faced by this community nowadays. Lastly it will focus on the main topic i.e. the rights of LGBT in India and how it became the main concern for the Indian citizens with reference to the 2009, 2013 and 2016 judgment by the Delhi High Court and Supreme Court and the decriminalization of section 377 of Indian Penal Code, 1860.

Keywords: LGBT, Human Rights, Decriminalization

I. INTRODUCTION

India is a vast and diverse country. The experiences of the LGBT community vary on a large basis. The disparity between urban and rural India, language, caste, class and gender add complexities in the understanding of the LGBT community. We have witnessed that India’s LGBT citizens are not a ‘minuscule minority’. The LGBT community has a very strong mindset and they are now all prepared to raise voice against the myths and odds faced by them.

- Section 377 of The Indian Penal Code, 1860 states “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished”. ²This is termed to be a colonial-era law that was at a complete different

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²Indian Penal Code, 1860

level in comparison to the modern and new principals of justice and equality of humankind. This section is very well known for criminalizing the act of private consensual homosexual sex between adults also.

- Section 377³ also states that heterosexual acts which are pointed out to be “against the order of nature” are an offence under the same.
- The Supreme Court judgment in 2018 ruled that this Section’s use against consenting adult homosexuality was irrational, arbitrary and not justified.

The LGBTQ community has been protesting for a very long time to overturn this dehumanizing law. One of their initial victories was the recognition of a third gender in India in 2016 when the Transgender Person’s Bill was passed. In a society where citizens tend to turn a blind-eye to even the existence of the LGBTQ community, various protests, which have garnered a lot of media attention, have certainly increased the awareness about the problems faced by LGBTQ members.⁴

II. BACKGROUND:

There is nothing wrong with you. There’s a lot wrong with the world you live in”

- Chris Colfer

LGBT is the code word for Lesbian, Gay, Bisexual and Transgender. Initially, this community was called the GAY COMMUNITY. Later, the abbreviation LGBT was introduced in the mid-1980’s to replace the word Gay Community because it was not sufficient enough to include the ones who are different from normal human beings altogether in the gay community as it referred only to the men.

LGBT people have different sexual orientation than a normal person where sexual orientation generally includes sexual fantasies, sexual attraction, sexual behavior, social and lifestyle preferences and self-identification.

- The term “Gay” traditionally was used to refer to the people attracted to people of the same gender and be in a relationship with same gender people. But the lesbians, transgender, and bisexuals are not included in the gay community.
- A lesbian generally refers to women who are attracted to women only. They are not all attracted to opposite genders.

³Indian Penal Code, 1860

⁴Monika, *Supreme Court’s Decision to Review LGBTQ Rights : A Decision Long Overdue*, July 18th, 2018 https://indians4sc.org/2018/07/18/supreme-courts-decision-to-review-lgbtq-rights-a-decision-long-overdue/#.X4Lr_NAzZPY (Last visited on 12th Oct, 2020)

- A bisexual person is the one who is sexually, romantically, physically and emotionally attracted to both the sexes. They are not only attracted to one but finds a connection in both the genders.
- Transgender is a term that can be defined as a way through which people's gender identities can differ from the sex they were assigned at birth. For example: a person who assigned a female sex at birth and has a male sense of self or vis-a-vis could be categorized as a transgender.⁵

Sometimes LGBTIQ or LGBT+ is used by some people meaning LGBTIQ as intersex people questioning their sexual identity and LGBT+ embracing spectrums of gender and sexuality.

III. HISTORY

Ancient Indian texts are relevant to modern LGBT causes. Religion has played a very vital role in modernizing and shaping the customs and traditions followed by the Indians. One of the famous texts of Hinduism i.e. Rigveda recognizes homosexual/transsexual dimensions of human life. Another famous ancient Indian text known as Kamasutra describes about a complete chapter on erotic homosexual behaviour. During Ancient times the Arthashastra was a Indian treatise on statecraft which covered a large variety of sexual practices performed with both men and women as a punishment imposed with an amount of some fine. Homosexual course at that particular time was not sanctioned and therefore it was treated as a very minor offence.

Early Modern Period (C. 1526-1947 CE)

The early modern period was considered to be a period of Muslim rule. Though the Hindus were completely opposite of the idea of homosexuality and pederasty but the sultans of the Delhi Sultanate did grew some romantic relationships with other men despite the prohibitions against it in Sharia. The noble class of the Mughal Empire did engaged themselves in the acts pf homosexuality and pederasty, considering them to be a symbol of "pure love".⁶

After the rule of the Mughals the British Raj came into existence for about a period of 90 years. They criminalized all the homosexual activities included under Section 377 of the Indian Penal Code which came into force in the year 1861 under the realm of Britishers.

⁵Stryker, Susan.(2008) Transgender History

⁶ Wikipedia, *LGBT rights in India*, https://en.wikipedia.org/wiki/LGBT_rights_in_India (Last visited on 12th Oct, 2020)

IV. DIFFICULTIES FACED BY THE LGBT COMMUNITY IN TODAY'S SOCIETY

The LGBT community faces innumerable difficulties in the society where the only accepted orientation is heterosexuality and homosexuality is regarded as abnormal. They are more likely to experience intolerance, discrimination, harassment and threat of violence due to their sexual orientation than those who identify themselves as heterosexual. Abuse is their daily routine and faced by them almost everyday. They face inequality, violence and torture from the people who mock at them and make them realize that they are different from others. The LGBT people even hide their gender and do not disclose it due to the fear of facing ragging, harassment at schools, colleges, universities, institutions and workplace which in many cases leads to depression and homelessness. Many LGBT youths are placed in foster care or end up in juvenile detention or on the streets, because of family conflict related to their LGBT identity. LGBT teens have a very high risk of health and mental problems when they become adults because they are rejected by their parents and caregivers. As a result of this they are developing low self-esteem and low self-confidence and are mostly isolated from their family and friends.

Additionally lesbian, gay bisexual and transgender people face poverty and racism daily. They suffer from social and economic inequalities due to continuous discrimination at the workplace. These people indulge themselves in wrong habits and get addicted to drugs, alcohol and tobacco in a large amount in order to get them relieved of the stress, rejection and discrimination they face daily by the society (societal pressures). In some countries, homosexuality is regarded as a crime. It is illegal and is often met by imprisonment and fines. For example, in Muslim law, homosexuality is regarded as a sin and is unlawful.

V. LGBT AS AN ISSUE IN INDIA

In recent years, the issues regarding lesbian, gay, bisexual and transgender have become a source of estranging among the nations. The earliest organizations supporting LGBT rights can be traced to the 19th century. During the 18th and 19th century, homosexual behavior was not socially accepted and was regarded as crimes. The social attitude towards homosexuality became bitter in the late Victorian Era. Around the 1800s, social reformers started defending the homosexuals but due to adversities, they kept their identities secret. A British secret society also campaigned for the legalization of homosexuality in the society. A book called "Sexual Inversion" by sexologist Havelock Ellis faced a lot of controversies and a bookseller was also charged for selling such a book. A movement was started by a Social Reformer in Germany against a law which stated that having sex with the same gender is

illegal. The first bold step was taken by USSR when it decriminalized homosexuality in around 1920s. It was at that time when society was conservative and was also socially backward regarding the matters of sexuality. But this victory was short lived as during the rule of Stalin, homosexuality was re-criminalized again. Immediately after World War II, a lot of homosexual groups came to the forefront and emphasized love over sex. A movement called Homophile movement was started in some European countries in 1945 and continued up to around 1970. A new movement called Gay Liberation Movement started in 1970 and continued for four years. Homosexual groups like Gay Liberation Front [GLF] and Gay Activists' Alliance [GAA] were formed.

Till then, only gays and lesbians were in the limelight. Bisexuals started gaining prominence in LGBT movements in the 1970s. National Bisexual Liberation Group was formed in New York representing the bisexuals. The advocates of the Gay and Lesbian Rights argued that one's sexual orientation has nothing to do with gender identity. Homosexual was considered as an illness across the world. But in 1979, Sweden became the first country in the world to remove homosexuality as an illness. In modern India, Shakuntala Devi was the first to publish a study on homosexuality in 1977. Section 377 of Indian Penal Code talks about unnatural offenses stating homosexuality is illegal in India.

VI. RIGHTS OF LGBT IN INDIA:

1) Naz Foundation V. Government Of New Delhi:⁷

The case was instituted by a non-governmental organization based in Delhi, which is devoted to the working of the issues of HIV/AIDS. They filed a writ petition arguing that Section 377 of the Indian Penal Code was unconstitutional. The NAZ Foundation submitted that Section 377 violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Indian Constitution. It brought the action in the interest of the public claiming that their work on combating the spread of HIV/AIDS was being hampered by discrimination experienced by the gay community because of Section 377. This discrimination, the petitioners submitted, resulted in the denial of fundamental human rights, abuse, harassment and assault by public authorities, thus driving the gay community underground and subjecting them to greater vulnerability in violation of their fundamental rights.

Appellant's Argument:

The LGBT Community is experiencing continuous harassment and discrimination due to the

⁷2009 SCC OnLine Del 1762

existence of Section 377. It affects the right to life and liberty enriched under Article 21 of the Indian Constitution. They submitted that the right to non-discrimination on the ground of sex given under Article 15 of the Indian Constitution should not be read restrictively but should include “sexual orientation”.

Respondent’s Argument:

The Ministry of Health and Family Welfare and Ministry of Home Affairs submitted their legal opinions as the respondents. They argued that Section 377 is provided for the execution of individuals for sexually abusing children. It also fills a gap in rape laws. They further added that Indian society does not accept such sexual behavior and laws comply with the on-going customs in the society. They also argued that removal of Section 377 would ‘make many people in high-risk categories in relation to HIV/AIDS reluctant to come forward for treatment due to a fear of law enforcement agencies and that in driving homosexuality underground it increases risky behavior such as unprotected sex’.

Judgment:

The landmark judgment given by the Delhi High Court in 2009 stated that Section 277 violates Articles 14, 15 and 21 of the Constitution. The court analyzed Article 14 that distinction and classification should be on an intelligible differentia which has a rational relation to the objective sought. It concluded that “Section 377 does not differentiates between public and private acts or between consensual and non-consensual acts, therefore does not consider relevant factors such as age, consent and nature of the act or absence of harm. Thus such criminalization in the absence of evidence of harm seemed arbitrary and unreasonable. Discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enriched under Article 15 of the Indian Constitution.

***2) Suresh Kumar Koushal V. Naz Foundation:-*⁸**

The decision given by Delhi High Court about decriminalization of homosexuality attracted many appeals in the Supreme Court challenging the judgment of High Court in the Naz Foundation case.

Arguments of Appellant:

Section 377 is gender neutral and includes the acts of carnal intercourse which are committed voluntarily irrespective of gender. It does not violate Right to Privacy under Article 21 and

⁸Suresh Kumar Koushal V. Naz Foundation (2014) 1 SCC 1

right to privacy does not include right to commit any offense under Section 377. The judgment of High Court affects the social structure of India and the system of marriage would be adversely affected. The young people would be inclined towards homosexual activities. Moreover, whether a law is moral or immoral should be left to the parliament to decide.

Arguments from Respondent:

Section 377 targets the LGBT community about their sexual orientation. Sexual rights are guaranteed under Article 21. So, Section 377 deprives them of moral citizenship. 'It outlaws sexual activity between men which is by its very nature penile and non-vaginal, it impacts homosexual men at a deep level and restricts their right to dignity, personhood, and identity, equality and right to health by criminalizing all forms of sexual intercourse that homosexual can indulge in'. Sexual intimacy is important to psychological well-being and homosexuals are deprived of it. The society is changing and so the laws should also change with changing times. Article 14 and 21 are interlinked with each other. 'Section 377 does not lay down any principle or policy for exercising discretion as to which of all the cases falling under the broadly phrased law may be investigated. It is silent on whether the offense can be committed within the home'. Criminalization also increases discrimination and act as an obstacle to HIV prevention programs.

Judgment:

The panel of two Supreme Court judges overturned the judgment of Delhi High Court on 11 December 2013, allowing the appeal and declaring the decision as "legally unsustainable". They held that Section 377 of Indian Penal Code is constitutional and is not violative of Constitution. The Supreme Court and High Court have the power to declare the validity of the laws, but the Parliament is deemed to act for the people and hence would not make any law which would go against the Constitution. Unless a clear constitutional violation was proved, the court was not empowered to invalidate the law. Also, 'Section 377 does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offense. Such a prohibition regulates sexual conduct regardless of gender identity and orientation'. The High Court could not find sufficient details regarding discrimination against gays and lesbians. Also, judicial intervention was not required on this issue. Section 377 does not violate Article 14, 15 and 21 of the Indian Constitution. The Legislature was free to consider Section 377 and can declare it unconstitutional if necessary. The Court held Section 377 of IPC constitutional and re-criminalized homosexuality, i.e., sexual intercourse against the order of nature.

VII. CONCLUSION

Section 377 of Indian Penal Code, 1860 is now decriminalized by the Supreme Court of India on September 6, 2018. It allowed gay sex among consenting adults in private. The Supreme Court ruled that consensual adult gay sex is not a crime saying sexual orientation is natural and people have no control over it. LGBT individuals are now legally allowed to engage in consensual intercourse.
