

LEGALIZATION OF HOMOSEXUALITY : AN ANALYSIS OF PROTECTION OF HUMAN DIGNITY OF LGBT UNDER INDIAN CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS.

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Abstract

One of the finest question that Indian Judicial system has been facing ever since of the dawn of human right is, should homosexuality be legalized? Here in this research paper, a mini timeline has been given for the current legal position of homosexual, lesbian, gay, bisexual and transgender LGBTQ community in India. India's honourable Supreme Court has given a decision that criminalizing consensual same-sex conduct is unconstitutional, is a major victory for human rights. In-fact, the LGBT people's right to privacy and right to equality in India make it become the world's second most populous country.

The Indian constitution and international human rights play a core role for providing LGBT community people for equal treatment and now the second-class citizens treatment based on their perceived sexual orientation have no place in today's modern India.

The ruling follows a long struggle for the decriminalization of same-sex conduct in India. In 2001, the Naz Foundation (India) Trust, an organization working on HIV/AIDS and sexual health, filed a case before the Delhi High Court, contending that Section 377 violated both the Indian constitution and international human rights law. On 2 July 2009 case: NAZ Foundation v. Government of NCT of New Delhi decided by a two judge bench of Delhi high court, is a landmark Indian case. The judgment held that "treating consensual homosexual sex between adults as a crime is violation of fundamental rights protected by India's Constitution", and this verdict resulted in the decriminalization of homosexual acts among consenting adults throughout India.

Then in another case, Suresh Kumar Koushal and another v. NAZ Foundation and others, In this famous case of 11 December 2013 by Supreme court of India overturned the Delhi high court case NAZ Foundation v. Government of NCT of Delhi and reinstated section 377 of Indian Penal Code, as the Supreme court of India did not find enough reasons for the portions of sections 377 to be declared unconstitutional and hence the Delhi High Court judgment was overturned, recriminalizing sexual intercourse "against the order of nature", as it was believed that the declaration made by the division bench of the high court is legally unsustainable.

One another case, Navtej Singh Johar and others v. Union of India, The Supreme Court on 6 September 2018 unanimously declared section 377 of the Indian Penal Code, which was a Victorian era law, unconstitutional. This case overturned a previous ruling Suresh Kumar Koushal v. NAZ Foundation. While the filing of the case by five people from the LGBT community, they argued that section 377 violated their fundamental rights.

In the light of the above mentioned cases, it is clear that a huge role has been played by Indian judiciary to legalize homosexuality.

Key words: Homosexuality, Prejudice, Sexual and reproductive rights. Acquired Immunodeficiency, transmission , India.

INTRODUCTION

Let us move from darkness to light, from bigotry to tolerance and from the winter of mere survival to the spring of life – as the herald of a New India – to a more inclusive society.

Justice Dipak Misra and Justice A.M. Khanwilkarin Navtej Singh Johar and others v. Union Of India, 2018¹ In 1950, the Indian Constitution came into force with the recognition that all persons had the right to equality, non-discrimination, life and personal liberty as fundamental right. The key role played by the Constitutional framework was that it gave to society the language of universal human rights, which would apply to all citizens without discrimination. Section 377 is also manifestly arbitrary, and create violation of Article 14 of the Constitution².

It's time for people in India to debate on the issue of homosexuality. Public awareness and sex education for all should be the bottom line to unravel the sexuality taboo and to create compassion and respect to India's homosexuals. If India needs to be recognized globally as a true democratic nation, it has to ultimately revise or abolish the prejudicial law so that the ignored homosexual society can be free at last³.

¹ See also, <http://spaceandculture.in/index.php/spaceandculture/article/view/400>, Poonam kakoti Borah, Engaging with the law: Decriminalization of Homosexuality and Johar Judgement, 2018.

² Ibid.

³ Ibid.

On September 6, 2018, the Supreme Court of India passed a historic judgment that decriminalised consensual same-sex acts among adults. The judgment which 'read down' Section 377 IPC was the culmination of demands that started from organisations that worked around HIV/AIDS prevention and eventually encouraged individual LGBTQ persons to challenge the law. Without undermining the significance of the grass root activism against Section 377, the paper also places stress on international human rights instruments and LGBTQ struggles against decriminalisation from different countries as factors that enabled the Johar Judgment.⁴ The major provisions of criminalization of same-sex acts are found in the Section 377 of the Indian Penal Code of 1860 which treats gay sex as an 'unnatural' offense, and punishable by imprisonment. This section 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 imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

Role of Indian Judiciary in the development of LGBT Laws

This law is originally based on the centuries old fallacy that sodomy is equivalent to homosexuality. Between 1860 and 1992, only 30 cases were officially registered in India's provincial High Courts and the Supreme Court. In fact, the law does not distinguish sodomy between males, and between male and female, and most of the registered cases targeted more males than females. The homosexual society across India remains vulnerable to police aggravation and prosecution due to this law in effect. Therefore they fear to seek help for sexually transmitted diseases including HIV/AIDS⁵.

For example, in New Delhi, police arrested 18 men in 1992 from a park on the suspicion that they were homosexuals. After protest by international human rights groups, they were released from police custody after filing a petty case against them.

Another case was reported in a small village in Gujarat State two decades ago, where Ms. Tarulata underwent a female-to-male sex change operation and changed her name to Mr. Tarun Kumar. He later married Ms. Lila in 1989. But Lila's father filed a petition in the provincial High Court stating that it's a lesbian relationship so the marriage must be null and void – the petition called for criminal action under Section 377⁶.

What is more aggravating is that in Lucknow city, the local police force has been bizarrely upbeat in its attempt to enforce Section 377. In 2001, police invaded two offices of the local AIDS prevention organizations to arrest their staff for promoting homosexuality. In January 2006, police arrested four men accusing them of operating an online "gay racket" and engaging in unnatural sex. Human rights groups condemned the arrest and India's coordinator for UNAIDS stated that treating homosexuals as criminals increases the stigma and therefore hinders the fight against HIV/AIDS⁷.

THE HISTORY OF SECTION 377

Section 377 was enacted by the British as a part of the Indian Penal Code in 1860. Since then, there have been approximately 200 convictions. In 2000, the Law Commission recommended deletion of Section 377 or, at least, a reduction of the harsh punishment to two years imprisonment⁸.

Section 377⁹ stated as follows

[U]nnatural 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 ten years, and shall also be liable to fine.

Explanation — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

International background for section 377

1. Buggery Act 1533 which was enacted under the reign of King Henry VIII. This law defined 'buggery' as an unnatural sexual act against the will of God and man. Thus, this criminalised anal penetration, bestiality and in a broader sense homosexuality¹⁰

4 Kakoti Borah, P. (2018). Engaging with the Law: Decriminalisation of Homosexuality and the Johar Judgement, 2018. *Space and Culture, India*, 6(3), 5-22. <https://doi.org/10.20896/saci.v6i3.400>

⁵See also, http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-89102007000400022, India's homosexual discrimination and health consequences.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Indian penal code, 1860.

¹⁰ Chaitanya Kediya, tracing the history of section 377 of IPC, available at, <https://factly.in/tracing-the-history-of-ipc-section-377/>.

2. **Offences against the Person Act 1861** In 1828, the Act was repealed and replaced by the Offences against the Person Act 1828. This Act broadened the definition of unnatural sexual acts, and allowed for easier prosecution of rapists, but also homosexuals¹¹.
3. **Homosexuality was decriminalised in the UK** by the Sexual Offences Act 1967. It is interesting to note that while the British government has now made same-sex marriage legal, the Indian government still follows this archaic law written in the 1830s and enacted in 1860¹².

INDIAN CONSTITUTION ON LGBT

In the meanwhile, two significant developments took place that created the hope that the anti-sodomy law would be over turned soon: first, the historic *NALSA V. Union of India*, judgment (henceforth NALSA) judgment was delivered by the Supreme Court on the 15th of April 2014; and second, the filing of additional writ petitions by individuals who identified as LGBTQ. In the NALSA judgment, the Supreme held that under the ambit of Articles 14, 15, 16 and 19 transgender are to be treated as 'third gender' and transgender ought to be left free to choose (National Legal Services Authority v. Union of India, 2014), Using the NALSA judgment as a springboard for advocating the repeal of section 377 transgender activists Dr. Akkai Padamshali and Uma Umesh filed a Writ Petition before the Supreme Court in July 2016 arguing that have argued that the grant of civil and political equality by NALSA and the denial of sexual rights by Koushal have created a paradoxical situation. The petition prayed that Section 377 should be declared ultra-vires of the Constitution as it impinged upon the very rights that NALSA had upheld (Dr Akkai Padmashali Ors Vs Union Of India, 2016). In June 2016, another petition was placed by Navtej Singh Johar and four other eminent LGBTQ personalities which argued that S377 was upfront to their fundamental rights guaranteed under Articles 14, 15, 16, 19 and 21 (Navtej Singh Johar and ors v. Union of India, 2018, henceforth Johar). This petition argued that it is distinct from the curative petition because this petition was filed by individuals who sought redressal under Article 32. It is noteworthy that while delivering the Koushal Judgment, Justice Mukhopadhyay had held that the Indian case was an 'imaginary Lawrence' as there was no visibly harmed party. Therefore, when the June 2016 petition was filed it can be called as the 'Lawrence moment' for the Indian LGBTQ movement¹³.

Article 21 and Right to Privacy of LGBT under Indian Constitution.

The Navtej Singh Johar judgment can be read as a seminal legal document that has further expanded the scope of Article 21 by including privacy, self-determination and individual autonomy within its ambit. The judgment extended the purview of right to privacy to explicitly include 'right to sexual privacy' as a natural right (Navtej Singh Johar and ors v. Union Of India, 2018). Chief Justice Misra, Justices Khanwilkar and Malhotra argued that privacy must be understood as both 'zonal/ spatial privacy' and 'decisional privacy' which implies that 'the right to life and liberty would encompass the right to sexual autonomy, and freedom of expression' (Navtej Singh Johar and ors. v. Union of India, 2018). Therefore, Johar can be held as a successor to Justice K.S. Puttaswamy (Retd.) Judgment of 2017 or the right to privacy judgment¹⁴.

INDIAN LEGAL POSITION ON SECTION 377

Over the years Section 377 has sparked numerous controversies and has been challenged in both the High Court of Delhi and the Supreme Court. In 2001, Naz Foundation (India) Trust, a non-governmental organization challenged Section 377 in the Delhi High Court by filing a lawsuit to allow homosexual relations between consenting adults. This Naz Foundation, which works primarily on HIV/AIDS and sexual health, filed a Public Interest Litigation in the Delhi High Court to challenge Section 377, which was dismissed in 2004. After several attempts and arguments between the Central Government and the High Court, the plea was heard in 2009. The Delhi High Court decided that Section 377 contradicts the Indian Constitution, specifically Articles 14, 15 and 21, i.e. the rights to equality before the law, freedom from discrimination, and the protection of life and personal liberty. The Indian government declined to appeal against this decision, thus implying the legalization of gay sex. Scores of people came out about their sexuality after this judgement as they felt empowered and supported by the state. The December 2013 Supreme Court decision, pursued by the Delhi Child Rights Commission and various religious bodies, overturned the progressive 2009 outcome¹⁵.

¹¹ Ibid.

¹² Ibid.

¹³ Supra note 4.

¹⁴ Ibid.

¹⁵ Ibid.

Sexual health of LGBT in India.

Hijras/TG communities face several sexual health issues including HIV. Both personal- and contextual- level factors influence sexual health condition and access to and use of sexual health services. For example, most Hijras/TG are from lower socioeconomic status and have low literacy levels that pose barrier to seeking health care. Consequently, Hijras/TG communities face some unique barriers in accessing treatment services for STIs¹⁶.

A culturally identifiable group in India known in the Urdu language as hijra deserves special attention in terms of health care programs since many of them work as male prostitutes; they are often ignored by the mainstream Indian society. These castrated men dress as women and some are hermaphrodites, born with ambiguously male-like genitals. Their exact population is not known since census data designate them as females. According to estimates, their population range from 50,000 to 500,000¹⁷

Human rights and LGBT rights

Human rights are a concept according to which every human being has basic, universal, non- transferable rights regardless of his/her nationality, social status, culture, religion and the law in force in the country where he/she lives¹⁸

Karel Vasak classified human rights into three categories in 1979 as¹⁹: (1) Human Rights of First Generation: International Covenant on Civil and Political Rights; (2) Human Rights of Second Generation: International Covenant on Economic, Social and Cultural Rights; (3) Human Rights of Third Generation: Collective Rights.

This law is in line with the 1948 Universal Declaration of Human Rights, which states that human rights are the basic rights inherent in human beings by nature, including the right to build a family, the right to self-development, justice, freedom, communication, security and prosperity. Based on minimum basic rights referred to as non-derogable and inalienable human rights. These two types of rights include, among others, the right not to be arbitrarily arrested; the right to a fair and impartial trial; the right to legal assistance; the right to the presumption of innocence. Inalienable rights, on the other hand, are personal rights held by an individual which are not bestowed by law, custom, or belief, and which cannot be taken or given away, or transferred to another person, are referred to as "inalienable rights." These fundamental rights are endowed on every human being by his/her creator and are often referred to as "natural rights". The Universal Declaration of Human Rights is also the legal basis for proponents of legalization of same sex marriage in Indonesia. As stated earlier, article 1 section 1 of this Human Rights Law defines human rights as a set of rights attached to the nature and the existence of human beings as creatures of the Almighty God and must be protected by the state for the protection of human dignity²⁰.

Sexual Orientation and Gender Identity within the International Human Rights Framework

Persecution of citizens through anti-sodomy laws that discriminate between heterosexuals and homosexuals have been a concern for international human rights discourse as it renders invisible violations that occur on the grounds of SOGI. In his report of February 2016, the UN's special rapporteur on torture. Prof Juan Mendez stated that: 'states are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever they create and implement discriminatory laws that trap them in abusive circumstances'(Banning Homosexuality Fosters Hate and Homophobia Says UN Report, 2016)²¹.

In the Hindu-dominated Indian society, religion has strong roots in social and cultural affairs. What most people forget to realize today is homosexuality indeed has an ancient historical base in India. Hindu religious texts such as Rig Veda dated back 1500 BC, and sculptures of India's ancient temples represent explicit homosexual acts. The ancient Hindu text Kama Sutra describes homosexuality more vividly than any other ancient texts. Intriguingly, some of the Hindu religious deities change gender to participate in homoerotic behaviors.²².

¹⁶ Ibid.

¹⁷ See also, http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-89102007000400022.

¹⁸ DEITY YUNINGSIH, UNIVERSITY OF HALU OLEO AND OTHERS, SAME SEX MARRIAGE IN LEGAL AND HUMAN RIGHTS PERSPECTIVES, <HTTPS://WWW.ABACADEMIES.ORG/ARTICLES/SAME-SEX-MARRIAGE-IN-LEGAL-AND-HUMAN-RIGHTS-PERSPECTIVES-7490.HTML>

¹⁹ Ibid.

²⁰ Ibid.

²¹ Supra note 1.

²² See also, <https://in.boell.org/2014/01/15/section-377-not-yet-lost-cause-0>, GITANJALI MORE AND CAROLINE BERTRAM, SECTION 377: NOT YET A LOST CAUSE.

CONCLUSION

A positivistic analysis of the current state of international human rights law will no doubt lead to the conclusion that LGBT rights are recognized as a part of the principle of non-discrimination and that of privacy. However, this conclusion is not to be taken for granted as there is a real possibility that a new norm or norms could develop. Rather than bringing international law to court, where it risks being reinterpreted fundamentally and frozen in a homophobic moment, it should be kept in the agora just outside the gates of courts where it can influence and challenge public opinion. It is only after international law is used as a basis of public discourse that judicial discourse should be attempted²³

LGBT rights advocacy should initially aim at disrupting the homosexuality. At this stage, the most important role of international law should be the prevention of the promulgation of laws that impose greater penalties on LGBT acts and identities at the domestic level. International legal standards should also be included in non-binding soft law pronouncements where they can have a performative role. Subsequently, and in some situations simultaneously, work should be done to decriminalize homosexuality²⁴.

²³ Abadir M Ibrahim, LGBT rights in Africa and the discursive role of international human rights law, see also http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962015000200003.

²⁴ Ibid.