

LONG BATTLE TO DECRIMINALIZE HOMOSEXUALITY AND THE AFTERMATH

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ABSTRACT

This paper had started its research by mentioning a brief introduction about the topic and stating the reasons behind the decriminalization of Section 377 of the Indian Penal Code. The paper stated a brief history about homosexuality and the LGBTQ community along with a few landmark judgments which ultimately led to the decriminalization of section 377. The paper has focused upon the main areas of research which includes whether section 377 violated the right to privacy of the LGBTQ community. It also found a link between right to privacy and the sexual orientation followed by the findings whether the right to privacy has protected the rights of the LGBTQ community after passing of the judgment. The paper found out how much success have this community achieved in the professional fields after passing of the judgment and an assessment where they did not achieve the height in the respective professional fields. The paper had its findings on some of the personal interviews of the people who belongs to the LGBTQ community and briefly stating the changes that took place after the judgment. The paper found out the role played by social media in spreading some light to the world regarding the LGBTQ community followed by a brief finding on how today's generation can be more aware and well-acquainted with such a vulnerable issue as this with the help of social media. This paper also attempted to throw some light upon the situation of the LGBTQ community in the international sphere thereby stating some opinions regarding what needs to be implemented in India in order to make them more comfortable in their own skin. Last but not the least the paper concluded by stating its own reasons and opinions on the overall issue of homosexuality and how far the landmark judgment of decriminalization of section 377 has been able to bring some change in the society and life of the people intrinsically.

Keywords: decriminalization, LGBTQ, right to privacy, homosexuality, social media.

INTRODUCTION

It is often said that what humans receive from the nature is a gift and that is called natural. We all have inculcated certain traits and habits from the nature and those traits are completely different in all individuals. We can rightly pose that as individuals we all have the right to live with those traits and habits with the utmost pride and without any external interruption. So we can say that the historic judgment that was passed on 6th September, 2018 was an indication that every individual is a different individual irrespective of their gender. However, the term ‘HOMOSEXUAL’ was coined in 1869 by Karoly Maria Benkert, a Hungarian doctor. Section 377 of the Indian Penal Code states that- “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 be liable to fine.” But the above-mentioned definition hampered the very essence of an individual’s overall personality and self-esteem. The case of *Navtez Singh Johar v Union of India* reflected that every minuscule trait or feature of an individual is his own and it is not determined by any outward force.¹ Any non-acceptance by any norms or societal rules shall lead to decrease of the self-esteem of the individual. A person has an exclusive right to live by the way he wants and has a right to his own individuality and every other person must respect that without imposing any kind of restrictions on him unreasonably. One of the reasons behind the decriminalization of section 377 was that this section was violative of Article 19(1)(a) and article 21 of the Indian Constitution which talks about freedom of speech and expression and right to life and personal liberty respectively. Justice Dipak Mishra, (the then Chief Justice of India) opined that the LGBTQ community or (lesbian, gay, bisexual, transgender, queer) community are consensual individuals and does not harm the public order or decency in any manner.² He also rightly pointed out that section 377 results in unreasonable restriction upon individuals which apparently makes carnal intercourse between two consenting individuals a criminal offence which directly hampers a person’s right to choice. Section 377 was held to be an “archaic law” which was incompatible with our present constitutional values and it cannot be preserved in any manner.³ Section 377 was held to be mala fide and it prevented the principles and benevolence of our

¹Navtez Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321 (India)

²Suresh Koushal v. Naz Foundation, A.I.R. 2014 S.C. 563 (India)

³ V. K. Dewan, Law Relating to Offences Against Women 1161 (5th ed. 2020)

Indian Constitution. Thus the LGBTQ community possesses the same rights as any other individual and they have the right to protect their personal liberty without any hesitation. The court also pointed out in the case of Suresh Koushal v Naz Foundation that “the LGBTQ community comprised only a minuscule fraction of the total population” and that this fact was misused and is not a reflection of the importance of the section.⁴ Another reason for the decriminalization was that section 377 was directly going against the constitutional morality. The primary objective behind passing of any legislation is that every individual gets access to the benefits of the legislation equally.⁵ Hence, a particular group of people getting affected and deprived of those benefits is a direct violation of our constitutional morality and thus it fails to uphold that ‘Constitution is the supreme law of the land’. Looking into these details, the Hon’ble Apex Court pronounced its judgment that irrespective of the gender and sex all have the rights to lead a life of their own choice and with dignity thereby giving a ray of hope in the minds of people and society that change is necessary for moving forward.

A HISTORY AND BACKGROUND OF HOMOSEXUALITY

Generally, people are identified as male or female but we forget their presence in the society that is third gender or transgender. They are ignored in society because their gender is different, the expression is different, and sexual orientation is different from a normal person and traditionally society has thought that a male is a male by birth and a female is female by birth. According to their sexual orientation these people can be either heterosexual or homosexual or bisexual and on the other hand some lesbians, gays, bisexuals are also coming under these transgender communities but more are not. Just because heterosexuality is common it does not mean homosexuals are detrimental, being gay or lesbian or bisexual or transgender there is no disgrace and that is why at the present date they have been legally recognized and sec 377 have no more existence in India. The word LGBT represent that each group of people who belong to lesbian, gay, bisexual, and transgender and also respect to their race, ethnicity, socioeconomic status, geographic location, age and which is planned to underscore a variety of sexuality and sex

⁴ Suresh Koushal v. Naz Foundation, A.I.R. 2014 S.C. 563 (India)

⁵ V. K. Dewan, Law Relating to Offences Against Women 1192 (5th ed. 2020)

character-based societies or include the ranges of sexuality and sex. Transgender means a person recognized as male by birth but later identify as female and that's the same way a person identified as female by birth but subsequently recognize as male and their internal feelings also change accordingly. Transgender individuals may recognize as male or female or not one or the other of the name fits them. Sexual orientation exists with select fascination to the inverse of the same sex. When an individual sexual and enthusiastic fascination is towards the individual of the same sexual orientation then it is called homosexual orientation, if the fascination is towards the inverse sex it is called heterosexual orientation and in case the fascination is towards both the sex it is called bisexual orientation of individuals. Gender identity refers to the physiological characteristics of the inverse sex an individual may have a male or female sexual orientation personality. Most of the members from LGBTQ community don't get family support like a normal person, family issues need communication and misconception between guardians and their LGBT children increment family strife, as a result, the LGBT children become homeless or are forced to do so and also any time they become drug-addicted and are victims of many crimes because they don't get any guidance which is very much necessary for them at that time. Therefore from the grass-roots level, they are victims of discrimination. Every human being has the right to enjoy human rights and fundamental rights, LGBT community is normal as any other human communities and such treatment ought to be given by the state to these individuals. On numerous occasions, LGBT people are not legitimately secured from injurious and unfair activities yet the state should make special legislation for them which will provide them justice in the true sense.

RIGHT TO PRIVACY AND HOMOSEXUALITY

Ever since the passing of the judgment of decriminalization of section 377, we can relate right to privacy and homosexuality in a holistic manner. Right to privacy was declared as a fundamental right by the Hon'ble Apex Court in the case of K.S. Puttaswamy v Union of India and the citizens of India became elated as soon as the judgment was passed. Thus we can say that the right to privacy as a fundamental right and decriminalization of section 377 are the two most

phenomenal judgments passed by the Indian Judiciary till date.⁶ Right to privacy of every individual implies that a person shall have his own privacy in every matter irrespective of his gender, caste, sex or creed. The Constitution must protect the rights of the citizens even if the right of only one person is in peril.

HOW SECTION 377 WAS VIOLATIVE OF THE RIGHT TO PRIVACY AMONG THE LGBTQ?

The courts through various judgments have expanded the ambit of right to privacy in the recent years and have concluded that the ambit of privacy allows every individual to develop human relation without any deprivation and interference from any other individual or from the state as a whole. According to the Indian Constitution, the right to live with dignity and right to privacy are recognized as dimensions of Article 21. Section 377 failed to uphold the true spirit of the Indian Constitution and it was in contravention with the ideals and principles of the Constitution. Denying a person's right and putting an individual under a particular stereotype solely based on his/her sexuality was nothing but vague and mala fide. The determination of an individual's identity by following section 377 was myopic and violates Article 21 of the Indian Constitution which states the right to life and personal liberty. Section 377 was regarded as a fangled law which stated homosexual intercourse a punishable offence which was regarded as baseless. We can rightly point out that 'privacy' means giving every individual a space of his own and should be guarded from all the unnecessary interference which hinders their freedom. As a result, it became an absolute necessity to make such portion in law that could protect and preserve their rights rather than causing trouble and endangering their personal freedom. Thus, the decriminalization of section 377 was regarded as a much needed amendment that could take our society towards progress and a path of enlightenment.

RIGHT TO PRIVACY AND THE SEXUAL ORIENTATION OF THE LGBTQ

The Hon'ble Apex Court opined that sexual orientation or preference is a fundamental trait of every person and determination of any individual's personality by subjecting them with remarks

⁶K.S. Puttaswamy and another v. Union of India, A.I.R 2017 S.C. 4161 (India)

that are detrimental to them and their character trait shall not be considered as conducive to the society. The overall individuality of a person is based on the perception of mutual respect and love. It inadvertently tells us that right to privacy and sexual orientation is interrelated. Individual choice and freedom is no exception where the right to privacy is concerned. Sexual orientation basically means an individual's identity in relation to any gender to which they are sexually attracted according to the 'Yogyakarta principles'.⁷ Sexual orientation can be related to sexual attraction and is as natural as any other biological phenomena. A person can be biologically attracted to any other person of the same sex or any other different sex that is based on the biological factors. This trait is innate and is acquired by his own self. When two consenting adults are emotionally and sexually connected to each other belonging to the same sex can be as natural as two bisexuals reciprocating love to each other. A person getting bullied for having a certain biological trait which the society perceives to be unnatural and offensive is not acceptable. It is similar as compelling a person to do something which was not present in their body previously and to forcefully accept the trait to which he was not accustomed. We can thereby conclude that the difference between a gay man and a straight man is something like a right-handed and left-handed man.⁸ A left-handed man cannot magically become right-handed all of a sudden and vice versa. Similarly, some are born as left-handed naturally and some are born as gay right from his birth.

IMPACT OF DECRIMINALIZATION ON THE RIGHT TO PRIVACY OF LGBTQ

It's only been two years since the passing of the judgment of decriminalization of section 377 and we cannot say that the impact has been phenomenal but it has undoubtedly shifted the emphasis from being stereotypical to thinking in a broader aspect. After the Puttuswamy v Union of India case, Justice Chandrachud held section 377 as "unsustainable" and also said that right to privacy and protection of sexual orientation are included in the fundamental rights and are regarded as the core of articles 14, 15 and 21 (right to equality, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and right to life and personal liberty)

⁷V. K. Dewan, Law Relating to Offences Against Women 1172 (5th ed. 2020)

⁸Id. at 1170

respectively. We can definitely say that after the decriminalization the right to privacy and the overall rights of the LGBTQ has received a greater height and had a tumultuous response especially from the LGBTQ community. They gained a greater confidence to face the world and the decriminalization took all of us a step forward to witness a new phase unaccompanied by any prejudice. It must be kept in mind that the rights of the LGBTQ community are real and genuine rights and in no way their rights should be ignored. The right to privacy among the LGBTQ include other rights such as right to maintain their own individuality, right to believe in oneself, right to protect their own identity etc. Right to privacy implies the core of human personality and their freedom to make individual choices both with respect to protection of their life and right to love.⁹ Thus, the decriminalization was significant in terms of protecting a person's identity and to ensure them that they have a right to be who they are and be unapologetic about it. However, a lot is yet to be seen and we have to make sure that the ray of hope which all of us have begun to receive after the decriminalization towards making it a country of our dreams is never lost and to hold that belief with utmost strength.

WHAT SUCCESS HAVE THEY RECEIVED IN THE PROFESSIONAL FIELDS AFTER THE DECRIMINALIZATION?

In our past we saw that our society considered LGBTQ community as a minority community on the basis of sex and gender. In every step they realize significance of the word 'discrimination' in every field but their indomitable will power could not stop them. Being a citizen of India they also need to have equal rights because our Indian constitution mandates social, economic, political equality of status for all.

Educational field: Education is the fundamental right for every citizen but they are not treated like a normal person and it starts from the grass root level when they start going to school. In the terms of education they only received bullying and teasing from their classmates and teachers also. But in the present scenario progressive changes have taken place in our Indian society with the assistance of states and activists groups. Presently many schools, colleges, universities like

⁹V. K. Dewan, Law Relating to Offences Against Women 1181 (5th ed. 2020)

Sahaj International School in Kerala, Delhi University provide them quality education. ManabiBandopadhyay becomes the first transgender principal in Krishnanagar Women's Collage in Kolkata. As per the Central Board of Secondary Education result 2020 there were nineteen transgender persons from class X and six from class XII who had registered their name. As per to the 2011 census data there was 57.06% literacy rate of transgender persons in India. We have witnessed yet another progress of the transgender community where the Kerala govt has endeavoured to issue order and revise applications of the transgender, trans women and trans men as other gender options to give them the encouragement and move forward in the work fields. Recently on 4th February, 2021 Kolkata High Court has given direction to the central to provide reservation, age relaxation and fee deduction to transgender persons in joint CSIR-UGC NET examination, which determines the eligibility for junior research fellowship (JRF) and lectureship and assistant professor, because these are included in right to life and quality which are the fundamental rights in our Indian Constitution.

Private sector: After providing education there is need for employment opportunity, supportive work environment. Ever since homosexuality was repealed Indian companies have become more open to LGBTQ employees, for example Indian renowned company Godrej Group launched Project Rainbow where LGBTQ community applied for internships and full time employment also. The Indian private sector has started to give diversity and support in Indian Workplace Equality Index (IWEI) 2020 report, which is India's first expansive benchmarking tool for employers that measure their progress on LGBTQ community inclusion in the workplace. After abolishing section 377 AmrutaSoni become the first transgender person who was appointed as a corporate house managing director.

Legal field: They did not backstep to show their skills in the legal field. As a result we saw in 2018 India got first transgender lawyer SathyasriSharmila. It was another win for LGBTQ community when she enrolled her name in Bar Council of Tamil Nadu and Pondicherry. JoyitaMondal becomes the first LokAdalat Judge in North Bengal who belonged to the LGBTQ community.

Medical field: After decriminalization of homosexuality many stories of hope have emerged from the LGBTQ community and medical profession is no exception of it. Dr VS Priya become the first transgender doctor in Kerala state by 2020, TrinetraHaldarGummaraju becomes the first

transgender doctor in Karnataka state in 2020, BeoncyLaishram become the first transgender doctor in Northeast, Jiya Das becomes first women transgender operating theatre technician of West Bengal, they are an inspiration for all members of LGBTQ community.

As per Padma Awards 2019, which is one of the highest civilian awards, NartakiNatraj was the first transgender person who was nominated for Padma Shri in the category of Art Dance Bharatnatyam, Tamil Nadu and this year our president has approved the conferment of 119 Padma Awards which was announced by our union home minister in 25 January 2021 (one day before 72nd Republic day), out of 119 awardees one is a transgender named Sri ManjammaJogati who has been nominated for Padma Shri in the category of art, Karnataka.

“First they ignore you. Then they laugh at you. Then they fight you and then you win” – Mahatma Gandhi.

UPCLOSE AND PERSONAL VIEWS OF THE LGBTQ AFTER THE JUDGMENT

It is generally said that any kind of change is necessary for a nation to be more progressive and for having a broader sense of perspective. We can definitely say that after the decriminalization a change could be seen across all over India but how much it has taken us to the path of progress is still a question. However the LGBTQ community experienced a sense of triumph after the decriminalization and some of their comments were remarkable and they felt proud of whom they are which was reflected in some of their interviews.

Sia, (tech professional) - a young girl of twenty years suffered terribly not only from outsiders but also from her own family. She is a transwoman and her family turned out to be so cruel to her that they hired some violent men who abducted her and made her to stay in a conversion centre along with 170 men as her parents thought that living with those men could cure her. But after the verdict came out, she felt that she had gained a new courage and she could raise her voice and demand equal rights. She thought it as a big change which could help people to realize that they are not different from others.

Joyita Mondal (First transgender judge)- it is a matter of pride that the LGBTQ are shining in every profession and legal profession is no exception. She became the first transwoman judge

and was appointed at Lokadalat. She felt that the LGBTQ received respect and the respect has augmented unpredictably after the decriminalization. Starting from experiencing contempt and abusive comments from people, she could not escape from anything. But after the verdict, Joyita Mondal is now being called to mediate in family matters and treated with a lot more respect and love.

Arnab Nandy (tech-professional)- this 25 year old tech professional turned around proudly and declared himself as gay in a Facebook post. His parents were ecstatic and assertive when the judgment was passed. They said that their son won't be treated as a criminal from now. It is heart-touching to know that getting a support from one's family can change a particular circumstance and make it easier for the child. Even after the decriminalization, Arnab very strongly opined that the struggle is still ongoing and they must not give up.

Manabi Bandyopadhyay(India's first transgender college principal)- it is an another matter of pride to be knowing about country's first transgender principal of Krishnanagar Women's College, West Bengal. According to her, the journey from changing of her sex to becoming highly educated was a challenge. She was subjected to constant bullying and had to hear detrimental comments since school and college days for her effeminate manners. Her take after the judgment was something she was very affirmative about. She thought that this might change the scenario and perspective of the general people. She also said in an interview that a little generosity and kindness would make a huge difference and there is no reason to treat the LGBTQ differently as they are a part of the society.

THE JOURNEY OF THE LGBT COMMUNITY WITH THE INFLUENCE OF SOCIAL MEDIA

When we talk about media the pictures that we visualise in our mind is newspaper, radio or television which is used for communication but presently with the progress of technology our society has change. In this 21st century we have another medium to communicate with each other in easy way that is social media. In the present date the World Wide Web has provided a great platform to this LGBTQ community where they are connected to each other through online mode. Most of the members from LGBTQ community don't get family support like a normal

person and in this situation social media have offered them convenient alternatives to make a neighbourhood apart from family. Instead of Whatsapp, Instagram, twitter, Skype and other networking platform Facebook is the most popular networking site which they use to express their views, online activism etc. Presently YouTube has got popularity in LGBTQ community because many digital influencers from this community are working in this platform like, in YouTube there are many trans video blogs which reveals who they are, how they spend their daily life, physical changes through hormone therapy, provide awareness and also many anti bullying videos are there through which they have express their stories of bullying and discrimination because of their transgender status and they have delivered advices regarding how to overcome from this situation. Presently we see many brands accomplishing trans community for Ads campaigns, the advertisers take an initiative for marginalising this community. We can say, this industry works as a mirror which reflects the changing mentality of the society because in the year of 2017 we saw one advertisement by Vicks which normalised trans motherhood in India and this video viewed by 10 million people on YouTube. The story of Gauri (transgender activist, who runs an NGO called Sakhi Char Chowghi) and Gayetri gave a new meaning to motherhood that Motherhood goes beyond biological knot and it has nothing to with any particular gender, regarding this one line has been drawn from Durga Saptashiti (sacred text) which is mention in Devi Stuti “Yaa Devi Sarva Bhutesu Vishnumaayeti Shabditaa / Namas Tasyai Namas Tasyai Namas Tasyai Namoh”

A GLIMPSE OF THE INTERNATIONAL SCENARIO AMONG THE LGBTQ

The LGBTQ community is making their presence felt in almost every sphere both nationally and internationally. There is not even an iota of doubt about their constant struggle and incredible courage to face the world with elan. We have witnessed a considerable amount of change in the status of the LGBTQ internationally where their rights have been recognized and they have been given a greater amount of respect for who they really are. Although many countries have still failed to provide them the position to where they belong but their attempts are still ongoing. Some of the countries that has made a noticeable change in the status of LGBTQ are mentioned as follows-

1. CANADA- It has been declared that Canada is the most gay-friendly country in the world. It possesses some of the most progressive transgender laws in the world. As reported by one of the gay couples who visited in Canada, felt extremely proud that a country can be so far-sighted in giving freedom to them and where they have the right to live independently without any negativity. They further said that they felt most comfortable in holding their hands in all places they visited in Canada. A person can even change his legal gender without any kind of requirement to undergo a surgery. Thus, this country has proved that all humans are equal and all of us have the right to be our own-selves unapologetically.
2. SPAIN- It is the first country in the world to have legalized homosexuality in the year 1979. It has even passed a set of anti-discriminatory laws in the year 1995 which included gay rights and which ensured that they have absolute freedom in moving everywhere in the country without any hesitation. Spain conducts the largest gay parade events in the world. It reveals that the country has made attempts to accomplish every dream into a reality where treating every individual with love and respect was their ultimate goal.
3. UNITED KINGDOM (U.K) - This country has progressive transgender laws which include the right to change legal gender since 2005. U.K has the highest number of gay pride events in the world conducted every year. Even in UK the LGBTQ have found their place and they are the proud citizens of that country. It is said that the citizens of U.K are lot more empathetic and kind towards them which makes a huge difference towards making the citizens more comfortable irrespective of their gender.
4. SWEDEN- This country legalized homosexuality in 1944 and has also allowed LGBTQ to openly serve the army. One of the most intriguing feature of this country is that there are no gay-friendly villages or no specific areas where the LGBTQ people are put in one particular box. It conveys that it does not need any enclave or place to determine them.
5. DENMARK- Denmark became the first country in the world to recognize LGBTQ unions. It also allowed LGBTQ people to openly serve the Danish army which is a great

matter of pride. This country felt the need to form unions that expressed about their rights openly and their right to reside in every part of the country without any fear or inhibition.

CONCLUSION

On the conclusion it can be said that every society and every community of the world is subjected to change and we humans get adapted to that change with the changing times. Every change has its pros and cons and the same is applicable to the decriminalization of section 377. Although the country witnessed such a massive change with the decriminalization and people started to get acquainted that the LGBTQ community do fall under the normal human community and they are as normal as any of us, most of the people are still finding it hard to accept them as a result the LGBTQ are having a difficult time to enjoy their rights. They are still battling with prejudice despite no fault of theirs. However we cannot deny that it shall take time to remove such a stigma from the minds of the people but small efforts can never go in vain. If we all strive towards making this change count and accept each individual just the way they are then that will be a ray of hope for the LGBTQ. Thus we can definitely say that complete freedom is yet to be achieved and this is rise of a new dawn.

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