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Decriminalization of section 377 of IPC: Securing Rights of LGBTQ+ Community

Authored By- Sujoy Paul

Introduction

“What is straight? A line can be straight or a street, but the human heart, oh, no, it’s curved like a road on mountains.”

- Tennessee Williams

Millions of Indians belonging to the LGBT community and their numerous supporters waited anxiously for the Supreme Court ruling on Section 377 of IPC, a law that was made in the colonial era and still continued to prevail in the modern and liberal India, where it had no place. For decades, countless people belonging to the LGBT community were smothered by the vague and archaic stipulation that homosexuality is against the order of nature.

A ‘human being’ means a member of the ‘homo sapiens’ species. In other words, it means a man, woman, or child having mental development than animals. Sometimes it denotes ‘natural person’ as well, which means an individual who has his personality, as opposed to a legal person. So, the term human being covers all persons without making any difference on the basis of sexual orientation. The Constitution of India, in article 14, guarantees all persons' right to equality before the eye of law. But unfortunately, in the Indian Penal Code 1860, a specific penal provision had been made for those engaged in performing same-sex physical relations. This penal provision was in force for 158 years. Although making the provision unconstitutional by the Supreme Court of India in 2018 could not change the mind of our Indian society, which still believes homosexuality, is a sin or few people treat it as a mental illness. Most of the countries, like Norway, Denmark, Finland, Belgium, etc., are against making any discrimination on the basis of sexual orientation and these countries have vigorously supported same-sex marriage. The thought regarding consensual sexual performance between persons of same-sex or same-sex marriage has been changing very slowly in our Indian society. In this paper, we are trying to elaborate on the present scenario of LGBT people in Indian society.

Section 377 of the IPC 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 with imprisonment of term which may extend to ten years and shall also be liable to fine.”

In simpler words, this section states that other than penile-vaginal intercourse, any other form of

intercourse is considered unnatural and the consenting adults who engaged in such intercourse should be held criminally liable and be given a punishment tantamount to committing heinous crimes such as rape or culpable homicide. This statute criminalizes anal sex and oral sex. While this statute to a certain extent has an effect on the physical intimacy between heterosexual partners, the effect is far worse on homosexual partners. Moreover, the mental health of the members of the community is hugely affected due to the non-recognition of their sexual orientation. There are many other problems that are faced by the members of the LGBT+ community.

Statement Of Problem

- Many members of the LGBT+ community have been thrown out of their own home due to their sexual orientation, they are not given houses, they are not allowed to adopt, and some are also thrown into forced prostitution.
- There is no such anti discriminatory code specially enacted for the LGBT community.
- Although article 15 states about prohibition of discrimination on the grounds of race, sex, religion, caste, or birth place the discrimination on the ground level is still continues.

Research Question

1. Is homosexuality against the order of nature?
2. Does the Indian Penal Code violate the rights of LGBT?
3. What are the consequences of being homosexual?
4. What is the role of the judiciary with regard to decriminalizing section 377?
5. What is the present scenario of LGBT people in Indian society?

Research methodology

I used doctrinal method of research for this research paper. The primary sources for my research are there in many articles which is available on internet and also I got some of the information from other research papers that helped me very much to doing this project. And the secondary sources for the research did from some important case laws from internet.

Objectives of study

1. To study the concept of homosexuality and LGBT+ community.
2. To understand attitude towards the LGBT+ Individuals by gender.
3. To analyze the Supreme Court's ruling on the section 377 of IPC.

1. Is Homosexuality Against The Order Of Nature?

The dictionary meaning of homo is 'same', and sexuality means 'sexual orientation' or 'sexual behavior'. A homosexual person is attracted to the same sex. The word includes within its ambit not only men attracted to other men, but also women attracted to other women. LGBT stands for Lesbians, Gays, Bisexuals, Transgender. The word lesbian denotes a woman who is attracted to another woman. Similarly, if a man is attracted to another man, that man will be known as gay. Bisexual means the person attracted to both sexes, i.e., he is attracted to a man and a woman. Transgender denotes those persons whose gender identity matches neither a man nor a woman. When these lesbians, gays, bisexuals, transgenders are attracted to the same sex rather than the opposite sex, we call them homosexual.

Homosexuality is nothing but a mere sexual orientation. Some find it a disease, whereas some find it a mental problem which is incorrect. When people think that homosexuality is a personal choice or disease, their attitude towards homosexuals, like gays, lesbians, transgenders, becomes negative.

"Homosexuality is viewed by many as a social problem. As such, there has been keen interest in elucidating the origins of homosexuality among many scholars, from anthropologists to zoologists, psychologists, to theologians. Research has shown that those who believe sexual orientation is inborn are more likely to have tolerant attitudes toward gay men and lesbians, whereas those who believe it is a choice have less tolerant attitudes."¹

2. Does The Indian Penal Code Violate The Rights Of LGBT?

Since 1860 section 377 was in force, and it played a vital role against the LGBT people. Whenever they had been caught either for staying together or for any other reason, they suffered a lot from society as well as from police authority. They have always been tortured by the police authority for their sexual orientation or behavior. Section 377 was a weapon to dominate the LGBT people.

¹ Jane P. Sheldon, Carla A. Pfeffer et.al. Beliefs about the Etiology of Homosexuality and about the Ramifications of Discovering Its Possible Genetic Origin, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4545255/> (30th December 2021, 12:11 PM)

Thomas Macaulay drafted the Indian Penal Code, and this provision was based upon the Buggery Act.² This Act defined buggery as unnatural sexual activity, i.e., Same-sex intercourse, which is against the will of God and criminalized that kind of activity.

In 1828, the Buggery Act was replaced by the Offences against Person Act 1828,³ which broadened the area of unnatural sexual performances, and this act was helpful to prosecute the rapists.

However, it also included homosexuals within the meaning of unnatural sexual activities. Section 377 penalizes unnatural offences, i.e., offences against the order of nature. In order to understand whether homosexuality is against the order of nature or not, we need to find out the meaning of the phrase "order of nature". Order of nature means the happenings which are considered normal and such happenings are expected to occur naturally without human interference.

According to section 377, intercourse between man and woman is considered natural, and any other carnal intercourse like anal or oral is unnatural. Hence, as per this section, a sexual relationship between two opposite sex is natural. How do we determine what is natural and unnatural? It can be seen that what was considered unnatural at an earlier point in time is no longer natural and vice versa. Let us take the example of polygamy. Before coming into force of the Hindu Marriage Act, 1955, 'polygamy' was in practice, and people did not find it unnatural, while if we saw the practical situations of the society, women suffered a lot because of the practice of polygamy.

The Hindu Marriage Act, 1955 had been enacted with many important objectives, including, among other things, the abolition of polygamy. So, when polygamy, which was once unnatural, has become natural, why the relationship between two same-sex people is not becoming natural? It is shocking and unfortunate to see that it took nearly 158 years after the passage of the Indian Penal Code to decriminalize consensual sexual activity between homosexuals!

3. What Are The Consequences Of Being Homosexual?

If a person belongs to the LGBT community, it is highly unlikely that he/she will be accepted with open hands by the society. Generally, they are discriminated on the basis of their orientation. Consequently, they have to face numerous problems

- **Marginalization:** Marginalization is one of the major problems faced by homosexuals. Marginalization means treating a person as peripheral. Sometimes, society refuses to accept them so that it becomes difficult for them to live as an individual. They are stigmatized and get negative attitudes from society. They want to contribute in every sphere of society, but they are

² The Buggery Act, 1533 (25 Hen. 8 c. 6)

³ The Offences against Persons Act, 1828 (9 Geo. 4 c. 31).

not allowed to participate equally because they are marginalized. We can term it as the social exclusion of homosexuals. Marginalization of LGBT people often starts from the family where they are born.

“In research, it is found that approximately 8% of transgender adults experienced homelessness in the past year in the United States of America. 6% of African American sexual minorities experienced housing instability. 71% of sexual minorities experienced homelessness for the first time as an adult and 20% of sexual minorities experienced homelessness before the age of 18.”

- **Harassment and Torture:** It can hardly be seen that a teenager, who is found as homosexual, has not been harassed or tortured in school by friends. The harassment is not limited to the schools only; people from the LGBT community face problems everywhere, be it in school or college, or streets. Sexual violence is experienced by lesbians, gays, transgenders, and bisexuals at a higher rate than straight people.
- **Rejection:** Rejection which the LGBT people usually face may be of types i.e., rejection from the family and rejection from the society. If a person is gay or lesbian in society, he or she is always rejected by society. Even if it is known to the family members that any child is found as gay or lesbian, he or she is ignored or marginalized by the family members.
- **Homelessness:** Homelessness is one of the biggest problems faced by people of being queer. The LGBT people are homeless and staying on the streets. They are simply thrown out of their homes for being queer. Even the domestic violence shelters also refuse to give shelter to them. Because of this homelessness, these people become addicted to drugs or sometimes they become sex workers. Furthermore, they also have to face financial problems.
- **Mental Weakness:** Mental weakness is the common result those occasions in the mind of LGBT people. When they need companion or support, they are usually rejected by the family and society and even by their friends. Because of this type of rejection, they start suffering from mental issues like going under depression. Sometimes they attempt to self-harm or try to commit suicide. This suicidal attempt is very commonly found in the mind of LGBT people.

4. What Is The Role Of The Judiciary With Regard To Decriminalizing Section 377?

The Indian judiciary played a vital role in decriminalizing section 377 of the Indian Penal Code. But it must be kept in mind that the entire section 377 is not decriminalized. There are several landmark judgments given by various High Courts and Supreme Court which have clearly supported the homosexual activity as natural one, not as an offence. The so-called sodomy law i.e., section 377 which punishes the carnal intercourse with life imprisonment has been finally struck down. The following judicial precedents will help to appreciate the role of the Indian judiciary with regard to decriminalization of section 377:

+ Naz Foundation Govt. Vs. NCT Of Delhi On 2 July, 2009

Lucknow police in July 2001 arrested some men under section 377 of IPC because the police were suspicious of them being homosexuals, not heterosexuals. The Police also arrested some members of the “Bharosa trust” NGO that was working towards spreading the correct information about safe sex, police assumed that they were running a sex racket. But the accusation was proved false by a legal aid organization, The Lawyers Collective, all the charges were proved false and the innocent were finally released.

After this incident, an NGO “Naz Foundation” filed the writ petition in the Hon’ble Delhi High Court asserting that section 377 is in violation of fundamental rights that fall under the purview of articles 14, 15, 19, and 21. Hon’ble High Court of Delhi in 2009, held that section 377 imposed an unreasonable restriction on an individual’s personal life and liberty, and thus the section is in violation of fundamental rights.

+ Suresh Kumar Koushal Vs. Naz Foundation On 11 December, 2013

Certain faith-based groups in India did not support this new wave of freedom; they approached Supreme Court to reconsider the following matter. On 11th December 2013 Supreme Court—criminalized homosexuality and stated that LGBTQ+ fall under “minuscule minority” and they did not deserve any constitutional protection. This did not suppress the ongoing movement for equality amongst the community; in fact, it lighted the spirit of the whole community to fight for justice and equality.

✚ National Legal Services Authority VS. Union Of India ON 15 April, 2014

The Transgender community has been most vulnerable in the whole LGBTQ+ community, they experienced exploitation, seclusion, harassment and have been the victims of human trafficking as well. In the landmark judgment the Hijra community was recognized as the third gender. Not only were this but they also granted a whole spectrum of rights after this judgment. The court recognized the difference between gender and biological components of sex.

✚ K.S. Puttaswamy Vs. Union Of India (2017)

This judgment is popularly known as “Aadhar Judgment”. Justice Chandrachud mentioned two cases in the judgment, one of them was Additional District Magistrate, Jabalpur vs. SS Shukla, which upheld the denial of basic fundamental rights and another was the Koushal case which rejected the rights of the LGBTQIA+ community. Justice Chandrachud said that one’s sexual orientation fall in the purview of privacy and a minuscule population cannot be a ground to take away their basic rights.¹⁷The Supreme Court held that the right to privacy falls under the purview of article 21.

✚ Navtej Singh Johar Vs. Union Of India On 6 September, 2018

Homosexuality was still a crime in India, which was protested by many famous faces like Keshav Suri, Ritu Dalmia, profound dancer Navtej Singh Johar. The writ petition was filed by many before the Hon’ble Supreme Court of India, being ambiguous of the constitutional validity of the same. On 6th September 2018, the court finally decriminalized homosexuality and held section 377 to be unconstitutional as it is in violation of fundamental rights of intimacy and privacy. Even after such a landmark development in India, the community is yet to grant several civil rights like that of right to marriage, adoption, surrogacy right from sexual assault.

✚ Madhu Bala Vs. State Of Uttarakhand & Ors. On 12 June, 2020

In this case, two women, Madhu Bala and Meenakshi were in a relationship since 2016. They were adults and lived together of their own will. Meenakshi was wrongfully confined by her mother and brother. Consequently, Madhu Bala filed a Habeas Corpus petition. The Uttarakhand High Court

clarified that two persons of the same sex are permitted to stay together. Live-in relationship by same-sex persons is not barred by law even though they are not allowed to marry at present. The court also stated that the right to liberty is a fundamental right that includes the right to choose a partner and the right to cohabit together.

The court also emphasized that a person who has attained the age of majority his liberty cannot be diminished because, as per law, he is capable of making a choice for himself or herself. Finally, the court reiterated that a consensual relationship between two adults of same-sex is not barred by law.

5. What Is The Present Scenario Of LGBT People In Indian Society?

Having discussed the meaning of homosexuality, the consequences that homosexual people face, the role of the judiciary, it can be said that the Hon'ble Courts have played a vital role in making the status of LGBT people equal to the heterosexuals. But it must be said that only making any provision unconstitutional or allowing same-sex persons to stay together doesn't give ultimate remedy to them. The societal stigma of being homosexual must be removed. If society accepts LGBT people just like heterosexual people, the battle will come to an end. This ultimate denial by society affects homosexuals, and as a result, they go under various mental issues. Society needs to accept one thing that 'homosexuality is neither a disease nor a choice; it is merely a sexual orientation.' Therefore, we need to accept a person attracted to the same sex like we accept a person attracted to the opposite sex. There is nothing wrong. We need to change our stereotypical minds.

Conclusion

The LGBT+ community in India is the most vulnerable community in India. They have been criticized, discriminated against and deprived of certain fundamental rights like the right to marriage and right to adopt, etc and in certain cases their very instance they have been deprived their right to life and personal Liberty as they are judged to even live with the person of their choice. The paper tried to understand respondents' attitude towards the LGBT+ Individuals by gender and India's attitude towards the LGBT+ community has been slowly changing and gaining a positive mindset towards them. Due to the awareness programs and the pride month demonstrations, people are getting more and more awareness about the LGBT+ community and are understanding the biological and psychological aspect behind LGBT people. This understanding has changed the people's mindset. they have started accepting the community in India and are showing a positive attitude towards the community. It is an astonishing thing as India is considered to be a very culturally sensitive country and acceptance of the LGBT+ community is an eye opener. As the current personal laws governing marriages have not recognized same sex marriages and this is something that has to be changed by the government. The government is also required to organize various awareness activities to make the public become more aware of the concept of homosexuality and LGBT+ Community. The recent Supreme Court of India's ruling that decriminalized section 377 of IPC is seen as a huge victorious step for the LGBT+ community in obtaining a status in the Indian society. Hence, the current LGBT+ community in India is on a positive side towards their recognition by the society and the government.