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LONG JOURNEY TO NOWHERE

AUTHORED BY - ABHISHEK GARG

Abstract

The homosexual community has been neglected and looked down upon since almost one and a half century, by both, law and society. They have been struggling to barely live a normal dignified life as any other citizen, ever since Section 377 was enforced. Many lost their lives, tired of the struggle; others spent their lives fighting for change. It was not without a harsh and tireless struggle, that, in 2018, they got the right to relationship, yet not the right to marry. The government makes so many laws, amendments, even rewrote the law from IPC, CRPC, to BNS, BNSS, but never bothered considering these people. Quiet recently, in Supriya Chakraborty case, 2023 the court said, it was the job of legislature, just the way it said in the Suresh Kumar Kaushal case in 2013, about legalizing homosexual relationship, but ended up doing it itself 5 years later in Navtej Singh Johar case, 2018. What is the court waiting for now? Is it always necessary that just as innocent victims like Asha Thakur, Bhavna Thakur, Avinshu Patel, Anjana Harish lost their lives to the humiliations of the society, for the Legalization of homosexual relationship; some more individuals need to die for the legalization of homosexual marriage? Do people of homosexual community need to sacrifice their lives and walk the way to their basic rights on a blood trail always? Is basic human living and dignity such a big luxury that always needs bloodshed for a particular community (homosexuals) to achieve it?

Introduction

The right to choose one's partner or marrying the person we like is a natural and fundamental right under article 19(1)(a) and article 21, that many of us don't even realize as fundamental right, rather a natural liberty that is taken for granted to be enjoyed by birth without any doubt or conflict.

Yet, even in a country like ours, where we talk of rights, liberty, equality, freedom, justice, fraternity, equity, right in our preamble of our constitution, yet there remains a huge segment of our people, to whom, these principles are merely bookish concepts and far beyond their day to day, ground level real life. Not just in recent times, from almost one and a half centuries Section 377 of the Indian Penal Code criminalized bodily/sexual intercourse against the order

of nature, which essentially aims towards consenting homosexual intercourse. It is due to this law that we have incidents like:

- 1. Asha Thakur Bhavna Thakur Suicide on 10th June, 2018 in Gujrat:** Both the women jumped in Sabarmati River to end their lives as they were homosexual lovers. Messages scribbled nearby with lipstick read “We left this world to live with each other. The world didn’t allow us to stay together, because we didn’t have any men with us.” And “The world didn’t allow us to stay together. But we want to stay together, and we will stay together, If not in this world, maybe in another or next birth.” They committed suicide because they were severely humiliated and defamed by the society due to their homosexual relationship, and also ended the life of a 3 year old, who was the child of one of them.
- 2. Avinshu Patel Suicide on 9th July, 2009 in Chennai:** The boy originally belonged to Mumbai, came to Chennai for work at a salon, he wrote a Facebook post, saying “They all know that I am a boy, but the way I walk, talk and think is that of a girl. People in India don’t like that. Please don’t blame my family, support them. We are very poor. I love my mother, sister and father very much. They always supported me, yet somehow, I was always so alone. It’s not my fault that I was born gay.” He took his own life because people around him used to make fun of him because of his sexuality and ways he behaved, talked and thought. His work brought him away from his family, the only people who ever supported, accepted, understood and loved him, and left him alone in a city of strangers who didn’t understand him, rather defamed and humiliated and secluded him because of his sexuality. Just because he was different.
- 3. Anjana Harish Suicide on 12th May, 2020 in Goa:** She was a 21 year old student from Kerala, escaped to live with friends in goa, since she was physically and mentally tortured and put under forced medication, by her family and the doctor, they took her to, since she came out as a bisexual. She was kept locked in a cell by the doctors, only letting her come out for meals. She was taken to 2 deaddiction centers and put under conversion therapy forcefully by her family, against her will. The trauma of her sufferings in Kerala followed her up to Goa, where it ended up taking her life. (*Various media reports, 2009; 2018; 2020*)

These are merely a few out of many such unreported cases that shout of the inhuman response of the Indian society and law to homosexual people.

What is IPC Section 377?

Section 377 from the Indian Penal Code reads as:

“377. Unnatural 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.” (Government of India, 1860, § 377)

The term “against the order of nature” doesn’t explicitly but impliedly point specifically towards homosexual intercourse, as the order of nature here implies customary “normal” heterosexual intercourse.

We Are Humans! – The Struggle for Identity

In 1991 the AIDS Bhedbhav Virodhi Andolan (ABVA), in their publication “Less than Gay – A Citizens” reported the status of homosexuals in India and highlighted all the major flaws in the Section 377 and actively demanded its repeal.

In 2001, NAZ Foundation Trust, a public interest group, filed a PIL in Delhi High Court, seeking legalization of homosexual intercourse between consenting adults.

The court, in 2009, refused to consider a petition regarding the legality of the law, saying that the petitioners didn’t have any Locus Standi (authority to stand) in the matter.

The petitioners went to the Supreme Court to challenge the Delhi High Court’s decision of dismissing the petition. The Supreme Court deemed the petitioners had the right to file the petition, and sent the petition back to the Delhi High Court, to reconsider it on merit.

On 2nd July, 2009, the Delhi High Court gave its landmark Judgment, striking down Section 377 and legalizing homosexual intercourse between consenting adults. (*Naz Foundation v. Government of NCT of Delhi, 2009*)

However, in the case of Suresh Kumar Kaushal Vs. Union of India, The Supreme Court struck

down the Delhi High Court judgment on 11th December 2013, saying that conferring such rights by amending laws, striking down laws, making a new laws, was the job of legislature, and judiciary can't give such rights by itself. The court also said that the issue affected a minuscule fraction of the society, and wasn't severe enough to take major actions as amending laws, striking down laws, making new laws. (*Kaushal v. Naz Foundation, 2014*)

Shashi Tharoor presented a private member bill in Lok Sabha to decriminalize homosexual intercourse in December 2015 and March 2016, both times faced strong rejection by the majority votes against the motion. (*Lok Sabha Secretariat, 2015*) (*Lok Sabha Secretariat, 2016*)

Final Steps to Victory

In April 2016, **Navtej Singh Johar, Sunil Mehra, Ritu Dalmia, Keshav Suri, Ayesha Kapoor**, filed a writ petition under Article 32 in the Supreme Court, challenging the constitutionality of Section 377.

This was the 1st petition in front of the Supreme Court, challenging the constitutionality of the section. The Supreme Court decided to review the petition and criminalization of homosexual intercourse, on the grounds of violation of **Sexual Privacy, Dignity, Right Against Discrimination, & Freedom Of Expression**.

Meanwhile, on 24th August, 2017, the Supreme Court ruled under the landmark case of Justice K.S. Puttaswamy (Retd.) v. Union of India, that right to privacy and sexual orientation lie at the core of the fundamental rights under Article 14, 15, 21 of the Indian Constitution. (*Puttaswamy v. Union of India, 2017*)

This judgment directly challenged the earlier judgment in the case of Suresh Kumar Mehra Vs. Union of India, 2013, as the said articles prohibit discrimination, enforce equality, and confer a vast scope right to life and personal liberty to the people of India. It was a ray of hope for the homosexual community as finally, the court was slowly turning to look at them, recognize them and consider their pain, agony and rights.

This case became a base for the 2016 petition, as the petitioners claimed that the Section 377 violates the mentioned articles and hence contradicts with the Supreme Court's Judgment and its recent understanding of the matter.

On 6th September, 2018, the 5 judges Constitutional bench, consisting of **CJI Deepak Mishra, Justice R.F. Nariman, Justice D.Y. Chandrachud, Justice Indu Malhotra, & Justice A.M. Khanwilkar** reserved its verdict, overruling the 2013 judgment and stated that Section 377 was decriminalized, to the extent where it criminalizes carnal intercourse between consenting adults. However, the other portions of the section such as, carnal intercourse with minors, animals and non-consenting adults still remain legal and in force. (*Navtej Singh Johar v. Union of India, 2018*)

Words of Justice.

Some prominent quotes and spoken words that supported this movement were:

“What is the use of such a life and society that doesn’t let you love the person you want to love?” – (*Seth, 1992*)

“To start a movement, you have to move out first, and then expect others to come with you” – (*Tagore, 1916*)

“People mostly criticize on what they can’t understand” – (*Dickens, 1869*)

“The history owes an apology to these people and their families. Homosexuality is a part of human sexuality. They have the right to dignity and freedom from discrimination. Consensual sexual acts between adults allowed for the homosexual community.” – Justice Indu Malhotra (*Navtej Singh Johar v. Union of India, 2018*)

Other Side of The Coin – The Half Justice

Despite the historical landmark judgment, the struggle isn’t yet over. Because the court also said that though the right to make relationship has been given to the homosexual community, right to marry can yet not be given. Because it will require individual changes in various other laws, such as adoption law, inheritance law, succession law, Hindu personal law, Muslim personal law, special marriage act, etc., which is the role of legislature to play in the matter as and when it sees fit. Hence Judiciary alone can’t give such right to the community.

In November 2022, Supriyo Chakraborty and Abhay Dang field a civil writ petition under Article 32 regarding marriage rights of homosexuals. They pleaded that gender specific terminology and approach of Special Marriage act deprived homosexuals from their right to marry under Articles 14, 15, 19, and 21 of the Constitution, based on the Navtej Singh Johar case.

The petitioners argued that terms like “Male” and “Female” in the Special Marriage Act and terms like “Husband” and “Wife” in the Foreign Marriage Act focus on heterosexuals and excludes homosexuals, depriving them of the equal right to marry under article 14, 15, 19 and 21 of the Indian Constitution.

The court called all the similar cases from all over the nation under the writ of certiorari and it turned out to be a total of 20 petitions and 52 petitioners. The five judges’ constitutional bench, comprised of **CJI D.Y. Chandrachu, Justice S.K. Kaul, Justice S. Ravindra Bhat, Justice Hima Kohli, Justice P.S. Narasimha,**

On 17th October, 2023, the court reserved their judgment. The court ruled that:

- The right to marry flows from legislation, not directly from the Constitution. Hence it’s the job of the Legislature, not Judiciary.
- Heterosexual transgender relationships retain the right to marry under existing laws.
- Parallel framework for same sex civil unions and amendment in the marriage acts were denied.
- The Union Government was directed to form a committee to consider practical rights for queer couples (hospital visitation, insurance, pensions). (*Chakraborty & Dang v. Union of India, 2023*)

Supporting Opinions and Quotes.

CJI Chandrachud & Justice Kaul: More sympathetic to LGBTQ rights, recognized the dignity of queer persons, and suggested civil union recognition. (*Chakraborty & Dang v. Union of India, 2023*)

Justice Bhat (joined by Kohli & Narasimha): Emphasized that marriage is a legislative domain, not judicial. (*Chakraborty & Dang v. Union of India, 2023*)

“A right delayed is a right denied.” – (King, 1963)

“To deny people their human rights is to challenge their very humanity.” – (Mandela, 1994)

“I cannot worship a God who is homophobic... I would refuse to go to a homophobic heaven.” – (Tutu, 2011)

Conclusion

Hence, even after so many years of struggle since 1860, the homosexual community still doesn't have an equal recognition and rights in our country as any other heterosexual citizens do. They still have to face the discrimination. Though this community has managed to secure the right to make relationship, they are still not given the right to marry. And even when the government took a major step to revise and rewrite the laws in 2023, which it did, and in the new laws, there's no law similar to Section 377, which is a positive thing, but nor there is any law giving them the right to marry. It's as if the government has got too used to the pain and suffering of this community that it has forgotten about this major issue, and doesn't consider it an issue at all. (Jain, 2018)(Shukla, 2020)

What do you think, is this incomplete right reasonable, justifiable and sufficient by any means? When the legislature had the chance to restructure the whole law in 2023-24, why do you think they didn't make this law? The Supreme Court said legalizing same sex relationship was the job of legislature in Suresh Kumar Kaushal case in 2013, then legalized it itself in Navtej Singh Johar case in 2018. Now it has said legalizing same sex marriage is the job of legislature in Supriya Chakraborty case in 2023, do you think it will legalize it itself in a few years if the legislature doesn't perform its job and cases continue arising, causing a major issue?

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