

Decriminalization of Homosexuality in India: A Step Towards Upholding Constitutional Morality Vis-à-vis Social Morality

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Abstract: For centuries, the archaic law which criminalised an individual merely because of sexual orientation inflicted catastrophe and distress and it has been exploited, compelling the Lesbian Gay Bisexual Transgender and Queer community to live in dark, isolation and as lesser citizens. The Human sexuality cannot be circumscribed within the limits of binary of a man and woman. The LGBTQ manoeuvres throughout the countries have been involved in the mission of captivating a much-needed legal reform. As a result of their constant efforts, the Apex Court of India delivered a landmark decision of treating the so called 'abnormal' homosexuals at par with other 'normal' human beings. In this research paper, the authors have tried to critically analyse the concept of homosexuality, the legal provisions dealing with it and the watershed judgements of the Courts culminating into the decriminalization of homosexuality.

Keywords: Unnatural, Homosexuality, Morality, Privacy, Consensual, Decriminalization

1. Introduction

The Constitution of India is a living document, having the main aim of manifesting an inclusive and dynamic society. It is 'grundnorm' and considered as the custodian of the rights of all the human beings. The elementary proposition of human rights lies on the cardinal postulates that all human beings should be treated with same degree of equality and dignity. The violation of such fundamental assumptions leads to discrimination and oppression. The Constitution of India has long ago acknowledged various categories of fundamental rights for the different segments of the society including the rights of gender as such. Our Constitution categorically provides that "the State shall not deny to any person equality before the law or

the equal protection of the laws within the territory of India”¹, and “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”², and “all citizens shall have the right to freedom of speech and expression”³, and “no person shall be deprived of his life or personal liberty except according to procedure established by law”⁴ and it impliedly embodies the right to live with human dignity.⁵ However the inherent basic rights are declined to a minority section of the population merely because of their sexual orientation.

Technically speaking, ‘Homosexuality’ is a sexual orientation in which individuals belonging to the same sex are inclined towards each other. The homosexual couples never enjoyed the same bunch of rights as are available to their heterosexual counter parts. The homosexuality was considered to be an immoral, abnormal and deviant behaviour which needed to be corrected by stringent legal mechanism. As a result of such inhuman, derogatory and discriminatory attitude of the society towards homosexuals, they were compelled to live an undignified life of subordination, fear, abuse and recluse. In the contemporary era, the sexual orientation and gender identity issues leads to discrimination, marginalization, social exclusion and injustice to the ‘socially unacceptable, immoral and abnormal’ homosexual community. Till recently, the homosexual population remained deprived of the inherent human rights without any fault of theirs.

Since time immemorial, the Homosexuality has been the subject of discussion. The traces of homosexual behaviour are found at various places in the Indian culture as well. The instances of homosexuality and same-sex activities found references in various literatures and ancient mythological texts like *Kamasutra*, *Manu Smriti* and erotic sculptures in old *Khajurao* temples etc. Even in the Indian epics, the demonstrations are indicated wherein various deities had the features of both man and woman, namely, *Ardhanarishvara*, which is considered as the incarnation of Lord Shiva and Goddess Parvati.

¹ Article 14, Constitution of India 1950

² Article 15, Constitution of India 1950

³ Article 19 (1) (a), Constitution of India 1950

⁴ Article 21, Constitution of India 1950

⁵ *Francis Coralie v The Administrator, Union Territory of Delhi & Ors.* AIR 1981 SC 746; See also *Maneka Gandhi v. Union of India* AIR 1978 SC 597

Across borders, LGBTQ movements have grappled hard opposing the discrimination arising out of sexual orientation and gender identity. Due to the long-lasting efforts of LGBTQ community, the homosexuality was decriminalised in various other countries of the world. It was during 1980's when the HIV/AIDS emerged as a global threat, that the health activists realised that the anti-sodomy law of India was a considerable impediment that dissuaded the identification and elimination of the disease among the perilous groups. The individuals who were involved in same-sex activities were hesitant to volunteer for HIV testing and condom dispensation schemes because they had the apprehension of being prosecuted and punished under the existing law of the land.⁶

2. Legal Provisions Criminalizing the Homosexuality/ Unnatural Offences in India

The Indian Penal Code drafted by Lord Macaulay in 1860 has criminalised the sex which is against the order of nature and the same is covered under the unnatural offences. It says 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 also be liable to fine."⁷ Further, the law provided that 'the penetration is sufficient to constitute the carnal intercourse necessary to the offence.'⁸

The draconian law of the land enjoyed its existence for 150 odd years and continued to treat a section of the society with disgust, anguish and agony. Though the actual prosecutions under the law was less in number, but the law was misused to terrorize, insult and intimidate the homosexuals. As a result of this, the homosexuals were living a sub-standard life of seclusion and hibernation without any fault of theirs. The global developments in the field of homosexuality hardly made an impact on the Indian law for quite some time. It was during 1980's that a wave of human rights activists emerged which started challenging the existence of such laws as being discriminatory, inhuman and arbitrary.

Surprisingly, the country where the sodomy law originated had abolished the offence of homosexuality between consenting partners by enacting the Sexual Offenders Act in 1967. In

⁶ Section 377, Indian Penal Code 1860

⁷ Ibid

⁸ Explanation to Section 377, Indian Penal Code 1860

India, the consent is totally inconsequential for establishing the offence of homosexuality as defined under the Indian Penal Code.

3. Gradual Transformation of Judicial Approach Culminating into the Decriminalization of Homosexuality in the India

The fight for decriminalisation of homosexuality in India began in 1990's by the 'AIDS Bhedvav Vidhohi Andolan' (ABVA), an organisation working in the areas of HIV/AIDS prevention. It observed that Section 377 of the Indian Penal Code was a noticeable hurdle and subsequently filed a writ petition in the Delhi High Court asking for its repeal on certain grounds, namely, First, the question of consent is not considered at all; second, both the heterosexuals as well as homosexuals may equally commit the act of sodomy; and third, it was a barrier towards the prevention and prohibition of the HIV/AIDS. Unfortunately, the petition for protecting the rights of LGBTQ community could not come up for hearing and it died a silent death without making much impact on the existing scenario of homosexuals in India.

In *Naz Foundation v. Government of NCT of Delhi*,⁹ the Naz Foundation filed a writ petition in the Delhi High Court in 2001 for striking off the Section 377 of the Indian Penal Code. This petition said that implicating private consensual adult sex encroached upon the fundamental rights enshrined under Articles 14, 15, 19 (1) (a) and 21 of the Constitution of India. The Delhi High Court dismissed the Naz Foundation writ in 2004 on the ground that Naz Foundation has no locus standi in the matter. Further, the Naz Foundation filed a review petition before the Delhi High Court seeking the dismissal of the previous order and requested for re-consideration of the writ. However, the High Court rejected this plea too. Later in 2005, in order to challenge the orders of the Delhi High Court, the Naz Foundation filed a Special Leave Petition (SLP)¹⁰ before the Supreme Court of India. In 2006, the Supreme Court ordered that 'the matter needs to be reconsidered' and it was the first significant instance in the lawful struggle toward decriminalisation of homosexuality.

⁹ *Naz Foundation v. Government of NCT of Delhi*, (2009)160 Delhi Law Times 277

¹⁰Article 136, Constitution of India 1950 states that the "Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."

Subsequently, the Delhi High Court heard the case and the judgment delivered in 2009 metamorphosed into one of India's most extensively reproduced judgments in the history of Human Rights Jurisprudence. The undaunted and adventurous judges read down the 150-year-old statutory law holding that Section 377 of the Indian Penal Code is violative of the fundamental rights guaranteed under Articles 21, 14, and 15 of the Constitution of India to the extent it criminalizes consensual sexual acts between adults in private. In this case the two-Judge bench of the Delhi High Court comprising of Chief Justice *Ajit Prakash Shah* and Justice *S. Muralidhar* held that considering the consensual homosexual sex between adults as a crime is an infringement of fundamental rights embodied in Indian Constitution. The Court emphasized that the right to life encompasses the elements of privacy and dignity which are integral part of life for the realization of a meaningful life. It further held that Section 377 of the Indian Penal Code makes arbitrary and unreasonable classification and it fails to consider indispensable facets like the role of consent, the age and the absence of harm and, hence, contradictory to Article 14 of Indian Constitution.

The Naz Foundation judgement is a solemn and diligent insistence on the mission and vision of the Constitution makers and the founding fathers of India who had the foresight to build a magnanimous, inclusive and forbearing republic. This decision is a memorial that the Indian Constitution is a dynamic document and it must be accommodative of the new developments and situations arising in due course of societal needs. The Court has accentuated that, "the sphere of privacy allows person to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her own choice, and fulfil all legitimate goals that he/she may set. In the Indian Constitution, the right to live with dignity and the right of privacy are recognised as dimensions of Article 21. Section 377 of the Indian Penal Code denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 of the Indian Penal Code denies a gay person the right to full personhood which is implicit in notion of life under Article 21 of the Constitution."

However, the Naz judgement did not sink well among all the individuals as rancorous reactions against the judgement was quite apparent. Many SLPs were filed against this judgment by diverse religious groups, individuals and secular institution.

In *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*,¹¹ the Supreme Court gave a death blow to the LGBTQ struggle in 2013 by holding that Section 377 of the Indian Penal Code is not unconstitutional and the orders made by the Delhi High Court is legally untenable'. A two-judge bench of the Supreme Court comprising of *Justice G.S Singhvi* and *Justice S.J. Mukhopadhaya* over-turned the Delhi High Court Judgement of Naz Foundation Case and reinstated the Section 377 of the Indian Penal Code. The *Koushal* Judgment is one of the infamous judgments regarding the denial of civil liberties.

In the meanwhile, another noticeable development was made in the Indian legal and judicial history as a remarkable judgment was passed by the Supreme Court in the case of *National Legal Services Authority v. Union of India*,¹² by a bench comprising of *Justice KS Radhakrishnan* and *Justice AK Sikri* which held that within the scope of Articles 14, 15, 16 and 19, the 'transgenders' are to be treated as 'third gender' and they should have the freedom to choose their partners.

The Court further stated that the freedom of expression extends to the right of an individual to express one's identity in a non-binary gender. The Court also directed the government to give legal recognition to the third gender, so that the individuals would be capable of identifying themselves as male, female or third gender. The government was also directed to evolve essential mechanisms for removal of social stigma associated with transgenders and to promote the transgender-specific health programs, and to ensure equal legal protection to them. After elaborating the classical and archival background of transgenders in India, the Apex Court emphasized that "gender identity and sexual orientation include trans-genders and each person's self-defined sexual orientation and gender identity is integral to their personality." It is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures as a requirement for legal

¹¹ *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*, Civil Appeal No. 10972 of 2013

¹² *National Legal Services Authority v. Union of India*, Writ Petition (civil) No. 604 of 2013

recognition of their gender identity.”¹³ The Court further made references to the international human rights standards which says that “Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.”

Eventually through the case of *Navtej Singh Johar v. Union of India*,¹⁴ came the *Magna Carta* regarding homosexuality in India wherein another writ petition was filed by Navtej Singh Johar and others in 2016 which argued that Section 377 of the Indian Penal Code was violative of the fundamental rights guaranteed under Articles 14, 15, 16, 19 and 21 of the Indian Constitution. A five-judge bench of the Supreme Court of India comprising of Chief Justice of India *Dipak Misra* and Justices *Indu Malhotra*, *DY Chandrachud*, *AM Khanwilkar*, and *Rohinton Nariman* in its historic unanimous verdict reversed its own decision and said Section 377 of the Indian Penal Code is irrational, unreasonable and arbitrary. Thus, the court had halted the sexual apartheid inflicted by Section 377 of the Indian Penal Code by holding that it would not apply to consensual same-sex acts among adults. *Chief Justice Dipak Misra* has emphatically emphasised that “Constitutional morality cannot be martyred at the altar of social morality, and it is an only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.”¹⁵ Further, *Justice Indu Malhotra* reiterates that “history should regret and beg pardon to the members of homosexual community and their families, for the delay in remedying the ostracism and humiliation that they were forced to suffer through the ages.”¹⁶

Though *Johar's* judgement is a milestone in upholding the individual rights and dignity, but the fight against oppression and inhumanity has not ended, rather the actual fight to eradicate misconceptions, spread awareness and educate people regarding ‘normality’ of different sexual orientations has gained momentum after this judgement. The non-receptive attitudes of many religious and community leaders are evident that they are predominantly averse and antagonistic to this amelioration and project the already existing extensive prejudice which

¹³ Ibid Para 20

¹⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1(2018)

¹⁵ Ibid Para 27

¹⁶ Ibid Para 59

jeopardize the life of LGBTQ community in India. The Apex Court of the country has made earnest endeavours to bring at par all the individuals irrespective of their sexual orientations.

4. Attitude towards Homosexuality at the International Level

Over a period, the various countries of the world have been inclined to decriminalize the homosexuality and very recently India has also joined that maiden list after a centuries old struggle against discrimination and oppression of the homosexual community. The escalating global consensus clearly shows that such barbarous and derogatory legislations punishing homosexuality are no longer admissible.

At the United Nations, the discussions of LGBTQ rights include joint statements and resolutions in the United Nations General Assembly and the United Nations Human Rights Council (UNHRC). Since the establishment of the United Nations in 1945, the political bodies never had any discourse regarding the equality regardless of sexual orientation or gender identity. It happened only in 1994 through the favourable resolution by the United Nations Human Rights Committee (UNHRC) after the *Toonen's* case.¹⁷ It was a landmark human rights complaint filed before the UNHRC by Nicholas Toonen, a Tasmanian resident in 1994. It had resulted in repealing the Australian sodomy laws because the Committee held that the anti-discrimination provisions includes sexual orientation under the International Covenant on Civil and Political Rights (ICCPR), 1966 as a protected status. Since then, the United Nation's human rights mechanisms have denounced the infringements based on sexual orientation and gender identity, including violence and discrimination in various areas of life. The UN treaty bodies have also urged states to terminate the discrimination in policy and law.

While celebrating the 60th anniversary of the Universal Declaration of Human Rights (UDHR) 1948, the General Assembly of the United Nations made a statement reiterating that the doctrine of non-discrimination necessitates that human rights should be made equally applicable to every human being irrespective of their gender identity or sexual orientation.

¹⁷*Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

Other universal bodies including the European Union and the Council of Europe have also condemned discrimination and violence against the LGBTQ community. A declaration was unanimously approved in 2008 affirming that the human rights protections extend to sexual orientation and gender identity in all 34 member countries of the Organization of American States.

In 2006, the Yogyakarta Principles relating to sexual orientation and gender identity (SOGI), was published as an outcome of a meeting of a distinguished group of human rights experts in Yogyakarta, Indonesia. In 2017, these principles were further expanded and supplemented to incorporate new grounds of sex characteristics and gender expression. These principles contain various tenets deliberated to apply the parameters of international human rights law in order to deal with the transgression of human rights of LGBTQ community. These doctrines constitute a comprehensive global guide to human rights which assert mandatory international legal standards to be complied by all States. They assure a bright future where all people born free and equal in dignity and rights can realize that priceless birth right.¹⁸

Sexual orientation refers to a person's capacity of profound affectional, emotional and sexual attraction to, and sexual and intimate relations with, individuals of the same gender or a different gender or more than one gender. Gender identity infers to a person's intensely felt individual and internal experience of gender, which may or may not conform with the sex designated at birth, including the personal sense of the body (which may involve alteration of bodily function or appearance by surgical, medical or other means) and other manifestations of gender, including speech, dress and mannerisms.¹⁹

5. Conclusion

After *Johar's* judgement, India has joined the list of other countries who had gradually decriminalized the homosexuality. However, the prominent question that remained unanswered is how far the *Johar's* judgment be capable of changing the stigma associated with the lives of LGBTQ community? Undoubtedly, the libertarian judgments like Naz and Johar have the prospects of generating fruitful deliberations on the aspects of heteronormativity and its omnipresence in the Indian patriarchal societal setup. The other pertinent

¹⁸<https://yogyakartaprinciples.org/>

¹⁹ Ibid

issues of LGBTQ community like recognition of property rights between homosexual couples, financial inclusivity, children adoption rights, implementation of marriage Act, surrogacy, basic equality etc. are required to be overhauled so as to do justice to one and all in the society. Post Johar's judgement, the journey LGBTQ community seems to be easy but one can well imagine that the things are not so welcoming as they appear to be.

The sincere efforts are required to be made from various quarters so that the celebrated Johar's judgement can achieve its desirous results in the times to come. The state shall endeavour to take appropriate measures to ensure the protection of basic human rights and freedoms to the individuals regardless of their gender identity and sexual orientation and should take adequate steps in order to avert discrimination and violence based on sexuality and transgenderism. The educational institutions should also periodically organise gender sensitization programmes and should spread sex-education across all levels of education. The need of hour is to orient people to change their attitude and mentality in order to accept other's distinct identity and accept what they are and not what they should be.