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## SECTION 377

**“BREAKING OF SHACKLES”**

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### ABSTRACT

Homosexuality is romantic or sexual attraction or behaviour among the people of the same sex. The common term used for homosexuals are ‘gays’, ‘lesbians’, ‘bisexuals’, or ‘trans genders’ and collectively they are known as LGBT people.

The legal struggle related to the decriminalising of homosexuality has begun. Today this is the most debatable issue as the duty to do justice lies on the Supreme Court of India as the issue involves the concern of the fundamental rights of the LGBT people.

LGBT people were struggling beneath the ground for their existence, identity and sexual orientation. Many people are in support of decriminalising the section 377 while there are many others who are in view to criminalize the homosexuality because of the moral values and culture of Indian society.

People belonging to this groups used to face various kinds of physical and mental torture which are been mentioned in the reports referred in this article

Therefore, we can say that the fundamental rights of the LGBT community must be protected in the interest of the humanity.

**Key words:** - Homosexuality, fundamental rights, gender identity, sexual orientation, LGBTQ.

*“I AM WHAT I AM SO TAKE ME AS I AM”<sup>1</sup>*

### BATTLE FOR SURVIVAL

Taking birth as LGBT is the trouble even in the societies that supports and protects the LGBT community’s right. The procedure starts when a person accepts himself, with this identity to the world. Judiciary may bring reforms to create an enabling platform so that people belonging to this category can come out and represent themselves as an important part of the society but social realities which exist in our country do not necessarily change. Now the struggle must be fought not only within the courtrooms but also inside the drawing rooms, classrooms, and meeting rooms, every day of our lives.

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<sup>1</sup>“Johann Wolfgang von Goethe”

## HISTORY OF HOMOSEXUALITY

The origin of section 377 Indian Penal Code, 1860 did not belong to Indian society or its values or morals at all. It came into force into India in late 19<sup>th</sup> century during British rule. An Act similar to this Act also existed in Britain at some time. It was the Buggery Act of 1533 that was passed in the Parliament of England during the regime of Henry VIII. As per the Act, sexual acts which are against the order of nature or will of god were punishable and British imposed the same on India undemocratically.

Indian Penal Code, 1860 contains a provision i.e. Section 377 which criminalise the consensual sex between men is totally based upon the judo-Christian concept, which states that the 'sexual activity' or say the term 'sex' is meant for the purpose of procreation only and any sexual activity done without the purpose of procreation will be said as against the order of nature. But the criminalisation of the same is completely antiquated and has no relevance in the modern State.

The fight against section 377 in India continues from about 20 years. In the year of 1991 (ABVA) "AIDS BHEDBHAV VIRODHI ANDOLAN" an organisation protested for the repeal of section 377 and a report<sup>2</sup> released on November- December 1991 shows the shocking events of blackmail, extortion and violence face by gays. ABVA had many attempts to bring the attention of government towards this major issue. In 1992 ABVA organised a seminar on the politics of homosexuality at Indian Social Institutes, then second Asia Pacific Aids conference was organised in Delhi from 8-12 November 1992 there the group staged several loud protest and demanded calling for the release of all HIV positive people from jail. Thereafter, in 1994 a writ petition was filed by ABVA for striking down the section 377 but still after the long continuous efforts nothing happened and journalists at press were so ashamed that they were not even in the position to put up one single question. In the month of May in year, 1994 heated discussions started when Kiran Bedi, (Inspector General of Tihar Jail in Delhi), denied to provide the condoms for prisoners on the ground that it may enhance the rate of homosexuals, and in response to the same ABVA, then filed a writ petition in the High Court of Delhi High and after a long battle and discussions the petition was dismissed in 2001.

In the year, 2001 a sexual health NGO named Naz Foundation filed a PIL in which it challenged the constitutionality of a provision of Indian Penal Code, 1860 i.e. Section 377, but then in the year 2004 High Court of Delhi dismiss the case saying that there is no cause of action and the matter raised does not have any practical relevance, then in the year 2006 a special leave petition was filed and after a battle of three years in 2009 a landmark judgement was given by High Court of Delhi, in which there was 2 judge bench consisting of Justice Ajit Prakash Shah and Murlidhar who decided to decriminalise the section 377 of IPC stating that the said section take away the fundamental rights of the LGBT Community i.e. the right to life, liberty and equality provided by the Constitution of India. Unfortunately, critics like Suresh Koushal challenged the decision of Delhi High Court in the apex Court and the said decision was overturned on the ground that the said section does not create a clause but it simply define an offence and prescribe a punishment for the same and therefore, the said section is constitutionally valid. The section is absolutely constitutional as the classification is reasonable. The issue was so sensitive that in 2016 again in case of Navtej Singh Johar by a Bharatnatyam dancer along with chef Ritu Dalmia and hotelier Aman and further supported by Keshav Suri challenged section 377 of IPC, and finally in the month of

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<sup>2</sup>"Less than gay report."

September in year 2018, the Supreme court with agreement of all the people involved in the matter decided to decriminalise thesection 377 of IPC which Justice Mishra describes as “irrational, indefensible and arbitrary” marking an achievement end to a lengthy struggle for justice.<sup>3</sup>

### **CHALLENGES FACED BY LGBT COMMUNITY**

The issues which were the major attraction of harassment as a result of forbidding the sexual acts between the consenting parties were the torture by police, detention, answering the questions, indulging into sex by force, payment of graft, disbelief about the same sex and the people in minority. An incident which is popularly known as ‘Lucknow incident of 2002’ titles as epidemic of abuse has been referred here:

In the report police harassment of HIV/AIDS exceed to the workers in India which is published by Human Rights. In this case the police on a complaint under section 377 of Indian Penal Code started investigation and during the period of investigation the police raid into a local NGO named as Bharosa Trust which was working for the protection and sexual health of the MSM who were suffering from the HIV/AIDS seized from there, a safe sex advocacy and the material information and also arrested four health care workers without any prima facie proof that whether they are liable to be prosecuted under Section 377 of the IPC. Without any reasonable proof the charges were filed against all the workers and the prosecution was started against them under section 292 of Indian Penal Code, 1860 which treats the educational literature as offensive material. The workers were detained and kept in custody for 47 days because the offence under section 377 is non-bailable. Now, there is another incident which is named as the “Bangalore incident” has been also referred here. In the case of Jayalakhmi versus State of Tamil Nadu which brings out incident of custodial torture of LGBTQ person where the said eunuch was raped by a gang of people who forced him to have the oral and the anal sexual act with them. Later on, he was taken to the police station where his clothes were taken off and was subjected to a lot of abuse by the gang and the victim after this happening commits suicide due to the abuse and torture faced by him.

Homosexuals are always given less importance as compare to the other people of the society who used to beneath their dignity by doing some or the other things and infringes their fundamental rights, the most important being the Right to privacy which according to Justice Indu Malhotra “is not only the right to be left alone, but is a wider concept”. It includes the right to make own choice of sexual partner which may also include the person of same sex.<sup>4</sup> Unfavourable opinion or strong disapproval by the public for the minorities which contains LGBT cannot be the ground for deciding the constitutionality of a statute. The problems faced by the people who belongs to such category are not only just for saying but there are some evidence also which depicts the complete picture and it includes the survey by an organisation named as National Aids control organisation (NACO). A report<sup>5</sup> has been submitted by the NACO after conducting the survey. In the report it was clearly mentioned that total number of MSM i.e. Men who have sex with Men are 25 lakhs in population. There was another data given by the National Sentinel surveillance in the year 2005 which has stated that the more than 8% of the population of MSM in India has been suffering from the HIV while the Rate of HIV among the heterosexuals i.e. among the general population is

<sup>3</sup>Navtej Singh Johar v. Union of India (2018) Writpetition (Criminal) No.76 OF 2016

<sup>4</sup> K.S Puttaswamy and Anr. V. Union of India and Ors.(2017) 10 SCC 1

<sup>5</sup>Naz Foundation V. Government of NCT and Ors. (2009) 111 DRJ 1

estimated to be even lesser than 1% which gave the high vulnerability of MSM to HIV infection. The financial support given by the NACO helped these NGO's to implement such projects. According to the submission given by the NACO, those who are highly infected are mostly in fear to reveal their sexual orientation due to the fear of State agencies which have enforced laws against them. As a result of which the health care NGO's are unable to reach such highly infected people as they become invisible by hiding themselves and thereby, pushing the cases of infection beneath the ground and as a result of this it becomes very difficult for the workers in public health care to have access to these. People of such class even denied their right to form association to provide benefits to sexual minorities like they were hesitant to form company due to social stigma and state fear and for the accommodation they take the assistance of "GAY HOUSING ASSISTANCE RESIDENCE" this shows the state of conditions being faced by them.

### **PRINCIPLES AND DOCTRINES**

Judiciary has looked for various external aids to overcome this extreme issue and court follow some doctrines principles one of them is the doctrine of non- retrogression which helped the court to nullify Suresh kumar kaushal's judgement. Former Chief Justice Deepak Mishra has applied the doctrine of non-retrogression according to which State has no power to do anything that deliberately lead to retrogression on the enjoyment of the rights as conferred by the Constitution of India. In simple terms the principle of retrogression means that the rights which have been once recognised cannot be taken away. The court is stating that Suresh Kumar Kaushal case was wrong because it infringed a right which had been recognised by High court of Delhi in the case of Naz foundation.

In Navtej Singh Johar case the court also considered the Yogyakarta Principles<sup>6</sup>.

The said principles was launched on 26<sup>th</sup> of March, 2007 by a group of human rights expert which was based upon the terms "sexual orientation" and "gender identity" which has been defined under this principle.

The principle clearly states that: -

- Every person whether homosexual or heterosexual irrespective of his sexual orientation and gender identity has a right to have the full enjoyment of all the human rights.
- Every person whether homosexual or heterosexual without any discrimination and regardless of its sexual orientation or gender identity has right to have the full enjoyment of the right to privacy as guaranteed under Article 21 of the Indian Constitution.
- The right to take part in the public activities and the right to participate in the formulation of the policies which effect the welfare of the public and the right to avail the equal public service and equality in right of employment is given to every citizen of India without any kind of discrimination that whether the person is homosexual or heterosexual and regardless of his or her "sexual orientation" and the "gender identity".

Many international cases has now rejected this discriminatory and outdated concepts U.S Supreme Court in cases of " Lawrence v. Texas, Roberts v. United states Jaycees" held that

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<sup>6</sup>Suresh Kumar Koushal and Ors. V. Naz Foundation and Ors.(2013) 4 SCC (Cri) 1

LGBTQ people should be given the right to be respected for their personal lives and the state has no power to interfere in their personal life by stating their sexual conduct as a crime and if the State does so then such people try to conceal their identity which is harmful for their self-esteem, confidence and respect.

## **CONCLUSION**

The people who belong to LGBTQ group have faced mental and physical torture both. History of our country is responsible for the delay in providing justice for the struggle that the homosexuals have gone through for such a longer period of time and compel them to live a fearful life. We have adopted the inclusive constitution which not only allowed the state but also sometimes directs the state to take affirmative actions against inequality amongst socially and sexually backward people. The only fact that the LGBT person are in minority in the population of cannot be the valid ground to prevent them of their fundamental rights. Decriminalisation of homosexuality has come as a relief for the members belonging to such community diminished to an extent. However, the apex court of our country has felt that it is quite normal and natural for such people to feel the way they feel and they have their complete freedom to choose their partners and state has no right to middle unnecessarily between them. If it occurs, then it defeats the purpose of constitution. After the historic judgement by Supreme Court now the people of LGBTQ community can express their joy wholeheartedly. Many people like celebrities, Rashtriya Swayam, Sevak sang has welcomed the decision but some opposed the same like All India Muslim Law Board, Ministry of Health and Family Welfare, Jamaat-e-Islami Hind on the ground that it is against the morals of the society and causes big hindrance in their fight against HIV/AIDS.

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