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RECOGNITION OF HOMOSEXUALITY IN THE CONTEXT OF INDIA

RITIKA SHARMA

B.A. LL.B(Hons.)

COLLEGE-VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES, GGSIPU

ABSTRACT

The article aims at discussing the most controversial issue of the recognition of the homosexuality in the Indian society. The very idea of same sex intercourse invites raised eyebrows and judgmental view amongst the individuals. This article provides the entire historical background of homosexuality and the landmark verdict of decriminalization of Section 377 of the Indian Penal Code (IPC), 1860. The concept of LGBTQ communities has been discussed in detail. The acceptance and recognition of these minority community has always been a major issue. The provision of legal rights to this community has been a major achievement which is worth celebrating. Hence, the article aims at discussing the entire context of homosexuality with relevant case laws and landmark judgments.

INTRODUCTION

LGBTQ is a famous acronym for lesbian, gay, bisexual, transgender and queer or questioning. These terms are used to describe a person's sexual orientation or gender identity.¹ Lesbian is a woman whose enduring physical, romantic, and emotional attraction is to other women. Some lesbians may prefer to identify as gay or as gay women.² The term gay is often used to describe individuals whose lasting physical, romantic and emotional attractions are towards people of the same sex. Bisexual is the term generally used to describe the person who has the capacity to form lasting physical, romantic, and emotional attractions towards individuals of the same gender or two of another gender. Individuals may experience this attraction in differentiated ways over their entire lifetime. These individuals do not need to have specific sexual intercourse experiences to be bisexual and they need not have necessarily had any sexual experience at all in order to be identified as bisexual. Transgender is the term usually used for

¹ <https://gaycenter.org/about/lgbtq/>

² Ibid.

those individuals whose gender identity and gender expression are differentiated from what is linked with the sex they were assigned right at birth. These individuals may describe themselves using one or more of a wide variety of terms including transgender. In order to bring the bodies of transgender in consistence with their gender identity, they are usually prescribing certain hormones by the doctors and some of them undergo surgery as well. The term queer is usually used by some individuals, specifically the younger people, whose sexual orientation is not heterosexual. However, for those individuals who identify themselves as queer, the terms lesbian, gay, and bisexual are seen to be very limiting. Some individual's can also uses the term queer, or the term genderqueer in order to mark out their gender identity and expression. The queer has been recouped by most of the LGBT people to describe themselves; however, it is not a universally accepted term even within the LGBT community.³

HISTORICAL BACKGROUND OF HOMOSEXUALITY

The Section 377 of Indian Penal Code defines the unnatural offences as whoever voluntarily has carnal inter- course 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 and it has been explained that penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.⁴ However, there has been a long history of homosexuality since ancient times. In the Khajuraho temples, there are many images of women who were embracing other women and men in a prurient manner and displaying their genitals to each other. Scholars and academicians have described this as an acknowledgement that individuals engaging in homosexual acts. Moreover, in the Valmiki Ramayana, Lord Rama's devotee Hanuman is said to have seen Rakshasa women kissing and embracing each other and at another place in the Ramayana, the story tells the tale of a king named Dilip, who had two wives who died without leaving an heir.⁵ The story says that Lord Shiva appeared in the dreams of the widowed queens and told them that if they made love to each other, they would have a child. The queens did as ordain by Lord Shiva and one of them got pregnant. They gave birth to a child, who went on to become famous king Bhagirathi, best known for "having brought River Ganga from heaven to the earth".⁶ In Mahabharata as well, an interesting story about Shikhandini, the feminine or transgender warrior of the time and responsible for the defeating and killing of Bhishma, is been clearly depicted. Shikhandini was a daughter of King Drupada, who actually raised her as a prince in order to take revenge from the Kaurav, who were the rulers of Hastinapur. Drupada even got Shikhandini married to a woman. When her wife discovered the reality, she revolted.

³ <https://everydayfeminism.com/2016/03/difference-between-gay-queer/>

⁴ The Indian Penal Code, 1860

⁵ <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>

⁶ Ibid.

A particular day was reserved by divine interference bestowing Shikhandini with manhood during night. Thereafter, Shikhandini lived as a hermaphrodite. Another scripture namely Narada Purana has allusions to what may be classified as "unnatural offences" which is described in Section 377. Moreover, it has been mentioned that the Narada Purana states that anyone who discharges semen in non-vaginas, in those who are destitute of vulva, and uterus of animals is a great sinner and will ultimately fall in hell. The Purana does not approve of "unnatural offences" but the references prove that they were very much in practice. Hence, the ancient Indian texts, inscriptions and paintings pertaining to the temple walls, do not approve of homosexuality, but the persistent references recognize its very existence in those times.

THE BATTLE FOR RIGHTS

In 1991, a document describing the experiences of gay people in India was being released by the AIDS Bhedbhav Virodhi Andolan (ABVA)⁷ which was a seventy-page report. It disclosed the appalling extent of blackmail, extortion and brutal violence that gay people faced, especially at the hands of the police officials. The report called for the revocation of legislation that discriminated against members of a particular community. Nonetheless, when this report was released at the Press Club of India, journalists were reportedly that uncomfortable that they did not raise even a single question at that point of time. In 1994, a major controversy broke out after Kiran Bedi refused to provide condoms for the prisoners saying that it would encourage homosexuality on a larger scale. In response to which, ABVA filed a writ petition in the Delhi High Court, demanding that free condoms should be provided and that section 377 should be recognized as unconstitutional.⁸ Finally, in December 2001, the issue of Section 377 of Indian Penal Code was raised by the popular NGO named Naz Foundation. The Naz Foundation which was a sexual health NGO which was working with gay men, filed a Public Interest Litigation in the Delhi high court, challenging the very constitutionality of section 377 and calling for the revocation of the legalization of homosexuality. The case was however, dismissed by the court in 2004, upholding that there was no cause of action and the issues which are completely scholarly cannot be examined in the court. The review petition was also dismissed. In 2006, the Naz Foundation filed a Special Leave Petition in the Supreme Court. In July 2009, in the leading case of *Naz Foundation v. NCT of Delhi*,⁹ Delhi High Court bench consisting of Chief Justice Ajit Prakash Shah and Justice S. Muralidhar decided to strike down Section 377 providing that it violated Fundamental Rights of equality, freedom, life and liberty. In 2013, in the leading case of *Suresh Kumar Koushal v. Naz Foundation*,¹⁰ the LGBTQ

⁷ An organization which was fighting against those who were affected by HIV or AIDS

⁸ <https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights/>

⁹ 160 Delhi Law Times 277, p. 2 (Delhi High Court 2009)

¹⁰ Civil Appeal No. 10972 OF 2013

community underwent a notable blow when the Supreme Court overturned the Delhi high court's judgment, saying section 377 "does not suffer from the vice of unconstitutionality and the declaration made by the division bench of the high court is legally unsustainable". In 2016, Navtej Singh Johar filed a writ petition in the Supreme Court challenging the validity of section 377 of the IPC. In July 2018, a five-judge bench of the Supreme Court heard the petition and decided to reserve the verdict. Finally, in September 2018, the Supreme Court decided to scrap the Section 377, which Chief Justice Deepak Misra describes as "irrational, indefensible and manifestly arbitrary," providing a victorious end to one of the lengthiest struggles for justice. It has been the most crucial issue for numerous years. It took approximately ten years to reach the final decision. In this landmark judgment of *Navtej Singh Johar v. Union of India*, the Supreme Court lifted a colonial era ban on gay sex. A Five Judge Constitution Bench pronounced judgment on a batch of petitions that challenged the constitutional validity of Section 377 of Indian Penal Code. The section was decriminalized, the section which proved to be the most draconian section. It was being laid down that consensual sexual intercourse between the two adults of any form is a matter of choice as in present times, individuals do not choose to have sexual intercourse just for procreation purpose.¹¹ The entire matter is about the consenting adults performing sexual act. Therefore, the pragmatic approach is to lend support to the belief of consensual sex whether it is between homosexuals or between the heterosexuals. This should completely be legal and valid. Under a constitutional scheme the individual has complete sovereignty over his/her body. One can surrender one's autonomy to another individual which becomes a private matter and a matter of choice.¹² This implies that an individual has the full right to choose his/her intercourse partner and the matter should not be seen with a myopic view all together.

¹¹ <https://www.liveweb.in/breaking-sc-strikes-down-157-year-old-law-criminalizing-consensual-homo-sexual-acts-between-adults-holds-section-377-ipc-unconstitutional/>

¹² Ibid.

CONCLUSION

The issue of such sort are hard to conclude in just a few lines as there are a lot of miles to cover before it reaches social sanction. The social awareness and discussion is required to be continued. It is crucially important to understand the thin line difference between the terms used to define homosexual. Moreover, the acceptance is still the most prevalent issue in our society. The recognition and the acceptance of the LGBTQ community is still required to be done by the people of our society. A new term bigender has emerged which provides a nutshell meaning for all of these communities. New law pertaining to marriage and adoption are required to be formulated. Such issues are sensitive in nature and requires a positive approach to deal with the same.

