

Legal Regime and debate circling Homosexuality in India

- By Sakshi Saran, Advocate

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1. Introduction

Homosexuality is one of those subjects which were considered as taboo for the society and culture of India. Dictionary meaning of homosexuality is sexual attraction or the tendency to direct sexual desire toward another of same sex. A person is called homosexual when he is sexually attracted to people of the same sex and not to people of opposite sex.

This subject remained as very uncommon subject to talk about until the Indian judiciary played its vital role to bring homosexuals with the main stream of society. Supreme Court of India recognized the rights of homosexuals and gave a separate identity to them. It paved a way for the better future of homosexuals. Government data of year 2012 showed that there were 2.5 million gay people on record. There are chances that this no. may be high. In past, due to the penal provisions in Indian law such people used to be afraid of revealing their sex orientation.

But now this situation has changed as homosexuals are no more required to keep their identity in dark.

2. Existence of Homosexuality in Old India¹

In the Indian history traces are found related to the existence of same sex sexual activities. In Khajuraho temples (M.P), India, there are many sculptures which depict homosexual activities. In ancient **Hindu religion** homosexuality is not considered as immoral; on the contrary it is completely natural. However certain instances are there in which homosexuality appears to have been banned among priests. In old texts related to medicine called “sushruta samhita” homosexuality was declared as incurable and it prohibited the marriage of such person to opposite gender. Transgender were recognized and named as Hijras. There are many examples from where it appears to be obvious that homosexuality existed in the early society as well.

In the **Mughal period** also, homosexuality was in existence. For example, Mughal emperor Babur, Ali Quli Khan and a poet, Sarmad Kashani are the prominent names of Mughal period who were involved in same sex sexual activities. On the other hand there was a law for criminalizing unlawful intercourse. However, for general people homosexuality was not known.

In the **British period** law was made to criminalize unnatural sex. Section 377 was incorporated under Indian Penal Code which came into effect in the year 1861 for punishing unnatural sex by anyone whether heterosexual or homosexual. With these examples it will not be wrong to say that homosexuality is not something new occurred all of a sudden. It has always been there in the society but not in a recognized manner. After the commencement of Section 377 of IPC and because of the punishment provided therein people started keeping their sex orientation as a secret otherwise it could lead to punishment for them.

¹ https://en.wikipedia.org/wiki/LGBT_rights_in_India.

3. Public approach regarding homosexuals²

Public approach related to homosexuality varies in different countries. When we talk about India a large no. of Indian people did not accept homosexuality in past. However the situation has changed with the passage of time. People are not as rigid as they used to be in past but still they have not given ample recognition to homosexuals in the society.

There was a survey conducted in 2014 by World Values Survey on 1500 people in India. In this survey it came was found that between 1900 and 2014 the percentage of people who used to believe that homosexuality cannot be justified fell from 89% to 24%. This revealed a drastic change in the mind set of Indian people. It will not be wrong to say that in the change of public approach towards homosexuality, legal developments and Supreme Court of India have played an important role. A question was asked to the Indian people in a survey to mention a group which they would not like as their neighbours. In the year 1991, there were 91% people who answered that they will not like homosexuals as their neighbors however this percentage decreased in year 2014 and it was only 42% which was not even half. There was another survey which was conducted in eight Indian States in year 2017–18 by the Centre for the study of Developing Societies and Azim Premji University.

It was found that 28% of people agreed that sexual relationships between two men or two women should be accepted by the society, however 46% people did not agree with the same and the rest people had no opinion or were having any idea of homosexuality. In year 2016 a different survey was conducted in which all young people from the age of 15 to 34 had participated. This survey was conducted in 19 Indian states. It showed a different picture of Indian society where the people of villages accepted homosexuality more easily as compared to those people who were living in cities. On the other hand the people who were religious accepted the phenomena of homosexuality easily than those who were non-religious. Hence, India is one of the developing countries that have started accepting homosexuality but it is not the case with many other developing countries. In other developing countries people are conservative in their approach. In China, Pakistan, Singapore and other western Asian Countries people do not accept and strongly oppose the homosexuality. In US and other

² <https://www.livemint.com/Politics/nLQipPl5UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html>

Western Countries which come in developed countries people have broad approach as they not only accept homosexuality but also support the same.

4. Religious oppositions for homosexuality

There are various pictures to see all around the globe for example, India which is a quite liberal country homosexuality was in existence and recognized since the past and now after the decriminalization of homosexuality it is not only recognized but also supported. However in many countries where Judaism, Islam, Christianity is followed as religion, homosexuality is completely prohibited because it is considered as against the religion and as a sin.

In countries like Afghanistan, Brunei, Mauritania, Sudan, Iran, Qatar, Saudi Arabia, United Arab Emirates, Yemen and northern Nigeria death penalty is imposed for such kind of sexual relationships between two people of same genders. Wherever the Islamic laws or Sharia law is applied homosexuality is considered as a crime or religious wrong which attract death penalty for the act. In some other countries the punishment for homosexuality may be of jail, fine or whip. On the contrary there are many countries where maximum population is follower of Quran, and majority of people are Muslim but they have not criminalized homosexuality and have set an example to the other conservative countries of the world. Because many times it has been that the people who strongly oppose the concept of homosexuality or don't accept the equal rights of homosexuals, transgender, lesbians or gay people take the shadow of religion and say that it is against the religion.

As far as Hinduism, Jainism, Buddhism and Sikhism are concerned situation is not much clear. Though instances are there about the acceptance of homosexuals, transgender and intersex people who are mentioned in Vedas and other religious texts. The ancient history has proved that there were people who were identified as third gender and were given a place in society. It is also seen that people were allotted the specific work as per their identity and requirements.

5. Acceptance of homosexuality in modern times

With the advancement of time many changes occurred in the concept of homosexuality. Now this doesn't include only same sex people but also other communities. This has been popularized by the name of LGBTQI (or LGBT). The term LGBT was initially used for lesbian, gay, bisexual, and transgender. This particular term was umbrella term which started to be used in 1980s and in the year 1990s this term replaced the term gay. The intention behind coining this term was to emphasize the variety of sexual and gender identity based cultures all around. This is comparatively a wider term which is not exclusive to a particular class. It includes every such person who is not heterosexual. History shows that earlier the term homosexual was used as a first wider term but it was not inclusive and was little negative hence the word homophile was used on this behalf in year 1950 and 1960. Later it was also substituted with the word Gay in 1970s. There are various groups who work for the rights of LGBT. In India LGBT people faced a lot of social and legal difficulties in society. They have been facing many issues like honor killing, beating, tortures, attacks, exploitation and other atrocities not only on the individuals but also on their families. LGBT people have kept on facing rejections from the society because homosexuality has always been considered as shameful.

However many changes can be seen today worldwide. In India also LGBT people are now coming forth and demanding the protection of their rights in the same way as the others individual rights are protected. In cities like Delhi, Mumbai, Bangalore, Chennai LGBT people are creating awareness for the protection of their rights as a normal human being. After the Judgment of Supreme Court which decriminalizes homosexuality, an identity has been given to LGBT people. Rights of such people are being guarded. It is a way to give a help for betterment of such people who were never a recognized part of society.

In Odisha a gay pride parade was organized in Bhubaneswar on 27 June 2009. From that time onwards many pride parades started happening in India that contributed in the better future of people of LGBT. Many programs like rainbow festivals took place in numerous states to show the pride of gay people. Certain groups came forward and raised the voices for the rights of LGBT. Many states of India like Kolkata, Chandigarh, Rajasthan, Madurai, Gujarat and Awadh were the states which got highlighted for the programs organized for LGBT. Lot of appreciation was received by these states from all over the world for supporting the

community. The overall approach of society is now more inclusive and uplifting the social strata of such people. So it would not be preposterous to say that the LGBT community can now enjoy recognition and equal status as other communities of the Indian society. So the public presence/events have been setting the tone towards more acceptance of LGBT community and the progress has been slow but steady.

6. Impact of the acceptance

In India the homosexuality is accepted to some extent by public at large but still it is a long way to reach the destination. In this direction Supreme Court has done its work by decriminalizing same sex relationship. This will not only give identity to LGBT community but also provide hopes for their settled life and bright future. In Singapore also a new hope is found among LGBT people after this action of court. Singapore penal laws are almost similar to Indian Penal Code. Section 377A of Singapore Penal Code was introduced in year 1938 to criminalize all other non-penetrative sexual acts between men. Section states “Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.” The term gross indecency is a wider term which has been interpreted through courts in many cases. It included mutual masturbation, genital contact, or even lewd behaviour without direct physical contact. There has been a continuous demand by LGBT community for repealing of this section. This section is being challenged on the ground of Article 12 of the Constitution of Singapore, which guarantees all persons equality before the law, and Article 9, which guarantees all persons the right to life and the right to personal liberty.

The irony is that the society of Singapore is spilt on this issue. Some people are in favour of repealing the section while some are against it but majority people support this law. The people who want this law to be repealed argue that it is a kind of discrimination with LGBT people. On the other hand there are people who want this law to be intact. They argue that legalization of homosexuality will result in a disturbance in society, family disputes and other social issues.

After the ruling of Supreme Court of India, law minister of Singapore showed the possibility of repealing the section 377A. A former UN ambassador of Singapore also called for a class action by gay community for challenging the constitutional validity of section 377A.

Growing minority population of Singapore want this law to be repealed and majority population oppose it. Government is in middle. It is for the public to decide what they want³. There are many campaigns going on in Singapore demanding the rights protection of LGBT. Social media is also giving platform for groups to raise the voice for change. Campaign “Repeal 377A” was launched in 2007 but did not get success⁴. This definitely worked to make this issue debatable in the country. Many petitions have been signed by the people of Singapore for repeal of this section 377A. LGBT people are in hope of a change for their betterment.

7. Tracing Legal Background

Rights of LGBT community had not been initially recognized and they were not accepted as part of normal living around the globe. In India, S. 377 of Indian Penal Code criminalized the sexual relationship between people of same sex. It stated that anyone who willingly has carnal intercourse (penetration being sufficient to prove carnal intercourse) in any way other than ordinary natural way either with a man, woman or any other animal, shall be punished for unnatural offence. This section also provided for maximum punishment of 10 years imprisonment along with fine for any such offender.

Because of this section same sex relationships could not be given a legal status in India. But it is not that this section came out of the blue in India. There is a history from where provisions of this section had come into being.

In Britain Buggery Act of 1533 was enacted in the reign of King Henry VIII which criminalized bestiality, anal intercourse etc. and stated that unnatural offences were wrong against God. This

³ <https://www.straitstimes.com/singapore/shanmugam-on-india-decriminalising-gay-sex-singapore-society-to-decide-which-direction-to>

⁴ <https://www.pinknews.co.uk/2018/09/07/india-singapore-gay-sex-section-377-next-country-decriminalise/>

Act was thereafter repealed and replaced by Offences against Person Act 1828 which broadened the scope of unnatural offenses and made it easier to prosecute homosexual

activities. This Act was thereafter an inspiration for drafting of S. 377 by Lord Macaulay in 1838 which was later brought into force in 1860 through the provision under IPC⁵.

Later in 1967 Offences against Person Act of 1828 had been repealed and so homosexual relationships had been recognized in Britain but it continued to be an offence in India through the provision of S. 377 of IPC.

There had been several debates on the unconstitutionality of the provision of this section as it was opposed to the basic fundamental rights available to every citizen of India but it was only in 1994 that the validity of S. 377 had been challenged by AIDS Bhedbhav Virodhi Andolan for the very first time. Thereafter in 2001, another similar petition was filed by an NGO (Naz Foundation (India) Trust) in which Delhi High Court delivered a landmark judgment and thus the debates that were ongoing outside the court gained a legal momentum.

- **Naz Foundation Case⁶**

Facts:

In year 2001 a Delhi based NGO Naz Foundation (India) Trust (hereinafter ‘Naz Foundation’) filed a PIL in Delhi High Court for upholding the rights of LGBT community and therefore to declare S. 377 of IPC as unconstitutional. Naz Foundation is an organization working on prevention of HIV/AIDS and on sexual health of people since 1984. This PIL had been initially rejected by the Delhi High Court on the basis of lack of sufficient cause of action. This matter was thereafter taken up in civil petition before the Hon’ble Supreme Court which ordered the Delhi High Court to hear and decide the petition on merits.

⁵ <https://factly.in/tracing-the-history-of-ipc-section-377/>

⁶ *NAZ Foundation v Government of N.C.T Delhi*, 160 Delhi Law Times 277

Issues:

The two major issues dealt with in this case were-

- 1) Whether S. 377 promoted the harassment of homosexuals thereby preventing them from being treated of HIV and AIDS in necessary cases?
- 2) Whether S. 377 was discriminatory and therefore unconstitutional?

Decision and analysis:

The court delivered its judgment in this case in 2009 and held that S. 377 was unconstitutional because it violated right to privacy and dignity (as guaranteed under Art. 21 of Constitution of India) and to freely socialize which has also been upheld under Universal Declaration of Human Rights. While discussing on the first issue the court stated that every individual has a right to be availed health facilities of highest standard possible under Art. 21 of Indian Constitution and under Art. 12 of ICESCR. But due to the effect of S. 377 the homosexual community is forced to isolation and public hatred because of which they are deprived of health facilities available to them for deadly disease like HIV/AIDS. Further the court also went on to saying that the classification of homosexuals is unconstitutional and it flows from the effect of S. 377 of IPC.

Subsequent approach

This case had started to be seen as a revolution in the status of LGBT Community but this ray of hope and happiness in homosexuals and LGBT community could not last for long.

In 2013 an appeal was filed from this judgment in the Hon'ble Supreme Court of India in case of *Suresh Kumar Koushal and another v. NAZ Foundation and Others*⁷.

Facts:

In this case appellants i.e. the people who considered Delhi High Court's decision as violating religious, moral and cultural values of society had filed an appeal in Supreme Court seeking to revive constitutionality of S. 377 and therefore to strike down the previous decision of Delhi High Court.

⁷ CIVIL APPEAL 10972 OF 2013.

Issues:

- 1) Whether Delhi High Court has erred in deciding that S. 377 violates Art. 14, 15 and 21 of Indian Constitution?
- 2) Whether decriminalizing of unnatural offences would have any effect on prevention and treatment of HIV/AIDS?
- 3) Whether the courts have power to intrude in legislation making power of Parliament?

Decision and Judgment⁸:

The appellants argued that Delhi High Court has ignored various facts in deciding the previous case. They stated that there was no class that was being discriminated and so violation of Art. 14 and 15 could not be pleaded. Also that prohibition from committing an offence cannot be pleaded as violation of Art 21 and so S. 377 cannot be held to be unconstitutional. Further, it was stated that it cannot be sufficiently deduced from the facts presented by the respondents that decriminalization of S.377 would have any effect on the health of people more specifically in treating HIV/AIDS. They also stated that the courts shall not be presumed to have power to legislate on any matter and that this power shall be left entirely on the Parliament.

Respondents on the other hand contended that having a specific sexual orientation shall be the personal choice of any individual and any law restraining that shall be considered as violating right of equality of homosexuals merely on the fact that they have sexual orientation different from the majority of people. S. 377 by prohibiting sexual acts between two people of same sex gave immense power to the police and to other people of society to harass homosexuals. They must have the right to be let alone and to make their choice in choosing their sexual preference and

orientation as has been guaranteed by Art. 21 of the Constitution. Because of the prevailing section the members of LGBT community feel left out and they avoid in coming up and revealing their identity because of which they cannot be supplied with appropriate medical facilities to prevent HIV/AIDS which is caused in them as a result of harassment they face in society due to their different sexual orientations.

The court after hearing contentions of both parties allowed the appeal and reversed the judgment of Delhi High Court holding it to be legally unsustainable. It stated that S. 377 did

not criminalize or differentiate people of any specific community. It merely has an effect of prohibiting certain acts which are against the ordinary course of nature. While stating on the power of courts the Supreme Court stated that the courts have sufficient power to declare any provision unconstitutional on the basis of doctrine of severability and so Delhi High Court has acted absolutely within its power.

It was further observed by the court that number of people belonging to LGBT community in India was very less and so S. 377 cannot be seen as unconstitutional only because it violated rights of few people. Decriminalizing it could have grave effects which cannot be overseen merely because of rights of a very small section of society. However, at last it was left on the legislature to amend or legislate on such matter if it was deemed essential by them.

Curative Petition⁹

After this judgment of Supreme Court, Naz Foundation again filed a curative petition before the Supreme Court which was contended to be inadmissible as it did not suffice the essentials of curative petition laid down in *Rupa Ashok Hurra v. Ashok Hurra*¹⁰ but the three judges bench of court headed by then CJI TS Thakur denied this contention and referred it to be decided by a Constitutional Bench of five judges because this petition involved an important

⁹ *Naz Foundation Trust v. Suresh Kumar Kaushal and Ors.* Wp (Cri.) No. 76 of 2016

¹⁰ 2001 4 SCC 388.

question to be determined in interest of public. This case was later decided in *Navtej Singh Johar* case illustrated below.

- **Other Judgments**

While the discussion on Naz Foundation case was ongoing, various other judgments were passed by Supreme Court which aided in the later judgments of courts as well.

In *National Legal Service Authority v. Union of India (“NALSA”)*¹¹ it was held that Art. 15 and 21 of Indian Constitution included right to gender identity and sexual orientation and therefore homosexuals including transgenders and other LGBTQI community shall also enjoy this right up to same extent as other men and women of our society do.

Thereafter, in Justice *KS Puttaswamy (Retd) and Anr. v. Union of India and Ors*¹² a nine judge bench unanimously held that right to privacy is a fundamental right that shall be available to everyone and therefore every individual shall have right to choose his/her way of living. The state shall have no right to interfere in this right of an individual unless there is a compelling necessity or fear of harm caused to other people.

- *Navtej Singh Johar v. UOI through Secretary, Ministry of Law and Justice*¹³

In this case a criminal writ petition was again filed to challenge the constitutionality of S. 377 on ground that it criminalizes consensual sexual activity between two adults of same sex done in private which was a denial of right to sexuality, autonomy and choice of sexual partner guaranteed by Art. 21 of Indian Constitution.

The five judge bench thereafter unanimously overruled the Suresh Kumar Kushal case judgment and held that right to privacy is a fundamental right and it shall be protected at all costs. It further held that sexual orientation is an important aspect of identity and that right of homosexuals and LGBT community are founded on sound constitutional principles which

¹¹ 2014 5 SCC 438.

¹² (2017) 10 SCC 1.

¹³ Decision of 06/09/2018

shall be ensured to every citizen regardless of their sexual preferences and their minimal representation in the society.

Thereafter, in 2019 a nine judges bench headed by CJI. Deepak Misra held that two adults of same sex consenting for an act be it 'unnatural' shall not be prosecuted under S. 377. The only case in which prosecution shall be done under S.377 shall be if one of the parties involving in the unnatural act is either minor or has not consented for it in any other way. Further they went on to discuss the meaning of term 'penetration' and held that it would include anal and oral sex as well and any such act done by man or woman who have attained age of majority and have consented for it shall also not be prosecuted under S. 377.

Hence the ray of hope in homosexuals had again revived after the passing of this judgment and the stigma associated with them had finally been removed.

8. Legislative Efforts

After the decision of Supreme Court in 2014 certain legislative efforts were made to pass a legislation for the benefit of transgenders. In December 2014 Tiruchi Siva, a Dravida Munnetra Kazhagam (DMK) Rajya Sabha MP introduced a private member bill in Rajya Sabha which was passed unanimously there but it never came up for discussion in Lok Sabha.

There were many flaws in the bill introduced earlier and therefore another bill named The Rights of Transgender Persons Bill, 2015 was introduced with certain amendments and new clauses been added to it that provided for remedial measures to protect discrimination of transgenders on the basis of their sexual preferences and orientation.

This bill even after been improved had several implications drawn from the previous bill because of which it was highly debated in the Parliament. It was then sent to the law ministry for legal advice and to suggest changes in it. Thereafter it was reintroduced in 2016 in the Lok Sabha for discussion. Even after so many efforts been made to bring a meaningful legislation for the benefit of LGBTQI community there are still discussions going on related to the rage in LGBTQI community regarding the bill. They consider that there were better provisions in

the 2014 bill related to the individual sexual identity of the homosexuals as related to the modified version introduced in the Parliament now.

So, even after all these efforts that have been made to bring about a balanced legislation to protect the rights transgenders, no law has yet been passed in this regard and the debates are still ongoing.

9. A new era

There are many activists in India who are working in the direction of better future and recognition of LGBT community people. Some people are there from LGBT community only and they have marked their place in the society by achieving the heights in their respective profession and field. For example Shabnam Mausi is the first transgender Indian who has been elected to public office. She was an elected member of the Madhya Pradesh State Legislative Assembly from 1998 to 2003. In Madhya Pradesh a political party has been made by transgenders named as "Jeeti Jitayi Politics". The party also released an eight-page election manifesto which it claimed outlines why it was different from mainstream political parties. Kalki Subramaniam is also a transgender rights activist, writer and an actor as well. She has active participation in politics. In the same sequence a candidate Madhu Bai Kinnar was elected as the Mayor of Raigarh, Chhattisgarh. Manabi Bandopadhyay became India's first transgender college principal. K. Prithika Yashini is the first transgender police officer in the state of Tamil Nadu. At the time, the Tamil Nadu police had three transgender constables, but Yashini became the first transgender person to hold the rank of officer in the state. On 12 February 2017, two transgenders Mayuri Alawekar and Yuvraj Alavankar were appointed by the Kolhapur District Legal Services Authority (KDLSA) as panel members for the local Lok Adalat (People's Court). In July 2017, Joyita Mondal was appointed to the Islampur Lok Adalat, becoming West Bengal's first transgender judge. In 2018, Swati Bidham Baruah became the first transgender judge in Assam. Swati is founder of the All Assam Transgender Association also, and later she was appointed to the Guwahati Lok Adalat.

These are only few examples. There is a long list of such people who are playing an active role in society in the direction of recognition of LGBT community. They are spreading awareness

in the society and simultaneously creating confidence in homosexual people. That is actually one of new developments in the society.

10. Conclusion

Homosexuality cannot be considered as a matter of choice as it is something attached with an individual from their birth. Discrimination on the basis of sex orientation is not at all good for any nation. With the same approach many countries have legalized same sex relationships and have given protection to their rights. India is one of the developing countries which have taken step towards decriminalization of homosexuality. Though the legal battle was so long for the same but ultimately legal situation is clear and the old law criminalizing homosexuality has been struck down by the Apex Court of India. “Third category” and “Other category” have been added at different forms of employment and passport.

It is not the complete victory for homosexuals. Efforts are still required to be made in the same direction because still the society needs to change the perspective towards homosexuals. These people have the same human rights as other people have. They should not be dependent on begging and demeaning works for their living. Government should create equal opportunities for them in every field. Such people should not be subject of the hatred and disrespect just because of their sexual orientation. If a person is bisexual, intersexual, transgender, gay or lesbian he is a human being and such different identity is given to him by nature.

"Gender preference does not define you. Your spirit defines you."

--Author P.C. Cast

- ***Surbhi Aggarwal***

(Founder & CEO, School of Legal Education)

Thankyou

