

Right to Privacy: A Glimmer of Hope for Homosexuality

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In this era of conscience-zero, homosexuality should become part of our consciousness as things which seem very “gay” to some may vary for others. If we look into a deeper perspective, we will understand that the most essential attribute of an individual is his own sexual orientation, which defines his identity and discriminating or infringing a person’s privacy and dignity merely on the basis of sex is insidious to his self-worth. Irony is that the British legal system which has introduced this anti-sodomy provision during the colonial era has itself removed this section from its code, but it is still prevalent in our India. I think sexual confusion has now become a fallen culture widespread as we can’t place public morality on gut reactions, where the sheer evidence of our hypocrisy is our weak conscience regarding the “wrong” and “right”.

Understanding the concept of S.377 and its relevance after Privacy judgement:

“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.”¹

On Aug 24, 2017 the Supreme Court’s 9 judge bench² unanimously ruled that the Right to Privacy is a fundamental right and also asserted that it is an inalienable right available to all its citizens.

What does this judgement mean for the LGBT community?

Lawyers and experts say in the light of Supreme Court’s decision that it’ll be difficult to uphold Section 377. Section 377 is a law which dates back to 1860 which bans “unnatural sex” or “sex against the order of nature”³, this means that section 377 applies not just to the LGBT community but it applies to everyone be it a straight person, LGBT person, a person involving in oral or anal sex is also technically violating section 377. The section

¹ Section 377 of Indian Penal Code, 1860

² Justice K.S. Puttaswamy v. Union of India, WR No. 494/2012

³ Sexual act which doesn’t lead to procreation and where penetration is other than penile and vaginal such as oral and anal sex.

was challenged in Delhi High Court in 2001 and in 2009, in Naz foundation case⁴ the High Court read down section 377, i.e., excluded consensual same sex acts from the ambit of law. This Naz foundation verdict is known as the watershed verdict for the LGBT community.

However four years later, the Supreme Court overturned this ruling in Suresh Kumar Kaushal’s⁵ judgement in 2013 said that it was up to the Parliament to scrap section 377 and not up to the court. This meant after four years of freedom India’s LGBT once again found itself in shackles.

What does the right to privacy judgement say about Section 377?

- The court in its judgement has categorically talked about sexual orientation and it mentions sexual orientation as a part of privacy.
- The Supreme Court says about its verdict in Suresh Kaushal’s case that in 2013 in Kaushal the judges based their judgement by calling the LGBT community a ‘miniscule minority’ and in Justice Puttaswamy’s judgement⁶, the Supreme Court says that 2013 verdict was erroneous and it doesn’t matter how many LGBT people there are and their rights and claim to those rights is inalienable.
- It brings the question of sexuality into the ambit of dignity, respect and freedom.

Activists have been heartened by the fact that the Supreme Court has recognized the rights of the lesbian, gay, bisexual transgender people to live with dignity and self-respect. The next stage in the fight against section 377 and for equal rights which will be again in the Supreme Court when the five judge bench will take up the curative petition against its 2013 verdict.

The Need to abolish S.377 in this era of Right to Privacy

Today, the need is to protect an individual’s rights and dignity rather than humiliating him on the basis of his gender and imposing penalties on him which is savage. Section 377 neither distinguishes between acts engaged in private sphere and those in public spheres nor between consensual and non-consensual acts between adults. Thus, it bears no rational nexus to the objective sought to be achieved because consensual sex between adults in private does not cause any harm to anybody. Therefore, any sort of qualification causing disgust towards a particular social group or vulnerable minority is not deemed to be a valid ground under article 14 of our Constitution. Everyday homosexuals have to go through various kinds of opprobrium and are made vulnerable targets all because of their orientation. Henceforth, the sexual act between two individual irrespective of their

⁴ Naz Foundation v. Government of NCT of Delhi, WP(C) No.7455/2001

⁵ (2016) 1 SCC 1

⁶ i.d.

sex in private sphere causes no harm to anybody and criminalizing the same would be arbitrary and unreasonable. The state interest must always be legitimate unlike in section 377 where it classifies between procreative and non-procreative sexual acts. If we look into its deeper connotation section 377 of IPC in its operation is unfair as it targets a particular community whereas facially it seems to be neutral as it targets acts and not identities. In this technologically dominated environment where day today working of our surrounding is being influenced by social media and every person is exercising their right to freedom of speech and expression, it becomes our basic concern whether these rights are genuinely given to the homosexuals? In our country Section 377 has a chilling effect on a person's ability to be open and speak freely about his or her sexual orientation, and to create artistic or literary works that capture the experiences of LGBT persons, which is an infringement of the freedom of speech and expression. For that Section 377 infringes the persons' right to form professional, social and other associations that are the norm for all other communities and that are essential for a sense of social, financial, psychological and political well-being.

As we well know, right to privacy is borne out of Art 21 of our Constitution, in the case of Justice K.S. Puttaswamy (Retd.) v. UOI⁷, it was held that "*Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.*"

The bench headed by Justice Deepak Mishra in Navtej Singh Johar v. Union of India Ministry of Law and Justice⁸ also stated that the earlier judgment on S.377 in Naz Foundation case and Suresh Kaushal's case needs to be reconsidered as it hurts the sentiments of people. Indulging in sexual activity is of extreme private nature and state have no right to intervene in privacy of two adults in their bedroom because the basic aspect of a person's dignity and freedom lies in his self-defined sexual orientation as well as gender identity. India being a signatory of International Covenant of Civil and Political Rights⁹, Art.17 of which also states that "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honor and reputation.*" This shows that time has come where homosexuals should also get equal respect, privacy and freedom and opportunity to live their life with dignity. With the recent judgment of Supreme Court in Shakti Vahini v. Union of India¹⁰, where right to choose life partner has been made a fundamental right, the freedom of sexuality and consequentially choice of sexual partner is a key determinant for any person to live a happy and fulfilling life and is protected

under Article 21 of our Constitution. Even in National Coalition for Gay and Lesbian Equality v. Minister of Justice¹¹ the court has observed that "*It is not for the state to choose or to arrange the choice of partner, but for the partner to choose themselves.*" Since social morality also changes from age to age, the morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution. What is natural to one may not be natural to the other.

Problems faced by homosexual communities

Although various provisions have been brought forth for uplifting and recognizing the rights of LGBT communities still the society hesitates in providing them those rights and respect and the provisions thus remains dormant. Not only regarding medical issues such as hindrance in HIV programmes conducted for trans people, as they fear in disclosing their identity because of the fear of being physically, socially and mentally abused, they are also face bullying and blackmailing. They are even denied basic access to drinking waters from wells. They even have to face denial from jobs and educational institutions. In 2014, the Supreme court declared that the transgender would be allowed admission in educational institutions and can also apply for job. But, this has only remained in papers because practically we are not yet ready to accept them as they are as most recently in Kolkata, a transgender teacher was asked if her breasts are real during job interview. In 2017, Herman Dey underwent sex-reassignment surgery and changed her name to Suchtra Dey. Surprisingly, her 10 years educational didn't mattered to them and all that they could see was a man transformed into a woman. Even today, the trans people find difficulty in fighting for their rights and acceptance.

Changing the Stigma

Many child right activists argue that section 377 is necessary to tackle the cases of child abuse. But after the enactment of the Protection of Children from Sexual Offences (POCSO) Act 2012, there is no need of section 377 in child sexual abuse cases as the POSCO act is more child friendly and much more stringent. In Gujarat, Prince Yuvraj Manvendra Singh Gholi, is India's only openly gay prince has taken initiative for the upliftment and developing various other skills of the lesbian, gay, bisexual and homosexual individuals in his Hanumanteshwar Palace. LGBT's have not only been denied their rights, dignity and freedom but also subjected to physical and mental abuse. After the Right to Privacy verdict, they have got a glimmer of hope and the evidence of the same is the the first LGBT Rainbow Pride Walk in Panaji, which also received world wide support and praises. The first Bhopal pride was also held in May, 2017.

⁷ i.d.

⁸ WP (Crl.) No. 76/2016

⁹ Come into force on 23rd March 1976

¹⁰ WP (Civil) No. 231 of 2010

¹¹ 1999(1) SA 6 (CC)

The queer women i.e., women loving women emerged in 90's in India, when 'Sakhi', a helpline for lesbian was started by Gita Thandani. Similarly, the idea and the mindset of the people that trans people can't be parents was changed by one 'Gauri Sawant', who adopted an orphan daughter of a sex worker and looked after her and even put her to school and college with all the motherly care and love. And this initiative of Gauri Sawant has also been honored by Vicks advertisement. The Gay marriages have also gained momentum today- it was initiated way back in 2006 when Humsafar Trust's Goa were organizing same sex marriage ceremonies for people. The Kochi metro has also taken bold step by hiring 23 trans women. Moreover, the Kerala State Literacy Mission, has started classes for trans people who are school dropouts in its various districts for empowering them in achieving their aims and fulfilling their dreams. In June 2017, first beauty pageant, "Queen of Dhwayah" for trans women was organized in Ernakulum. Jyoti Monda, a trans activist was appointed to the bench of the National Lok Adalat in Uttar Dhinajpur, West Bengal marked the first step towards giving recognition to homosexuals and transgender in State bodies.

Conclusion

Even in 2018 half of the population is ignorant about who are LGBT's and the only thing known to them is that gays are not meant to be the part of their society, the denial of rights and dignity to them is the proof that still society at large don't consider them to be human beings to enjoy such respect and freedom. Although we got independence in 1950 from the British but the LGBT community is still fighting for its independence from this societal taboo and bondages to which they are subjected since the time of their birth. Being responsible citizens and the future of our Nation, it is our duty to become conscious and fight for the rights of homosexuals. The time has come when S.377 shall be decriminalized; it being archaic when it was incorporated in 1860 in our Penal Code, now the society is advancing and becoming cosmopolitan in their approach. Therefore, rather than criminalizing sexual intercourse between same sex individuals in private sphere, various provisions should be incorporated so that they too can enjoy their basic human rights and dignity.