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Path to Decriminalisation of Sodomy law

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ABSTRACT

on September 6th 2018 the supreme court of India stated consensual same sexual conduct is unconstitutional i.e., Section 377 of India's penal code [1], which is a British colonial rule drafted by Lord Macaulay and enacted in 1860, calling it a ten-year sentence carnal intercourse (against the order of nature) and the Law Commission of India, in its 172nd Report of 2000, concluded that the law should be repealed. Meenakshi Ganguli director of Human Rights Watch stating that it is the human decision and their matter on privacy and no one should discriminate against what they want to do in their private space. This article will lead to forbidding of rule that protected LGBTQ people in India in the perspective of both India's constitution and international human rights. Although the criticism still exists in modern world but surprisingly, about 123 countries have decriminalised homosexuality. Indian courts have adopted a test of imitative sexual intercourse equating penetrative acts with sexual intercourse which broadens the legal definition of sodomy to include sexual acts other than anal sex, such as oral sex. As it's inclusive aspect, this paper traverses the unite relationship of history of how the same sex got decriminalised with the foundation of article 14,15,19 and 21 [2], creating the broader shift in the conclusion that the repeal of the sodomy law cannot by itself relieve the plight of sexual minorities, it can be a significant part of the solution.

keywords: carnal - LGBTQ - decriminalised - homosexuality

INTRODUCTION

Sodomy or buggery (British language) refers to the sexual activity between person of same gender or non-procreative activity, sodomy regarded as deviant behaviour when it takes place outside the context of intimate sexual relations but important question is why these type of people are judged on the basis of morality and behaviourism when people should not be discriminated or denied human rights based on their sexual inclination or preferability; specially the transgenders in LGBTQ face difficulties in employment, healthcare etc even the Transgender Persons (Protection of Rights) Act, 2019 [3] fails to incorporate yet other principles in line with the Supreme court judgment in National Legal Services v. Union of India 2014 [4], such as the right of transgender people to declare their self-perceived gender identity without undergoing sex reassignment surgery, and reservations in jobs and educational institutions. Anything that violates the dignity violates principle of Equality and makes way for discrimination which thus defy the essence of preamble of the Indian constitution which gives equality acceptance in the society to every individual.

Amongst the modern youngsters there is admissible behaviour towards this type of community but today also being, being gay is seen as shameful in most of the country just like sodomy law still exists in 69 countries, and



many people keep their sexual preference and gender identity secret.

HISTORY

Homosexuality is not the new concept in India; it is being followed since ancient times depicted sexual activities between women as feminine in many sculptures, Rig Veda and including manuscripts like sacred texts Vishnu is seen as Mohini and fell for him and their unification resulted in Lord Ayyapa. The renowned characters of Shikhandini and Brihannala are the most respected transgender characters of Mahabharat as well as in Kama sutra the lesbians are called the 'swarinis' [5]. Talking about the medieval times the most loyal slave of Allaudin Khilji Malik kafur was in homosexual relationship but through the passage of time, the homosexuality turned from being natural to abnormal since the beginning of nineteenth century in India with change in thoughts of people.

A. Britisher's Autonomy and Modernisation

negative impact started to initiate in Vedic Brahmanism due to Aryan invasion gradually shifting to colonialism authority. Suo Moto initiated by police in Queen Empress v Khairati [6] was the first case registered under section 377 in India where the accused found to be a sodomite in British era where khairati was punished for practising homosexuality. Therefore, with the rise of British empire thoughts of people in India changed through their manipulative approach resulted in anti sodomy and criminalised homosexuality. A vast body of English laws not only survived in an independent India, but continue to evolve by way of amendments, abolition or judicial interpretation; one colonial law that has remained since its inception in 1860, is Section 377 of the Indian Penal Code modelled on the basis of 16th century law, called the Buggery Act [7] which was passed in the British parliament

when Henry VIII was the king. Buggery was punishable by death under the 1533 Act and this law found its way into India when through recommendation of the first law commission of India under Thomas Macaulay.

Decades later the protest for gay rights happened in 1992 in Delhi It was sparked off by the police picking up men from Central Park in Connaught Place on suspicion of homosexuality – in those days, this kind of harassment was still a 'normal' practice. But activists from an organisation called AIDS Bhedbhav Virodhi Andolan (ABVA) decided not to let it pass this time and challenged constitutional validity of section 377 in 1994 filing a public interest litigation also the first infamous rainbow pride parade held in Kolkata this march was the first-ever Pride march in South Asia and since this memorable 21 cities in India have been held marches, all this outpouring support for LGBTQ+, also for the decriminalisation of the section 377

PACE OF SECTION 377

A. Naz foundation

Offence under this section was non bailable and cognizable offence in which sodomite and homosexual were referred as same and no emotional attachments, desired were given consideration for the same. Thus, de jure, it was an attempt to criminalize sodomy while de facto it was an attempt to criminalize and stigmatize homosexuality. Part III of Indian constitution guarantees set of fundamental rights which includes article 14(right to equality before law), article 21 (right to life and personal liberty) and article 32 (right to approach supreme court).

In July 2001 many raids shocked the Lucknow city and LGBTQ community which lead to a judgement in 2009 a landmark Delhi High Court decision in the NGO based Naz Foundation v. Govt. of NCT of Delhi case held that treating consensual homosexual relationship between

adults as a crime is a violation of fundamental rights protected by India's Constitution.

B. After Judgement of Naz

This was later overturned by the Supreme Court of India in Suresh Kumar Koushal vs. Naz Foundation [8], in which a 2 judge bench stated Section 377 of the Indian Penal Code. However, even that was overturned by a 5-judge bench in 2018, decriminalizing homosexuality once again. In case National Legal Services Authority v. Union of India 2014 transgenders was termed as "third gender" and fundamental rights were given to them along with reservations in educational fields. In 2017 the Court located the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 of the Constitution, and held that criminalization of consensual gay sex violated these rights, also offends the guarantee of equality in Article 14 of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. Although this unconstitutionality resists in case of minors, sexuality with animals is still a crime.

Problems faced by the youth

Loving women written by Maya Sharma explains that the two women who wants to be with each other is treated badly from their own family and villagers and is badly beaten, thrashed. This can be related through how LGBTQ when discloses or accept themselves are treated publicly and harassed on the basis of their sexuality and the main question is that when the society is not ready to accept the homosexuality then how can law help even after Navtez singh's case. Recently, Tamil Nadu amends the law to punish the cops who harasses the LGBTQ+ people in the society still they continue to face discrimination and exclusion differentiating them from heterosexual people, violence on this community is occur on regular basis . Particularly the young generation LGBTQ people are vulnerable who experiences antipathy from

their family, friendship, in school intimidation leads to incompetency, drop out, severe mental health conditions such a Homophobia (fear of negative reactions) or transphobia.

According to 2022 national survey on LGBTQ youth mental health, nearly 1 in 5 transgender and nonbinary youth attempted suicide and LGBTQ youth of colour reported higher rates and 60% of LGBTQ youth who wanted mental health care in the past year were not able to get it [9]

There is problem of homelessness that includes lack of housing and service, youngsters who are rejected by their parents are sometimes told to leave the house for being in the community of LGBTQ due to which they get in the consumption of drugs and other toxicants, they become the part of poverty, illiteracy which further results in more AIDS AND HIV problems in them. Most of the teachers are not trained to handle to queer people so even they participate in harassment. India's law and government has been evolved much in aspect of LGBTQ community but still there is more needed to protect gender equality in India

Many people are also not aware of terminology of language, they don't know the concept of homosexuality in broad details and society feeds in the other younger people mind who are heterosexual that homosexuality is wrong to attain.

SUGGESTIONS FOR LGBTQ+

[5]proclamation as well as problems regarding the same, it is necessary to find the various loopholes and think about the best alternatives that can shape the future of LGBTQ+ people and their rights in India or which will contribute to civil rights in India, including right to marriage, right to Adoption , right against discrimination as well as try to make the laws gender neutral.

A. RIGHT TO MARRIAGE:

Right to marriage is a legal right although it is not mentioned anywhere but it is interpreted in the Supreme court in the landmark case of Lata Singh v State of Uttar Pradesh where when a

person gets major he/she has a right to marry but not comprising of same sex marriage which is not still legal or made as a particular law in India. Recently in 2022 the two gay couples filed an public interest litigation for same sex marriage arguing that the state's refusal to recognise them as marriage violated their fundamental rights and there are many other petitions to amend the 1954 Special marriage act. Thus, after reviewing all the research methodology, according to a 2016 poll by the International Lesbian, Gay, Bisexual, Trans and Intersex Association, 35% of Indian people were in favour of legalizing same-sex marriage. So far, where 26 international countries have legalised same sex marriage, India need to take initiative to consider for the rights of LGBTQ+ people.

B. Right against Discrimination:

As a part of social fact, the male and female gender faces much lesser discrimination than LGBTQ people in India. However, the impact of decriminalising the sodomy law make the same sexuality minorities in India brings one step closer to live with dignity and speak for themselves still, there are many laws which can be considered to inclusive of homosexual rights but substantially is not. [10]

i. Discrimination at the workplace:

No citizen shall be discriminated against race, caste, sex and religion or any of them

according to Article 15 which is interpreted in the Naz foundation case and further can be extended in terms at the workplace. Law talks about it in terms of LGBTQ also but has not indubitably adopted in real life. Additionally, the Transgender Persons Act having provisions to protect the homosexuals from discrimination in workplace yet has several drawbacks; it is restrictive in its nature for example, they need to approach to district magistrate if they want to be identified as a gender and required to have sex reassignment surgery which is clear violation of 2014 NALSA judgement, it does not

provide any reservation for transgenders. Looking forward to these conditions when there is no option of good health, education, safe workplace they choose to do begging or sex rackets which gets them arrested under immoral trafficking act 1956 or anti-beggary laws. So there should be particular which protects LGBTQ in deeper terms rather than just giving protection for the name sake.

CONCLUSION

Sodomy law had a greater influence on the people of India after Independence due which the judgements like of NALSA and Navtez Singh Johar became the progressive aspect that brought the influential change in the context of LGBTQ rights and this article proves that the decriminalisation in sodomy impacted economy as well, for example there is depletion in prostitution, alcohol consumptions and other misconducts further considering that there's a lot of talks about human rights internationally and advances made to ban discrimination, recognising homosexual relationships further in 2016, UNHRC created the mandate of the independent expert for protection against violation and discrimination against on the basis of sexual orientation and gender identity and there are many formations of civil society to deal with the same or to foster about the rights of LGBTQ+. It can also be reviewed that even after all these efforts, people are lacking to truly assist the homosexual community in comparison to heterosexual.

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