

ISSN: 2582 - 2942



LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- III

APRIL 2020

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ISSN: 2582 - 2942

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Uncaging the Queer Bird

Malvika Singhal, Sakshi Malik

UNCAGING THE QUEER BIRD

What freedom men and women could have, were they not constantly trapped and tricked and enslaved and tortured by their own sexuality. The only drawback in that freedom is that without it one would not be a human. One would be a monster

~ John Steinbeck

Gender identity is not something that we choose for ourselves. It is the nature's process of giving every person born in this world a different gender orientation and the only duty and task that we humans are supposed to do is embrace and respect that gender orientation with our whole heart. But unfortunately the society that we live in even in 2020 is not as progressive and upfront as it promises to be. India of modern times is a nation where democracy, sovereignty, secularism, and freedom are not just words they are essence of the very constitution that defines its people, culture and their freedom. Today, the citizens of India are more aware of their rights and responsibilities more than ever. With the change in the mind set and living standards India is coming forward as a progressive nation not just in terms of technology, trade, international brand value but also in its culture and society in general. With decisions like allowing women to enter into Sabarimala temple or banning the practice of Triple Talaq or giving death sentence to a rapist of a girl less than the age of 12 years shows how our system is changing socially. These changes would not have been possible if they were not to be initiated by the people of the country with their undertakings, resistance and appealing power. India is a home to people from different cultures, values, beliefs makes the canvas of the nation more colourful yet pretty. When we look around us we see people of all sorts and our constitution provides dignity and equal freedom to every person within the territory of India. Freedom means nothing if it comes with terms and conditions. To think of one can live with restrictions of speech, trade, religion and profession but how does one live with restrictions put on his identity, the very fact that makes him or her a human or the very reason which allows them to live peacefully. Sadly, this freedom that our constitution guarantees to every citizen within the territory of India has failed to guarantee this freedom to homosexuals or the LGBT community. The rights and opportunities enjoyed by the heterosexuals. The members of the LGBT community are still not socially acceptable and are looked upon as indictment to the Indian society.

INSTANCES FROM THE PAST

The ancient India also provides with evidences that even before 18th century the acts of homosexuality were prevalent and were not expressly considered to be an offence. For instance Rigveda, one of the four canonical sacred texts of Hinduism says *Vikriti Evam Prakriti* (Sanskrit: विकृतिः एवम् प्रकृति, meaning what seems unnatural is also natural). The ancient Indian text Kamasutra written by Vātsyāyana dedicates a complete chapter on erotic homosexual behaviour. Historical religious evidence indicates that homosexuality has been prevalent across the India since times immemorial. The Arthashastra, an ancient Indian treatise on statecraft, mentions a wide variety of sexual practices which, whether performed with a man or a woman, were sought to be punished with the lowest grade of fine. While homosexual intercourse was not sanctioned, but it was treated as a very minor offence and several kinds of heterosexual intercourse were punished more severely.¹ In the temples of Khajuraho, there are images of women erotically embracing other women and men displaying their genitals to each other. Scholars have generally explained this as an acknowledgement that people engaged in homosexual acts.² These are the few of many evidences that are present in the literary ancient India that homosexuality was there ever since and has become a criminal offence only after the colonial rule.

LEGAL STATUS

Section 377 of the Indian Penal Code, 1860 states “unnatural offences” and thus criminalises sexual relations between the people of the same sex. The section states as follows:

“377. Unnatural offences: 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.³”

The above section has received constant criticism from human right activists, LGBT community, scholars, advocates and other parts of the society since a long time and urged the Supreme Court

¹ [Vanita & Kidwai 2001](#), p. 25

² <https://devdutt.com/articles/did-homosexuality-exist-in-ancient-india/>

³ <https://indiankanoon.org/doc/1836974/>

to struck down Section 377 as unconstitutional and allow homosexual community in India to live the life of dignity and freedom.

The first time the voice against section 377 and how it is taking away the rights of the homosexual people was raised in 1994 by **AIDS Bhedbhav Virodhi Andolan** but then the petition was rejected by the Delhi High Court, few years later in 2001 another petition was filed in the Delhi High Court for decriminalising section 377 by **Naz Foundation** and this turned out to be a landmark judgement as after eight years the Delhi High Court decriminalised sex between consenting adults of the same gender by stating the provision illegal up to that extent.⁴ In year 2013, this judgement was overturned by the Supreme Court in case of **Suresh kumar koushal v. Naz Foundation** and it criminalised sexual relation between the people of same sex. To justify its judgement Supreme Court said that:

“**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.”⁵

In year 2017, the Supreme Court upheld in its judgement of 547 pages in case of **K.S Putthaswamy v. Union of India** that “right to privacy” is a fundamental right and stated that it is an “intrinsic” part of right to life and personal liberty under Article 21 of the Constitution of India.⁶ This landmark judgment also proved to be fruitful to the LGBT community as sexual orientation of a person is a matter of privacy and becomes the part of the right to life and liberty under Article 21 of the constitution. Therefore, revisiting its decision on case of Naz Foundation the Supreme Court in 2018 decriminalised section 377 by ending a 158 year old burden on the legal system. But as said by the Supreme Court decriminalising section 377 was only the first step⁷ as more needs to be done for the rights and upliftment of the homosexual community both legally and socially.

The LGBT community members still go through social humiliation and are discriminated because of their identity which needs to be changed. More awareness and acceptance need to be there among the people so that the members of the LGBT community which are approximately 2.5 million in India according to the government sources.⁸ They still face social, economic and mental agony that most of them do not choose to come out and remain in the closeted. A large

⁴ <https://timesofindia.indiatimes.com/india/sc-verdict-on-section-377-all-you-need-to-know/articleshow/65695884.cms>

⁵ <https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights/>

⁶ <https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time>

⁷ <https://www.thehindu.com/news/national/highlights-from-the-supreme-courts-verdict-on-decriminalising-section-377/article24880311.ece>

⁸ <https://www.bbc.com/news/world-asia-india-17363200>

section of the society still considers decriminalisation of the section 377 and accepting homosexuals as equals as a problem like,

- Critics said that allowing such type of sexual relations between consenting adults will become a tool for exploitation and it will be difficult to take decisions in such matters.
- It is also against the law of the nature and everything which is against the law of nature causes harm and disturbance in the normal course of life like causing many illness among such people.
- Sex ratio will decline if people continue adopting homosexuality
- Religious communities said that it is against the religious values and the scriptures also considers homosexuality as a sin. The religious texts provides evidences of homosexuality as an offence and punished those who followed it.

Keeping aside the religious and societal taboos the decision of Supreme Court was welcomed by majority part of the country and even international appreciation was received by the country on ending the prejudice.

A LOOK AT THE OUTSIDE WORLD

Life for homosexual people is not easy anywhere in the world. Every day they face discrimination, verbal or physical abuse by people, their faith and society at large. There are still 72 countries with anti-gay laws. And there are 8- 12 countries that provide death penalty for homosexuality majority of them are Islamic countries. There are different laws and takes of different regions on homosexuality rights.

- Asia : homosexuality is legal in most of the Asiatic countries which include china, Taiwan, South Korea , Japan, Thailand, Vietnam , India
- Africa : homosexuality is completely legal and discriminating on this basis is illegal
- North America : homosexuality is absolutely legal and discriminating on this basis is illegal⁹
- South America : some countries accepts homosexuality as legal which are Argentina , Brazil, countries of central America
- Europe: Australia, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Netherlands, Scotland, Spain are countries where homosexuality is absolutely legal

⁹ <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report>

and countries like Hungary, Italy, Greece, Switzerland, Cyprus and few more homosexuality is partially acceptable in some civil or legal forms.¹⁰

POSITIVE IMPACT ON SOCIETY

After section 377, For LGBT Indians, this was the moment of moving from a colonial legal regime to the Indian Constitution's promises of equality, dignity and fraternity. It's been more than 1 year since the Supreme Court abolished section 377, the past year has seen dramatic changes within India and the impacts can be felt beyond imagination. Many big names came out and openly express their true nature and true to themselves. For instance:

1. Dutee Chand is an Indian professional sprinter and current national champion in the women's 100 metres event. She told the Indian Express that she was in a relationship with a woman from her village in the eastern Odisha state, saying she found the courage to come out after the Supreme Court scrapped a colonial-era ban on gay sex last year.
2. Apurva Asrani Award-winning filmmaker, editor and writer Apurva Asrani, who is known to work on successful films like Satya (1998), Shahid (2013) and City Lights (2014), is one of few openly gay men in Indian cinema.
3. Gopi Shankar Madurai is an Indian equal rights and Indigenous rights activist. Shankar was one of the youngest, and the first openly intersex and gender queer, candidates to contest in 2016 Tamil Nadu Legislative Assembly election. Shankar is also the founder of Srishti Madurai Student Volunteer Collective. Shankar's work inspired the Madras High Court (Madurai Bench) to direct the Government of Tamil Nadu to order a ban on sex reassignment surgeries on intersex children and many more.

The Indian cinema is the most great influence on today's generation, it works like a mirror and can help the homosexual people. Movies like Kapoor and Sons, Ek Ladki Ko Dekha Toh Aisa Laga, Bombay Talkies and the most currently Shubh Mangal Zyada Saavdhan.

Also people of LGBT community are publicly coming out to celebrate their freedom by promising the marriage to each other

¹⁰ <https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions/>

In india on 30 march 2019, The two men (Parag Mehta and Vaibhav Jain) smashed taboos and reclaimed tradition with a big fat Indian wedding, replete with all the pomp and rituals of a traditional Jain wedding. change is happening all over the world and people are coming around to the basic notion that love is love, that it need not fit our traditional ideas of marriage or family, and that the rights and responsibilities of marriage should be available to all who seek them. Moreover, a gay couple approached Kerala high court on Monday 27, 2020 seeking a court declaration that homosexual couples are entitled to get their marriages registered. Nikesh PP and Sonu MS also appealed to the court that a provision in Special Marriage Act, which specifies that solemnization of marriage is possible only between a man and a woman, be declared unconstitutional.¹¹

IMPACT ON SOCEITY

section 377 of IPC has been declared unconstitutional but still Indian society has not give its credence to LGBT community. One day everyone in the society will accept it openly, but it will take lot of time for our society to understand and accept homosexual people as still many & many people are not ready to freely open about their sexuality we need to understand that the eternal soul is neither male nor female. Ancient India was known to be openly about sexuality and was discussed freely in books , depicted in paintings, sculptures in temples and in both religious & fictional . The irony is that the India is generally considered the first place to provide education in sexuality and relationships.

Now sexuality in India is a TABOO, we have limited our mind and became so insecure. HINDUISM has never decided anything for anyone. It just presents theories, arguments and stories for every human being to learn. The ideology of Hinduism was and is very much different from the moguls and British, Indian culture is about accepting the world around you rather than exterminating what is against your ideologies, values or shunning it completely and pretending it doesn't exist Most Indians are so rigid that they don't even know their roots. For instance, In Hindu scriptures BHAGIRATHA is born from the union of two women.

¹¹ <https://www.ndtv.com/kerala-news/kerala-gay-couple-moves-court-to-legalise-their-marriage-2170853>

SHIKHANDI MAHABHARATA and ARDHANARISHVARA have also been described. Even the supreme gods Vishnu (Mohini incarnation) and Shiv (Ardhanarishvara) are ANDROGYNE GODS. Originally, Hindus and Hindu religion had the view of any form of love to be natural and tolerable. Known to history is that our Indian culture in India was greatly influenced by Christian and Islamic beliefs and has changed to quite great of extent. Those who have unusual forms in their perspective were punished throughout that era. As The Result, laws are being too greatly affected by it therefore it criminalized sex between gay couples.

CONCLUSION

The Supreme Court by decriminalizing section 377 has brought a hope in the LGBT community for better future. It has put forth strongly a message that India is progressing as nation and its people as a society becoming more accepting and easy to be part of. This move is only going to help us reach the goal where the members of LGBT community will be able to live life without any humiliation and discrimination. With decriminalization of section 377 more laws for gay people need to make only then in true sense India will become a country where equality and freedom is guaranteed to person of every gender and identity. We look forward to make a better world for this community.