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Deconstructing Queerness: Evolving Landscape of LGBTQ+ Community Through Centuries

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ABSTRACT

The paper analyses the conception of queerness as something ingrained in Indian culture, which directly contrasts those who see homosexuality as a Western importation. By studying old texts, the development of morality and current views it asserts that queer is an Indigenous idea that became oppressed by colonial and traditional power. The mention of queer acts can be traced back to a lot of texts which were written between the 4th century B.C.E. to the 13th century C.E. starting from Ramayana to Babarnama. There are a lot of ancient and medieval sculpture which depicts queer acts. The transition happened in the 19th century when such cultural diversities were brutally oppressed by the colonial government. One such act was criminalizing homosexuality by section 377 of I.P.C. It wasn't until 2018 when the Supreme Court in the case Navtej Singh Johar v. Union of India, decriminalized homosexuality and removed a few parts of section 377. Although queer people were no more criminals in the eyes of the law, marriage right was still not provided. Due to this in 2022 one couple Supriya Chakrabarty and Abhay Dang knocked on the doors of the Supreme Court and filed a writ petition, regarding the legal recognition of queer couples. SC in the judgement discussed many things but denied giving such rights. It further discusses the economic inequality and exclusion faced by queer individuals, who are denied basic education, employment opportunities, and access to health care. It also examines the need for constitutional principles for queer empowerment and an inclusive society. Finally, after critically analyzing all the social, political and cultural factors, a holistic picture of contemporary India is given regarding queer population.

Keywords: Indigenous, Colonial, Homosexuality, Decriminalized, Inclusive.

I. INTRODUCTION

“Equality means more than passing laws. The struggle is really won in the hearts and minds of the community, where it really counts.” - Barbara Gittings²

¹ Author is a student at St. Xavier's University, Kolkata, West Bengal, India.

² "Barbara Gittings." Wikipedia, Wikimedia Foundation, 22 May 2024, en.wikipedia.org/wiki/Barbara_Gittings. Accessed 18 Jul. 2024.

India, celebrated as the cradle of democracy and a mosaic of diversity, is home to 17% of the global population. It has a significant queer population and may be one of the largest in the world. In their journey towards LGBTQ+ rights, they have seen highs and lows. When the Indian Supreme Court last year struck down Section 377 of the IPC, which had criminalized homosexuality for more than a century and a half, as it was introduced by the British in 1861, many celebrated it as a praiseworthy verdict. Still, with such a huge legal win, the LGBTQ+ population is subject to seemingly intractable levels of discrimination, and social marginalization from so many public spheres. This paper provides an insight into the scenario of LGBTQ+ rights in India while also focusing on the social, cultural and political factors.

II. THE GENESIS OF A MOVEMENT

The tussle between the queer couple and the state authorities started, long back in 2020. In the beginning, it got started when a queer couple³ filed a petition in the Kerala High Court for the legal recognition of marriage in January 2020. It was in November 2022 that Supriya and Abhay filed a petition in the Supreme Court which brought significant prominence to the matter. On 15th March the Supreme Court had unified all cases and constituted a 5-judge bench which included Chief Justice Chandrachud, Justice Kohli, Justice Kaul, Justice P. S. Narasimha and Justice Bhat. This landmark case became known as *Supriyo @ Supriya Chakraborty & Abhay Dang v. Union of India through Its Secretary, Ministry of Law and Justice, & other connected cases*⁴.

• Petitioners' Arguments and Supporting Interventions

The petitioner demanded to recognize right to marry as a fundamental right, and its scope should be expanded for the non-heterosexual couples. Their argument was, if the state deprives them from such right then it's a complete violation of their fundamental rights regarding equality, freedom of expression, right to privacy and life, which are mentioned in Article 15, 19(1), and 21⁵ of the Constitution of India. They further said that due to the absence of any legal recognition of their marriage, they can't avail any social security benefits just like another heterosexual couple. Thus, Supreme Court being the protector of fundamental rights as per Article 32⁶ of Constitution of India, they wanted the honourable court to intervene into this matter.

³ Nikesh P.P. & Anr. v. U.O.I. & Ors W.P.(Kerala HC) 2186/ 2020

⁴ Supriyo @ Supriya Chakraborty & Anr. v. Union of India W.P. (SC) 1011 (2022)

⁵ Constitution of India, art.,15/ 19, cl. 1(a)/ 21

⁶ Constitution of India, art.,32, cl. 2

- **Respondents' Arguments : Preserving Traditional Institutions and Heritage**

The Government of India argued that marriage in India is a very pious union between a man and a woman. Whereas, homosexual marriage can't perform the basic function of marriage i.e. procreation as it is between the same genders. Thus, the concept of homosexuality is very contradictory to our ancient culture. Although their major argument was, that the judiciary can't play the role of the legislature as the right to make laws is only provided to the legislature, not the judiciary. Along with the government, religious organizations like Viswa Hindu Parishad, Jamiat Ulema -e- Hind etc. had opposed such changes in marriage laws⁷.

- **The Supreme Court's Verdict: A Mixed Bag for the LGBTQ+ Community**

In October 2023, the SC in its judgement refused to grant legal recognition to same-sex marriage in the country leaving it for the Parliament. The court interpreted the constitutional validity of the marriage mentioned under Section 4 of SMA 1954⁸, as a marriage between heterosexual couples and not between homosexual couples. The five-judge bench jointly held that the right to choose a partner is different from the right to marry. The court believes queerness is a natural thing, the state should promote awareness and it's the responsibility of the state to protect this community from discrimination. Although honourable court didn't allowed same sex marriage but validated the marriage between transgender communities, just like another heterosexual marriage.

III. CULTURAL INCOMPATIBILITY & SEPARATION OF POWER

Upon analyzing the reasons opposing the legalization of same-sex marriages, two main justifications come to light. Firstly, the concept of queer marriages is seen as culturally inappropriate. Secondly, it was argued that the judiciary has no right to make laws as lawmaking is the sole responsibility of the parliament.

(A) Ancient Indian Epics and Queer Relationships

- **Ramayana and Queer Relationships⁹**

Ramayana is considered to be the oldest Indian epic. As per traditional beliefs, Valmiki, the great sage had written it. Historians believe that it was written between the 8th century B.C.E. to 3rd century C.E., by a lot of writers from different parts of the subcontinent. If we read Valmiki Ramayana, we will find an instance where Hanuman (devotee as well as companion of

⁷ Paliwal, Aishwarya. "Right-wing outfits oppose legal recognition for same sex marriage" *India Today Group*. May 2, 2023

⁸ Special Marriage Act, 1954, § 4, No. 43, Acts of Parliament, 1954 (India)

⁹ Sundararajans. "Chapter 9–Hanuman enters the inner buildings of Ravana" *Sundara Kandam*. June 17, 2012.

Lord Rama) when went to Lanka and entered Ravana's palace in search of Sita, he saw many women were lying outside Ravana's bedroom, not properly dressed, and were kissing and embracing each other.

- **Kamasutra and Queer Relationships¹⁰**

Another ancient text Kamasutra by Sage Vatsyayana, written between the 2nd – 3rd century C.E., clearly states “it is to be engaged in and enjoyed for its own sake.”. The ninth chapter of Kamasutra which might be written in 4th century B.C.E., talks about Auparistaka (oral sexual acts) between homosexual people and Tiritiya prakriti (transgenders). Vatsyayana says, these relationships (queer relationships) are based upon the bond of love and trust.

- **Hora Shastra and homosexual births¹¹**

Horoscope is one of the most mystical art forms in ancient India. The mother of all horoscope-related texts, i.e. Brihat Parashar Hora Shastra written by Rishi Parashar, most probably between 400 B.C.E. to 400 C.E. He gave two different conditions for homosexuality. Firstly, if a girl child turns out from a bond that was made when Venus was on the ninth day of Saturn, then chances are that she would turn out as a homosexual. And secondly, if a boy is formed from a bond when Venus is on the ninth day of Mars, then chances are that he will turn out as a homosexual. Similar texts are found in an astrological text called ‘Saravali¹²’ which was written by Kalyan Verma during the 4th century C.E.

- **Arthashastra and Manusmriti: Punishment for Queer Acts**

In a similar manner, in Arthashastra too, we can get certain mention of non-vaginal and homosexual intercourse. Chapter 13 of Arthashastra says, to punish those men who have sexual intercourse with other men, by imposing fines on them. Manusmriti might be one of the early texts which clearly distinguishes between several types of gay and lesbian acts. But it never supported such acts, and sanctioned such acts.

(B) Medieval India and queer relationships¹³

Temples have always been an epicentre for Indian culture. Temples of different eras represent that particular time's heritage. It is quite surprising that India of the 21st century is talking about sexual morality and immorality, whereas medieval India of the 11th-12th century speaks

¹⁰ "LGBT rights were accepted in ancient India, Sec 377 must be repealed: Amish Tripathi". *Hindustan Times*. Sep 4, 2017.

¹¹ Toole, Garry. "Homosexuality in the Vedic Horoscope" *Timeline Astrology*. 2012

¹² Ghosh & Chowdhury. "It's all in the stars: Indian astrological texts are full of queer predictions for mortals" *The Print*, Sep 2018.

¹³ Sohail, Sara. "Homosexuality in Medieval India" *Madaras Courier*. Feb 14, 2019.

something different.

- **Temples and Erotic Sculptures**

The Hindu and Jain temples found in the Bundelkhand region of Madhya Pradesh, which are also known as Khajuraho temples, depict humans engaging in passionate sexual activities. It also depicts two men playing with each other's genitals. In a similar manner, sculptures in Konark temple of Odisha depict different forms of eroticism, including homosexual acts.

- **The Story of Alauddin Khalji and Mallik Kafur¹⁴**

Allauddin Khalji, one of the famous rulers of the Delhi sultanate from the Khalji dynasty. On the other hand, Mallik Kafur was a slave of Khalji. Despite that, Kafur became Alauddin's most trusted military general. During his last days, Alauddin made Kafur as the Wazir of the Sultanate. It is believed Alauddin had special affection towards Kafur. Everyone in the court was directed to pay respect to Kafur. It became pretty much clear when a later historian Ziauddin Barani referred Kafur as an eunuch and as someone who had no other work, but to attend sultan's pleasure.

- **Ghazal and Homosexual Love**

Another speculation of queer love can be found through the writings of the great Sufi Amir Khusrau. One of his famous ghazals, 'Chaap Tilak', which is from the perspective of a bride and her love towards her husband. He writes,

Your glance had coloured me with your colour
Oh Nizam, my life is meant for you
Your glance made me your bride
Your glance is sufficient for me to be a wonder

Whatever Amir Khusrau has written, every piece is said to be dedicated to Nizamuddin Auliya, who was a very famous Sufi saint. Even they were buried in close proximity in Delhi.

- **Mughal Regime and Homosexuality¹⁵**

Another example of homosexuality is found in the royal courts of the Mughal regime. In Babarnama, Mirza Rahim mentions homosexuality as a very common practice in royal courts. In Babarnama, Babar says that while he was in Farghana, his family had arranged his first marriage with Ayisha Sultana, but he was completely uninterested in his wife. He used to visit her once or twice a month. During this period of his loneliness, he met a boy in the camp bazaar

¹⁴ Sah, Anuj. "Efflorescence of love: Male Same-Sex Desire in Early Modern India" *Qurbatein, CSGS, Ashoka University*.

¹⁵ "Journal of Babur". Hindustan Times. May 14, 2024

of Uzbekistan, Baburi Andijani. He felt attracted to Baburi but was too shy to interact with him. Although we don't get much historical instances regarding Baburi in any further texts.

IV. DECONSTRUCTING THE NOTION OF QUEERNESS IN INDIAN CULTURE

We are in the 21st century, and there is no need to refer to Manusmriti or Arthashastra which are in themselves very biased and written from a brahmanical and royal point of view. Also, if we analyse the medieval historical facts, there is no concrete proof for such claims, and even if we consider these as true facts, still one can easily argue that it's an example of fiduciary relationship or devotional relationship. Though from a positive side we can say, the concept of homosexuality is not foreign or alien to Indian culture.

(A) Evolution of morality: from tradition to constitution

Laws previously were mostly based upon traditions. Even though these were against the very concept of humanity, no one dared to change it because these carried the power of public morality.

- **The Legacy of Colonialism: Criminalizing Homosexuality**

In the Middle Ages, it was England's monarch Henry VIII for the first time made a separate code for the prohibition of homosexual acts under the Buggery Act 1533¹⁶. And this later made the path for Section 377 in IPC which termed homosexuality as an unnatural act, and prohibited it by state sanctions. There is a possibility as already religions present in India prohibited such acts, so there was no specific opposition from the public at large.

- **The Triumph of Constitutional Morality**

In September 2018, the Supreme Court of India decriminalised homosexuality and struck down parts of Section 377 of IPC, terming it as unconstitutional, in the Navtej Singh Johar v. Union of India¹⁷. The Supreme Court thus affirmed that any law or custom if it is against the very basic nature of the constitution, then that will be subject to scrutiny. And this is what constitutional morality states. Judgments like 2014 NALSA¹⁸, Navtej Singh Johar or Sabarimala¹⁹, all corroborate this particular principle.

V. CONTEMPORARY INDIA'S PERSPECTIVE

On 13th March 2012, the Government of India told the Supreme Court of India, that India has

¹⁶ "Buggery Act 1533." Wikipedia, Wikimedia Foundation, 24 Jun. 2024. en.wikipedia.org/wiki/Buggery_Act_1533. Accessed 18 Jul. 2024.

¹⁷ Navtej Singh Johar & ors v. Union of India thr. Secretary, Ministry of Law and Justice SC 76 (2016)

¹⁸ National Legal Services Authority v. Union of India, 2014 INSC 275

¹⁹ Indian Young Lawyers Association vs The State Of Kerala, WRIT PETITION (CIVIL) NO. 373 OF 2006

an estimated 25 lakh gay population²⁰. As per the IPSOS survey of 2021²¹, almost 17 per cent of Indians identify themselves as non-heterosexuals, which includes gays, lesbians and bisexuals.

- **Raising Awareness and Challenging Perceptions: The Role of NGOs and Research Institutions**

After the 2018 judgement, due to the efforts of NGOs like the Naz Foundation, awareness regarding homosexuality has increased. There was a very popular perception that homosexuality is a very elite concept. As per certain individuals, urban areas are much more accepting. However the findings of CSDS Lokniti²² suggest that the rate of denial regarding sexual relationships between two men or two women is higher in urban, in comparison to rural India. There was another survey published by Pew Research in June 25²³, 2020, which said that India has an overall 37 per cent of the population who believes homosexuality should be accepted by society.

- **Economic Inequality and Exclusion: The Impact of Stigma on Queer Livelihoods^{24,25}**

The Indian economy has two major extremes - on one hand it is the world's fastest growing economy and on the other, it is among the world's most unequal countries with significant economic disparity. As per the census 2011, the overall transgender literacy rate in India is close to 56 per cent, which is much lower than the national average which is 73 per cent. Due to lack of opportunities most trans people indulge into sex work or begging. As per government reports, HIV prevalence among transgenders is much higher in comparison to that of the general population. There is another major problem regarding employment, where most institutions are not queer-friendly. Although recently there are private companies that have inclusive queer policies.

- **The Intersection of Democratic Principles and Constitutional Fraternity: A Critical Examination of Inclusive Governance and Queer Empowerment**

We are in a democracy that mandates the party that gets the largest numbers. But it doesn't

²⁰ "Govt. Submits data on gay population" *The Hindu*, March 13, 2012

²¹ "LGBT+ Pride 2021 Global Survey" *Ipsos*, p.9, June 2021.

²² "Politics and Society between Elections" *CSDS- Lokniti & Azim Premji University*, p.91, April 2019.

²³ Poushter Jacob, Kent O. Nicholas "The Global Divide on homosexuality persists" *Pew Research Centre*, pp. 3-4, June 2020.

²⁴ Badgett, M. V. Lee "The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India" *World Bank Document*. Oct. 2014

²⁵ "India LGBTI- Landscape Analysis of Political, Economic and Social Conditions" *Astraea*, pp.9-11, 2016

mean, the minority has no voice. A democracy is valid where both government and opposition have equal opportunities in the parliament. Even the Preamble of the Constitution of India talks about fraternity which has greater importance from its literal meaning 'brotherhood'. It's the duty of every community, to uplift other communities, if they lag in the race of development, then only the true sense of 'Fraternity' can be achieved.

VI. CONCLUSION

- **Comparing India with Other Countries**

The very basic unit of the society, which is family, is in itself a very different concept in West and India. The defendant side in the *Supriyo @ Supriya Chakraborty & Abhay Dang v. Union of India through Its Secretary, Ministry of Law and Justice, & other connected cases*²⁶ argued, that the countries that allowed to legalise same-sex marriage, are mostly eastern. There are almost no countries from the orient which have allowed it, except Taiwan. The comparison in itself is not very reasonable. As we know, the parameters to understand India and the West are different to each other. Now if we need to compare, why don't we compare India with Nepal, Sri Lanka and Thailand which are part of greater Indian culture? While Nepal has a temporary system to legally recognise same-sex marriage, another hand Thailand²⁷ has recently passed a same sex marriage bill in the Thai senate with clear majority, whereas India has no plan as such of now.

- **The Fight for Queer Rights**

Even if we consider marriage equality is not something very urgent, there is another very important issue regarding queer community, i.e. security of the members of such community. Society in general, views people from such community as weak individuals, someone who is inferior to the so-called mainstream society. On 22 February 2022, a 16-year-old boy named Arvey Malhotra²⁸ suicided because of bullying as his way of speaking and presenting himself was different. On November 2023. Pranshu²⁹ a 16-year-old queer boy from Ujjain, MP committed suicide after the hate comments he received in his Instagram reels. Ultimately, the fight for queer rights is not just about legality or legislation; it's about love, dignity, and the fundamental principle that every individual deserves to live authentically, without fear or discrimination. We are a "sarva dharma sambhav" country, now it's the time to be a "sarva linga

²⁶ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India* SC 1011 (2022)

²⁷ Jonnathan, Kelly "Thailand moves to legalise same sex marriage" *BBC*, March 27, 2024

²⁸ Bhaat, Rohin "Death by suicide of a 16-year-old queer person: Why don't you care when we are bullied?" *The Indian Express*, 29 November, 2023

²⁹ Navya, Kharbanda "16-year-old queer child Pranshu dies by suicide due to bullying; Did we fail as a society?" *Hindustan Times*, Nov 28, 2023

sambhav” country.
