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Missing Colors of Rainbow Community: A Legal Analysis in Indian Context

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ABSTRACT

Human Being, the most powerful specie on this earth, due to the mental intellect it possesses, is still helpless and powerless in few matters which are essential of it's being i.e. into which gender a person will born into, how a person feels about the rules associated with the gender they are born into, to whom they feel attracted too etc. Like a Lion is a King of the Jungle a Human Being is King of the World, but still a little powerless than a Lion because of the boundaries and rules. Nature gave three genders to this world, male, female and third gender, but somehow, we closed our eyes to the existence of third gender and started treating them as someone dangerous and dark. In India it was only in the year 2014 that the Hon'ble Supreme Court recognized transgender as a third gender, to be given rights in the country. Except our transgenders there is another set of community which struggle a lot in the society and are often seen as someone different from the league of being called human being, these are the homosexual community i.e. Gay, Lesbians, Bisexuals. Unlike the Trans-gender the Homosexuals are born into a particular gender but they either do not feel associated with it or are attracted to a person belonging to the same sex. In India Section 377 of The Indian Penal Code explicitly criminalized same sex relationships and was punished rigorously and it was not before the year 2018 that the Hon'ble Supreme Court of India has recognized this relationship by partially declaring Section 377 unconstitutional and violative of Article 14, 19 and 21 of The Indian Constitution. This Chapter will analysis the rights of our unrecognized, hidden community in the legal framework through the Indian Penal Code, Bhartiya Nyaya Samhita, case law journey of these communities while also comparatively analyzing the Indian Scenario with other countries.

Keywords: Homosexuals, Transgenders, Indian Penal Code, Bhartiya Nyaya Samhita, Case Law

I. INTRODUCTION

The presence of homosexuality in India and around the world is from time unknown but it was in the year 1980 that a magazine named 'Bombay Dost' talked about it for the first time,

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and it was not before the late 20th century that the American psychiatric Association and World Health Organization has officially recognized homosexual relationship as normal, after being stated as sin, crime and pathological disorder.

This late recognition has uncountable number of suffers who were treated as sinners, criminals or of unsound mind. Imagine just because of loving someone truly and in all honesty, a person was labelled as being of unsound mind. They were taken to the doctors, forced to take medicines, just because parents were not able to accept that their child might be different from others.

Homosexuality is nothing but just a sexual orientation of a person. This doesn't means that everything else has also changed about that person. That certainly doesn't means that the person is diseased or mentally sick or as believed in India, a victim of some kind black magic.

In this regard it has rightly been said by **Jane P. Sheldon, Carla A. Pfeffer in Beliefs about the Etiology of Homosexuality and about the Ramifications of Discovering Its Possible Genetic Origin**, that, "Homosexuality is viewed by many as a social problem. As such, there has been keen interest in elucidating the origins of homosexuality among many scholars, from anthropologists to zoologists, psychologists, to theologians. Research has shown that those who believe sexual orientation is inborn are more likely to have tolerant attitudes toward gay men and lesbians, whereas those who believe it is a choice have less tolerant attitudes".

The possible negative attitude towards homosexuality can also be contributed to the fact that it is regarded as against the order of nature. The nature has made man and woman, the union of only whom can give birth to a new life, so to continue the society and world as such. But scientists have also tried to laid down some theories in order to understand the why homosexuals are homosexuals!.

In this regard there are basically two theories A) Biological theory which is based on anatomical hormone. It is criticised due to problems with sampling bias, reliability of measures, generalizability, representativeness, controls, operationalization of variables and lack of replication. And still they were not able to find a single, specific gene which can be implicated in an association with homosexuality to date, and researchers have been unable to identify linkages to any genetic region in lesbians. B) psychologically- and sociologically-based studies – It investigate the roles of individual choice and decision-making, identity development, societal hierarchies, gender role stereotypes, role expectations and conformity in the etiology of homosexuality. But still no theory could any explanation to the origin of homosexuality.

II. INDIAN PENAL CODE AND BHARTIYA NYAYA SANHITA

The first draft of the Indian Penal Code was drafted by the First Law Commission of India, chaired by Thomas Babington Macaulay way back in the year 1837, borrowing many elements from the Napoleonic Code and Louisiana Civil Code of 1825. After undergoing few amendments the code finally came into force in the year 1860. Section 377, was part of the original act itself, which states that,

“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.”

A clear interpretation of the section reveals that it punishes homosexual relationships among other form of offences and it is head-noted as ‘**unnatural offences**’. The mere fact that this section carries such a strict punishment clearly establishes that at the time of enactment of Indian Penal Code, homosexual relationship was considered as a crime and not a petty one rather a heinous crime. It is a known fact that penal provisions are drafted as per the situation of the society and it can be said to be the best way to understand any society at any given point of time.

But the society is also never static and it keeps on changing and this change can be seen in the freshly enacted, yet to be enforced, Bhartiya Nyaya Sanhita, 2023, which is set to replace the Indian Penal Code, 1860, and has added many new provisions and deleted old ones signalling towards a fresh wave of thoughts in the society.

Talking about deleting some old provisions, Bhartiya Nyaya Sanhita has not incorporated the provisions of section 377 of the Indian Penal Code in any form. This can be regarded as a positive attitude towards our rainbow community but complete removal of this section might also lead to some adverse consequences.

III. DECRIMINALIZATION OF SECTION 377 AND RECOGNIZATION OF THE THIRD GENDER – A JOURNEY

A) Decriminalization of Section 377 of the Indian Penal Code -

The first concrete efforts towards the decriminalization of section 377 of the Indian Penal Code was made in the case filed by the Naz foundation in year 2001, a non-governmental organization, challenging the constitutionality of the section in the High Court of Delhi. The

main objective of this law suit was to sought the legalization of homosexual relations between the consenting adults.

However this petition was dismissed by the High Court of Delhi in the year 2003 on the grounds of non-governmental organization, Naz Foundation did not have the locus standi i.e. the foundation was not getting effected by the section 377. The Naz foundation filed an appeal against the dismissal in the Hon'ble Supreme Court of India in the year 2006, challenging the dismissal of the petition by the High Court of Delhi. The Hon'ble Supreme Court directed the High Court for reconsideration of the petition.

In the year 2009, the High Court Delhi passed a landmark Judgment decriminalizing homosexuality among consenting adults and held that section 377 violates the right to equality, right against discrimination and protection of life, guaranteed under the Constitution of India.

However this order of the High Court of Delhi was overturned by the Hon'ble Supreme Court of India in the year 2012 after various appeals were filed before it, challenging High Court's order on the ground of it's authority to change a law. The Hon'ble Supreme Court held that the decision of the High Court is legally unsustainable. The division bench, comprising of Justice G S Singhvi and Justice S J Mukhopadhaya, observed that the High Court had overlooked the fact that a minuscule fraction of the country's population constitutes LGBT, and that in over 150 years less than 200 people were prosecuted for committing an offence under section. The Hon'ble Supreme Court, furthermore recommended that the parliament address the matter because only they had the power to amend the existing laws.

In the year 2015, Shashi Tharoor introduced private member bill to decriminalize homosexuality, but the Lok Sabha voted against it.

In the year 2016, five petitioners moved to the Hon'ble Supreme Court of India against the Section 377. These were S.Johar, journalist Suni Mehra, Chef Ritu Dalmia, Hotelier Aman Nath and Business Executive Ayesha Kapur. The petition claimed that their rights to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity, and equality, alongwith other fundamental rights, which are guaranteed to every citizen of India, under part III of the Constitution of India are being violated by the Section 377 of Indian Penal Code. In the year 2018, The Hon'ble Supreme Court of Indian started hearing on these petitions. A five-judge Constitutional bench was created which was led by the then Chief Justice of India, Justice Dipak Misra and comprised of Justice R.F. Nariman, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud and Justice Indu Malhotra.

The September 6th of 2018 marks the day when the Hon'ble Supreme Court of India decriminalized homosexuality. The bench delivered four separate, but concurring judgements that decriminalized, sex between two consenting adults irrespective of their gender. The apex also overruled its previous judgement of the year 2016. This landmark is titled as *Navtej Singh Johar v. Union of India*. The bench also quoted Dr. B.R. Amedkar's idea of Constitutional morality which stated that, justice, liberty equality and fraternity cannot be attained without the organs of the State being loyal to Constitutional Morality. When a provision is challenged to be against the fundamentals of the Constitution, be it the case for minority or majority, it has to be dealt with justly and in consonance with the constitutional principles. If LGBTQ is declined their basic rights, the courts that have been the statue of justice for so long will be under a big question mark. If any provision is found to fail the parameters of the Constitution it should be abrogated.

B) Recognition of Third Gender –

It was in the year 2014 that the Hon'ble Supreme Court of India recognised the rights of the third gender, which was and still is to an extent treated with a lot of discrimination. The case is titled as *National Legal Service Authority v. Union Of India*. Two writs were filed to protect and safeguard the rights of individuals that belong to the transgender community. The first one was filed by the National Legal Services Authority, which is constituted under the Legal Services Authority Act, 1997. And this writ was followed by the another writ petition which was filed by Poojya Mata Nasib Kaur Ji Women Welfare Society, a registered association for the protection of the rights of the Kinnar(Transgenders).

The issues raised revolved around the gender identity and the protections that were necessary to safeguard the rights and interests of a person who identify themselves with the third gender. Second issue was whether a person who is born male but has female orientation has the right to be identified as a female; the same question arises when an individual uses surgery to change his/her sex. The third issue was whether a person who does not identify either as a male or a female has the right to be categorized in a third gender.

The judgement was delivered by a two-judge bench comprising of Justice K.S. Radhakrishnan and Justice A.K. Sikri on 15th April 2014. The court made a distinction between *Biological sex and Psychological sex*. It said *no gender identification based on biological sex and gave full importance to identification based on psychological sex*. The Court ruled that all provisions in the international conventions including the Yogyakarta Principles must be recognized and followed, provided they align with the fundamental rights guaranteed by Part

III of the Constitution. It stated that transgenders fall within the purview of the Indian Constitution and thus are fully entitled to the rights guaranteed therein. Article 14 guarantees equality to “any person” which means man, woman, and transgender, and as such, they are also guaranteed equal protection of the law. They have equal rights in employment, health care, education, and civil rights. Discrimination on the grounds of sexual orientation and gender identity represents inequality before the law and unequal protection of the law and violates Article 14. The Court further added that transgender individuals have freedom of expression under Article 19 whereby they can talk, dress, act, and behave in a manner they like. They also have a right to live a life of dignity under Article 21. The Court held that the State and Central governments must grant transgenders full recognition in the eyes of the law so that they can get education and healthcare without being subjected to any kind of discrimination.

The Court also decided that Hijras, Eunuchs are to be treated as the “third gender”. It made various declarations and directions to the Centre and State Governments such as to operate separate HIV Zero-Surveillance Centres, provision for separate public toilets, and appropriate medical care in hospitals for transgenders

IV. THE ROAD AHEAD

Even after the decriminalization of the same sex relationships, the challenges of our rainbow community have not ended. The biggest challenge ahead is the same sex marriages, even though the judgement has been passed and consensual gay sex is being decriminalized but the same sex marriages are still not approved in India. In the recent case of *Supriyo v. Union of India*, The Hon’ble Supreme Court of India has dismissed the petition seeking the right of same sex marriage, on the ground that it is for parliament to formulate legislation on it. The Hon’ble CJI observed that, the court can neither strike down or read words into the special marriage Act to include same sex members within the ambit of the 1954 law. It is up to the parliament and state legislature to enact laws on marriage. However, at the same time, the CJI says that the relationship of marriage is not a static one. He holds that queer persons have an equal right and freedom to enter into a union. He said the failure of the state to recognise the bouquet of entitlements which flow from a union will result in a disparate impact on queer couples, who cannot marry under the current legal regime. He further added that a union or a relationship between queer couples should not be ignored or discriminated by the state.

Another challenge before the community would be to adopt a child. As they cannot have a child naturally their only recourse is to adopt a child but it seems like long distanced dream.

There is still no official data about the LGBT population in India and without any official data it is more than difficult to frame any law for them.

V. CONCLUSION

The decriminalization of homosexuality has definitely been one of the landmark step of India towards the acceptance of change. This has also ensured the sexual minorities a few steps further in living with dignity and has given them more confidence which in result is also affecting the development of our country. Decriminalization has helped in the acceptance by the society and the families of the people. Though the judgement has helped the LGBT community in the issue of the discrimination and other aspects but it still needs an anti-discrimination law which would empower them to built productive lives and relationships The government still need to make many changes in order to ensure that LGBTQ community is not denied public services. There is still a long road ahead for the transgender people that they need to endure. There will be many challenges in front of them, but this new India knows, recognizes and values people irrespective of their sexual orientation. The homosexual and transgenders are now openly accepting their sexual anatomy and are being proud of it. I would like to conclude this chapter with the following words of **Martin Luther King Jr** –

“Darkness cannot drive out darkness: only light can do that.

Hate cannot drive out hate: only love can do that.”

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