INDIA AND HOMOSEXUALITY: A JUDICIAL - CUSTOMARY INTERPRETATION

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Abstract

One of the key features of the Indian Constitution is the Independence of the Judiciary and it is one of the basic structures of the Indian Constitution. The prime duty of the Judiciary is to maintain socio-economic justice throughout the country. The Supreme Court of India, constituted by the Indian Constitution, is the apex court of India and its decisions are binding on all other courts within the territory of India. On 6 September, 2018 the Supreme Court of India, made a landmark decision by declaring consensual homosexuality between two adults is no more a criminal offence. This paper briefs about the whereabouts of Section 377 IPC and the decriminalisation of the Section. With the Section being decriminalised, this paper aims at bringing out the various perspectives of the major religions of the country and the public opinion on this benchmark verdict. The Indian society is mostly based on customary rules and regulations, propounded by the Vedas. Savigny, the chief exponent of the historical school of jurisprudence clarifies that Customs prevail before the Statutes. The Indian Constitution under Art 13(3) states, a custom which has a force of law, is considered to be a source of law and it shall be quoted in specific areas for decision making in the Courts. This paper contextualises customs and homosexuality, thereby validating the verdict of Supreme Court of India. The paper compares the International and Indian perspective of Homosexuality. The paper culminates with the pros and cons of decriminalisation of Section 377 IPC.

KEYWORDS: Section 377, Decriminalisation, Homosexuality, Judiciary, Custom.

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INTRODUCTION

The term 'Homosexuality' can simply be defined as the sexual relationships between people of the same sex. Though it may sound simple, there lies a huge arena of emotions, physical and mental anomalies behind this definition. People who are homosexual, in particular males are known as 'gay' and the homosexual females are known as 'lesbians'. The marriage among them is known as 'gay marriage', which is legal in many countries. The initial evidential documents supporting the existence of homosexual relationships have been received from the history of Ancient Greece. There were many homosexual marriages among the Christians and non-Christians communities.[2] Researches prove that homosexuality was strongly opposed by the teachings of the Clergy. Though the upper classes found the homosexual relationships as immoral, the lower classes accepted such relationships as a general one during the periods before the Industrial Revolution. The pre modern era depicted about such relationships in its art, paintings and poetry.[3] It is evident that historic figures like Alexander the Great, Leonardo da Vinci, Michelangelo had relationships with people of their same sex.[4] Even having scarce popularity, the term 'homosexuality' appears in a print form for the first time in 1869 in an unknown German pamphlet in the 142nd paragraph of the Prussian Penal Code and in few instances in the Draft of the Penal Code for North German Confederation authored by Karl Maria Kertbeny. This entire pamphlet endorsed the repeal of Prussia's sodomy laws. These are not the only incidents that have the records of Homosexuality, but there are many other historical records found in the literature of many religions such as Hinduism, Buddhism, Islam and a few trending fictions throughout the Indian history. The formation of the LGBT community, who were the Gay Rights Activists, started and attained the spotlight only after the Industrial Revolution. Thus the history of the country and the world is filled with evidences proving the extant of homosexuality in the society. Initially, objected by many sections of the people as it was considered immoral, in the emerging trends this opinion has reversed and many people in the society have turned open towards such homosexual relationships and marriages.

[2] https://www.ilga.info/index.html
[3] http://www.umiacs.umd.edu/users/sawweb/sawnet/news/news337.txtg
[4] http://www.umiacs.umd.edu/users/sawweb/sawnet/news/news337.txtg

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INTERNATIONAL PERSPECTIVE OF HOMOSEXUALITY

Having a population of a huge number, the LGBT community has been fighting for their basic Right to Equality and Right to Life along with Personal Liberty, which are not just the Fundamental Rights of many countries but also the basic structure of the Written Constitution, emerging as a cornerstone of the Constitutions of many countries including India. Facing the demands and the opposition over the penalizing laws of homosexual relationships, countries have given up their staunch stand on penalizing the homosexuals. Many countries have generally stood along with such communities tolerating their demands and have also given the recognition that was needed. As the prime function of a State is to maintain internal peace and security along with the protection of rights, many States have made amendments to their laws regarding homosexual relationships, in order to avoid any form of discrimination. In many countries, homosexual couples have legal right of adopting children. From this we can conclude that the attitude towards the homosexuals has taken a huge turn. However, still many countries and cities have retained their staunchness in the statutory prohibitions on homosexuality, with opposition of its citizens being rapid. Progression towards the ban of same-sex marriages stood as a main topic of discussion throughout the world in the late 1990s and early 2000s. But with breakthroughs in science, the conception of homosexuality has seen many changes. In 1974, homosexuality was removed as a form of mental disorder and since then homosexual acts has been decriminalized in various countries.[5] Presently, North America, some parts of South America, Australia, Member States of European Union have recognized Homosexual unions and have given them all rights and protection from discrimination.[6] India, Russia, Singapore, Malaysia, Indonesia, parts of Africa and Europe have no penalizing laws against the homosexual unions but does not recognize them or protect them from discrimination.[7] Bangladesh, Pakistan, Tanzania and Zambia of Africa have Life Imprisonment as punishment for involving in homosexual acts. Afghanistan, Iran, Nigeria, Sudan, Yemen, Saudi Arabia, Qatar Somalia, Brunei and UAE allow Death Penalty for homosexuality.[8] Many countries of the world supported the LGBT Rights Declaration in the General Assembly of the UNO and the Human

[5] https://psychology.ucdavis.edu
[6] https://www.weforum.org
[7] https://www.weforum.org
[8] https://www.weforum.org

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Rights Council in 2008 and 2011.[9] A few countries strongly opposed this declaration while another sect of countries including India did not support the declaration. With the rapid augmentation, countries have started to realize there is nothing wrong in homosexual unions and the same has to be protected from discrimination and exploitation.

INDIAN PERSPECTIVE OF HOMOSEXUALITY

Many LBGT people on India remain behind the closets in fear of discrimination along with torture from their families, as the India society feels the acts of homosexual as shameful and sinful. Though homosexuality in India is legal, same-sex couples cannot get legally married in our country. The Indian Judiciary and Legislature has been tolerative towards the homosexuals and the Transgender. In 2016, the transgender community was given constitutional right to register themselves as the Third Gender.[10] They are called as *hijras* commonly and bear different names in different states of India. The Government protects them through different welfare schemes, right to employment, medical schemes like free surgeries in government hospitals etc. There are approximately 4.8 million transgender people throughout India.[11] In 2009, the High Court of Delhi in Naz Foundation v. Govt. of India decided that Section 377 IPC was a direct violation of fundamental rights guaranteed by the Indian Constitution.[12] The Section 377 IPC stated, "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".[13] In 2012, the Ministry of Home Affairs conveyed its strong opposition towards the decriminalization of homosexuality.[14] Later the Central Government reversed its stand and stated the decriminalization of homosexuality was no legal error. In 2013, The Supreme Court set aside the 2009 Delhi High Court decision of decriminalizing consensual homosexual activity. [15] On 18 December 2015, member of the Indian National Congress, Sashi Tharoor introduced a bill of repeal of Section 377 IPC. The Bill was rejected in the Lower House in a 71-24 vote.[16] Finally,

[9] https://www.ohchr.org
[10] The Transgender Persons (Protection of Rights) Bill, 2016
[11] Abraham, Rohan. 30 Nov,17 "All you need to know about the Transgender Persons Bill, 2016". The Hindu.
[12] WP (C) No. 7455/2001
[13] Edition 2018, The Indian Penal Code, Bare Act, 2018, Professional Book Publishers.
[14] Mahapatra, Dhananjay 23 Feb,12. "Centre opposes decriminalization of homosexuality in SC". Economic Times.
[15] Mahapatra, Dhananjay 12 Dec, 13. "Supreme Court makes homosexuality a crime again". The Times of India.
[16] "India parliament blocks MP's bill to decriminalize gay sex". Rappler

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on 6 September 2018, in the case of Navtej Singh Johar v. union of India the Supreme Court issued a verdict stating Section 377 IPC as unconstitutional as it was a sheer violation of fundamental rights and thereby legalizing acts of homosexuality.[17] Many activists and experts have suggested the Government of India, to legislate laws for the recognition, marriages, settlement, adoption and civil rights of the same-sex couples.

INDIAN HISTORY AND HOMOSEXUALITY

There are various instances of homosexuality recorded in Hindu Mythology. The country's largest religion, Hinduism has depicted homosexuality as natural phenomenon and its epics portray various homosexual relationships. In Mahabharata, Shikhandi is born as female but identifies herself as male and subsequently she gets married to a woman. It also depicts that, Arjuna takes a vow to live as the third gender and transforms him into Brihandala, later becoming dance teacher for a princess. The Naradasmriti states homosexuality is incurable and it restricts them from marrying a person of opposite sex. The Rig Veda states "*Vikruti evam Prakriti",* which means diversity is what nature is all about or what seems unnatural is also natural. The Kama Sutra, a text on human sexual conduct, describes homosexual men as *tritiya-prakriti* and gives a detailed description about their anatomy along with their practices. It also talks about lesbians and calls them *svairini.* The transgender people worship the deity Ardhanarisvara, which is the androgynous incarnation of Lord Shiva and his wife Parvati. Aravan, a hero whom Lord Krishna married after transforming him as a woman, Lord Ayyappa, who was born from the union of Lord Shiva and Lord Vishnu's female incarnation Mohini, mark the existence of homosexuality in the Indian society. In the Mughal Empire, homosexuality was a common phenomenon, especially in the Court life. Many transgender scholars were in high posts of the kingdom. Mughal Emperor Babur recorded in his memoirs that he has crush on a boy. There were much more incidents in the Mughal empire. Thus instances of homosexuality are available in historical and mythological texts world over and India is not an exception to this.

RELIGIOUS VIEWS ON HOMOSEXUALITY

Throughout history, Hinduism though not evident but it has always supported the idea of Homosexuality. The Epics, Vedas, Smiritis, Upanishads, Shastras has commented and described

[17] WP (Cr) No. 76/ 2016

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about homosexuality in a great detail. Marriages between heterosexuals and transgender Hindus happen every year in South India and it is known as the Koovagam festival. In the village of Angaar in Gujarat, the Kutchi community has a ritualistic transgender marriage being performed during the time of Holi festival for the past century. Ishaak, the bridegroom and Ishakali the bride are both men, which is unusual. Thus, these residues show that Hinduism has always recognized homosexual unions.

Looking at Christianity, we can see that, there is clear restriction imposed on homosexual relationships. "You shall not lie with a male as with a woman; it is an abomination". (Leviticus 18:22) and "If a man lies with a male lies with a males as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them". (Leviticus 20:13) are the two verses from the Bible, which evidently opposes homosexuality. Various verses of the book of Genesis, Romans 1, 1 Corinthians, 1Timothy has expressed its discontent and contempt against homosexual unions. But the Clergy, at present, has been open to the individuals who identify themselves as a member of LGBT and has priests, preachers who have identified themselves as homosexual. The churches have now constantly solemnized the marriages of same-sex couples in the countries where homosexual marriages are legalized. This marks the acceptance of the homosexuals in the Christian world.

In Islam, the Quran is the paramount source of law. The Quran mentions about the destruction of the people of Lot by the wrath of God, as they entered into lustful carnal relations between two men. According to Muslim Jurisprudence, the acts of homosexuality are punished with death. Though there are many incidents of homoeroticism in the Mughal Emphire, homosexuality was strictly prohibited in Islam. It is said that the Islamic countries like Saudi Arabia, UAE and others have death penalty for engaging in acts of homosexuality is due to the strict rules of the Quran. The Muslims have entirely polarized themselves and state that no good Muslim is a gay. This is the current view of Islam on homosexuality. The literature drawn from Hindu, Buddhist and other religions of the world signifies the existence of same-sex union in different forms.

DECRIMINALIZATION OF SEC 377 IPC

On 6 September 2018, in the case of Navtej Singh Johar v. union of India the Supreme Court issued a verdict stating Section 377 IPC as unconstitutional as it was a sheer violation of

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fundamental rights and thereby legalizing acts of homosexuality.[18] This perception of the Indian Judiciary is most welcomed as it speaks for the rights of the populace who at present face various forms of discrimination. The people who were once dominated and suppressed have now started to gain their rights and have a chance to establish their self respect. Equality before law and Equal protection of the Law is the basic purpose of Article 14 of the Indian Constitution. This verdict passed by the Supreme Court of India, which is binding on all other Courts of India, has protected and safeguarded the sole purpose of Article 14. When we look upon this matter from the view of Article 21 of the Indian Constitution, Right to life with Dignity has been protected by this verdict as it gives the freedom and right to live in the society just like the others without any struggle and discrimination based on sexual orientation. The Transgender Persons (Protection of Rights) Bill, 2016 stand as the basic tool for protection of interests and rights of the transgender community. Just as how the transgender people have received their recognition and their rights, this judgment will further let the LGBT community to claim their rights. Acting upon this judgment, legislations shall be passed by the Indian government in order to protect the rights of the members who identify themselves as LGBTIQ.

CONCLUSION

When we consider the present Indian societal setup, it is evident that there is a huge positive response towards the judgment passed in favor of the homosexuals. But still there is a stereotype in the society towards marriage and they expect all marriages to be as heterosexual because only then there shall be procreation and rearing of children. The failure to acknowledge the emerging trends of science have made them come to such stereotype. The availability of various IVF methods, artificial insemination method, surrogacy and other methods of procreation of children can be adopted, if the lack of procreation of children is the only hindrance for the objection of homosexual marriages. Once when there are laws and a uniform code regarding the marriages, settlement, adoption, reproduction rights are framed all such stereotypes shall break and lose its worth. So, it is in the hands of the Legislature, Executive, Judiciary and Society at large to accept the feelings and emotions of homosexuals, as their also are of the same blood and flesh. Once the perception about them is changed in the minds of the people everything shall fall in place and there shall be peaceful coexistence among all in the nation and the world.

[18] WP (Cr) No. 76/ 2016

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