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Legal Aspects *of* *Homosexuality* *In* *India*

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Legal Aspects of Homosexuality in India

By: Kajal Sharma

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

– Barbara Gittings

ABSTRACT:

This article examines gay marriages in India as an unresolved conflict that has been effectively concealed. It also aims to understand and justify different facets of homosexuality, such as its development, social attitudes and responses to such relationships, and various landmark judgments. Marriages are considered sacred, consecrated, pious as per India's traditions and culture, which explicitly also provides that marriage is a union just between a man and woman. Unlike most of the developed countries where same-sex marriages have been declared to be lawful, the scenario is not similar in India, and therefore they are often condemned and denounced here. Change is the only thing that is constant in our lives, and evolution is a part of growth; henceforth, the Supreme court of India has scrapped section 377 of the Indian Penal code, thereby also explained that according to the proper analysis of Section 377, sexual intercourse of any sort between consenting adults was not "unnatural." The apex court's decision on Section 377 of the Indian Penal Code demonstrates the exceptional bravery of the Indian Supreme court.

KEYWORDS: GAY MARRIAGES, SECTION 377, HOMOSEXUALITY, SAME-SEX, UNNATURAL SEX, GENDER, ARTICLE 15, LESBIAN, GAY.

INTRODUCTION:

The term homosexuals mean "of the same sex" since it is a combination of the Greek word homo, which means "same," and have a Latin base, which implies "sex." Homosexuality is a sexual preference wherein two persons of the same gender are attracted to each other sexually and otherwise. Individuals who are homosexual, males specifically, are referred to as "gays," whereas females are referred to as "lesbians." A homosexual marriage, also known as gay marriage, is a union of two people who are of the same sex/gender.¹ The Indian judiciary has abolished colonial-era legislation that discriminated expressly against homosexual and transgender individuals and broadly interpreted Article 15 of the Constitution to preclude discrimination based on sexual identity and orientation. However, certain human rights, such as same-sex marriage, have been left out.

PAST TRACES OF HOMOSEXUALITY:

Homosexuality is also not a modern concept. In Hindu mythology, even cases of homosexuality exist. Hindus, Buddhists, Muslims, and modern fiction literature also bear witness to the presence of same-sex love in several forms. Historical sources such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads, and Puranas relate to homosexuals. Also, there are reports that activities of homosexuality are frequent among sannyasins, who cannot tie the knot of marriage. Thus incidences of homosexuality are available in great historical texts the world over, and India is not an exception. Manu's principles, the core work of Hindu law, acknowledge a 'third gender' that may include articulating non-traditional sex and homosexual conduct. Furthermore, according to Kama Sutra, homosexual men were also known to marry.² The Arthashastra, an ancient Indian exposition on statecraft, mentions a vast range of sexual practices that were sought to be penalized with the lowest satisfactory grade, whether done with a man or a woman. While homosexual intercourse was not prohibited, it was considered a minor offense, and many types of heterosexual intercourse were prosecuted more harshly.³

¹ Available at:

<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>

² Vātsyāyana. (1994). The complete Kāma Sūtra : the first unabridged modern translation of the classic Indian text by Vātsyāyana : including the Jayamangalā commentary from the Sanskrit by Yashodhara and extracts from the Hindi commentary by Devadatta Shāstrā. Park Street Press. ISBN 0892814926. OCLC 28799425

³ Vanita & Kidwai 2001, p. 25

In Gujarat, in the tiny village of Angaar, a religious ritual of the transgender wedding is practiced mostly during the Holi festival among the Kutchi people.⁴ Their traditional traces can be seen. For 150 years, this marriage is celebrated every year, which is uncommon because both are males Ishaak, the bridegroom, and Ishakali, the bride. History is, therefore, rife with evidence that homosexuals existed in history.⁵

In an obscure German pamphlet published by Karl Maria Kertbeny in 1869, the word homosexuality made its first appearance in print in paragraph 142 Penal Code of Prussia. The repeal of Prussia's discriminatory laws was advocated in this pamphlet.⁶ In Japan, homosexuality has been recorded for over centuries-long now and was linked to the warriors' Buddhist monastic life and culture. This same-sex culture of love has given birth to the deep values that document literature and in the forms of paintings as well.

In the same way, the society of Thailand has long been characterized by Kathoey, "lady-boys," and Thai kings had both men and women as their lovers. While Kathoey can include basic effeminacy or transvestism, it is mainly considered third sex in Thai culture. They are approved by society in general, and Thailand has never had a legal ban on homosexual behaviour or same-sex relationships, or unions.⁷

The Chandela dynasty constructed the temple complex between 950 and 1050. The temple's grotesque paintings represent homosexuality. Related temple art can be found in the 13th-century Sun Temple in Konark, Orissa, and Buddhist monastic caves at Ajanta and Ellora, Maharashtra.⁸

⁴ Available at:

<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>

⁵ Arvind Kala, *Invisible Minority: the unknown world of the Indian homosexual* (Dynamic Books, New Delhi, 1994)

⁶ Ruth Vanita and Saleem Kidwai (Eds.) *Same Same Sex Love In India : Readings From Literature And History* (St. Martin Press, 2000).

⁷ International Bar Association. Conference (2000 : Amsterdam, Netherlands) (2014-05-22). Sexuality and human rights : a global overview. Graupner, Helmut, 1965-, Tahmindjis, Phillip. Binghamton, NY. ISBN 9781134732579. OCLC 880877782

⁸ Available at:

<https://www.bbc.com/news/world-asia-india-46620242>

Devdutt Patnaik, a renowned mythologist, has often discussed the existence and recognition of homosexuality in the Hindu religion." The term homosexuality and legislation against 'unnatural' intercourse were enacted around the world by authoritarian might, and while they had a tremendous impact on subsequent perceptions, they were hardly universal nor eternal. "They were, it should be kept in mind, manifestations of ideas that were directly inspired by the sex is a sin ideology in the Christian Bible," he states.⁹

Indian practices and rituals have been influenced by religion. While there are no direct prohibitions on homosexuality's ethics in Hinduism, it has taken several viewpoints on the matter, ranging from including homosexual characters and themes in its scriptures to being impartial or hostile to it. The current Personal Laws in India, including the Special Marriage Act, are "Hetero" centric and do not include "Homosexual" marriage, which is direct prejudice against the community as mentioned earlier and a denial of Article 15 of the constitution. Homosexual couples want to be included and accepted without prejudice.

Although we have seen that legal interventions have moved in the last few years around the world from the right to get privately intimate, the right to have equitable homosexual relationships, the right to be individuals, to be protected from discrimination and harassment, and services to the right to have relationships, it is not such a linear transition from the emphasis on rights, from giving legality, to civil security, to civil acceptance. So a host of states have relaxed or repealed legislation in recent years that prohibited same-sex relationships. Change is the only constant; evolving with time is the only way to grow.

LEGALITY OF HOMOSEXUALITY IN INDIA:

Acknowledgment of the fact that the Supreme Court of India has recently abolished the illegality of homosexuality in India under Section 377 of the Indian Penal Code, evidence from opinion polling suggests that public recognition could still be a long way apart. Although the number of Indians who reject identical-sex marriages, their perceptions regarding homosexuals have eased over a while.

⁹ Available at:
<https://www.bbc.com/news/world-asia-india-46620242>

Between 1990 and 2014, the percentage of Indian respondents who thought "homosexual behaviour is never legitimate" in the WVS(World Value Survey) dropped from 89 percent to 24 percent, a significant drop from an absolute majority to a tiny minority. This transition does seem to have arisen chiefly in the absence of substantive challenge to the legislation. The most rapid decrease in anti-homosexual opinion occurred in the late 1990s, although the Delhi high court's Naz Foundation decision legalizing homosexual relationships came only in 2009.

The Centre for Study of Developing Societies (CSDS) and Azim Premji University performed research of people in eight states in 2017-18, finding that 28 percent approved or somewhat agreed with the argument that sexual interactions between two men or two women should be acknowledged by society, 46 percent opposed, and the rest had no viewpoint.

According to a 2016 poll commissioned by CSDS and the Konrad Adenauer Stiftung of young people (aged 15 to 34) in 19 states, only 24% of young people accepted or somewhat approved same-sex marriages, about the very same percentage as their acceptance or rejection of live-in relationships¹⁰ Two Females, Asha Thakor and Bhavna Thakor, former aged 30 and the latter 28, plunged to their deaths in the Sabarmati river on June 10, 2018. They left two suicide letters nearby Ellis bridge. "We have left this world to reside with each other," a message inscribed with red lipstick near the Sabarmati river. We could not be together, and the universe would not let us. "This world did not encourage us to remain together." Another note, scribbled in the same manner, was discovered nearby on a discarded plate: "This world will not permit us to live together. When are we going to catch up again? When will we see each other again? Maybe in the next birth". They committed suicide because their homosexual relationship had been ruined by the perspective of people towards same-sex relationships.¹¹

Section 377 corresponded to 'unnatural offenses,' which states that anybody who willingly engages in carnal intercourse which is against nature's order, with any man, woman, or animal

¹⁰ Available at:

<https://www.livemint.com/Politics/nLQiPp15UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html>

¹¹ Available at:

<https://timesofindia.indiatimes.com/city/ahmedabad/two-women-in-love-end-lives-along-with-the-daughter-of-one/articleshow/64548839.cms>.

shall be punished by life imprisonment, or by imprisonment of any description for a period up to ten years, plus a fine.¹²

In 2018 on September 6, the Supreme Court of India announced a landmark decision, decriminalizing Section 377 of the Indian Penal Code and allowing homosexual relationships among consenting adults in private. The Supreme Court decided that voluntary adult homosexual relations are not illegal, stating that gender orientation is a normal process over which individuals have no power.

Following are five significant cases that have led to the decriminalisation of Section 377:

- ***Naz Foundation v. Govt of NCT Delhi***¹³

The Naz Foundation is a non-governmental organization that aims to combat AIDS and other health problems. One issue arose in this situation, and that was, Whether Section 377 needs to be repealed or not? The Court answered this question in two ways: the first is (Right to Life, Article 21), which states that no one should experience life without integrity or anonymity, and the second is (Right to Equality, Article 14&15), which states that Section 377 is a breach of Article 14 because it is an unfair prejudice. It discriminated against Homosexuals as ethnicity, as well as against Consensual Intercourse. Section 15 states that no one should be discriminated against because of their gender.

- ***Suresh Kumar Koushal v. Naz Foundation***¹⁴

In this case, the Indian Supreme court restored Section 377 of the Indian Penal Code. In this case, the two objections emerged. The first is that homosexuality is a crime that Parliament can only decriminalize; the Court cannot get entangled. The second is that the right to privacy would not adhere to homosexuality. The individuals who revealed their identity in society and voluntarily communicated their sexual orientations after 2009, following the judgment in Naz Foundation case, after Suresh Kumar Koushal's decision by the two bench judges of the apex court, the community labelled them as criminals or offenders again.

¹² Section 377 of the Indian Penal code.

¹³ 160 Delhi Law Times 277

¹⁴ Civil Appeal No. 10972 OF 2013

- ***NLSA v. Union of India & Ors*¹⁵**

Many of India's current regulations apply to all genders, but only men and women came under the ambit of the term gender. No law protects the interests of the transgender community. One of the reasons that the transgender community faces discrimination in society is because of this issue.

The Supreme Court restructured multidimensional protections to address the problem's loopholes, which include:

- Article 14- Every individual, including men, women, and transgender people, has the right to vote.
- No individual should be differentiated or prejudiced just because of their gender orientation, according to Article 15.
- Privacy, sex, identity, and dignity are both covered by article 19 (1) (a) and can be included in article 377.
- Article 21 - The right to live with integrity and the right to decide their sexual orientation.
- Transgender people now have the right to self-identify their gender, fair rights of "all people," an official acknowledgment of their gender identity due to this case (men, women, transgender).

- ***Justice K.S. Puttaswamy v. Union of India*¹⁶**

The Supreme Court of India has decided in this very case that the right to privacy is a fundamental right in this instance. Justice Chandrachud authored the lawsuit, which was heard by a panel of nine judges. He said that it is the duty of the Supreme Court to correct the error in the Suresh Kumar Koushal case. He also claims that sexual orientation is an integral attribute of privacy and that Part 3 of the Indian Constitution protects this attribute by articles 14, 15, and 21. The notion of a Minuscule Minority was dismissed in this case.

- ***Navtej Singh Johar v. Union of India*¹⁷**

The last case involving Section 377 was this. Navtej Singh Johar filed a petition in this case, alleging that Sec 377 violated his constitutional rights to privacy, freedom of

¹⁵ AIR 2014 SC 1863

¹⁶ WRIT PETITION (CIVIL) NO 494 OF 2012

¹⁷ W. P. (Crl.) No. 76 of 2016

expression, liberty, human dignity, and security from discrimination. The apex court held that discrimination based on sexual preference violated the right to freedom, that criminalizing sexual intercourse between adults in private violated the right to privacy, and that sexual orientation is an integral part of self-identity, and that refusing that orientation would be a breach of the right to life.

CRITICAL ANALYSIS:

In India, marriage is always considered sacred and pious. Indian society considers wedlock as one of the most crucial and paramount phases of an individual's life. To marry and procreate is of fundamental importance in Indian culture and society. The very notion of sexual relationships between identical genders is precisely opposite to the purpose of marriage, and this would ultimately lead to the end of one's line of succession unless they adopt a child, which is again an issue yet to be resolved, the judgment in *Navtej Singh Johar v. Union of India* only legalized the homosexual relationship but was quiet and did not mention anything related to the marriage of homosexuals in India. The lack of sexual equivalence in these relationships obstructs children's natural growths who are put in their custody. They will be denied the opportunity to get feel either love of the father or motherly love. In India, one out the two in a homosexual couple can adopt and raise a kid independently, but both of them will not be the legal parents of that child. Marriages of homosexuals are considered unnatural. As a result, the Sodomy statute must be strengthened. If homosexuality is legalized, the human race will face extinction due to homosexuals' lack of reproductive capacity. The tension between homosexuals and heterosexuals can be seen in the institution of marriage in India and around the world, where sodomy law is in force. This controversy arises from the reasons offered in favour of and against the two forms of relationships, which raises compassionate questions about the social and legal representation of sexual minorities, namely whether or not such recognition should be granted.¹⁸

The Ministry of Health and Family Welfare in 2017 launched health-related resource material to be used as part of Saathiya, a national teen peer-education program. The material covers many topics, including homosexuality. "Yes, teenagers always fall in love," the material says. They may be attracted to a peer or someone of the same or opposite gender. It is perfectly

¹⁸ Available at:

<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>

normal to have strong feelings for others. Adolescents must understand that these relationships are built on mutual consent, loyalty, accountability, and dignity. It is okay to express those feelings to the person with whom you have them, as long as you do so in a polite manner.¹⁹

CONCLUSION:

In accordance with this study, it can be inferred that, after the Navtej Singh Johar decision in 2018, section 377 of the IPC was eventually decriminalized. After this ruling, Section 377 was declared unconstitutional. Members of the lesbian, gay, bisexuals, transgender, and queer community will now exercise their rights under Articles 14, 15, 19(1)(a) 21 of the Indian Constitution. Even after section 377 of the Indian Penal Code was declared unconstitutional, Indian society still has to recognize the LGBTQ community. As a consequence, members of these groups are hesitant to reveal their sexual orientation or sexuality. They were afraid that society would reject them and that they would be unable to live everyday life.

Enabling them to have private voluntary intercourse has not given them any additional rights that a heterosexual has been bestowed with. Marriages between homosexuals have the power to reject the exclusive framework of sexuality.²⁰ They oppose misogyny and the patriarchal dominance that results from it, and as a result, they are penalized for not fully engaging in the day sustaining of female oppression. They still have to combat fights daily. The rise in homosexual suicides is causing an unsettling scenario that shouts to us that now is the time to pay attention to the LGBT community's needs. Every life lost serves as a reminder that prejudice persists in our community. The greatest tribute to the deceased will be to see someone like them lead the life they desired, with grace and with their chosen one. Only when each part of the country develops, the whole country will progress.

This case study is for information purpose only. Nothing contained herein shall be deemed or interpreted as providing legal or investment advice.

¹⁹ "Homosexual attraction is OK; 'NO' means no: Health Ministry rises above Indian stereotypes". The Financial Express. 21 February 2017. Retrieved 21 February 2017.

²⁰ Available at:
<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>