
ANALYSIS OF SOCIAL AND LEGAL TRANSFORMATION AFTER DECRIMINALIZATION OF SECTION 377 IPC

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ABSTRACT

Homosexuality has been for a long time seen as a criminal act but then came a very landmark case in 2018 which decriminalized section 377 of the Indian Penal code. After this act the private homosexual relations were made legal. This became important because this change would now have a great impact on certain section of the society and the long drawn battle fought by them to their dignity and equated homosexuality to sexual perversity. The coming of the judgment has been a step in a positive direction but there is a still a long way to go as the society is yet to change the perceptions regarding the homosexuals. The authors through this Article have analyzed the legislative and societal journey which so far has been undertaken by the LGBTQ community since decriminalization of Homosexuality in India.

INTRODUCTION

Nearly four years have been passed since the reading down of Section 377 of IPC by the Supreme Court in so far as it criminalizes the consensual sex between two same sex adults. Since then is there any change came in our existing gendered laws and in the perception of society regarding the homosexual people.

Honestly, and sadly, the answer is no. The Decriminalization of homosexuality has not brought any social change in society so far, pertaining to respect, treatment, and acceptability of LGBTQ community people.

Moreover, we can understand that mere enactment, repealing or struck down of laws; usually not bring any big change in society in such a small space of time. But here what is more worst is non-deliberation by our legislature on making and amending the laws, so that the queer community people would also able to realize their constitutional right that is guaranteed to them in Indian constitution.

LEGISLATIVE JOURNEY

The day 6th September, 2018 was a historic day of queer community. The judgment on that day had given them hoped that the step taken by the Apex Court of India towards decriminalization of homosexuality would pave the way of recognition of civil rights of LGBTQ community.

They thought that after this judgment other wings of the state i.e. Legislature and executive would also take some milestone efforts that would empowered the sexually marginalized community to realized their constitutional rights as guaranteed to other citizens under Constitution of India.

But after a span of 4 years, when no such further step were taken not even the deliberation for civil rights, then the confidence of this community on the state has started depleting. Their confidence further depleted when the Centre opposed the petition in Delhi High Court in Udit Sood and Ors. V. Union of India¹, “filed for seeking recognition to the same sex marriage under various personal laws, by saying on affidavit that there is a “legitimate state interest” in limiting recognition of marriage to persons of opposite sex only and the institution of marriage is not

¹ Sofi Ahsan, Centre opposes same-sex marriage in Delhi HC, says not comparable with ‘Indian family unit concept’, The Indian Express, (30 October 2021, 9:29 PM) (<https://indianexpress.com/article/india/same-sex-marriages-legal-recognition-centre-7204303/>)

merely a concept relegated to the domain of privacy of an individual”. “The acceptance of the institution of marriage between two individuals of the same gender is neither recognized nor accepted in any uncodified personal laws or any codified statutory laws”.²“Also argued that the legalization of homosexuality by the Supreme Court in the case of Navtej Singh Johar v. Union of India was a limited declaration to decriminalize a particular human behavior which was a penal offence under section 377 IPC. The said declaration was neither intended to nor in fact, legitimize the conduct in question”.³

Further, argued Observation in K.S Puttuswamy Judgment and Navtej Johar case do not confer a fundamental right to seek recognition of the same-sex marriage.⁴

Further, opposed the urgent hearing of these petition by arguing that “You don’t need marriage certificate for hospitals, nobody is dying because they don’t have marriage certificate”.⁵

This imprinted a very bad impression on the hopes of queer community from our legislature arena.

Further, our executive wings particularly the police official is no less than the legislature. This is apparent from the various petitions that have been filed in various High courts across the country regarding the protection from violence by the police official on the same sex couple who want to stay together. The police official instead of granting protection to these couples, they on fake complaints by parents/guardian of these couples starts harassing these couple and take every steps to make sure that these people don’t live peacefully together and by doing this violates their fundamental right to live with a partner of one’s choice.⁶

Our justices in Navtej Singh Johar case, knows that these types of problem will occur, therefore Justice Nariman in his separation concurring judgment⁷ has made a remarkable observation that all government officials, including and in particular police officials, and other officer of the Union of India and the States be given periodic sensitization and awareness training of the plight of such persons and also urged government to give wide publicity to the court’s order to counter the stigma of mental disorder associated with homosexuality.

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶Shafin Jahan Vs. Asokan K.M. and Ors, (2018) 16 SCC 408. .

⁷Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

But as we can see no such compliance of observation on the part of govt. has been undertaken by the govt., which cause the LGBTQ people to still suffer a lot.

Today the legal status of LGBTQ is that they have almost no civil rights as other citizens whose other citizens enjoys on account of rights guaranteed to them under Indian constitution and in various statutes.

The only relief they have is that now their status of being a criminal has been seized. But that is not suffice, constitution guaranteed them all the fundamental right as it to other peoples. So, despite of constitutional guarantee why the LGBTQ community still not able to realize those rights. Why can't they marry and registered their marriage, why can't they adopt a child, why they faced a social discrimination be it in their student life or professional life, why they are still afraid to declare their sexual identity despite of their so much wish to do so, why they still faces violence from their family and police whenever they express their will to choose and stay with their same sex partner, why still homosexuality are perceived as a mental disorder and these people are subjected to treatment.

The only institution of the state that is helping the queer community as the last ray of their hope is Judiciary. Whether it is their marriage under personal law or special marriage act, be it the protection from the police harassment, in every way judiciary is providing relief to the LGBTQ couple. This is evident from the relief orders of various High Courts that have reduced the grievances of the queer people to a great extent.

For instances, Recently Madras High Court's Justice Anand Venkatesh in *S.Sushma and another v. Commissioner of Police and others*⁸, where lesbian couple reached out to the Court for relief from harassment by the police official in the fake missing complaint lodged by their parents, issued guidelines for the sensitization of police, judiciary, educational institutions and health care professional regarding LGBTQ+ issues, by stating that till the legislature don't comes up with an enactment, the LGBTQ+ community cannot be left in a vulnerable atmosphere where there is no guarantee for their protection and safety and also made various notable observations regarding the societal attitude and need of law for LGBTQ+ community.

Justice Anand Venkatesh before issuing these direction voluntary underwent a psycho-educative sessions with clinical psychologist and had interaction with transgender persons to

⁸ S Sushma v. Commissioner of Police W. P. No. 7284 of 2021

overcome his prejudices and to understand the problems of homosexual people and break his pre-conceived notion about LGBT+ community.

These kinds of steps by the judiciary preserves the faith not only of LGBTQ+ community but people across India, that there is at least one institution that is always there for remedying their grievances when there hopes from other institution comes to an end.

SOCIETAL JOURNEY

Does law brings change in society or society brings change in law always remain a hot topic of debate, various jurist propounded their theory for proving their own notions about it, still this remain a grey area on which more research is required to be done.

Here, if we see homosexuality decriminalization, it doesn't working much in legal cases, then acceptability of homosexual relations so soon in society is a far distant reality take much more to achieve it.

This is because of the account of today's situations. Society is not accepting the queer community people, parents still don't want that their children to study in a school where queer community people are also studying, many of the employees in an office does not want that their peer is a homosexual or LGBTQ.

This forces this sexual marginalized community to hide their identity, live the closet life, where deep inside this hurts their soul and dignity. They always remain in a fear of discrimination, termination as the case may be.

Children's who discover themselves as homosexual or transgender or any category person of LGBTQ, they afraid to tell their sexual orientation to their parents, whom they trust so much, they tell their parents everything that is going in their life, except this. Means, we can imagine a child of 15 years of age, who is naïve in everything, except on this.

This happens because of environment in which we all brought up. We see whenever there is talk regarding LGBTQ+ community, and then people in their private space always disgust it, no matter what they express in public sphere.

Sometimes this disgustness comes because of societal hatredness towards this community, but most of the times people hate these queer community from deep inside their heart.

This sounds very bad, but sadly this is the harsh reality. This is not a situation in rural area or urban area or for that matter educated and uneducated people, these apply to all categories of people not only across India but across the world.

In India, despite the decriminalization of Homosexuality, despite the judgment in NALSA case, which gives right to each individual to choose their sexual identity, Despite of that we see, there is no change in acceptance of LGBTQ+ community people in society at large.

If we take a look around, how many people we know who are from this community, is there any transgender person studying in the same school in which our little brother/sister or child is studying or is there any person from this queer community working with us as our peer member.

The answer mostly we find in negative only. Even if some people express their sexual identity to parents, the parents instead of supporting them, they consider it as a mental disorder and force their children to undergo a harsh treatment. We have also seen various LGBTQ+ couple approaching the High court for protection from police and parents harassment.

All this shows that, though law have decriminalize the homosexuality but society doesn't.

CONCLUSION

So far, we have analyzed that no legislative and societal changes has come after decriminalization of homosexuality, it is only judiciary which is granting protection and led the queer community people to live with dignity.

But we have also seen that mere judiciary pro-activeness would not be of much help without proper laws and change in societal attitude.

Our judiciary works on constitutional morality whereas our legislature primarily works on societal morality. No matter which govt. is in power, they bring only that laws which woo them votes.

The other major issue is that even though our legislature brings laws that grant full civil right i.e. marriage, adoption and so on to these LGBTQ+ community, but despite of that the discrimination and violence against these LGBTQ+ community people would not get stop.

No matter how much stringent law would be made but that would not remedy the problem from its roots unless there is societal change. This is because any law success or failure mostly lies upon the will of the people.

For instances, we have made dowry prohibition law so many centuries ago but despite of that, dowry is still very much prevalent in India, while on the other hand if we see law to stop sati pratha or for that matter child marriage, it has completely eradicated the sati pratha and child marriage to a maximum extend. Because in the initial law there is lack of public will while on the latter laws there were public will.

So, therefore enactment and amendment of law is necessary but equally societal change is also necessary for that law success. When there would be societal change “legislature” would also make all laws that would help queer community to live with dignity and realize all their constitutional rights.

Social awareness campaign, counseling centre, media propagation about the situation and rights of LGBTQ+ community is necessary, in order to break the people preconceive notion about the LGBTQ+ community. Common peoples particularly of India, because of their upbringing in a very conservative culture, they are not aware of these kinds of relationship. They don't know the difference between “Gay, Lesbian and Transgender”, for them all are same.

So all these soft methods of awareness spreading would help to get rid of these problems. Earlier too these methods brought a fruit full results in lots of Social change campaigns be it using the contraceptive device for population control and sexual transmission disease prevention or corona vaccination drive and so on. This LGBTQ relations, is very new to people and it not easy for common people to accept this so early. It is a gradual and continuous process.

This we can understand, that even Honorable High court Justice Anand Venkatesh have to undergo psycho-educative session for breaking his preconceived notion about LGBTQ+ community,⁹ so how we can expect from common people, who are not even aware about his own basic right to be aware of queer community basic rights.

⁹Ajay Kumar, A big thank you for Justice Anand Venkatesh, The LEAFLET, (Nov. 3, 2021, 9:29PM), <https://www.theleaflet.in/a-big-thank-you-for-justice-anand-venkatesh/>.

This is gradual changing process that would take a lot of efforts and patients. But along with this our legislature have to make laws, so they these queer community people at least till then have some legal protection if not societal acceptance.

This is necessary on the part of legislature on the account of the mandate of Constitutional principle, and also due to implied direction issued in K.S Puttuswamy¹⁰ case and Navtej Singh Johar¹¹ case.

¹⁰Justice K.S.Puttaswamy (Retired). v. Union of India And Ors. (2017) 10 SCC 1.

¹¹Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.