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## HOMOSEXUALITY IN INDIA – DECRIMINALISATION OF SECTION 377 OF IPC

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### ABSTRACT

It is not an unknown fact that homosexuality has been a taboo in India since times immemorial. Homosexuals were ill- treated, discriminated against and not given their due rights. After years of struggle the scenario changed and there was hope for some light, when the Honourable Supreme Court on 6 September 2018 decriminalised Section 377 of the Indian Penal Code in the landmark judgement of Navtej Singh Johar v Union of India, to the extent it penalised same sex relations between consenting adults. This was the first step in the fight for achieving equal rights for the LGBTQ community. However, we still have a long way to go, as even now homosexuals do not enjoy some rights, such as the right to marriage. Also, even though they have been given legal recognition, some people still have not accepted them as a part of society.

Though homosexuality is considered unacceptable according to Indian culture, this has not always been the case. There are several examples in Indian history which prove that homosexuality was in practice. The Mahabharata and Ramayana depict stories of homosexuality. Several famous kings and rulers of ancient and medieval India were known to be homosexuals. The Khajuraho temples have images of women and men engaged in homosexual sexual activities.

This research will discuss the problems and obstacles experienced by the LGBTQ community in India even after abolishing section 377 of the Indian Penal Code. It further deals with influence of COVID-19 virus on the LGBTQ community. In addition, we have studied the attitude of society about the LGBTQ community, the legal situation of LGBTQ rights, history of legal fights of LGBTQ and campaign against section 377.

A mix of primary and secondary research has been done. Various books, journals have been reviewed. The analysis and research of reports occurred exclusively from the legitimate official websites. All the case laws have been collected from e-data sources such as SCC online, India Kanoon and Manupatra.

**ABBREVIATIONS**

PIL	Public Interest Litigation
IPC	Indian Penal Code
HC	High Court
SC	Supreme Court
AIDS	Acquired immunodeficiency syndrome
ABVA	AIDS Bhedbhav Virodhi Andolan
LGBTQ	Lesbian, Gay, Bisexual, Transgender, Queer

**LIST OF CASE LAWS**

<b>NAME OF CASE</b>	<b>CITATION</b>
Naz Foundation V Government of NCT of Delhi	160lh Law Times 277
Suresh Kumar Kaushal v Naz Foundation	Civil Appeal No. 10972 OF 2013
National Legal Services Authority v UOI	Writ Petition (civil) No. 604 of 2013

Justice K S Puttaswamy v Union of India	(2017) 10 SCC 1)
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## **CHAPTER 1**

### **OBJECTIVES**

1. To find the constitutional validity of section 377 under Indian Penal Code, 1860.
2. To analysis the distinction between public perceptions of morality and constitutional rights.
3. To study the history of LGBT community in India, 15 years of long battle.
4. To identify the violation of basic human rights harassment and violence among the LGBT community.

### **RESEARCH MEHODOLOGY**

1. A thorough assessment of 0bstacles and challenges experienced by the LGBT community even after decriminalising of homosexuality.
2. A particularised examination of the history of legal conflicts of LGBT and campaign against section 377.
3. A detailed examination of impact of Covid-19 on the LGBT community.

### **HYPOTHESIS**

- The overruling of Honourable Supreme Court over the decision of Delhi High Court in Naz Foundation v. Government of NCT of Delhi<sup>1</sup> seems to be re-examined and the decision is not fair.
- There is a need of separate laws of LGBTs in India.
- Section 377 is violation of human right.
- AIDS in LGBT's cannot be controlled.

### **LITERATURE REVIEW**

This research will discuss the problems and obstacles experienced by the LGBTQ community in India even after abolishing section 377. It further deals with influence of COVID-19 virus

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<sup>1</sup> Naz Foundation V Government of NCT of Delhi AIR 2010 CrLj 94 (Del):160(2009) DLT 277

on the LGBTQ community. In addition, we have studied the attitude of society about the LGBTQ community, the legal situation of LGBTQ rights, history of legal fights of LGBTQ and campaign against section 377.

A mix of primary and secondary research has been done. Various books, journals have been reviewed. The analysis and research of reports occurred exclusively from the legitimate official websites. All the case laws have been collected from e-data sources such as SCC online, India Kanoon and Manupatra.

## **CHAPTER 2**

### **INTRODUCTION**

The concept of homosexuality is ancient which is found in almost all countries and even in many mythologies. The biggest example of this can be found in Hindu mythology where the Hindu deities many times favoured same sex relation. From the ancient times homosexuality has been favoured by many people and by many kings and queens across the world. In 21st century almost all countries guarantee basic human rights to their citizens. Therefore, many countries legalized homosexuality but some countries like India did not do so. The researcher in this research is trying to focus on the Honourable Supreme Court decision on homosexuality and will analyse the effects of such decision in relation to humanity and find out if such type of relation can be termed illegal or not. The researcher will be focussing on many landmark judgments of India as well as foreign judgements.

## **CHAPTER 3**

### **HISTORY OF LEGAL BATTLES OF LGBTQ COMMUNITY**

Discrimination on the basis of sexual orientation and sexual identity has been very common in India. Ever since the Britishers came, they enacted various discriminative legislations which targeted the LGBTQ community, especially the transgenders:

- The first act was passed by the British in 1897 as an amendment to the Criminal Tribes Act, 1873. This act targeted the 'Eunuchs' which was a derogatory word used for transgenders. Eunuch was defined as a person who was 'reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the

IPC, or of abetting crimes under these provisions.’<sup>2</sup>

- Society was biased against eunuchs and they were required to register themselves with the local authorities. They were suspected of committing crimes against children like kidnapping or castrating them. Under the Act of 1873, they were not allowed to adopt or be a guardian to a child and were prohibited from dressing as women and dancing in the streets.
- The Telangana Eunuchs Act, 1919 also criminalised acts done by transgenders. Section 4 of the Act states that if transgenders are found dancing in public places dressed as a female, they will be arrested without a warrant.
- During the nineties, transgender activists were very active and took to the streets to protest in metropolitan cities like Bangalore for demanding basic human rights for the LGBTQ community. However, there was no mass movement yet which demanded for striking down of Section 377 of the Indian Penal Code, 1860.
- The first PIL challenging the constitutional validity of section 377 was filed by the AIDS Bhedbhav Virodhi Andolan in 1994 before the Delhi High Court, which was dismissed in 2001.
- The turning point came in 2001, when the Naz Foundation filed a petition, before the Delhi High Court challenging the constitutional validity of Section 377 of IPC. The petition, which was a PIL was filed as a reaction to the injustice that had happened with the people in Lucknow, who were arrested merely for distributing condoms as a part of their HIV Health Rights work, as the police thought them to be homosexuals.
- The PIL was dismissed by the Delhi HC in 2004, but was heard by the Supreme Court when an appeal was filed in 2006. The SC then directed the HC to take up the petition. Thereafter many organisations and human rights groups organised mass protests against the filing of this PIL and the LGBTQ community had to suffer violence at the hands of the police.
- Finally, in the landmark judgement of Naz Foundation v, Govt. of NCT of New Delhi and Others (2009) section 377 of IPC was struck down and was held to be violative of the constitution of India. But this judgement was overturned in 2013, in the case of Souresh Koushal v. Union of India. <sup>3</sup>Finally, on 6 September 2018, in a fresh petition filed by Navtej Singh Johar, section 377 was held to be unconstitutional and arbitrary

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<sup>2</sup> Akanksha Madan, “Decision of Honourable Supreme Court on Section 377 of Indian Penal Code is it just and fair?” published in Articles section of [www.maupatra.com](http://www.maupatra.com) 17 (2014)

<sup>3</sup> Suresh Kumar Kaushal V Naz Foundation Civil Appeal No. 10972 OF 2013

of Articles 14, 15 19 and 21 of the constitution of India in so far as it criminalises consensual sex between same sex individuals.

## **CHAPTER 4**

### **HOMOSEXUALS IN INDIA- TYPES**

Transgenders in India are called as Hijras or they are also known by the derogatory term of eunuch. Transgenders, male or female have organised themselves into communities, popularly known as Jamaats. The head of the jamaat is called as Aravani. The Aravni acts as a maternal figure for the new Hijras, who have to perform several functions for the Aravani including earning money by begging and sex work. At the same time the hijras have to adhere to the rules of the community. The responsibilities of the gurus are offering emotional support to the chela sans advising them against castration. The members of the Jamaat are bound together by a feeling of unity and kinship. Before entering the jamaat, the hijras have to perform complex rituals. The hijra community is more closely connected in North India than in South India. Following third gender sects have been present in India since ancient times in Hinduism:

- The Aravni or Ali:

Transgender women in Tamil Nadu are known as Aravani. The history of transgender participation in Indian queer visibility movement dates back to the mid-1990s. It was observed that the queer community is at risk of being infected with AIDS or HIV. The WHO and other international organisations contributed money for the welfare of the queer. The SIDA- Social Integrated Development for Aravanis, fought for achieving civil rights for aravalis. Their efforts were successful when the Tamil Nadu government announced that transgenders might chose either male or female as their gender in their identity documents. In 2003 the state committee on transgender welfare was set up, which recommended the government for working towards improving the quality of life of aravanis. The suggestions of committee included sensitizing in schools, counselling for the MSM (Men who have sex with men) group, etc. The Tamil Nadu government has also reserved seats for the aravanis in educational institutions.

- Hijra:

Hijras are the most popular group of transgenders in India. They are mainly found in northern India. This is the only transgender group which performs castration. Though there is a widespread belief that hijras are taken away by the hijra community at birth,

the truth is that most of them join the hijra community out of their own will. The hijras worship Bahuchara-Devi, the Hindu demigoddess of transsexuality.

## **CHAPTER 5**

### **ROLE OF INDIAN ACTIVISTS**

Even though homosexuality is considered to be a taboo in Indian society, there were many activists who took up the initiative to talk about this subject and campaigned for demanding rights for homosexuals.

- The first study on this topic was undertaken by Shakuntala Devi, who was also popularly known as the 'Human Computer'. In her book 'The World of Homosexuals' in 1977, she opined that ignorance on sexual matters is a major cause for the suffering of homosexual community. This book contains interviews of homosexual men which were conducted by Shakuntala Devi herself.
- The All-India Hijra Conference was held in 1981 in Agra and was attended by 50,000 people of the homosexual community.
- India's first ever pride parade, known as the Friendship Walk was organised in 1999 in Kolkata and was attended by 15 members.
- The first public protest was organised by the AIDS Bhedbhav Virodhi Andolan in New Delhi outside the police headquarters on 11 August 1992 because 15 people had been arrested from Connaught Place in New Delhi on grounds of engaging in homosexual activity. The protest played an important part in spreading awareness about the importance of decriminalizing homosexuality throughout India.
- The ABVA presented a report in the year 1991 on the Status of Homosexuality in India'. This was the first report to demand queer rights in India and provided the first source on homosexuality in the country. It asked for repealing section 377 of IPC along with other sections of the Navy, Army and Air Force which criminalized same gender sex.
- In 1994, when the Tihar Jail denied permission to ABVA activists to distribute condoms to the prisoners on the ground that it would encourage same sex relations, ABVA filed a PIL before the Delhi HC demanding striking down of section 377. The PIL was later dismissed in the year 2001.<sup>4</sup>

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<sup>4</sup> Ankit Srivastava & Dr. Vivek Kumar, "Section 377 and Legal Activism in India" 6 IJRAR 31(2019)

- The Humsafar Trust, founded by Ashok Row Kavi (India's prominent LGBTQ activist), campaigned for health rights of the LGBTQ community and even held the LGBTQ film festival in Mumbai. A flash mob was held in Mumbai at August Kranti Maidan on 14 March 2019, which was supported by the Humsafar Trust.
- Ashok Ravi is also the founder of India's first magazine for queer men called Bombay Dost. Many actors of the film fraternity became a part of this magazine, thus further promoting the cause of homosexuals.

## **CHAPTER 6**

### **ROLE OF ART AND LITERATURE**

- The book 'Lotus of another colour' authored by Rakesh Ratti told the experiences of South Asian homosexuals.
- Bomgay, 1996 was India's first gay film. The plot focusses on how queer Indians were living in maximum cities in the country. However, the film did not get a commercial release.
- Directed by Deepak Mehta, 'Fire' was a film which followed the storyline of the homosexual relation between two women. But the film could not be screened properly as the Shiv Sena vandalised the theatres in Mumbai, Delhi and other places. There was mass violence across the nation after the release of this film. Maharashtra's then chief minister believed the film to be against Indian culture and traditions.
- In 2010, the movie 'Aligarh' was released directed by Hansal Mehta. It depicted the struggle of Professor Ramchandra Siras, who was a professor of Marathi at Aligarh Muslim University. He was suspended from the university as he was suspected to be in a homosexual relationship. Assailants broke into his home when he was engaged with his male partner and filmed him, while blackmailing him at the same time. Days before the landmark judgement of 2009 which overturned Section 377, Professor Siras was found dead. Thus 'Aligarh' was an impactful film which created awareness among the citizens regarding the problems which the LGBTQ community faces.
- After the Naz Foundation judgement in 2009, the Kashish Mumbai Queer film festival- India's largest LGBTQ film festival was launched in 2010. Bollywood actor Celina Jaitley extended support to the same.
- Shobha Kumar, an entrepreneur, founded the Queer-ink publishing house, which not only published queer fiction but also provided LGBTQ Indians with educational resources.

## CHAPTER 7

### HOMOSEXUAL MARRIAGE UNDER PERSONAL LAWS

Marriage, besides being a fundamental right, can also grant homosexual couples other legal and constitutional rights along with health and economic benefits. Some of the legal rights which come with being legally married are:

- Economic benefits under the Employment Provident Fund Scheme, 1952 and Workmen's Compensation Act, 1923. These benefits are not made available only to married people.
- Maintenance, succession and other legal rights are also available only to people with a legally recognised marriage.
- Single and unmarried couples are not eligible to adopt and therefore the LGBTQ community is also not eligible.

In India, marriage is referred to as a heterosexual institution associated with procreation. Till now, homosexuals have not been allowed to marry under the personal laws of different religions.

- Marriage under the Hindu Law is governed by the Hindu Marriage Act, 1955.<sup>5</sup> Section 5 (iii) of the Act states the words 'bride' and 'bridegroom' while laying down the conditions of marriage. Hence marriage under Hindu Law is one between heterosexuals.
- Section 60 of the Christian Marriage Act, 1872 uses the words 'man' and 'woman' while specifying the age of marriage. Here emphasis on the words man and woman indicates that Christian marriage is of heterosexual nature.
- Muslim marriages are not governed by any statute. In Islam, marriage is an agreement with the goal of procreation, hence it is a marriage between heterosexuals.

## CHAPTER 8

### RELIGIOUS ART

Homosexuality was prevalent in India since ancient times and the proof of the same can be seen in various art forms.

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<sup>5</sup> Lawoctopus.com, available at <https://www.lawctopus.com/academike/decriminalizing-of-section-377/> (last visited on 10 May 2022)

- The Khajuraho walls in Madhya Pradesh show a carving of two women who are holding each other.
- A painting in the Kandariya Mahadev Temple in Khajuraho shows three women and one man involved in sexual intercourse.
- The Shiva temple in Ahmedabad shows two women sexually involved with each another.

## CHAPTER 9

### FACTORS AFFECTING HOMOSEXUAL ORIENTATION

1. International Contributing Factors- a major question which arises is whether homosexuality is a product of the environment or it is the outcome of a person's upbringing. For many years, the American Psychological Association treated homosexuality as a mental illness. Behaviourists argue that certain disparities in sexual and gender identity may be explained by the roles that families assign to children, such as masculine and feminine stereotypes. It is important to mention the Parental Manipulation Theory here. This theory explains how parents force their children to be heterosexuals.
2. External Factors-
  - i. Sadness- Many times the relation between parents and children is of a toxic nature and parents are not able to understand their child's issue. Women may turn homosexual due to lack of maternal love, while men may turn to homosexuality as a result of being teased by their peers for not being masculine enough.
  - ii. Lack of physical strength in men-insecurity, lack of confidence and self esteem in boys can turn them towards homosexuality. Due to rejection by members of the opposite sex, men seek acceptance from the same sex. It may happen that a boy is not good in sports at school, or that he lacks physical strength. Peers make fun of him and tell him that he acts like a woman. This reduces the boy's self confidence, and he decides to change his sexual orientation.
  - iii. Emotional and physical abuse<sup>6</sup>- fear, or a childhood trauma makes people want to be in a homosexual relationship. Males may be afraid of females or vice versa

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<sup>6</sup> Vikram Kolmannskog, "India's decriminalisation of homosexuality understood in light of contact" 25 Gestalt Review 112 (2021)

due to their own bad experience. Example, females may not be able to trust men because their father did not care or love them in their childhood. men may not like women as their mother's behaviour was narcissistic and abusive towards them.

- iv. Sexual abuse during childhood- men who are raped or sexually assaulted during childhood think that were raped or assaulted due to their own fault, that they were not masculine enough hence they were raped.
- v. Addiction to sex- Gay people are addicted to things that are sexually abusive, and dangerous for health. They are obsessed with sex, just like drug addicts are with drugs.
- vi. Angel issues-sometimes men who are ridiculed for being unmanly and weak fantasize or desire for other men who have a more manly body structure. Thus, they get attracted towards the same sex. Anger leads to frustration in homosexuals. They want other people to suffer as well just because they themselves went through a lot. For example, many gay people don't tell their partners that they may have HIV.

## CHAPTER 10

### CASE LAWS

#### 1. Naz Foundation V Government of NCT of Delhi, 2009

This was a landmark judgement in the history of the LGBTQ movement. In 2009, the Honourable Delhi High Court struck down Article 377 declaring it as violative of the constitution of India on the following grounds:

- It is against the provisions of and also violative of Article 14 of the Indian constitution which states that everyone is equal before the law and is entitled to equal protection of the law. Section 377 is arbitrary of section 377 as it creates two groups of individuals i.e homosexuals and heterosexuals on the basis of sexual orientation. Heterosexuals were permitted for having consensual sexual acts while homosexuals were denied from the same. An arbitrary classification was created without any basis for the object sought to be achieved.
- It is violative of Article 15 of the Constitution. Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth<sup>7</sup> whereas section 377

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<sup>7</sup> S.N Misra, *Indian penal code*, (central law publications, 22nd edn.,2018)

discriminates on the ground of sexual orientation and sexual identity.

- Article 21 of the constitution, which protects the right to life of an individual, also includes the right to dignity and privacy.<sup>8</sup> Right to select a partner of one's choice is inclusive in sexual orientation of an individual and if a person is discriminated on this basis, then article 21 is violated. Right to privacy is also inclusive of the right against interference in private space which section 377 does by prohibiting consensual sex between same sex adults even in 'private space'.

## 2. Suresh Kumar Kaushal v Naz Foundation

After the verdict was announced in the Naz Foundation Case, several petitions were filed in the Supreme Court challenging this judgement saying that it is against the culture, morals and traditions of the country. People showed their displeasure by conducting strikes and protests all around the country. Arguments of the petitioners were:

- Decriminalization of section 377 would lead to rise in AIDS and HIV in the country.
- Right to privacy is not violated under Section 377.
- Youth will try to copy the western culture and become homosexuals even if they are not.

Judgement:

- Section 377 is held to be not violative of article 377 as it only regulates sexual conduct and has nothing to do with a person's sexual identity. Only certain acts are identified as an offence.
- The argument raised by the petitioners that police misuse this section was held to be invalid as merely on this basis a whole section cannot be held to be unconstitutional. The contention that homosexuals are harassed and tortured was denied as well.
- There are two different categories that are: the ones who indulge in carnal intercourse and the ones which are against the order of nature. The second category argued that they were classified irrationally. However, the court dismissed this petition.
- The SC held that in the last 150 years less than 200 people were arrested under section 377 therefore it cannot be violative of articles 14, 15, 19 and 21 of the constitution.

## 3. National Legal Services Authority v UOI, 2014<sup>9</sup>

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<sup>8</sup> ibid

<sup>9</sup> National Legal Services Authority v UOI Writ Petition (civil) No. 604 of 2013

In 2013, there was a major setback in the fight for LGBTQ movement as the Supreme Court had criminalised homosexuality once again, in *Suresh Kumar Koushal v Union of India*. but in 2014, in the *NALSA* judgement transgender people were recognised as citizens of the country for the first time in the legal history of India. Transgenders were given the identity of third gender.

#### 4. Justice K S Puttaswamy v Union of India<sup>10</sup>

This judgment served as a background for the *Navtej Singh Johar* judgement. The *K.S Puttaswamy* was a landmark case which held that the right to privacy was an integral part of Article 21 of the constitution of India. The LGBTQ community was now not denied the right to choose their partners as a part of their right to privacy. Hence this case played a huge role by paving the way for striking down section 377.

Facts - A petition was filed by *K.S Puttaswamy*, a retired judge of the Karnataka High Court challenging the constitutional validity of the Aadhaar project spearheaded by the UIDAI. He argued that the requirement by the government of biometric data of the citizens was violative of Article 21 of the Indian Constitution.

## CHAPTER 11

### VERIFICATION OF HYPOTHESIS

- Hypothesis Number 1- In 172nd report of law commission where the committee recommended for the deletion of Section 377 of IPC and stated that it will harm the public health. In numerous researches it was found that there is a need of homosexuality. In 2006 research named Section 377 and dignity of homosexuals it was found that section 377 is the biggest offence towards humanity.
- Hypothesis Number 2- In 2008 research has been conducted by Suicide Prevention Resource Centre where it was found that the suicidal behaviour of homosexuals is due to discrimination towards them by the society. In 2009 research on homosexuals found that due to criminalizing of same sex activities acts many places such as school, library, public places etc homosexuals are being discriminated and being misbehaved by the heterosexuals of the society.
- Hypothesis Number 3: - Section 377 of IPC is a violation of Human Rights. According to the principles of International Human Rights said that criminalising sexual

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<sup>10</sup> Justice K S Puttaswamy v Union of India Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

orientation is a violation of human rights also it violates their right of equality and non-discrimination. Not only UNHR but ICCPR in their statute stated that everyone has right to life freely and equally. In 2011 human right commission passed a resolution in favour of sexual orientation. All the human rights of LGBTs prove that same sex rights have been violated in our country.

- Hypothesis Number 4:- The major focus of Supreme Court decision in Suresh Kumar Kaushal case have been given on AIDS which said that the percent of AIDS increases to 8% because of legalizing homosexual activities but in various research it was found that HIV/AIDS can be controlled by taking proper protection in anal sex such as by using condoms<sup>248</sup> above it was proved that doing sex with protection will save a person from HIV. Though the percentage of HIV has been increased in homosexuals but criminalising same sex activities will result such activities to be done in privacy with fear which will make them not to use protection. To prevent from HIV there is a need for proper protection which can be done only by support of judiciary and government so that one may decriminalize such act and other may bring awareness about such virus and their protection. Thus, it can be concluded that the above hypothesis has been accepted.

## **CHAPTER 12**

### **CONCLUSION AND RECOMMENDATIONS**

India, which term to be as the world largest democratic country is a developing country which consist of a minority of homosexuals. Indian constitution provides fundamental rights to its citizens which include right to life, equality, non-discrimination etc. But the rights of LGBT's human rights have been violated in India due to criminalizing same sex relationship.

Condoms should be distributed to LGBTs freely by government in villages, prisons etc also awareness programme should be specially conducted for the homosexuals in schools, colleges, television and on radio. .

Privilege to LGBTs-in education, employment and other activities a special privilege should be provided to LGBTs so that they may stand equal to the society.