

SECTION 377 AND LGBT ACTIVISM IN INDIA

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ABSTRACT: *The Indian democracy always respected, protected and fought for the human rights of its citizens. The inclusion of the words 'Liberty and Equality' are not just the ideals enshrined in the Preamble to our Constitution but a living reality for its citizens. Section 377 of Indian Penal Code, 1860 was the greatest tool for the homophobic groups to persecute the sexual minorities of India. Homosexuality is not new to the Indian society but homophobia is. The Ancient Indian literature has a very different and accepting outlook towards the sexuality of humans. As a matter of fact, India was ruled by various foreign rulers who brought different ideologies to this land. The Muslims and British considered any physical relationship outside the heterosexual humans as a 'sin against nature' which indirectly stated that it's a grossest form of violation of God's commandment. The journey of inclusion of Section 377 in Indian Penal Code, 1860 and its revolt which finally scrapped this archaic law on September 6, 2018 by the Supreme Court of India is a showcase of the LGBT community and the people who constantly supported and fought on their behalf. The activists are responsible in sensitising the masses towards the LGBT community and pressurising the Governments to end the discrimination. For the very purpose, various NGOs fought together with the queer community in India. Various 'pride parades' were carried out from metropolitan cities to other relatively small cities which included activists, lawyers, etc. This article is written to get ourselves equipped more with the struggle faced by the LGBT community in India and a step closer to accepting something which is natural.*

"Like racism and all forms of prejudice, bigotry against transgender people is a deadly carcinogen. We are pitted against each other in order to keep us from seeing each other as allies. Genuine bonds of solidarity can be forged between people who respect each other's differences and are willing to fight their enemy together. We are the class that does the work of the world and can revolutionize it. We can win true liberation."

-Transgender liberation: A movement whose time has come

Introduction

Section 377¹ classified the homosexual act as cognizable offence and any voluntary intercourse was considered against the order of the nature. The term 'against the order of the nature' includes any kind of penetration except vaginal by a male with any other female, male or animal. Thomas Babington Macaulay, then head of the Law Commission, drafted section 377 in 1862 which was based on Britain's own former anti-sodomy laws. This law criminalized homosexual activity as against the order of the nature and can be used at any time to harass and imprison same sex couples. Anyone committed this carnal intercourse was liable for imprisonment for life or maximum 10 years or fine. When such law was enacted the common man were made to believe that other than heterosexual act any other sexual act is unnatural. It took almost 150 years for Indians to completely believe in what their foreign rulers believed. Sadly Indian people are not aware of the Vedic literature which talked about three genders of human namely male, female and third sex. People of the third sex were recognised even in kama sutra. It was around 3102 B.C. that *tritiya prakriti* or the third nature was recognised as homosexuality.² The third sex can be understood as a state of mind or psychological behaviour where one cannot identify with themselves to what gender they belong irrespective of their biological bodies. They were neither persecuted nor denied their basic rights. But with the passage of time, this law was used by the police personals to freely harass, torture and abuse the LGBT person in day light or in police custody. This archaic law proved to be the source of persecution of this sexual minority community even in the 21st Century India. We as a society cannot still openly talk about sex let alone homosexual relations between two consenting adults in their private sphere. As no one ever discusses about this in private or public spheres, this topic becomes taboo to the Indian society and as a result many

¹ The Indian Penal Code, 1860, ACT NO. 45 of 1860

² GALVA-108, Tritiya-Prakriti: People of the third sex(1) (Mar. 6,2019, 2:28 A.M) , <https://www.galva108.org>

misconceptions arose. Sadly the LGBT community is still not considered 'normal' and they are forced to get treated medically, spiritually or forcibly beating by the hands of their parents or relatives. In some extreme cases they are boycotted from their homes or become the victims of honour killings. Yet in other cases the homosexual person, whether male or female, are forced to marry with the opposite gender which highly results in bad marriage and potential future divorce. Many homosexual people suffer from various psychological problems which if not checked on time can potentially lead to clinical depression with time. Due to all these problems and in view of achieving a liberal society this law was repealed in Great Britain in 1969. Indian activists were also inspired from the foreign movement and strived to scrap the archaic Section 377.

The contribution of Indian activists towards LGBT

India got its own LGBT activists which dared to talk about this taboo openly and had a positive impact over our society. Shakuntla Devi popularly known as "human computer" wrote her famous book *The World of Homosexuals* in 1977 explaining the plight of homosexuals. The book contained interviews with homosexual men and was said to be the first study of homosexuality in India. She was of the opinion that human problems arises more out of ignorance and prejudice on sexual matters than from any other cause. In 1981, the *All India Hijra Conference* was held in Agra and nearly 50,000 members of the community marked its presence. On 2nd July, 1999 India witnessed the first ever pride parade called *friendship walk* in Kolkata, West Bengal and had around fifteen participants.

On 11th August 1992, there was the first organized public protest outside the police headquarters at New Delhi. The protest was organised by *AIDS Bhedbhav Virodhi Andolan*³ or *AIDS Anti discrimination movement* and it was attended by over 500 individuals including civil liberties and democratic rights groups. This protest was the aftermath of the arrest of 18 people from central park, Connaught place on the charges that they were allegedly about to engage in homosexual acts. The members of ABVA organises various public meetings, protest actions and public demonstration. It was responsible for grass root work in Delhi slums and campaigning for the decriminalization of sodomy in India through their constant efforts of repealing of all discriminatory legislation. In late 1991 ABVA presented a report titled "*Less Than Gay: A Citizens' Report on the Status of Homosexuality in India*" which is considered as the first document to publically demand queer rights in India. This report was an interesting breakthrough and should be regarded with respect as it provided the first resource on homosexuality in India. Seven ABVA members prepared this report which carried the Charter of demand- The LGBTQ Manifesto articulated the demand for the repeal of section 377 along with the relevant sections of the Army, Navy and Air force Act,1950 which criminalises homosexuality. It demanded for the recognition of right to privacy as a fundamental right given to all Indian citizens. ABVA will always be remembered in history for filing in 1994 the first Public Interest Litigation (PIL) in Delhi High Court challenging the constitutional validity of section 377. The reason for filing the PIL became necessary when the ABVA activists were refused permission by the Tihar jail authorities to distribute condoms to the prisoners. The then Inspector General of Prisons , Kiran Bedi, refused permission on the ground that allowing distribution of condoms would mean admitting the existence of homosexual relations in Tihar and that it would encourage the practice further. It was the first legal protest against the oppression of the LGBT community in India by Government institution. Due to the lack of support from the queer community itself, the petition was dismissed in 2001 because it was more difficult for the queer community to come out openly in the 1990's for the fear of public persecution, harassment at workplace and home, etc but nonetheless it sowed the seed of fighting spirit in them.

Ashok Row Kavi is a reputed journalist and one of India's most prominent LGBT rights activist and is the founder-chairperson of the Humsafar Trust⁴. It has emerged as one of India's strongest voices in support of health and human rights for LGBT communities since 1994. It organised an LGBT film festival in Mumbai which sensitised audiences and lead to a more open dialogue on gay and lesbian rights. 2019 is the year for celebrating 25th Year of the Humsafar Trust serving the LGBT rights in India. Ashok Row Kavi with others filed the petition before the Supreme Court clammed that Section 377 of the Indian Penal Code deprived the LGBTQ persons of equality before law, freedom of expression, personal autonomy and right to dignity in direct violation of Article 14,15,19 and 21 of the Constitution of India. The Trust had supported flash mob in Mumbai at August Kranti Maidan this January⁵. Ashok Row Kavi is also known as the founder of India's first

³ (Mar. 10, 2019, 10:30 AM) , aidsbhedbhavvirodhiandolan.blogspot.com

⁴ (Mar. 14,2019, 4:54 P.M.) , <https://humsafar.org/about-us/>

⁵ (Mar. 14,2019, 5:18 P.M.) , archive.indianexpress.com/news/loud-and-queer/902287

magazine for queer men- Bombay Dost. It has been in circulation since 1990. This magazine proved to be a success as many actors and actresses from hindi film industry were part of this and society gradually shifted their attitude towards them.

The role of art and literature in shaping queer movement in India

Rakesh Ratti is a queer psychologist and is known for his book titled "*Lotus of Another Colour*" which was published in 1993. The book unfolded the stories of the South Asian gay and lesbian experiences.

Bomgay was a short film made in 1996 was India's first gay film, it didn't had a commercially release. It followed several storylines of queer Indians living in 'maximum cities'. It remained an important part of queer cinema in India.

Fire is yet another movie which depicted homosexual relations between two women was directed by Deepa Mehta. But there was a setback when Shiv Sena vandalised theatres in Goregaon, Mumbai and Regal cinemas New Delhi that were screening this movie. The then Maharashtra's Chief Minister Manohar Joshi was of the opinion that film's theme is alien to Indian culture. The violent acts and such comments prompted queer women to come together and advocate their rights. Aligarh is yet another powerful movie directed by Hansel Mehta in 2010 was a biographical drama depicting the struggle and unexplained death of Prof. Siras. Ramchandra Siras was a professor of Marathi in Aligarh Muslim University. He was suspended from his job after the college authorities found him guilty of 'gross misconduct'. While with his male partner, Prof. Siras' home was invaded by unknown assailants who filmed him and threatened him with blackmail. He fought for himself and many like him but just days before the Delhi High Court decriminalised section 377 he was found dead in suspicious circumstances. After the result of efforts by *Naz foundation case*⁶ the landmark judgement was passed by the Delhi High Court on 2nd July 2009 which granted the equal rights to those seen as 'sexual minorities'. As a result of this High Court's decision, India's largest LGBTQ film fests- The Kashish Mumbai Queer film festival was launched in the year 2010 with the support of Bollywood actor Celina Jaitley. In the same year Queer-Ink publishing house was launched by entrepreneur Shobhna S. Kumar which published queer fiction and also provided educational resources and crisis intervention services for LGBTQ Indians. In the year 2015, Gaysi Magazine published a first of its kind illustrated anthology about queerness featuring colourful, moving, powerful artworks from over 30 artists.

The changing stance of Judiciary towards Section 377

As we know that legislation had changing views on section 377 throughout the 21st century. The morality of any society isn't static and it keeps on changing from time to time so does the stance of the legislature on any particular statute. Section 377 of the Indian Penal Code is no exception to this rule. In the colonial era, this section was included in the Indian Penal Code and this law was imposed on its subject. As the societies got independent from their colonial rulers, the old, archaic laws got replaced by new laws as per the standards of the new progressive societies. In India, the change in the attitude towards homosexuality and LGBT community saw a major shift in the metropolitan cities. From the 1980's India among other liberal and democratic countries of the world started openly fighting for the basic human rights of queer community through publishing various book, magazines, movies, pride parades, etc. As a result more and more Non-government organisations and other activist groups came forward and fought wholeheartedly for the sexual minority in India. From 2001 the *Naz foundation* through the petition filed against section 377 got the constant attention of Indian judiciary. The year 2001 saw the landmark events in the struggle for LGBT rights in India. The movement to repeal the British era rule was led by the Naz Foundation Trust an NGO which filed a lawsuit in Delhi High Court in 2001 seeking legalization of homosexual intercourse between consenting adults throughout the Indian territory. In 2009, the Delhi High Court decriminalised the consensual sex between people of same gender. But this landmark judgment in the history of LGBT which granted equal rights to them was overturned by the Supreme Court of India in 2013⁷ stating that matters pertaining to the repealing or amending of Section 377 should be left to the Parliament and not the judiciary. In Suresh Kumar Koushal case, SC had recriminalized homosexuality by restoring Section 377 in the Indian Penal Code, 1860 in its original form. Supreme Court was of the opinion that if Parliament wants then it is free to bring a law in favour of homosexuals or else can decriminalise homosexuality until then Section 377 will continue to operate. The LGBT community of India was anguished after the Supreme Court overturned the Delhi High Court's progressive judgement on Section 377 which reinstated colonial law all over India. It proved to be a massive blow to the community specially for those who came out of the closet after 2009

⁶ Naz foundation v. Govt. of NCT of Delhi 160 (2009) DLT 227 (129)

⁷ Suresh Kumar Koushal v. NAZ Foundation SC AIR 2013

Delhi High Court's judgement. Even after the SC's decision, Guwahati held its first pride walk in 2013 which highlighted the presence of the LGBT community in North-east. 2018 was an important year for the LGBT community as the Supreme Court of India agreed to hear a petition to revisit the 2013 *Naz foundation* judgement. The petition was filed on 29 June 2016 before Justice S.A. Bobde and Justice A.K. Bhushan. The case⁸ on 8 January 2018 was listed to be heard by the Chief Justice's bench which passed an order stating that the case would be heard by a constitution bench. From January to July the matter was heard by the Supreme Court and on 6 September 2018, the court's verdict was out declaring the unconstitutionality of Section 377. The decision overturned the 2013 ruling in Suresh Kumar Koushal case in which the court upheld the law but the portion of section 377 which remained are sex with minors, non-consensual sexual acts and bestiality.

Justice K.S. Puttaswamy case⁹

Justice K.S. Puttaswamy is the retired judge of Karnataka High Court who was the original petitioner challenging the Government of India over Aadhar mandatory. This case comes under right to privacy and is a landmark case because it led to a constitutional challenge to a wide range of Indian legislation such as legislation criminalising same sex relationships. The case was brought before nine-judge bench of the Supreme Court to determine whether the right to privacy was guaranteed as an independent fundamental right following other conflicting decisions of the Supreme Court. Justice Puttaswamy argued before the nine-judge bench that the right to privacy was an independent right, guaranteed by the right to life with dignity under Article 21 of the Constitution. The nine-judge bench of the Supreme Court unanimously held that the right to privacy is an intrinsic part of the right to life and personal liberty under Article 21. The right to privacy includes autonomy over personal decisions, bodily integrity as well as protection of personal information. J. Nariman classified the facets of privacy into non-interference with the individual body.¹⁰

Conclusion

It is not wrong to state here that India had a liberal culture in the past before any foreign conquests. The temples of Khajuraho are the best example where one can see the images of women erotically embracing each other and men displaying their genitals to each other. It is evident that India once agreed that homosexuality did occur in their society and was a part of nature and it acknowledged its existence without any persecution over what we call today 'homosexuals'. The British rulers didn't acknowledge this basic fact and labelled the homosexuality as 'sinful' and an act against the order of the nature. The Biblical stories of two ancient cities of Sodom and Gomorah is the reason for all the homophobic attitude towards the LGBT community. As a result it created anti-homosexual primitive laws in all Jewish and Christian communities. This later transformed into their legislations and eventually made the homosexual act punishable under the State laws. The British did the same by introducing what we now know as the discriminatory law merely on the ground of consensual sexual activity between two people.

For years many LGBT person lived in closet fearing the legal persecution as well as social discrimination in jobs and other spheres of life. From the late 20th century, India witnessed a huge shift in the attitude of the general public through the works of activists, sensitising the Indian public towards LGBT issue and making them understand it was important to become a voice for queer community. The distribution and awareness of using of condoms by NGOs to prevent the fatal diseases like HIV/AIDS and other sexually transmitted diseases. Many gay magazines were started printing like 'Bombaydost', several short films and pride walks were organised in different cities of India which gathered a positive response from the general public. The activism played a significant role by filing various petitions in the Indian courts which shaped the legal rights of LGBT community and finally granted them a life of dignity through the September, 2018 judgement of Supreme Court of India.

Although as the society has progressed and the apex court's judgement went in the favour of the sexual minorities which now granted them at least a legal protection and gave them a legal direction to fight against their discrimination. But the role of society is also needed in accepting what is natural and opening its arms for it queer community. The society should not resist in renting the flats to the gay and lesbian

⁸ Navtej Singh Johar and others v. Union of India

⁹ Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and others WRIT PETITION (CIVIL) NO 494 of 2012

¹⁰ [Mar. 16, 2019, 6:09 P.M.], <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/>

couples, it should be more welcoming by employing them into various unconventional fields like modelling, acting, singing, movies, etc. The transgender people are forced into beggary which inhibits their social growth and invites more discrimination on a daily basis. The inclusion of transgender people in various public as well as private jobs would normalise the attitude towards the LGBT community. The more we accept and normalise these sexual minorities as a part of our Indian society, the more they can live with dignity and we can head towards achieving a pluralistic society.