



Decriminalization of Homosexuality in India: A Step towards the development of LGBTQI Community.

Sheikh Abbas-Bin-Mohd¹

"If I wait for someone else to validate my existence, it will mean that I'm shortchanging myself."
Zanele Muholi

ABSTRACT

This paper examines the successful fight against the provision in Section 377 of the Penal Code of India that criminalized private consensual sex between adults of the same sex. This law had led to serious discrimination against people engaging in homosexual acts, who were subjected to frequent beatings and blackmail attempts by police, who used the threat of prosecution against them. NGOs working with sexual minorities have also been harassed and sometimes charged under Section 377. By stigmatizing homosexuality and threatening gay men with prison, the law is also likely to have impeded the battle against HIV. The provision was read down in July 2009 after an innovative, sustained, mass media campaign by activists. The Voices Against 377 coalition brought together sexuality and lesbian, gay, bisexual and transgender (LGBTQI) organizations, who were previously marginalized, with groups working in areas such as children's rights and feminist groups, showing that support for non-discrimination towards sexual minorities was broad-based. Further legal and social changes are needed for LGBTQI individuals to gain full acceptance and equality within Indian society. However, the judgment transcended the LGBTQI issue with the implication of protection for all minorities and introduced for the first time in South Asia the idea of sexual citizenship.

Key Words: Advocacy and Political Process, Homosexuality, Equal Rights, Sexual Discrimination, LGBTQI Organization.

Received 24 July, 2022; Revised 04 August, 2022; Accepted 06 August, 2022 © The author(s) 2022.
Published with open access at www.questjournals.org

I. Introduction:

This article will focus on the petition filed by Naz Foundation India Trust and the role played by the coalition "Voices Against 377". However, this is not to diminish the immense efforts made and progress achieved by numerous other organizations and individuals working on sexuality, LGBT and other human rights issues, which have made this judgment and other strides towards equality possible. The article traces the history of Section 377 and how it has been enforced in India. It then assesses the impact of the decision on the lives of Indians, in particular its effect on people at risk of or living with HIV. It then describes the fight against the law and how it successfully brought together disparate civil society groups to advocate for change. Finally, it discusses the likely impact of the ruling and what further changes are necessary in India for the country's hitherto marginalized LGBT individuals to gain broad acceptance and equality within the wider society.

1. The History of Section 377:

Section 377 of the Indian Penal Code was authored by Lord Macaulay, the President of the Indian Law Commission, in 1860, as part of Britain's efforts to impose Victorian values on its biggest colony (similar laws were imposed on most of its colonies, including the United States). It reads as follows:

Section 377: Unnatural offences – "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 10 years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

¹ Practicing Advocate at Jammu & Kashmir High Court Srinagar, National campaigner of Socio-political Rights, BALLB, School of Law University of Kashmir, and Prospective LLM Scholar

Although not explicitly defined, “carnal intercourse against the order of nature” has been taken by the Indian courts in the intervening years to include anal sex, oral sex, and in some cases other non-procreative sexual acts, such as mutual masturbation. Although heterosexual couples also partake in these acts, the weight of the law over the centuries has fallen on homosexual sex. Even when such sex is consensual, the “voluntary” provision in the law makes it illegal.

Laws such as Section 377 have long been abandoned in most Western democracies, although they persist in many post-colonial countries in Asia and Africa (except South Africa and Nepal). In the 1980s, the European Court of Human Rights ruled that criminalizing same-sex sexual behavior was a violation of protections of private life. Britain, the author of the Indian Penal Code and Section 377 during the colonial period, decriminalized homosexuality in 1967.

In India, the difficulty of proving that “carnal intercourse against the order of nature” has taken place in private has meant that the law has only infrequently been applied in court judgments. Achieving a prosecution requires catching two people carrying out the sexual act, which usually takes place in private. Since 1930, there has been only one prosecution of adults having same-sex consensual sex. Of the 50 reported judgments under Section 377 reviewed by Gupta, 30% were cases of sexual assault or abuse of minors, however, although few cases against consenting adults have gone to trial, the existence of Section 377, and the threat of possible arrest, has allowed the authorities to discriminate against homosexuals and organizations working with them. Thus, Section 377 has had an enormous negative impact on many people's lives.

2. The Fight Against Criminalization

It was in response to the 1994 Delhi prison case that an initial suit was filed against Section 377 in the Delhi High Court in 1994. ABVA, a Delhi-based NGO, filed public interest litigation calling for the repeal of Section 377 on the grounds that it violated the constitutional right to privacy. The case withered, however, as the petition did not come up for hearing until 2001. As a non-funded group run entirely by unpaid volunteers, ABVA did not have a full-time lawyer keeping track of the case, so when it finally came up ABVA failed to appear and the case was dismissed without their knowledge.

The next attempt to repeal Section 377 began in 2001. The “Naz Foundation India” Trust, based in Delhi, whose workers had suffered police harassment during HIV education campaigns among marginalized communities, joined up with the Lawyers Collective, a legal aid organization working for the rights of people affected by HIV and AIDS. They petitioned the Delhi High Court not to repeal Section 377 as a whole, but to read it down to exclude private consensual sex between adults. Children's rights groups were opposed to the entire law being repealed, as it is the only law under which some types of sexual abuse of minors can be prosecuted.

The petition challenged Section 377's violation of four fundamental rights guaranteed by the Indian Constitution: Under Article 14, 15, 19 and 21, this petition was dismissed, however, because the Naz Foundation was not personally aggrieved by Section 377 and therefore had no *locus standi* in the case. The Naz Foundation and Lawyers Collective therefore asked the Supreme Court of India to review the dismissal of the petition. The Supreme Court ordered that the grounds for dismissal were not valid, and that the Delhi High Court had to hear the case.

To strengthen the case and provide testimonials from individuals who were personally aggrieved by Section 377, a coalition of NGOs representing various social movements working on human rights issues joined the petition. Formed in 2003, it brought together a large number of NGOs working to strengthen gay, lesbian and transgender rights, child rights activists, and feminist groups, from which a united voice was articulated against Section 377. The coalition was able to provide the stories of people whose lives had been damaged by fear of prosecution and blackmail from police and others who took advantage of the discriminatory law. These testimonials were quoted in the final judgement, and served to throw light on the shadows of these marginalised lives. Eventually, this resulted in the July 2009 judgement that Section 377 must be read down to exclude consensual adult sex. The judges declared that the law, “insofar as it criminalises consensual sexual acts of adults in private”, violated Articles 14, 15 and 21 of the Constitution. The law would continue to apply in cases of penile non-vaginal sex involving minors.

Here is a timeline of the case right from Introduction of Section 377 to its Decriminalization: 1861: Introduction of Section 377

Section 377 was introduced by British India, modeled on the Buggery Act of 1533. This section of the Buggery Act was drafted by Thomas Macaulay in 1838 and was brought into effect in 1860. It defined ‘buggery’ as an unnatural sexual act against the will of God and man, thus, criminalizing anal penetration, bestiality and homosexuality, in a broader sense.

2001: Naz Foundation files petition against Section 377 in Delhi High Court:

In 2001, non-governmental organisation Naz Foundation filed a petition challenging the constitutionality of Section 377 in the Delhi High Court. They filed a lawsuit seeking the legalisation of homosexual relations between consenting adults.

2003: Delhi HC dismisses Naz Foundation plea: The Delhi High Court dismissed the Naz Foundation petition, saying the body had no standing in the matter. The Naz Foundation appealed against the dismissal in the Supreme Court in 2006. The Supreme Court instructed the Delhi High Court to reconsider the case.

2009: Delhi HC decriminalizes homosexuality:

In a landmark decision, the Delhi High Court decriminalized homosexuality among consenting adults, holding it violates the right to equality, right against discrimination and protection of life under the Indian Constitution.

2012: Supreme Court overturns the HC order:

After the high court's judgment, various appeals were made to the Supreme Court, challenging the High Court's authority to change a law. In December 2012, the Supreme Court overturned the high court's decision, after finding it "legally unsustainable."

A two-judge bench, comprising Justice G S Singhvi and Justice S J Mukhopadhaya observed that the high court had overlooked the fact that a "minuscule fraction of the country's population constitutes LGBT," and that in over 150 years less than 200 people were prosecuted for committing an offence under the section.

The Supreme Court then recommended that the Parliament address the matter because only they had the power to amend the existing laws.

2015: Shashi Tharoor's Private Member Bill:

After the Narendra Modi-led government was sworn-in in 2014, it said it would take a decision regarding Section 377 only after the Supreme Court judgment. In a written reply to Lok Sabha, Minister of State (Home) Kiren Rijiju had said, "The matter is sub-judiced before the Supreme Court. A decision regarding Section 377 of IPC can be taken only after pronouncement of judgment by the Supreme Court."

A year later, when Shashi Tharoor introduced a private member's Bill to decriminalize homosexuality, the Lok Sabha voted against it.

2016: Five petitioners move SC against Section 377:

Five petitions were filed by S Johar, journalist Sunil Mehra, chef Ritu Dalmia, hotelier Aman Nath, and business executive Ayesha Kapur.

The petition claimed their "rights to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity, and equality, along with the other fundamental rights guaranteed under Part-III of Constitution, are violated by Section 377."

2018: SC begins hearing on Section 377:

A five-judge Constitutional bench, led by Chief Justice of India Dipak Misra and comprising of Justices R F Nariman, A M Khanwilkar, D Y Chandrachud, and Indu Malhotra, begins hearing petitions challenging Section 377.

September 6, 2018: SC decriminalizes gay sex:

The bench delivers four separate, but concurring, judgments that decriminalised sex between two consenting adults irrespective of their gender. The apex court has also overruled its previous verdict in the 2016 case, which had reversed the Delhi High Court ruling decriminalising gay sex.

3. Constitutional morality

The Navtej Singh Johar Bench also quoted Dr. Ambedkar's idea of Constitutional Morality which along with other organs of the State is a duty of the judiciary. According to Ambedkar, justice, liberty equality and fraternity cannot be attained without the organs of the State being loyal to Constitutional Morality. When a provision is challenged to be against the fundamentals of the Constitution, be it the case for minority or majority, it has to be dealt with justly and in consonance with the constitutional principles. If LGBTQ is declined their basic rights, the courts that have been the statue of justice for so long will be under a big question mark. If any provision is found to fail the parameters of the Constitution it should be abrogated.

4. LGBTQ: Equally entitled to human rights and dignity

The perspectives of human dignity were also taken into consideration while deciding this matter. The Right to Dignity is an inseparable aspect of Right to Life and is protected under Article 21 of the Indian Constitution. It has got space under the international domain as well in the Universal Declaration of Human Rights, 1948 which talked of all individuals being born free and equal in dignity and rights.

5. The Impact of decriminalizing the Homosexuality

The impact of decriminalizing homosexuality can be seen as by the changing attitude of the society and the families are changing their perspective and accepting their children as who they are. The societies anti-LGBTQ attitude has changed and the world is now accepting the changes and more awareness is being forwarded through education, counselling and many other ways. There is more increase in self-acceptance and confidence is being built up in the people. The people claim that they have improvements in self- awareness, self- confidence, self – acceptance and they also have gained emotional security after the judgement. The majority of the people has become fearless and more confident, after the judgement they are able to stand for themselves even more confidently and bravely. As earlier police were also generally abusive towards them whether it was verbally or physically but now after judgement it has reduced significantly and this shows that it is a positive sign towards the fact that homosexuality is no more a punishable offense.

The major impact is that the general acceptance of LGBTQ community has increased in the country since the judgement is been passed. With this total acceptance there is gradual process that certainly has changed the perspective of the society and more awareness has been there. The media has also played a big role in the process as there has been more news about this topic and making the people more aware about accepting the change and to change their thinking and there has been movies made related to section 377 to generate more social awareness and acceptance. There were many respondents whose families did not use to understand them or to accept them as who they were. The families use to discriminate and there were many others who were even sacred of telling to their families but now after the judgement they are able to gain confidence and tell their families about them and who they love. The families have also starting to accept the change.

6. Why the decriminalization of homosexuality is not enough?

Although governments after governments have introduced various laws for the protection of rights of trans people even in the 21st century, we are yet to provide the community with their right to marry a legal sanction. As discussed above, sometimes law acts as a catalyst to social acceptance. There was a time when love marriages did not exist at all. Marriage was incomplete without the blessings of the parents. With the legalisation and introduction of civil marriage laws, the couples found a way to get social acceptance through legal sanctions. There have been many revolutions for better laws for the trans community but the right to marriage has not so far been a major issue. One argument can be, as India, unlike western democratic nations, though being a secular country, is yet to take full control of marriage. Marriage is considered as a subject under the control of the particular community itself. Indian Law accepts and recognises a marriage performed according to any Hindu community rites and practices as legitimate. Most of the Hindu marriages in India today take place without a marriage licence and are, mostly, never registered with the State. Marriages in India are considered to be a family matter conducted within the community. The approval of elders is considered to be important to approve a marriage. This implies that society plays an important role in deciding what may constitute a marriage.

Challenges even after decriminalizing:

There are still many challenges that need to be overcome which are faced by the LGBTQ community. The biggest challenge ahead is the same sex marriages, even though the judgement has been passed and consensual gay sex is being decriminalized but the same sex marriages are still not approved in India. They still cannot marry each other being in India where marriage is the biggest thing the most sacred part of many cultures and the LGBTQ community can still not experience it. The next challenge could be that they are still not allowed to adopt which means that they could stay together but cannot have the child. This is also one of the major encounters that the people need to go through.

There is still no official data about the LGBTQ population in India where more than 2 million gay people live and still no official information is in the system about them there is still particular law about the LGBTQ's, there is no law for the case where the protection of transgender people should be done from rape or any other kind of crime. There is online petition submitted for the protection gay men and women but still the law is silent.

II. Conclusion:

This concludes that decriminalizing the homosexuality has ensured the sexual minorities in India a few steps further in living with the dignity. The undoing of the section 377 ensures more confidence among the LGBTQ community which leads to self-confidence and steady growth of the country. This shows that the society is changing and it changes the attitude of the people in general. Decriminalization has helped in the acceptance by the society and the families of the people. Though there still little bleak in acceptance but it will also improve with time and the further amendments relating to this section and in favor of the community.

Though the judgement has helped the LGBT community in the issue of the discrimination and other aspects but it still needs an anti-discrimination law which would empower them to build productive lives and relationships as there is still petitions which are for the legalization same sex marriages. The government still need to make many changes in order to ensure that LGBTQ community is not denied and public service. There is still a long road ahead for the transgender people that they need to endure. There will be many challenges in front of them but now after the judgement they will no longer be alone in the fight as the society will also be there with them because the decriminalization has made society open their eyes and support them and help them live their normal lives as every person of the country lives.