

LGBT AND ADULTERY; JOURNEY FROM ILLEGAL TO LEGAL

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Introduction:

In India, Lesbian, gay, bisexual, transgender and intersex(LGBTI) face legal and social difficulties from non-LGBTI persons. In India, LGBTI peoples have gained more and more tolerance, especially in metropolitan cities. Apart from this most of the LGBTI people remain closeted, fearing discrimination from their families in India, they might see homosexuality as shameful. In India Data has shown honor killings, attacks, beatings of members of the LGBTI community are not uncommon. LGBTI people face discrimination and ignorance from rural areas as well many urban areas, in these areas society doesn't accept them and forced for marriage in their opposite sex. They see homosexuality as a sin. Sexual activity between opposite sex people is legal, but until recently sexual activities between the same-sex couple was considered as a crime but now on 6 September 2018, the Supreme court of India decriminalized the homosexuality and declared section 377 of the Indian penal code unconstitutional.

History of LGBTI and Adultery:

The Khajuraho temples in India famous for erotic's sculpture, contain various depictions of homosexual activities. Hijra considered as a third gender by the Hinduism. , after the independence of India, the homosexual relationship came into existence through section 377 of the Indian penal code by the British which stood for more than 70 years¹.

Adultery is considered extramarital sex that is regarded as objectionable on religious, social, moral, or legal grounds. The concept exists in several cultures and is similar to Islam, Christianity, and Judaism. Historically, adultery to be a severe crime, considered by many cultures. Adultery incurred punishment, usually for the woman and sometimes for the man with penalties including capital punishment, mutilation, or torture. In those countries where adultery is a criminal offense, sentences range from fines to caning and even capital punishment. Since the 20th century, criminal laws against adultery have become controversial, with international organizations calling for their abolition, especially in the light of several high-profile stoning

¹ Zeenat Saberin, India decriminalizes gay sex in a landmark verdict, Aljazeera (Sept.6, 2018), <https://www.aljazeera.com/news/2018/09/india-decriminalises-gay-sex-landmark-verdict-180906051219637.html>.

cases that have occurred in some countries. The head of the United Nations expert body charged with identifying ways to eliminate laws that discriminate against women or are discriminatory to them regarding implementation, Kamala Chandrakirana,² has said that: "Adultery must not be sorted as a crime at all." A joint statement by the United Nations Working Group on discrimination against women in law and practice states that: "Adultery is a criminal offense which violates women's human rights."

The British Raj criminalized (heterosexuals) and (homosexuals) under Section 377 and section 497 Adultery of the IPC, 1860, Code came into force on 1861. If any person voluntarily has carnal intercourse against the order of nature, he or she committed the offense, and they will be liable for punishment under section 377 and 497. But now these both sections have been declared unconstitutional by the supreme court. While the Code goes by several changes over the past years, the two provisions were managed to unshackle, in the past despite having been challenged several times. However, the two judgments have not only done so on legalizing but also on a deeper understanding of a person's sexual desire and autonomy to express one's core identity.

Judicial Pronouncement on section 377 and 497-

Recognition of same-sex relationships:

Section 377 violated Article 15 states that: no citizen shall be discriminated on grounds only of race, religion, caste, sex, place of birth or any of them by the state."

*Naz Foundation vs. GOVT. Of Delhi*³In 2009, the Delhi High Court found that section 377 of Indian penal code and other legal restrictions and prohibitions against private, adult, consensual, and non-commercial same-sex activities to be a direct violation of Fundamental rights which have been given by the Indian Constitution of law. Section 377 of IPC talks about "Whoever voluntarily has carnal intercourse against unnatural manner with any man, woman or animal. he/she shall be liable for punishment with imprisonment for life, or with imprisonment of either description for a term which may extend for ten years, and shall also be liable for fine," with this added explanation that: "Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section 377 under Indian Penal Code."

² Kamala Chandrakirana, Indonesian Advocate for Human Rights, Justice and Democracy.

³ Naz Foundation v. Govt. of Delhi, 160 Delhi Law Times 277.

In India, there have been many incidents of sexual harassment of LGBTI groups by authorities under the law. The Ministry of Home Affairs was expressed their opinion on LGBTI On 23 February 2012, and opposed to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as sinful and immoral. The Central Government reversed its decision on 28 February 2012 and saying that there was no legal error in decriminalizing homosexual activity. This decision was given by the two judges of the Supreme court.

Human Rights groups given expressed concerns that the Supreme court ruling on LGBT would render same-sex couples vulnerable to police harassment and asserting that the supreme court decision is a disappointing setback for human dignity, non-discrimination and the fundamental rights to privacy⁴.

The Naz Foundation said that it would file a petition for reviewing the decision of courts. The Indian Supreme court has dismissed the petition for review on section 377 of Indian penal code submitted by Naz Foundation and Central Government and several others. The Supreme Court bench said and claiming that "While reading down Section 377of IPC. The High Court has overlooked that a minuscule fraction of the country's population. Constitutes lesbians, gays, bisexuals or transgender people and in the more than 150 years past, less than 200 persons have been prosecuted for committing an offense under Section 377 of IPC, and it cannot be made a great basis for declaring the Section ultra vires Articles 14, 15 and 21 of the Indian constitution."⁵

In 2017, in the case of *K.S. puttaswamy vs. the state of Tamilnadu*⁶. The Supreme Court has decided unanimously that the right to individual privacy is an intrinsic and fundamental right under the Indian Constitution. The Court followed this judgment and ruled that a person's sexual orientation is a privacy issue, this decision giving hopes to LGBTI people as well as activists that the Supreme Court would soon strike down Section 377. After that in January 2018, the Supreme Court agreed to refer the issue on Section 377's validity to a larger bench and heard several petitions. In response to the court's request, the Central Government announced that it would not

⁴ Harmeet Shah Singh, India's Supreme Court declares homosexual sex illegal, CNN (December 11, 2013), <https://edition.cnn.com/2013/12/11/world/asia/india-same-sex-relationship/>.

⁵ J. Venkatesan, Supreme Court sets aside Delhi HC verdict decriminalizing gay sex, The Hindu (DEC. 11, 2013), <https://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece>.

⁶ Justice K.S. Puttaswamy v. Union of India, 2012 WRIT PETITION (CIVIL) NO 494.

oppose the petitions, and they would leave the case "to the wisdom of the court," A supreme court hearing began on 10 July 2018 with a verdict expected before October 2018.

After that in the case of *Navtej Singh Jauhar Vs. Union of India*⁷. The petition was filed by dancer Navtej Jauhar, journalist Sunil Mehra, Chef Ritu Dalmia, etc. for declaring the section 377 as illegal and unconstitutional. On 6 September 2018, the Supreme Court decided its verdict. The Court unanimously gave judgment that Section 377 is unconstitutional as it is infringing the fundamental rights under the Indian constitution of autonomy, intimacy, and identity. Thus court legalizes homosexuality in India.

Furthermore, it stated that any discrimination based on sexual orientation is a violation of the constitution of India. Sexual orientation is biological phenomena which are natural and inherent in an individual and controlled by biological and neurological factors. The science on sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination by one sexual orientation would entail a violation of the fundamental right of freedom of expression under the constitution of India.

The Supreme Court had given direction the Government of India to take all necessary measures to properly broadcast the fact among the public that homosexuality is not a criminal offense, and also create public awareness and to give the police force periodic training to sensitize them about the issue which happens with LGBTI people. Some of the Legal experts have requested the Government of India to pass legislation and makes laws to protect their rights if same-sex couples want to marry they can, no one can restrain from this, adoption by same-sex couples (if they're going to adopt a child they can take) and inheritance rights.

Non-Consensual sex (rape), Sex with minors and bestiality remain criminal offenses under section 377 of Indian Penal Code.

The Judgment of the Supreme Court may not extend to the state of Jammu and Kashmir, because Jammu and Kashmir are governed by its criminal law, the Ranbir Penal Code.

LGBTI Rights in India:

⁷ Navtej Singh Johar v. Union of India, 2016, W. P. (Crl.) No. 76.

Some people were a third gender neither male nor female considered by society; this has been recognized by the South Asian country. Such people are known as hijras. But in the English language, these people called as intersex people or transgender people.

In 1994, they were legally obtained rights of voting as a third gender. Due to the ambiguity of legal procedure, Indian transgender has difficulties in using safe medical facilities for their surgery.

In 2014, transgender people of India were an economically and socially backward class entitled for getting the reservation in jobs and education, declared by the supreme court of India. And the court also directed to the union government and the states government to establish a scheme for welfare for these people. And the court also said that transgender people have fundamental Right under the Indian constitution to change them without any sort of surgery, and also ensure the equal treatment for all transgender people.

The supreme court also directed that the Constitution of India ruled that the recognition of a third gender on all official documents such as voter ID cards, passport, and bank forms and started with the option of Male and Female, usually designated other, third gender or transgender.

In the year of 2013, S. Swapna and Gopi who are the gender and transgender activists have started a protest in collectorate office of Madurai and demanding a reservation and also permission for appearing in the examination which is conducted by TNPSC, UPSC, SSC, and Bank exams. Swapna had successfully moved to Madras High Court for seeking permission to appear in the TNPSC exam as a female candidate. And she has become a first transgender person to clear TNPSC exam⁸.

On 24 April 2015, The rights of Transgender persons Bill unanimously passed by the Rajya Sabha and guaranteeing rights, reservations in education, entitlement, and job, legal aid, unemployment allowances, pensions and skill development program for transgender people.

The Bills providing the several clauses for the welfare of transgender people that are-

⁸ Gokul Vannan; Transgender Clears TNPSC Group IV Exam, (Feb.9, 2014), <http://www.newindianexpress.com/states/tamil-nadu/2014/feb/09/Transgender-Clears-TNPSC-Group-IV-Exam-573808.html#.Uvc-CPmSycw>.

- Prohibiting discrimination in employment as well as prevent violence, abuse, and exploitation of transgender people.
- Center government and states the government must establish the welfare board and transgender rights courts for providing justice to these people.

DMK Tiruchi Siva has introduced this Bill. And sent to the upper house of the parliament. However, the Bill contains various inconsistency and lack of clearly on how few ministers will coordinate to implement its provision but Bill is still pending in the Rajya Sabha.

Thaawar Chand Gehlot minister of social justice and empowerment said that government should introduce a new bill for transgender people rights in the monsoon session of the parliament. The Bill would be based on the issues of transgender; this will have conducted by a committee. Which is appointed on 27 January 2014. According to the Thaawar minister to provides all the rights to transgender and also give them entitlement currently enjoyed by the scheduled castes and scheduled tribes⁹.

The Transgender Persons (Protection of Rights) Bill, 2016. Which was introduced in parliament in August 2016, and reintroduced in parliament in late 2019? But this does not talk about the hot topics such as marriage, adoption, and divorce for transgender people, that's why some of the transgender activists have opposed the Bill. The bill passed the on 17 December 2018 Lok Sabha with 27 amendments, including a controversial issue prohibiting transgender people from begging.

Adultery Law in India:

Section 497 of IPC deals with Adultery. Under this law; a woman cannot be punished for the offense of adultery. A man only who has consensual sexual intercourse with the wife of another man without his consent can be penalized under this offense in India. Adultery is a ground for divorce, if someone "lives in adultery," the spouse can file for divorce. This law became

⁹ Express News Service, Rajya Sabha passes historic private Bill to promote transgender rights, (Apr. 25, 2015), <https://indianexpress.com/article/india/india-others/rajya-sabha-passes-private-bill-to-protect-the-rights-of-transgenders/99/>.

decriminalized on 27 September 2018 by Supreme Court of India. The Supreme Court has declared the law unconstitutional because it "treats a husband as the master"¹⁰.

In the case of *Joseph Shine v. Union of India*¹¹ In December 2017 the Supreme Court decided to accept the public interest litigation (PIL) in which it has been prayed that the Court strikes down the Section 497 of the Indian Penal Code Entirely Because of this problematic interpretation. It has been argued that this section violates articles 14 and 15 of the Indian constitution-

- Article 14¹² states that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
- Article 15¹³ states that: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

On accepting this petition, in its initial observations, the court noted that this was not the first petition challenging the section. An argument by the opposing the decriminalization, section 497 safeguards, supports and protects the institution of marriage. They further argued that if the petition is allowed then "adulterous relations will have more free play than now."

On 1 August 2018, The Court starts to hear the arguments on this petition. If the party was challenging this section The Court said that it could merely prove that it violates Article 14 of the Indian Constitution, then the section will be struck down. A constitution bench of five judges of the Supreme Court on 27 September 2018 unanimously ruled to discard this Section 497.

CONCLUSION:

Both the verdicts hardly emphasize individual autonomy and sexual freedom of consenting adults. While one decision recognized the fact that the provision failed to acknowledge women as equally autonomous individuals in society, the other recognized that the freedom to choose a partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are endogenous to the constitutional protection of sexual orientation.

¹⁰ Soutik Biswas, Adultery no longer a criminal offense in India, BBC, (Sep.27, 2018), <https://www.bbc.com/news/world-asia-india-45404927>.

¹¹ *Joseph Shine v. Union of India*, 2017, WPC No. 194.

¹² Article 14 of Indian Constitutional Law, Right to Equality.

¹³ Article 15 of Indian Constitutional Law, Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth.

LGBTI people, for me, are as ordinary as any other human being. They have every right to live normally and right to love. It's shocking how our society reacts to someone being sexually different from themselves. They state it as being 'abnormal.' And it's genuinely heartbreaking how these people are treated by society. LGBTI still fighting for their rights after Supreme Court judgment. There are many examples like Gopi Shankar Madurai; The All India Hijra Kalyan Sabha had fought for over a decade to get their voting rights. In India, LGBT people are banned from joining the services in Indian Defense. In my opinion, this is the violation of the right to equality and opportunity of employment of LGBTI people under articles 14, 16(1), 16(2) of the Indian constitution.

Since the supreme court has recognized these rights, it is a move towards a liberal society in the modern era. However, there is a reluctance in the community towards their acceptability.

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