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3rd Year, BA LL.B.**HOMOSEXUALITY LAWS AND MORAL POLICING****ABSTRACT**

There exists a difference between case laws and the actual practice and implementation of these changes and reforms since the time of the Navtej Singh Johar vs. Union of India judgment in 2018. There continue to be multiple incidences of gender-based violence towards the LGBTQ populations since the cases in New Delhi as well as other parts of India, which have been documented in various ways. This includes a direct link of moral policing and justification for the same in the name of tradition or "culture" which hints at a larger necessity for societal reform. This, one can consider, was discussed by Justice Dipak Misra as a matter that needed constitutional morality that needed to be learned, as opposed to pre-existing social morality. This paper, thus, looks to discuss the difference between the text and practice, between legal imaginations of the existing case law and the legal realities, the actual realities and the happenings in society, with respect to incidents of violence against LGBTQ people in India from across the country since the Navtej Singh Johar judgment, to discuss a more practical framework of the limitations of the law. The paper also posits recommendations for the need for new law enforcement sensitization in a robust manner to counter such negative social forces that create an oppressive environment in the country.

KEYWORDS: Gender, LGBTQ, Society, Violence.

RESEARCH METHODOLOGY

The data collected is mostly from sources of various books, journals, articles, annual reports published by the government and websites of different governmental and non-governmental agencies and organizations.

INTRODUCTION

On 6th September, 2018, Section 377 of the Indian Penal Code – a colonial era law that criminalized “carnal intercourse against the order of nature” was read down and homosexuality was decriminalized in New Delhi, with the delivery of the judgment for the Navtej Singh Johar vs. Union of India case, by five judges of the Supreme Court of India. Prior to this judgment, the Naz Foundation vs. Government of NCT of Delhi on the 2nd of July 2009 had held that consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution. However, after this, the Suresh Kumar Koushal vs. Naz Foundation of India case in 2013 resulted in this being overturned, and homosexuality once more being classified as a criminal offense under Section 377.

The justifications used in the latter was that firstly, there were not as many LGBTQ individuals in the country, and that secondly, sexuality was a matter “privacy” therefore not one requiring a separate judgment; the bench said that the country’s LGBTQ population was a “miniscule fraction” and that the previous decision had wrongly relied upon international precedents “in its anxiety to protect the so-called rights of LGBT persons”. This in effect re-criminalized sexual intercourse “against the order of nature”. In its judgment the Supreme court bench of justices G. S. Singhvi and S. J. Mukhopadhaya stated — “In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable.

Both judges however noted that the Parliaments should debate and decide on the matter. A bench of justices upheld the constitutional validity of Section 377 of Indian Penal Code that makes anal sex a punishable offense. This, itself, was followed in the next few days by the former Finance Minister Yashwant Sinha calling for the arrest of same-sex companions of US diplomats, citing the Supreme Court of India's recent upholding of Section 377 of the Indian Penal Code. This resulted in multiple other incidents of violence against members of LGBTQ populations in different parts of India, with international condemnation coming in for the decriminalization of gay sex, from the United Nations, prominent academics, other countries, and more.

The previous case with the Naz Foundation resulted in a judgement that primarily discussion sexuality, specifically homosexuality to be something that is a matter of privacy, which “belongs in the bedroom” and cannot be discussed or brought into the foray in public spheres, almost in a “don’t ask don’t tell” metric of law and legality in India.

The Navtej Singh Johar judgement, however, resulted in the discussion of an alternative paradigm of understanding, with gender and sexuality both being also considered as something to be practiced publicly and without fear -- Justice D.Y. Chandrachud stated that not only must homosexual couples be able to love one another privately, but must also be able to do so in a public fashion -- as in the case of holding hands, or other forms of love that are conventionally considered acceptable for cisgendered and heterosexual practices of love in Indi.

He further stated as a part of the judgement that institutions such as the police and law enforcement should be sensitized and trained in order to protect such situations from an otherwise existence of oppression, something which, despite explicit mention in the judgement, is uncertain whether it has taken place since the judgement. Particularly, this is a primary element that comes into the foray while discussing gender-based violence after the judgement

-- the difference between the existence of different case laws on such matters and the actual practice and implementation of these changes and reforms since the time the judgements take place. There continue to be multiple incidences of gender-based violence towards the LGBTQ populations since the cases in New Delhi as well as other parts of India, which have been documented in various ways. This includes a direct link of moral policing and justification for the same in the name of tradition or “culture” which hints at a larger necessity for societal reform. This, one can consider, was discussed by Justice Dipak Misra as a matter that needed constitutional morality that needed to be learned, as opposed to pre-existing social morality. This paper, thus, looks to discuss the difference between the text and practice, between legal imaginations of the existing case law and the legal realities, the actual realities and the happenings in society, with respect to incidents of violence against LGBTQ people in India from across the country since the Navtej Singh Johar judgment, to discuss a more practical framework of the limitations of the law. The paper also posits recommendations for the need for new law enforcement sensitization in a robust manner to counter such negative social forces that create an oppressive environment in the country.

LEGAL RECOGNITION STATUS AND ITS IMPACT

The concept of human dignity is encountered with increased frequency in the context of gay rights and marriage equality in particular. Throughout legal orders, human dignity has emerged as a justification tool for bringing about gay rights either through adjudication or legislation and this in the absence of a fixed content of dignity in juridical application in most domestic legal orders. LGBT communities have an important stake in legal injustice issues. Specific groups within the LGBT community are disproportionately affected by violence and discrimination, sometimes at the hands of law enforcement officials. LGBT youth, and sex workers are particularly vulnerable to police misconduct and abuse; transgender people are also at greater risk of being targeted by police and treated inappropriately or abusively while in police custody. On the contrary, in India, LGBT community is not protected by the laws. The main hindrance of this lack of protection is Section 377. Although, the objective of Section 377 has remained unclear and unsubstantiated. The offence was introduced into British India with a presumption of a shared Biblical morality. Historians have speculated that “there were concerns that not having wives would encourage the Imperial Army to become ‘replicas of Sodom and Gomorrah’ or to pick up ‘special Oriental vices’”. The Section 377 is not merely a law about anal sex alone, but applies to homosexuality in general. The lack of a consent-based distinction in the offence has made homosexual sex synonymous to rape and equated homosexuality with sexual perversity (Kar et al. 2018). Section 377 is the biggest affront to the dignity and humanity of a substantial minority of Indian citizens (Gupta 2006). The commonlaw prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals (Chettiar 2015; Gupta 2006). The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human (Gupta 2006). There are reported cases of LGBT Indian being

raped and tortured by police (Chettiar 2015). Although, in July 2009, Delhi High Court decriminalised consensual same sex acts in private by declaring the Section 377 IPC unconstitutional saying “the section denies a gay person a right to full personhood” (Chettiar 2015; Tomori et al. 2016; Rao 2017). In 2013, in the Supreme Court, the petitioners argued that Section 377 does not classify any particular group or gender and hence is not in violation of Articles 14, 15 and 21 of the Constitution (Constitution of India 1950). They also argued that if the High Court judgment was approved by the Supreme Court, “India’s social structure and institution of marriage will be detrimentally affected and it would cause young people to be tempted towards homosexual activities”. The Supreme Court accepted the arguments advanced by the appellants and observed that Section 377 is the only law that criminalises paedophilia and crimes like sexual abuse and assault (Supreme Court of India 2013). It also reasoned that if Section 377 was a pre-constitutional statute and if it were in violation of any fundamental right, the framers of the constitution would not have included it in the first place. Based on such observations, the apex court overturned the decision of the Delhi High Court (Supreme Court of India 2013). However, the impact of this law is vast and not only limited to the courtroom.

MORAL POLICING AND CRIMINALISATION

The major highlighting social impact of moral policing and criminalisation in the LGBT community is quite complex and understudied and hence explained here:

IMPACT OF FAMILIES ON LGBT POPULATION

Heterocentric, patriarchal, traditional family values of Asian culture have contributed higher stigma and incepted homophobia (Cho 2016). Homophobia is irrational negative attitudes towards the people of sexual minorities (Murphy 2007). It can be due to their intense value on lineage, marriage, and children, these expectations are considered normal and thus contribute to stigma, even among the unmarried and divorced as well as homosexuals (Cho 2016). Stigma is a process of labelling, stereotyping, devaluing and discriminating within unequal power structures, based on actual or perceived identity or status. Having said that, in developed countries, myriad of negative psychosocial outcomes are faced by gay men and lesbians who experience rejection by their family for not being heterosexual (Carastathis 2017). There are countless examples of transgender people being shunned by their families. Moreover, most families do not accept if their male child starts behaving in ways that are considered feminine or inappropriate to the expected gender role (Cho 2016; Murphy 2007; Carastathis 2017). Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or woman (Carastathis 2017). Some parents may outrightly disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child (Carastathis 2017). Parents may provide several reasons for doing so: bringing disgrace and shame to the family; diminished chances of their child getting married to a woman in the future and thus end of their generation (if they have only one male child); and perceived inability on the part of their child to take care of the family (Delliswararao 2018).

MARGINALISATION

Marginalisation is treatment of a person, group, as insignificant or peripheral. People who are marginalised have relatively little control over their lives and the resources available to them;

they may become stigmatised and are often at the receiving end of negative public attitudes. Their opportunities to make social contributions may be limited. Further, they develop low self-confidence and self-esteem and may become isolated. LGBT individuals may experience multiple forms of marginalisation, such as racism, sexism, poverty or other factors- alongside homophobia and transphobia that negatively impacts on mental health (Collins et al. 2015). The marginalisation leads to social exclusion of many kinds. Exclusion from Social and Cultural Participation Some members of the society ridicule gender-variant people for being 'different'. Even from police, they face physical and verbal abuse, forced sex, extortion of money and materials; and arrests on false allegations. Absence of protection from police means, ruffians find Hijras/Transgender people as easy targets for extorting money and as sexual objects. Study on MSM and transgender community shows increased incidences of forced sex, physical abuse, verbal abuse, blackmail for money and threat to life (Delliswararao 2018).

EXCLUSION FROM EDUCATION

An important connection between stigma, exclusion, and economic outcomes flows through the educational and training process. Some evidence suggests that LGBT people face exclusion in educational settings. A small set of studies in India find that education and training opportunities are denied to LGBT people or are made more difficult by negative treatment and lack of support for LGBT people. Indeed, a 2005 Naz Foundation study found that half of MSM respondents had experienced harassment and violence by teachers and classmates, and that treatment reduced their ability to continue with their further education (Bhatia 2017). Another study of a small group of transgender students in secondary schools found evidence of harassment and discrimination by students and teachers (Delliswararao 2018; Chettiar 2015; Bhatia 2017). Moreover, National AIDS Control Organisation (NACO) survey rates suggests shocking number of illiteracy rates amongst MSM (NACO 2011).

LACK OF SOCIAL SECURITY

There are documented cases of social security issues faced by LGBT community (Cho 2016; Murphy 2007; Carastathis 2017). However, in India the transgender population is mostly vulnerable to this particular concern. Since most transgenders run away or evicted from home, they do not expect support from their own family in the long run. Subsequently, they face a lot of challenges, especially when they are not in a position to earn due to their health concerns, lack of employment opportunities, or old age. Lack of livelihood options is a key reason for a significant proportion of transgender people to choose or continue to be in sex work - with its associated HIV and health-related risks

BULLYING, MOCKERY AND ABUSING THE LGBT YOUTHS

Despite the acknowledgment of societal attitudes such as homophobia foster bullying, the preponderance of bullying research neither addresses nor acknowledges sexual orientation as a possible factor. Sexual minority students report more bullying and sexual harassment than their heterosexual peers (Mishna et al. 2009; William et al. 2005). Limited evidence suggests that youth of sexual minorities lack supportive families, friends, teachers and experience more victimization with isolation from their families and schools (Mishna et al. 2009). Lesbian and gay youth report that educators often did not intervene, even when they witnessed harassment of students perceived to be gay or lesbian (Mishna et al. 2009). Further, sexual minority youth may not seek support from their parents, who may be potentially available, out of fear that

seeking support will lead to further victimisation (William et al. 2005). Lack of awareness, sensitivities and fixed ideas of heteronormativity in India makes the LGBT youth more vulnerable to hostility. In recent years, there are significant reported incidences of suicides and murder of Indian LGBT community (Gwalanil 2015).

CONCLUSION AND RECOMMENDATIONS

It is clear to conclude that sexual minorities of India faces series of discrimination, exclusion from the society, thus quite often, meet with obstacles to satisfy their needs. There is no short cut solution that can address the problems facing many LGBT people in India. Therefore, in the light of the above-mentioned discussion, following recommendation can be developed in recognising the role that individuals as well as institution can take effectively. a) Government support to establish and decriminalise anti-LGBT laws.

- b) Support the most marginalised of the sexual minorities- Transgender, low income, people with HIV.
- c) Awareness campaigns to create a tolerance and inclusion and positive policies towards sexual minorities.
- d) Better individual health for LGBT people can affect all individuals, such as reducing the transmission of disease or freeing up health care resources to treat other conditions. e) Research can measure the impact of stigma and other following details:

(1) Research can be used to evaluate the success of interventions designed to address exclusion;
(2) Research can be helpful in designing new policy approaches to strengthen the materials include HIV, other STD, or pregnancy prevention information that is relevant to LGBTQ youth; such as, ensuring that curricula or materials use inclusive language or terminology.

- f) Training needs to be conducted for health professionals to increase their understanding of LGBT identity as potential risk factor for self-harm suicidal behaviour and depression. Respective authorities should ensure that physical health, mental health and social care services are provided in a way that is accessible and appropriate to LGBT people.
- g) Police force at all levels need to be sensitised on LGBT issues and also on the general principles of fundamental human rights.
- h) To check the violence that is perpetrated in the home as well as in the public sphere, the domestic violence law has to be expanded to include non-spousal and parental violence as well.
- i) To change societal attitude media has to play a responsible role by reporting on LGBT issues and promoting a culture of tolerance and freedom for minorities.

At the end it can be said that, protecting sexual minorities from violence and discrimination does not require the establishment of a new set of laws nor does it require the creation of new international human rights standards. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy.

REFERENCES

https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&authuser=2&q=homosexuality+legal+law+and+moral+policing+in+india&btnG=#d=gs_qabs&u=%23p%3DwVx92Hs7cNMJ

https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&authuser=2&q=homosexuality+legal+law+and+moral+policing+in+india&btnG=#d=gs_qabs&u=%23p%3DofVZR-Q9wa4J

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