

## HOMOSEXUALITY: THE PROTECTION OF HUMAN RIGHTS

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### *Abstract*

*If a normal family find out that their son or their daughter is homosexual they went to their typical NAHIII! And they think this can't happen and the reason for it is that we think that way like it's so unusual and against the norm of 'NATURE'. But here we have to understand that nature is the one that made us all together and it's natural. Even now our law considers it legal in India but still, we are not accepting the very fact that if someone is inclined that way it's their own choice if someone has such preferences it's their wish and we are no one to decide the way they want to live.*

The meaning of homosexuality is defined by various authors and different people have their own understanding in this regard. When two people feel for each other the society thinks they can only be a man and a woman, but if they hear that there are two peoples of the same gender and they feel for each other society never accept them. For our society, the term HOMOSEXUALITY is so wide that they are not yet able to accept it. Still in 21st-century society is not able to accept the fact that the two peoples can have feeling regardless of their gender and it is totally OKAY! It's important to know there is nothing wrong to feel for someone of the same gender as you. Even so many peoples know that they are homosexual but they are not ready to accept it just because of the pressure of their family like what their parent going to say and after that what society says. They thought it is a sin. Is homosexuality is a sin? Is it is okay to feel or have a feeling for same gender? To know the answer to these all question first we have to know the meaning and the history of homosexuality. Homosexuality means having a feeling or feels attractive toward the same gender; here the word homo means "same-sex". If a man attracts to the man he is said to be homosexual. Homosexual peoples denote themselves as an LGBT community which describe as Lesbians, gay, bisexual and transgender.

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If we discuss Indian history, same-sex loves as old as Ramayana, Mahabharata, and Vedas. It is acceptable by the Indian history until the east India Company followed by queen Victoria British raj introduced the concept of sin, conjugal love and therefore the straight and narrow. The ancient Indian peoples are well aware of the actual fact that love is decided by two souls, not by mere gender. At that point peoples belong to each religion accepted the concept of the various dimension of affection, there are numerous stories present which describe the beauty of our old culture and one among the foremost intrusting ones is when lord Vishnu turn himself into a woman (Mohini) when he/she wanted to trick the demons.

In Ahmedabad there is a temple belonging to Bahulara a god who write the roster, it is said that there was a pound that might turn a woman into a man. local tradition also acknowledge the love between same-sex, in Gujarat there is a temple named bahuchraji is actually a princess who castrated her husband because her husband every evening prefer to go to the jungle and there he behave like a woman. In kritiwas Ramayana, there is a story of two women who make love to each other in the absence of their husband and produce a baby without bones. Even with the introduction of Islam in India the Islam culture also accepted this fact like there is Mahmud of ghazi who openly leaves with a man he is in love with even in that time, we all know about Aladdin khalji but no one knows that he is in love with kafur that he even made him his deputy. Before this east India Company, our India is like a bunch of flowers in which every religion, every place of peoples and every soul irrespective of their gender live together happily.

For ancient India same sex love is integrated part and they have their choice that how they want to leave and gender plays no role in it, but despite more than 70 years of independence the Indian sense of morality has remained faithful to the colonials. If we talk about our politicians what they believe is that, they publically give their statement that same sex love is an import of foreigners and will destroy our Indian values. In present world our society is not accepted the fact and the believe that there is a boundary between homosexual and heterosexual, and they even believe that being homosexual is just a mental ingredient and can be change by the choice but even science accepted that homosexuality is not a choice and it is hormonal, no person have control over it if a man want to be like a women that it is his choice. One way to understand this is we have to see the beauty of ancient India, for them lines divide males and females, heterosexual and homosexual were blurred.

This world is not just for man and woman but also for man with woman heart and woman with mans need, there is much more in this word than a person or a human mind can see. There is so many things present in this word that no one can explain, having feeling for same sex is just normal.

### **Legal prospective about homosexuality**

In India if we talk about homosexuality section 377<sup>2</sup> always came into the picture, this provision is of victoria era law where same-sex is just not acceptable. Section 377 of the Indian penal code actually deals with Unnatural offences, before 2018 gay sex is illegal in India and whoever commits this offence are punishable by the court of law. This section deals with unnatural intercourse against nature. At that point in India, homosexual practices privately between consulting males or consulting females even above the age of 18 are going to be treated as criminals. But now as we see our judiciary is takes so many steps to change this law through their judgments. The first step was taken by our judiciary in 2009 there's a case of *Naz Foundation v. govt. of NCT of Delhi*<sup>3</sup>, an NGO filed a petition to Delhi High Court seeking decriminalised the offence under section 377 it was held that section 377 was creating unreasonable classification and target homosexuals. It was also stated that as per article 15 any discrimination on the ground of sex is prohibited and section 377 clearly discriminate homosexual by their sexual orientation, section 377 violate article 15 and added that due to section 377 there are such a big amount of homosexuals who do not want to declare their true identity because they have afraid of being criminals. And hence the Delhi high court decriminalised the offence under section 377.

But still, there are so many non-profit organisations and institutions that challenges the judgment passed by Delhi high court and they say that decriminalising homosexuality is not good for our future generation. And this judgment is challenged in the apex court in the case of *Suresh Kumar Kaushal and another v. NAZ Foundation*<sup>4</sup> and others, Suresh Kaushal (petitioner) challenged the judgment of the Delhi High Court in the Naz Foundation case where the court decriminalised homosexuality in Supreme Court. It was argued that the court can't take away the duties of the legislature and said that section 377 is gender neutral which

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<sup>2</sup> 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 ten years, and shall also be liable to fine.

<sup>3</sup> 160 Delhi Law Times 277.

<sup>4</sup> Civil Appeal No. 10972 OF 2013.

contains offences against nature which is an essential part of our society. And it had been also contended that the right to privacy under article 21<sup>5</sup> doesn't include the provision of section 377, the petitioner said that legalised homosexuality breaks down our social values and it is not according to the order of nature. It was held that section 377 is there from the colonial era and it is pre-constitutional law if it violates any of the fundamental rights present in part 3 of the constitution they would already be declared as void. And further, the court added that homosexuals in our country are in very small quantity that is they belong to the minority and the interest of society as large, also more important than that, so it was held that section 377 is constitutionally valid. And also added that it is a duty of legislation to decide whether they strike down the provision of section 377 or not.

After this judgment of the apex court so many conflicts arise and therefore the NGOs and the entire organisation who engaged and doing everything to secure gay rights are just feel nothing. Because of this judgment, all the struggle of over 15 years just vanishes, but they still stand and face all this. The thing is that provision section 377 is imposed by Britishers and not by our parliament, this is a colonial mentality. Our India is a developing nation and for a developing nation it is important to adopt every single change during this dynamic environment, and it is not only important for the development of the nation it is important for the development of every person to leave in our nation male, female and LGBTs. No one should be held criminal just for their way of living their life; it is their choice and depends on them how they want to leave. In our nation, we always say minority's rights are as important as the majority, so the rights and the way homosexuals want to leave it all upon them and this is their basic human rights.

So many peoples still believe that homosexuality is just a mental disorder and it is just a myth, homosexuality is not a mental disorder or a psychological problem, so much scientific organisation announced that it is not a mental element it is normal. But peoples thought the structure of family must have a father, mother and their kids because they only think that way they see the structure of the family in this way over the centuries and they are not in a position to accept any other structure of families. The question is that those children who are born as they are why they don't have the right to leave as they are and why society interferes in their personal lives, and why they held liable for the offence of section 377. Section 377

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<sup>5</sup> No person shall be deprived of his life or personal liberty except according to procedure established by law.

talks about unnatural offences and being homosexual and live with the choice of their loved ones is natural, nothing in this is unnatural so why homosexuals held liable under this. In Suresh Kaushal judgement the Supreme Court not upholding the judgment of the Delhi high court takes ways the basic human rights of the homosexual community. To be together in the way one person wants is their personal right as long as they don't affect any other person. Consensual sex between adults that is above the age of 18 is their right to live and taking always this right is not given in our constitution. If two LGBT couples having sex in private is their personal right to live if they don't affect the public and doing it in private and section 377 take this right away from them. The Delhi high court said in the judgment that section 377 interfere with the dignity of a one-person and the humanity of someone.

As a human being, we all have our basic rights which help us to leave and make us being a proper human but for homosexuals, they don't have that right to leave which is against the human dignity. Having sex with their gay partner is their lifestyle to live in their own way and they have their choice we can say that this is the core of homosexual personality. But this is all about before the 2018 judgment which decriminalised homosexuality and gives rights to all homosexual peoples to live in their own way.

Previously, Supreme Court gives the landmark judgment which shows the human mind again start to alter their thoughts for the homosexual community and begin taking steps to just accept homosexuality. Before 2019 in India homosexuality is illegal and that they aren't allowed to have sex if they even want to. In India, same-sex is in the category of 'unnatural offence' which is defined in section 377 where it was stated that same-sex or gay sex is prohibited in India. But now our supreme court decriminalised the offence under section 377 within the case of *Navtej Singh Johar v. Union of India*<sup>6</sup>, in this case, it was again argued that whether section 377 of the Indian penal code is unconstitutional. On 6th Sep. 2018 a five judge's bench were established for this case. And it was held that section 377 actually violates various fundamental rights of the citizen and added that this section clearly discriminates based on the sexual orientation of one person, and this leads to gender inequality which is a violation of article 15<sup>7</sup> and article 14<sup>8</sup> of the constitution. Further, they also added that this section also violates article 21 of the constitution that is it harm the

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<sup>6</sup> AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

<sup>7</sup> The Indian constitution; The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

<sup>8</sup> The Indian constitution; The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

personal dignity of the individual. And it is said that the identity of homosexuals is as important as a dignity of normal human being. The court partially sticks down section 377. In additionally, the court said that it is a right for every citizen to live his/her life without any intervention and also added that it is a choice of every citizen to live full of efficiency without any fear, it's the duty of the constitution to ensure everyone lives their life with dignity. And our constitution is concerned to safeguard 'constitutional morality' not popular morality.

This judgment gives hope to homosexuals by this finally they are no more criminals just because of who actually they are. Our constitution give rights to every citizen immaterial of their gender they all have each fundamental right and freedom given by the constitution as a citizen of India, he or she will not be held liable just because of their sexual orientation. Everyone has the right to privacy everyone has their choice to choose their partner, and this is unconstitutional if it don't happens. After this landmark judgment whole LGBT community said that know they feel that they are citizens of India after all they fought for more than 15 years just to take freedom from this section.

Is homosexuality against the India culture?

We already see the history of Indian thoughts on homosexuals and we all know our India is a group of peoples from different religions from various places and now the thing is ancient India appreciate the idea of homosexuality than the question is when did it become a criminal act. After 1860 through section 377, colonial rule establish which help to grow that thought that homosexuality is against the Indian culture but no it is a part of Indian culture.

Our constitution provides rights and duties of everyone, it's sort of a general rule or a set of rule which give us everything we want, as a people of this nation we always have to accept the interpretation of it which is given by our judiciary. After that judgment still, numerous peoples are not ready or not accepted the very fact that homosexuality is not a sin. We are humans and this is the duty of every human being to respect the other one. In the 2019 survey, it had been found that only 30% of the Indian population seriously believe and accepted homosexuality and respect that but there 70% of the population believe that colonial rule. Even Vishva Hindu parishad and call homosexuality is an 'imported disease'.

The thing is why are we and who are we to interfere with their personal lives. Article 14 of the constitution talks about equality, as a pride nation we always have been proud that in our nation we always treat everyone equal and nobody will ever be treated unequally if it happens

then it is a violation of that person fundamental right but here in the case of homosexuals, we punish them because of the way they want to live. It's clearly a violation of their right to life and personal dignity if the person in our nation is not able to live with the one he/she wants then it is not right to life, right to life provide not just living the life but also provides everyone should live their life with full of joy and enjoy every movement of it, do whatever the person wants to do but without harming others. If we talk about article 15 which talks about discrimination on the grounds of religion, race, caste, sex and place of birth, still after that judgment peoples discriminate them due to their gender orientation. We also talk about the protection of the rights of women in our country and gender inequality but no one wants to on this subject matter because they believe in that colonial rule even the Indian national ruling party maintain pin-drop silence on the most important landmark judgment of 2018. Anti-forced conversion therapy by families remains a common practice in so many parts of India. But queer activism is taking a huge role in India because there are peoples who really don't know about this and if they know they think it is a disease due to lack of education. Queer activism growing fast through cinema, the internet, music, sports, and plenty of different mediums to challenge the hetero medium society of what really constitute Indian culture. Indian culture includes everything because our India believes in all the things which are possible as we know ancient India is colour-full and ancient India known for its stories which we all believe. *Queerness isn't against Indian culture it's at the very core of it, it is everywhere in our culture in every religious, book we see there is a part or there's something always have which is about homosexuals.*

#### Conclusion

Today our society faces several problems but the issue is not just that the main problem is instead of comforting them we often try to cover them up. Because if a child is born they are expected to be a boy or a girl but if they born with a body of a boy but having soul of women it would be very hard for them to accept it. The thing is no one wants to talk about these problems openly and now we have to talk about them openly so that everyone should beware of that fact. Love and compassion are for everyone it is not just for a male or female, love has no boundary it is everywhere and in every form of the body. After the 2018 verdict the peoples who are hiding their true self because of fear of their parents come and celebrate their winning and the children who feel like they belong to the LGBT community get the courage to talk about this to their parents but due to the backward mentality of old generation won't

accept that and come with the answer that in our culture this is not acceptable. Whenever we talk about sexuality it is something which our nature put in us for continues of this world or because there is something which is called perpetuation of the race and specious, talking about sexuality is important for human but the thing is some peoples have their own preferences which goes nothing to do with the reproductive process. Every individual has the right to do whatever they want to do with their body because it is their body but the condition is without harming themselves. In our nation now homosexuality is decriminalised and now Supreme Court held that every individual do have right to privacy they can do whatever they want to do in private and they are not be treated as criminals but there is only a judgment and its implementation but the important part is everyone have to respect it. But it is not possible till every individual accept it from the heart.