

DECRIMINALIZING HOMOSEXUALITY IN INDIA

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Few topics arouse more attention of people than sex. Since times immemorial, sex has been the central issue in governing human relations. Human sexual behavior all across the world has been influenced by different attitudes and opinions over time. It is generally seen that societies that hold conservative attitude towards sexuality also tend to suffer from a lack of general freedom of expression, which in turn is often associated with a lack of economic, democratic and religious freedom. However, the actual ideological makeup of sexual conservatism differs from culture to culture. Thus, homosexuality may be stigmatized in one culture by sexual conservatives while tolerated or even advocated by comparable groups in another.

What is homosexuality? Homosexuality is a term derived from the Greek word *homos*, which means 'the same.' Homosexuality means sex drive oriented towards personal and sexual gratification with the same sex.

Interestingly, sexuality holds a central place in the Indian culture, with early Hindu texts and art heavily charged with sex. Homosexuality has existed from the time that man began to record history. The best examples of this could be the carvings of Khajuraho temples, the 'love science' or 'the love teachings' of *Kamasutra* by Vatsyayana. The latter clearly refers to Homosexuality in form of active-passive binary evidences.¹⁹⁵ In both the Old and New Testaments, homosexuality was prevalent, though the same was condemned. In the Greek city states of Sparta and Thebes, homosexuality was closely limited to the military and in Athens, homosexuality and sport were intimately related.¹⁹⁶ The same was in practice in Britain also. In the 13th century, the term "*sodomites*" became a common term to broadly refer to same sex acts, prominently between men.¹⁹⁷ However by the influence of Judeo-Christian values and belief it was made criminal. It is mentioned clearly in the Halsbury Laws of England as follows:

Sodomy: The offence of sodomy can only be committed per annum. It may be committed by a man upon a woman even upon by his own wife.

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195 Douglas Malti, *Encyclopedia of Sex and Gender*, MacMillan Social Science Library, vol 2, p 724

196 Douglas Malti, *Encyclopedia of Sex and Gender*, MacMillan Social Science Library, vol 2, p 725

197 Douglas Malti, *Encyclopedia of Sex and Gender*, MacMillan Social Science Library, vol 2, p 722

The offence consists in penetration per anum and it can be committed by a man with a man, or with a woman, or with an animal. It is a misdemeanor for any male whether in public or private to take part in or attempts to procure the commission by any male of any act of gross indecency with another man. In criminal law it is known as "buggery."¹⁹⁸

Many other nations followed the track. Since India was under the control of the English, it could not escape unaffected; British anti-sodomy laws were in effect in India and the influence of Judeo-Christian considerations took hold in India. The law relating to homosexuality was prevailing under the Indian Penal Code (IPC) framed by Lord Macaulay as under:

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 of either description for a term which may extend to ten years; and shall also be liable to pay fine

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to constitute the offence described in this section.

The typical phraseology which is used in the section is "carnal intercourse", which according to the Oxford Dictionary means "any intercourse satisfying the sexual desire." This must be against the order of nature. Now the question arises, "What is the order of nature? What does it signify?" Sex according to the order of the nature is essentially procreative or per vaginum. Hence, the acts punishable by this law could be like anal intercourse, oral sex, etc.

Further the section states "with any man, woman or animal", it means this section punishes homosexuality and bestiality as a whole because according to this section these are unnatural forms of intercourse which is not procreative apart from per vaginum, among heterosexuals, even with one's wife.

Now the most controversial term used in this section is "voluntarily". This particular term gives a sweeping scope over all type of non-procreative intercourse whether voluntarily or forcefully because consent for this section is immaterial. It means if you have done or performed any type of non-procreative intercourse with any body on this earth, you are liable under this section regardless of your mental state.

However, this offence in India is wider in its scope compared to Common law, because in *R v Jacobs*¹⁹⁹, it was held that the act in child's mouth does not constitute the offence

198 Kenny, *Outlines of Criminal Law*, 19th Edn, p 205

199 Nelson R.A., *Indian Penal Code*, 9th Edn, vol. 3, p 3738

but the same act in India was held to be punishable under Section 377 in *Khanu v Emperor*²⁰⁰.

After giving this general reading we can conclude that this section punishes all types of “penetrative and non penetrative acts” regardless of the mental state of the parties. Hence, this act clearly takes homosexuality under its dragnet. But these laws of sodomy or unnatural sex have constantly undergone the scanner of rights, constitutional validity, etc. These laws put forward certain fundamental questions relating to its utility and reasoning, like what is the purpose of the law? Does the law relating to sodomy follow these footsteps? Is this section a violation of right to personal liberty and right to equality? Is this law against right to privacy?

The basic purpose of law is to regulate the society and criminal law being society’s strongest form of official censure and punishment, should be concerned only with major wrongs affecting central values and causing significant harms.²⁰¹ It was clearly stated by the Wolfunden Committee Report of 1957 on homosexuals and prostitution – “the purpose of law is to preserve public order and decency, to protect the citizens from what is offensive and injurious and to provide sufficient safeguards against exploitation....” But in the opinion of the author the homosexual acts are neither offensive because this private act is not at all harmful for others, nor injurious as it has been proved that this phenomenon is due to some biological factors like genetics and prenatal developments. It also depends upon the surrounding environment in which an individual has grown. Various other writers who have attempted to ascertain the aetiology of homosexuality have found other determining causes. The factors held to be responsible are often unidimensional and over simplified. Some of the unitary causes adduced are strong attachment to a man; immaturity with lack of comprehension of sex drives; lack of virility in the fathers; excessive defeat in assertiveness; feminization by being dressed as a female; incidents, such as venereal diseases, which render heterosexuality unpleasant; disillusionment in marriage, etc. The same was recommended by Wolfunden Committee report in 1957 that homosexuality cannot be regarded as a disease, because in many cases it is only the symptom and is compatible with full mental health in other respects. Hence, one who is homosexual by nature, one who enjoys company of same sex, to prohibit his freedom will amount to an unnecessary attack on his personal liberty, which is given to everybody under right to life and personal liberty in Article 21 of our Constitution. These rights are of paramount and in circumstance can be taken away.²⁰² It is a kind of inalienable and inherent right of an individual. To build a truly democratic and plural India, we must collectively fight

200 *Ibid*

201 Ashworth Andrew, *Principles of Criminal Law*, 5th Edn, p 17

202 Shukla V.N., *Constitutional Law of India*, 10thEdn, p 164

against laws and policies that abuse human acts and limit fundamental freedoms.²⁰³ The basis of all law is that it punishes acts that harm other people. But there is no evidence that homosexual acts between consenting adults harm anybody.²⁰⁴ Its one's fundamental right to choose one's own partner on bed and falls within the liberty without being punished as criminals.

Let me now present a judgment of the Delhi High Court dated 20th October 20th, 2008 on homosexuality – whether be made criminal act or not and my opinion and views analyzing the facets of the judgment.

The Central Government's unscientific stand on the issue of homosexuality reflects that if the act of homosexuality is legalized the same will bring devastation to the society. However, irritated by this motion of the centre, the Delhi High Court on Monday (20th October, 2008) has observed that the homosexual trait in a human being cannot be termed as a 'disease' and objected to the contention that if legalized, homosexuality would bring 'devastation' to the society. The High Court observed that according to a WHO report, homosexuality trait is not a disease.

Bunch of petitions are being filed by gay activists seeking decriminalization of gay sex among consenting adults which, at present, is an offence. Section 377 of the Indian Penal Code provides a punishment up to life imprisonment for indulging in gay sex.

Now the main issue that arises here is this law against the right to privacy? The basic purpose of law is to regulate the society and lay down a standard code of conduct and the basic reasons for having criminal law is preventive and act as a deterrent in respect of acts which are very serious and alarming for the society at large. It was clearly stated that "the purpose of law is to preserve public order and decency, to protect the citizens from what is offensive and injurious and to provide sufficient safeguards against exploitation." In my opinion the homosexual acts are neither offensive because this private act is not at all harmful for others, nor injurious as it is an outcome of some congenital and prenatal developments. The High Court's stand on the issue that the homosexual trait is not a disease has also been strongly advocated in the Wolfunden Committee Report. The Centre contended that legalizing homosexuality would send a wrong message to the youth and that the interest of the majority "cannot be compromised" just to accommodate their rights. The Centre talks about the homosexual acts sending a wrong message to the youth, but it is indeed sad that the Centre is negligent and ignorant about the much cherished and relished history of Indian art and culture. Sexuality has always held a central place in Indian culture, with early

203 Seth Vikram, 'Love that dare not speak its name', Hindustan Times, 16th September, 2006

204 Sanghvi Vir, 'Campaign Against Section 377', Hindustan Times, 17th July, 2006

Hindu texts and art heavily charged with sex. The best examples of this could be the carvings of Khajuraho temples and *Kamasutra*. Thus, legalizing homosexual acts (between consenting adults) would not be an attempt to mislead our youth.

Not to forget but the Naz Foundation too filed a petition in 2001 stating that Section 377 of the IPC is against the right to privacy. The petition stated, "*Section 377 demeans a gay man. It silences a gay man into accepting the discrimination against him. He will not come out to declare his orientation. It can be criticized on the basis of moral grounds but it is illegal to make homosexual acts between consenting adults an offence.*"

The Centre in this matter gave its contention regarding the issue of spread of AIDS stating that "AIDS is already spreading in the country and if gay sex is legalized then people on the street would start indulging in such practices saying that the High Court has given approval for it." The Centre again is ignorant here of the fact that Section 377 is acting as an obstacle on the way of eradication of AIDS. Sujatha Rao, the Director General of the National AIDS Control Organisation (NACO), a Central Government Agency, at a recently held international conference is reported to have said, "Section 377 places a huge constraint on Government's HIV/AIDS programmes. If you criminalize any behavior you increase the chances of it going underground." Also the essay from the "Five Stakes Study" by Verma and Associates reports that approximately 10% of unmarried rural youth had some MSM (men sex with men) contacts in 2002. Gay activists often cite the internationally accepted figure of 5% MSM in any given sexually active adult male population. This puts figures for the whole country at around 13 million, thought the actual figure may be even higher and I am sure that the law of our nation would not hesitate in accommodating the rights of such a large portion of our society. These evidences show that male sex relations need immediate attention for stopping the rate of HIV epidemic.

In *Lawrence v Texas*, 2003²⁰⁵, the US Supreme Court finally struck down the law relating to punishing two consenting adults for homosexuality in private. The liberty protected by the Constitution allows homosexuals the right to make choice of his or her partner. The Court further held that it is sufficient for us to acknowledge that adults may choose to enter upon this as free persons.

This case was overruled the case of *Bowers Attorney General of Georgia v Hardwick*, 1986²⁰⁶ which upheld the validity of anti-sodomy laws in the US.

Article 21 of our Constitution includes right to privacy within its sweep which was

205 Mathew Lippman, *Contemporary Criminal Law, Concepts, Cases and Controversies*, p 46

206 Gaur K.D., *Cases and Materials*, p 523

upheld by our Hon'ble Supreme Court in *Kharak Singh v State of U.P.*²⁰⁷ for the first time. Supreme Court held that right to privacy is an essential ingredient of right to personal liberty. In 2001 Naz Foundation has filed a petition in Delhi High Court that section 377 of the IPC is against the right to privacy. The petition questioned the legislative intent as being arbitrary and outdated to challenge the effect the effect of law as being discriminatory on the basis of sexual orientation. Hence, it is also violation of Article 14 of our Constitution. In *Lawrence v Texas*²⁰⁸, the US Supreme Court clearly admitted this fact and held that when homosexual conduct made criminal by the law then this amounts to discrimination both in public and private spheres. This stigma this criminal statute imposes is not trivial.²⁰⁹ Discrimination made by this criminal statute is not only between the homosexuals and the society at large but also between the group of homosexuals i.e., law discriminates gay couples against lesbian couples.

In India, it has very serious public health dimension relating to HIV / AIDS prevention. Sujatha Rao, the Director General of the National AIDS Control Organisation (NACO), a Central Government agency, at a recently held international conference is reported to have said, "*Section 377 places a huge constraint on Government's HIV/AIDS programme. If you criminalise any behavior you increase the chances of it going underground.*"

At the same time, I fail to understand the dichotomy of the State that on one hand the Government through National AIDS Control Organisation (NACO) and other state organizations, is encouraging diverse sexual practices within a safe sex, HIV prevention framework and on the other hand, it still contains the prohibitions of homosexuality. In my opinion the State cannot demean the existence of the homosexuals by making their private sexual conduct a crime. It is a promise of our Constitution that there is a realm of personal liberty which the Government may not interfere with, at the same time this act is very natural for homosexuals "by nature". So how can law criminalise the act which is very natural? The function of law is to regulate but it cannot decide the lifestyle and the destiny of an individual.

Basically homosexuality is a private act and it is executed in a very confidential manner between two consenting adults. The reason behind this is very obvious, Section 377 of the Indian Penal Code and social unacceptability. Because this law results into social stigma upon the homosexuals, in order to skip this, this act is being done in hiding which is clearly an abuse of law. It results in undermining the respect of law because there is a pattern of non-enforcement with respect to consenting adults acting in private. The State of Texas admitted in *Lawrence v Texas*²¹⁰ that in 1994 as of the date it has not

207 Shukla V.N., *Constitutional Law of India*, 10th Edn, p 243

208 Mathew Lippman, *Contemporary Criminal Law, Concepts, Cases and Controversies*, p 46

209 Mathew Lippman, *Contemporary Criminal Law, Concepts, Cases and Controversies*, p 46

210 Mathew Lippman, *Contemporary Criminal Law, Concepts, Cases and Controversies*, p 47

prosecuted anyone under homosexuality laws.²¹¹ Take for example the case of India, where the percentage of homosexuals is around 5%.²¹² How many cases out of this figure are being disclosed in from of police or for that matter reaches the Court? Not even 0.1%! Hence, this law is not serving the purpose for which it was made. And in case even if the sexual act is disclosed then too this law is being arbitrarily enforced and thus inviting the eminent threat of blackmailing.

We can, however, definitely introduce some changes either by adding or by omitting so as to make the law able to serve some practical utility and bring itself at par with the rights of an individual. The law should be in the form so as to be able to fight with sexual exploitation and forceful intercourse with great vigour. But at the same time it should not punish two consenting adults acting in private. By omitting the word "voluntarily" from Section 377 we can achieve our goal. The consent of parties should also be given a higher footage. Another path by which the status of homosexuals be improved can be adoption of this issues by the political parties of our democratic India. Can you tell how many political parties have come up with the issue of the rights of homosexuals in their election manifestos so far? The answer is very discouraging. None of the parties so far have even thought of including this issue on their campaigning speeches or manifestoes.

Various human rights organizations are against this law, for example, European Court of Human Rights did not follow the Bowers case. In 1998, the Constitutional Court of South Africa, one of the most respected international judicial institutions, unanimously invalidated provisions of several criminal laws, which made punishable homosexual conduct between consenting males in private as violative of the Equality Clause. The Hong Kong Court of Appeal in September 2006, unanimously invalidated similar provisions in Hong Kong laws, which criminalized homosexual practices in private between consenting adults.²¹³ It is worth recalling that Justice Michael Kilby, one of the most distinguished serving judges of the high Court of Australia and Justice Edwin Cameron, a great anti-apartheid activist and now a serving judge of the Supreme Court of Appeal in South Africa, have publicly acknowledged their "gay" status for many years. India must march in the step with other democracies in removing legal restrictions on sexual orientation. Same sex marriage is legal in Massachusetts and California. No one has the right to deny another his life, even though they disagree with it, because everyone has the right to live the life they desire if it does not harm another and because discrimination has no place in America.²¹⁴ With Section 377 of the Indian Penal Code,

211 Mathew Lippman, *Contemporary Criminal Law, Concepts, Cases and Controversies*, p 48

212 Verma, Ravi K., Pelto, Pretti J., Schensul, Stephen L., Joshi, Archana. (Eds.). (2004). *Sexuality in the time of AIDS: Contemporary perspectives from communities in India*

213 Anil Divan, *Human Rights versus Section 377*, *The Hindu*, Thursday, October 2006

214 19th September, 2008, *Times of India*, Lucknow Edn, p 10

which criminalise homosexuality, posing a threat to public health by impeding programmes for the prevention and control of HIV/AIDS, the issue has become urgent.

I thereby, conclude by mentioning that it is high time for us that we decriminalize homosexuality between two consenting adults in private in our country because when we talk of criminal liability and its related conduct, the answer changes from era to era. The reason for this being that law has taken birth from the womb of the society and since society is in a state of flux, then how can law and the legal system be unaffected?