



DECRIMINALISING HOMOSEXUALITY: AN IMPERATIVE FOR ENSURING EQUALITY*

Introduction

Law can never be segregated from society at any point of time because the former cannot work or function as an autonomous body and it is always regulated through certain religions and customs which have been followed by the community or an institution from time immemorial. The Indian Legal System is per se heterogeneous in character and has its own hierarchy where the administrative and judicial authorities are considered to be the redressal platform of the country, but due to the enormous population it becomes a bit difficult even for these appeals podiums to address everyone's grievances which lead to various conflicts popping up in the society amongst several communities whose demands are not taken care by the government and are to put to face disappointment from judiciary as well. Law has at various instances albeit not intentionally but has created differences whether it is through Article 370 of the Constitution or it is Section 377 of Indian Penal Code. Law and gender has always been a debatable issue in India, where there has always been an effort to bring this topic under the ambit of political arena and creating a moral stigma out of it rather than giving it a wider perspective and speculating it rationally. Currently what is being witnessed is that a person is being deprived of his certain inherent rights and a significant protection from law just because of him being a transgender which is a very remorseful truth of a country that aims to provide equality in the nation. With such draconian laws such as Section 377 of Indian Penal Code, it is arduous to imagine India which the framers of Constitution dreamt of while inserting the article of Equality in the Constitution. The judicial interpretation of this very penumbral area of law has given rise to a concept known as **anti-citizen** whose continuation is antithetical to the rudimentary concept of citizenship.¹

The research papers apart from various others aspects even tries to raise a very important question regarding the power of the State to intervene in an individual's private affairs. The aim of this paper is to bring into the light the struggle of homosexual in the country for claiming their

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¹ Ranabir Samaddar, State of Justice in India Issues of Social Justice, Volume II, Sage Publications India Pvt Ltd.

rights which have been cornered by the judiciary that too not by the virtue of their behaviour but due to their sexual orientation.² Since the time of Social Contract Theory it is observed that a person is only secured if he is the part of state and there is no citizen outside the state but the contradiction lies in the point that it is the state who decides on its discretion that whether a person is fragment of the state or not. Moreover state is also obliged to ensure that its citizen survives and are not left unaided. This archaic law criminalises voluntarily sexual intercourse against the “order of nature”, surprisingly the justification given by the judiciary is that this act is immoral and cannot be legalized thereby raising a pertinent question that how far can the state decide that whether the act is a moral or an immoral one? And can an act that is morally wrong be criminalised without corroborating it with a sufficient justification.³

This manuscript further advances argument in support of decriminalising homosexuality which in past ten years has become a blistering issue due to involvement of various human rights institutions that insofar seems to be an endless struggle.

THE AFFILIATION BETWEEN MORALITY AND CRIME

Our society has always tried to regulate various sexual acts according to their own whims and fancies by bringing arguments that tend to deprive the individual of their liberty and equality which is said to be guarded by the constitution. The known debate has been of linking morality with homosexuality, where the acts of the latter are said to be immoral because according to some profound jurists it does not set in with the line of morality that the entire society acquires and therefore is not universally shared which is a pre requisite for the existence of a society. The status quo which prevails is that when there is a conflict between the individual's rights and community right the formers rights are ignored and overlooked due to the hindrance in the public-interest, similarly in the case of homosexuals it is said that these people should be considered as out casted members of the society because their acts are sufficient enough to evoke a feeling of intolerance in the society which threatens the morality of the humanity.⁴ The judgment of Supreme Court raises a very imperative issue of individual's autonomy which is being infringed due to the state's decision of punishing a person for his acts that he is carrying on in his personal life. Morality is being decided by the court in a way that they allow heterosexual to choose their intimate

² Animesh Sharma, Section 377: No Jurisprudential Basis, Economic and Political Weekly Vol. 43, No. 46 (Nov. 15 - 21, 2008), pp. 12-14, <http://www.jstor.org/stable/40278169>

³ Ibid 2.

⁴ Ibid 3.

associations but denies the same privilege to homosexual thereby giving birth to an argument that, are homosexuals not entitled to the constitutional right to privacy alike other communities?. The case that right to privacy is given to family, marriage and procreation but not to homosexuals contradicts the entire essence of the constitution of which dictates Equality. Right to privacy should be extended to each and every individual section of society irrespective of their sexual orientation and in the present case it is very astounding to view that the act is being criminalised when the same is not causing any type of harm to any third member of society. An individual should have this rudimentary right to choose his own style of living and the form as well as nature of such interpersonal bonds without interference of state, moreover state should respect their dignity.⁵

The enforcement of Section 377 authorises the state to peep into the bedroom of two adults whose acts are consensual in every sense which in its kind legalises surveillance by the state to inquire about what is going on. There is a need to draw a line between the acts which lie under the ambit of public behaviour and something that is consensual and are done within a private arena. Analysing the practises of homosexuals in depth it can be argued that alike heterosexuals their relation does not result from individual autonomy but by the realization of human goods therefore leaves no reason for not regarding their relationship as sacred or terming them as undignified. ⁶ The morality is being challenged ipso facto by questioning the sanctity of the relationship which is bilateral and has its origin for a noble cause. There is a transparent violation of Article 21 of Constitution because it advocates the privilege of every man to have a right to a **dignified** life, but what the current scenario portrays is that there is a clear cut violation of liberty and equality which on one hand is being provided to one section of society but not to others and to add to this Is State competent enough to guide someone the manner in which he should conduct himself in his personal capacity?

The preliminary debate on morality regarding the homosexual was initiated between HLA Hart and Patrick Devlin where the latter one was against decriminalising homosexuality corroborating his argument by saying that society has right to pass judgments on morality and get them enforced by legal mechanism. Patrick Devlin states that an act should considered being immoral if it is not supported by majority in the society because the society has the authority to decide its moral codes and preserve them as other institutions. On other hand HLA Hart argues that it is a very immature argument on Lord Devlin part to popularise morality in sexuality, the individuals right cannot be

⁵ Michael J.Sandal, Moral Arguments and Liberal Toleration: Abortion and Homosexuality, California Law Review, Vol 77, No

No. 3, Symposium: Law, Community, and Moral Reasoning (May, 1989), pp. 521-538, <http://www.jstor.org/stable/3480558>.

⁶ Ibid 5.

governed by the morality that the entire society possesses moreover it would be infantile to hope that the entire humanity carries a single web of morality. Hart stated that in a region where the liberty, equality and safety are protected it is appropriate to accept certain level of deviance to bring a change in the society.

There should nothing be odious in drawing an analogy between the marital relationship and homosexual relationship because as the former is said to be significant in terms of initiating a mutual support and self expression, the same can be said **im pari materia** to homosexual relationship. The right to privacy should not be seen in context of the practise that it would protect but should bestow an individual the right to choose his conduct of life as long as it is private and consensual.

A very interesting fact stated by **Emmanuel Kant** was that there is different between an object and human beings where the latter have a certain type of dignity which is not replaceable but which in this case it seems apparent that the dignity of homosexuals is being infringed and the concept of social justice is being deserted which compels you to think from the perspective of the vulnerable section of society. There cannot be a universal conception of morality in a society which eventually gives rise to a political agreement in the community that each individual would respect the freedom of others to choose to live life the other want in their own way.⁷ Therefore the benefit of constitutional right to privacy should not be given by seeing the act for which the right has to be guaranteed but it should be granted seeing the privilege that an individual is entitled to irrespective of his action else it would be very reckless and quaint to infringe the privacy of a person, after the justice or the injustice of laws against the homosexual do not depend on morality or immorality of any kind.

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UNDERSTANDING HOMOSEXUALITY IN INDIA

Moral indignation and cultural beliefs can never be the basis of law making in a democratic, free, secular and modern country which is at present the **status quo**, regretfully there are very learned people who try to bring into religion in this debate of homosexuality in India. No religion states that homosexuals should be placed or brought under the ambits of criminal that constitute offence like murder, rape and many more. Sexuality has been understood with a very naive understanding

⁷ Ibid 6.

of being only feasible for procreating and similarly in India it is observed that thought process of people articulated that human morality according to them looks sexuality as pipes that fit together else it is labelled as **unnatural** or **out of order** which is a very puerile approach towards a matter that demands a very furnished understanding because human sexuality is far more complex than that. Such demeaning understanding would definitely lead to trampling away the rights of individual. It can also be argued that the society through its arguments is notifying them to live a deceitful, dishonest life by asking them to question the sanctity of their sexual orientation. The very essential fact that is being overlooked is that homosexuality does not have any ailment rather it's a natural condition which is prevalent among the small minorities of population. In India which is considered to be largest democracy it is remorseful to know that an identity is regarded as divergent only because of sexual orientation moreover it is forbidden to carry on its activities which are normal but are categorized as a taboo by the community.

FUNCTIONING OF SECTION 377 IN INDIA

This section is intended to punish the offence of sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman or by a man or woman in any manner with an animal.⁸

The objective of Section 377 has always been ambiguous and contradicted from the time it was introduced by the Britishers with a view that not having wives would encourage the Imperial Army to become replicas of Sodom and Gomorrah. The vagueness of this section lies in the fact that judges decide the act as **unnatural** through their own whims and fancies and apply to specific cases by determining what kinds of sexual acts will be classified as unnatural offence. Definition of sodomy has been widened by including sexual activities other than oral sex, mutual masturbation, thigh sex etc. The wide interpretation of this section has led to not only classifying these acts as "grossly indecent" but also the person himself as sodomite.⁹

The very constraint to prove section 377 is in itself controversial because of the fact that two men are required to be caught having sex in their personal spaces. This draconian law authorises to invade a bedroom of any person if it can be inferred that they are having sex even with proper consent. **Hart** has stated that undisturbed performance of private consenting act is more important than immorality of the act but Indian courts have never recognized the private immorality but has given authority to police to march into the homes of people for arresting them

⁸ V R Manohar, Ratanlal and Dhirajlal, The Indian Penal Code, 33rd Edition, Lexis Nexis Butterworth's Wadhwa.

⁹ Alok Gupta, Section 377 and dignity of Indian Homosexuals, Economic and Political Weekly, Vol. 41, No. 46 (Nov. 18-24, 2006), pp. 4815-4823, <http://www.jstor.org/stable/4418926>,

for an act that is not even harming others. It is a fact to be pondered upon that instead of scrutinizing the various grievous and heinous offences that take place in the society; the state is interested in employing policemen to catch people who are not even harming others.¹⁰

The misappropriation of this section is up to an extent that policemen have started trapping people just by going on their appearances and they assume that those people will commit or have committed acts of sodomy. People are threatened on the name of this section and realising the difficulties in prosecuting them under this section the corrupt police officers ask them for sexual favours or money. Moreover the section coming under a non-bailable offence makes it more difficult for people to escape from its perilous nature because when it comes to providing bail to couple even the judge's biasness comes into picture towards same sex couple.¹¹ The tragedy with the operation of this law is that on one hand it inflicts penalty on certain kinds of sexual act being committed that are classified criminal and on other hand it isolate citizens only on the basis of their appearances as was done in the Lucknow incident in 2006 where certain police officers arrested homosexual couples sitting together and presumed them to have sexual intercourse without any cogent piece of evidence.

In a nutshell it can be said that the Indian courts are demeaning the existence of gays, transgender, and lesbians by putting them under the shed of criminals of society which is against the dignity of a human being that the Constitution of India protects therefore this section which is arbitrary and discriminatory and is becoming a blemish on Indian society should be struck down and declared unconstitutional.

JUDICIAL TREND PERTAINING TO SECTION 377 OF INDIAN PENAL CODE

The first petition concerning this section was filed by ABVA a Delhi based NGO in regard to the Delhi prison case in 1994 for repealing section 377 but the case did not come up for hearing until 2001 and being a unaided NGO they could not hire an appropriate lawyer to keep a track of case as a result the case got dismissed without their knowledge.¹² The next attempt to repeal this section was in 2001 brought up by the Naz Foundation India Trust based in Delhi whose workers had to face harassment by the police while there were carrying on a campaign for educating people about the rights of people affected by HIV aids. They petitioned to not to repeal the entire section but exonerate the part which criminalises even the consensual sex between adults, earlier the petition was dismissed on the ground by the court that Naz Foundation did not have locus

¹⁰ Ibid 9.

¹¹ Ibid 10.

¹² Geetanjali Misra, Decriminalising homosexuality in India, *Reproductive Health Matters*, Vol. 17, No. 34, Criminalisation (November 2009), pp. 20-28, <http://www.jstor.org/stable/40647442>, Last seen 2016-02-14.

standi and was not the aggrieved party but later on in 2003 with coalition of numerous other Ngo once again voice was united against section 377.¹³ Fortunately all these organisation were successful in bringing in light the grievances suffered by these marginalised section of society and the court laid down in its judgment that the as far as the section criminalises consensual acts of two adults it violates Article 14, 15 and 21 of Constitution and as a result consensual adult sex should be excluded. The main thing to be noted is that the court did not bring into picture the argument of morality or defining what constitutes natural sex rather rationally scrutinized the issue and highlighted the discrepancies in the section and went on to respect the rights of liberty, privacy guaranteed by our Constitution.¹⁴

But surprisingly the Apex Court in 2013 in the matter of Section 377 has first time took away the rights of people of the country and this basically raises question on the concept of shining India which we are celebrating. The vision of the Supreme Court on this issue has been disappointing and had dismayed the citizens of country with its verdict in 2013 which makes essentially criminal to be a gay in this country. Supreme Court quashed the judgment of Delhi High Court which in 2009 decriminalised homosexuality, instead the Supreme Court passed on the buck to Parliament that whether they want to amend the existing draconian or the archaic law. This step by the Supreme Court has taken the clock back and hindered the process of developing a certain level of maturity towards sexuality and it would to not be wrong if one is cynical about that whether the parliament will amend this law or not?. It is hard to believe that the parliamentarians carrying a antiquated thought process would give a positive response on this subject.

The arguments advanced by Justice Singhvi writing the verdict were that there is no discrimination apparently seen regarding homosexuals in the country and there are hardly any convictions under this section, which is a very lethargic argument to be expected from a judge of Supreme Court. In a democracy state should not undermine the rights of minority rather it's about sustaining their rights in the country even if one belongs to minuscule community. Supreme Court has overlooked all the material and reports that High Court considered while delivering the judgment and stated that we cannot rely on foreign judgment, this is truly ironical because when the matter is regarding commercial law the court does not hesitate to indulge into foreign judgments but now they are willing to consider those judgment when various human rights are at stake. In India it is already very difficult to live a life if you belong to marginalised section and now when it had been criminalised the homosexuals are completely ostracized from the society.

¹³ Ibid 12.

¹⁴ Ibid 13.

The advocates of equality have a long way to go in their struggle for decriminalising homosexuality moreover the Apex court should understand the sensitivity of the issue and seeing the changing times law should also be made flexible in such matters and it is very much evident from past that laws relating to sati, dowry death have changed over the time then why should this be kept secluded from amendment. The approach required should be devoid of dominance by religious institutions and influence by other communities on this issue needs segregation in order to come at a rationale conclusion. The main predicament that needs to be addressed is the decolonisation of thought process of the society due to which bringing a change in this archaic law is becoming difficult. There is a need to spread awareness and education pertaining to this issue and without intruding any type of moral stigma with regard to this. Being in 21st century, giving heed to principles that were believed in past and which are even in conflict with the rights of a person in today's time should definitely be quashed and brought to end.

The Apex Court of the country should look into the matter as “**de novo**” contemplating every issue in detail and pondering on the issue from the perspective of the victims of this draconian law and respecting the trust that every individual has on the court should pass a verdict that is conventional and path breaking in this field and avoid happening the travesty of justice.

There is no jurisprudential justification for this section as it criminalises an act that does not harm any third party and falls well within the ambit of individual autonomy. The argument of state for making morality a ground for justification of this section can be demolished by arguing that what is the limit till which the state can dictate morality. **John Stuart Mill** stated that the only part or action of an individual over which society could exercise control is concerning others else an individual should be considered a sovereign and master of his mind and body.¹⁵ Supporting the aforementioned argument **Jeremy Bentham** bringing up the Utilitarian argument said that if the punishment is causing more harm than good then it should be left on the private ethics.¹⁶

CONCLUSION

The researcher in this manuscript tries to emphasise on the fact that there is a need to revisit the law concerning homosexuals and help them achieve their legitimate identity in the society which currently it being infringed by the operation of Section 377. The justice being delivered is relying on the identity of the individual and entirely overlooking the principle of equality which is basic essence of our constitution. While application of this law the state has attempted to make those places public which are in fact private. The state has unfortunately followed a mechanism which is seen responding only when the “violation” is meeting certain qualifying test such as it should be a

¹⁵ Supra 2.

¹⁶ Supra 2.

“good body” which is under threat and even if the body is being violated under a legal construct there is no recourse.¹⁷ **Diane Richardson** in her essay **Constructing sexual relationship** explains that the law would only come for rescue of an individual if the person firstly in its correct orientation what he is supposed to be and is not a victim of any of the disqualification according to the law, moreover in case of homosexuality it is the heterosexual that are considered to be natural and normal and the sex is said to be ideal only if it is done amongst the heterosexuals therefore establishing the belief that body should not be used for acts for which it is not designed.

The homosexuals of the country are the potential justice seekers and if their grievances are not addressed on time and appropriately it would catalyze the violence and criminalization in society as a consequence of their frustration towards the legal system of the country which is justified up to an extent.

It is unfortunate to say this but it would not be wrong either that India would not be able to achieve the dream of becoming a developed nation and other accomplishments as aspired by our leaders until and unless it is successful in bringing every individual at an equal platform without any kind of discrimination and intolerance being shown towards them.

⁶ Samir Saran and Vivan Sharan, Less corporate, more social, 10th August 2013, available at: <http://www.thehindu.com/opinion/op-ed/less-corporate-more-social/article5007515.ece>

¹⁷ Supra 1.