

Homosexuality in India: A Controversial Issue

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Abstract

Homosexuality that is a part and parcel of Indian culture from the time immemorial has only recently become a subject of public debate. A reference to homosexuality is no more a hidden/ buried concept but now is sufficiently visible and is gradually being acknowledged. Object of the article is to find out whether by decriminalization of homosexuality would be attack on religious and moral values. Many people think that it is a sin and a social evil which will only lead to a societal disintegration and the break of the family. So, obviously first question would be that by decriminalizing the homosexuality, would it be acceptable to the Indian Society or not? Another object of the article would be on the analysis of the judgment passed by Delhi High Court in Naz foundation Case, which decriminalized the homosexuality, later on overruled by Hon'ble Supreme Court of India, but finally agreed to reconsider its 2013 judgment and refer it to Constitutional bench for hearing the issue at length.

Keywords: homosexuality, controversial, India

Introduction

Sexual acts between consenting adult males have long been the target of considerable social and legal condemnation. Acceptance of these acts has only been, recently forthcoming as society gradually becomes more permissive^[1]. Over eighty countries in the world continued to criminalise sexual activity between consenting adults of the same-sex, according to the International Gay and Lesbian Human Rights Commission (IGLHRC). In addition, lesbians, gay men and bisexuals were often targeted for arrest under provisions relating to 'scandalous conduct', 'public decency', 'loitering', and similar charges^[2]. India is among the countries that retained laws pertaining consensual sexual relations between adults of the same-sex, characterising these acts as 'crimes against nature'. Men and women who identified as gay, lesbian or bisexual were attacked as immoral and putative criminals. In recent years, both due to liberal attitudes and the need to control HIV/AIDS, several NGOs and state agencies have all demanded legislation or at least decriminalisation of homosexuality and acceptance, tolerance and equality for gay men, lesbians and bisexuals^[3].

Instances of Homosexuality and Same Sex Marriages in India

Homosexuality that is a part and parcel of Indian culture from the time immemorial has only recently become a subject of public debate. A reference to homosexuality is

no more a hidden/ buried concept but now is sufficiently visible and is gradually being acknowledged.

Instances of homosexual union have been making headlines for past few years in India. 'Lakshya', a Vadodra based organisation helped fifteen gay couples tie knot. A lesbian couple in Amritsar was given sanction by the local magistrate to live as friends^[4]. Two women were legally wedded in Jodhpur and got the blessings of the family and their marriage was also officially registered^[5]. Two nurses Shiby and Prema got judicial permission to live together forever in Kerala^[6], and there is a growing demand from activists for the working for betterment of this community to decriminalize homosexual relationships. In September 2006, Nobel Laureate Amartya Sen and acclaimed writer Vikram Seth came together with scores of other prominent Indians in public life to publicly demand this change in the legal regime^[7].

Recently, the movement to decriminalize homosexuality has become popular. Campaigners of this movement lays emphasize on same sex relationship both as a human right as well as health issues, and stress on the importance and the need to disseminate information about HIV/AIDS.

Several organizations like the Naz Foundation (India), National AIDS Control Organization have put forward the demand to legalize homosexuality relationship^[8]. However none of the major Indian political parties have endorsed gay rights concerns into their official party manifesto. However, it is important to note here that, one of the Politburo members of the Communist Party of

¹ Subhas Chandra Singh, "Homosexuality and the Law: A Policy of Control and Containment", in *Indian Socio-Legal Journal* 2008 Vol. XXXIV No. 1 and 2. Indian Institute of Comparative Law p.19

² Human Rights Watch World Report 2001: Special Programmes and Campaigns, Lesbian and Gay Rights. available at <http://www.hrw.org/press/2003/07hrw-amicusbrief.htm>. visited on 12 June, 2012

³ See *supra* note 1 at p. 19.

⁴ Ramesh Babu, "Court Nod for Lesbians in Kerala" *Hindustan Times*. 29 October, 2002. p.13

⁵ *Ibid*

⁶ *Ibid*

⁷ <http://www.guardian.co.uk/world/2006/sep/18/gayrights.books> visited on 25 March, 2012

⁸ <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102249766.html> visited on 30.March, 2012

India (Marxist), Ms. Brinda Karat, did write an open letter in 2003 to the then Minister of Law and Justice, Arun Jaitley, demanding a repeal of section 377 IPC^[9] and Syeda Hameed member of the Planning Commission of India^[10] have either implicitly, or expressly come out in support of decriminalizing homosexuality in India, and pushed for tolerance and social equality for lesbian, gay, bisexual, and transgender people. Law Commission of India 172nd report of the Commission has actually recommended that the rape laws be changed to

- a) Make it gender neutral;
- b) Make special provisions for child sexual abuse; and
- c) Repeal section 377 of the IPC^[11].

Legality of Homosexuals and Same Sex Marriages in India

Despite having an ancient history, homosexuality is considered as a taboo subject by both Indian civil society and the state. Homosexuality is also criminalized, due to provisions against sodomy and unnatural sex, under section 377 of the Indian Penal Code (IPC). The section reads:

“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 for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”^[12].

A plain reading of section 377 reveals that carnal intercourse against the order of nature coupled with penetration is the gist of the offence. To be more precise, provisions of section 377 come into play when a person accused of ‘unnatural offence’,

1. Had carnal intercourse with man, woman or animal;
2. Such an intercourse was against the order of nature; and
3. Such an act was done voluntarily by the person accused of the offence.

Whether Section 377 of Indian Penal Code is constitutionally valid?

It is humbly submitted that the Part III of the constitution primarily carries the common theme of human right. The international conventions and the principles of natural justice also focuses on the aspect of right to life with the full of dignity and liberty. The fundamental rights are basic rights of the people. They are considered as basic rights to live a perfect life. Moreover Article 13 (2) says that

“The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of

the contravention, be void^[13].” So, according to the constitutional provisions, Section 377 violates number of fundamental rights of the homosexual people.

Judicial Approach towards Homosexuality

In December 2002, Naz Foundation filed a Public Interest Litigation (PIL) to challenge IPC Section 377 in the Delhi High Court. On 2 July 2009, in the case of Naz Foundation v National Capital Territory of Delhi, the High Court of Delhi struck down much of S. 377 of the IPC as being unconstitutional. The Court held that to the extent S. 377 criminalised consensual non-vaginal sexual acts between adults, it violated an individual’s fundamental rights to equality before the law, freedom from discrimination and to life and personal liberty under Articles 14, 15 and 21 of the Constitution of India. The High Court did not strike down Section 377 completely. It held the section to be valid in case of non-consensual non-vaginal intercourse or to intercourse with minors, and it expressed the hope that Parliament would legislatively address the issue.

On 11 December 2013, on responding an appeal filed by an astrologer *Suresh Kumar Koushal and others*, the Supreme Court of India upheld the constitutionality of Section 377 of the IPC, and stated that the Court was instead deferring to Indian legislators to provide the sought-after clarity. In its judgment the Supreme Court stated that Section 377 of IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile nonvaginal sex involving minors. Secondly, it was also clarified that judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.

On 28 January 2014, Supreme Court dismissed the review petition filed by Central Government, Naz Foundation and several others, against its December 11 verdict on Section 377 of IPC. On 2 February 2016, the Supreme Court agreed to reconsider its 2013 judgment; it said it would refer petitions to abolish Section 377 to a five-member constitutional bench, which would conduct a comprehensive hearing of the issue.

Countries Have Given Legal Recognition to Homosexuals and Same Sex Marriages

Decriminalisation of same-sex sexual behaviour has been at the forefront of public discourse in recent years. As of 2005, consensual homosexual acts between adults are illegal in about 80 out of the 192 countries of the world; in 42 of these, only male-male sex is outlawed. This number has declined since the second half of the 20th century. The countries of the world have a wide variety of laws relating to sexual relations between people of the same-sex.

Sodomy laws vary from nation to nation, depending on cultural and political set-up of the nation. The trend among Western nations has not been followed in all other

⁹ <http://www.hinduonnet.com/fline/fl2210/stories/20050520002410400.html> visited on 30 March, 2012

¹⁰ <http://www.indiatogether.org/2005/dec/hlt-legalise.htm> visited on 31 March, 2012

¹¹ http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=44&FileID=64 visited on 22 March, 2012

¹² Subhas Chandra Singh, “Homosexuality and the Law: A Policy of Control and Containment”, in *Indian Socio-Legal Journal* 2008 Vol. XXXIV No. 1 and 2. Indian Institute of Comparative Law p.22.

¹³ P. M. Bakshi, *Constitution of India*; Universal Law Publishing Co. Pvt. Ltd. (2003), p. 13.

regions of the world. Sodomy is punishable by death in Afghanistan, Mauritania, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, United Arab Emirates and Yemen, and by life imprisonment in Bangladesh, Bhutan, Guyana, India, Maldives, Nepal, Singapore and Uganda. Countries that did not have explicit laws prohibiting homosexuality may still prosecute lesbian, gay and bisexual people under laws prohibiting activities such as 'hooliganism' or behaviour 'against public morality', for example in China [14].

Currently, same-sex marriages are legal in only a few countries around the World. In Spain, Canada, South Africa, Belgium and the Netherlands [15], it is fully legal. In the United States, the degree of legality of same-sex marriage civil union varies with each province or state. Massachusetts became the first state to legalise same-sex marriage [16]. Some countries have special legislation that allows gay and lesbian couples to register committed relationships and gain some benefits [17].

Arguments Opposing and Supporting Decriminalisation of Homosexuality and Legalising Same Sex Marriages

One argument that decriminalisation will result in an increase in the frequency of a homosexuality and a corresponding decrease in the number of marriages entered into and that this, in turn, will undermine the whole institution of a family [18]. This is clearly absurd. Research conducted in jurisdictions which have decriminalised consensual homosexual activities does not support conclusions that decriminalisation will lead to an increase in homosexuality. There is substantial agreement among scientific researches that sexual orientation is due to genetic factor and is determined by age five to six. Therefore it is unlikely that increase in the incidence of homosexuality will occur as a consequence of decriminalisation. Nor will reform result in a significant drop in the marriage rates and levels of procreation.

Decriminalisation may be a step towards removing some of the stigma associated with homosexuality and may have positive repercussions on relationships between homosexuals and their families. It may substantially promote homosexuals by their families, which will do

much to strengthen family ties. Empirical research also indicates that decriminalisation results in more self-occupational, psychological and emotional security among homosexual men. A common observation in many instances is that homosexuals living in jurisdictions which criminalised homosexuals tended to have lower self-esteem and higher levels of psychological maladjustment, depression and suicide, than those living in jurisdictions in which homosexual acts were not regarded as criminal offence. Criminalisation reinforces negative societal attitudes regarding homosexuality. This in turn results in greater discrimination and thus impacts adversely on the self-esteem of many homosexuals, which often leads to deception and friction within families.

Though homosexuality is a crime in India, convictions are extremely rare. The arrests and prosecutions which do occur, the accused persons face with public exposure and humiliations as the prosecution attracts considerable attention. While it is true that the criminal penalties that are actually imposed in these cases may be light, such as the release on good conduct bonds and relatively small fines, they may nevertheless have devastating personal, social and economic effects for these arrests and prosecutions. Once convicted, the offender will no doubt have a criminal record, which may hinder future employment. Anti-sodomy laws encourage entrapment by police which unreasonably interferes with the privacy rights of individuals [19].

It is remarked that socially and sexually conservative country India penalises and stigmatises any non heterosexual practices even between consenting adults in private, continuation of the penal provision (sec. 377) against homosexuality in the Indian Penal Code, violates Articles 14, 19 and 21 of the Constitution.

Law does not run separately from society it only reflects perception of the society. Public tolerance of different-activities, change and legal categories get influenced by those changes. Homosexuality though exists from a time immemorial yet it was never approved and not universally accepted behaviour. In its 42nd and 156th reports, the Indian Law Commission stated that Indian society did not consider homosexuality as an acceptable form of sexual behaviour. It is not a part of Indian culture. According to a survey only 3% people desired same sex relationship and were out of closet. Though 4% desired same sex relationship but were not out of closet. There are 81% who are firmly heterosexuals and 6% are bisexuals. Government said that homosexuals comprises only 0.3% of the population and the interest of rest 99.7% population cannot be compromised just to accommodate their rights.

Suggestions and Conclusion

When, I come to know about the problems being faced by homosexuals in India I was of the opinion that the homosexuality should not be decriminalized by repealing Sec. 377 of IPC because of the following reasons:-

¹⁴ There is no law against homosexuality in document in China, because the lawmaker thought there was no gay in China, but there are some provisions such as 'hooligan' which explanation includes sodomy. For sodomy, there are two law systems in China, one is criminal law, and the other is social security administrative punishment. Sex in public, group sex, sex by force and sex with child break the criminal law. For, China, it is said that China is a country not by law but by military and police force. Source: Homosexuality and the Law in China, <http://www.utopia_asia.com/chinalaw.htm> visited on 14 March, 2010

¹⁵ The Netherlands was the first country in the world to legalise same-sex marriage in 2001.

¹⁶ The Supreme Court of Massachusetts ruled on 18 November 2003 that the state could not refuse to marry same-sex couples. Marriage has been available for both opposite-sex and same-sex couples. However, the law allows same-sex marriage only to residents of the State.

¹⁷ Denmark, Greenland, Iceland, Norway, Sweden, Finland, France, Germany, Great Britain, Hungary, New Zealand, Portugal, Scotland, Switzerland had provisions for registered partnerships, which provided limited rights to the same-sex couples. The benefits are often limited only to Citizens or to residents who had lived in the country for several years.

¹⁸ Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination", 98 *Yale Law Journal* 145.at p.158.

¹⁹ Subhas Chandra Singh, "Homosexuality and the Law: A Policy of Control and Containment", in *Indian Socio-Legal Journal* 2008 Vol. XXXIV No. 1 and 2. Indian Institute of Comparative Law at pp. 29-31.

Even, if the homosexuality is decriminalized, the society at large would not accept it and it will still remain a social taboo. Even today the social fabric of Indian society doesn't allow sexuality to be talked freely in the society.

The argument that homosexuals are suffering from AIDS and therefore, they hesitate to go to the doctors and even, if they go for treatment, they are discriminated. Even this argument doesn't hold any ground for two reasons:-

Even doctors cannot recognize the source of infection from which the person got infection by any test.

Yes there is a problem of AIDS Patient, being refused treatment by Hospitals and Doctors but this discrimination exist at large. That is all AIDS patient.

Recognition of homosexuality would create new legal problems like:- on issue concerning marriage, adoption, property rights etc. and there may be likely to chances of false litigation and blackmailing.

Homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality. Majority of the developed world has not only accepted homosexuality as a normal behaviour ^[20], they have enacted sufficient laws to protect the rights of the sexuality minorities (either through legislations or judicial pronouncements). Most of these nations have made laws to recognize or regulate same-sex marriages ^[21]. Naturally, there is a need to expand the horizons of sexuality jurisprudence in India.

And even many medical expert organizations are of opinion that decriminalizing homosexuality would decrease that the spreading of AIDS infection as they would get "more options in partner and treatment also" one needs to give a serious thought.

Then what is the way out? Perhaps it the ancient view is best on this in all of the world societies that it should not be promoted in society but one doesn't need to have penal laws regarding it. The state feels homosexuality is not natural or cannot be tolerated and then it is the responsibility of the state to curb it and it should start giving treatment to these people. Simply decriminalizing an act and shedding of the responsibility is not right thing. The issue needs a serious thought at all levels in the society and only by reading down 377 IPC would not

give immediate recognition which homosexuals are actually demanding from society.

But the demands for legal change must go beyond this, to raise the issue of legal recognition of gay unions if gay men and women are to have social and legal sanction to live together and if they are to lead healthy and happy lives. This is of the most vital importance.

One can literally count on one's finger-tips the number of successful gay couples in India. If promiscuity is to be countered, and it must with the AIDS epidemic now threatening India, and if gay men and women are to lead sane and satisfying lives, gay marriages must have to be recognised, and legal mechanisms worked out to regulate them.

Ultimately, changes in law correspondingly reflect such changes in social attitudes to homosexuality. Thus, finally it can be concluded that Sec- 377 of IPC should be amended to the extent, which decriminalizes the consensual homosexuality between adult in private place. Supreme Court should have to restore the decision of Delhi High Court, and consider homosexuality with liberal attitude. Legal recognition of same sex couples should be given. Other legal right should also be given to homosexuals like marriage, adoption, property rights, etc. Society should accept it, and don't think that they are deviant people.

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²⁰ Position Statement approved by the Board of Trustees, December 1992 on Homosexuality. "Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, the American Psychiatric Association (APA) calls on all international health organizations, psychiatric organizations, and individual psychiatrists in other countries to urge the repeal in their own countries of legislation that penalizes homosexual acts by consenting adults in private. Further, APA calls on these organizations and individuals to do all that is possible to decrease the stigma related to homosexuality wherever and whenever it may occur". See <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/199216.aspx> visited on 28 March, 2012)

²¹ Same sex marriages are legal performed legally in Belgium, Canada, Netherlands, Norway, South Africa, Spain and Sweden. In Aruba (Dutch only), Israel, Netherlands Antilles (Dutch only), United States (DC, NY) it is recognized but not performed. In Andorra, Czech Republic, Denmark, Finland, France, Germany, Greenland, Hungary, Iceland, Luxembourg, New Caledonia, New Zealand, Slovenia, Switzerland, United Kingdom, Uruguay, Wallis and Futuna recognize civil union and registered partnerships. In Argentina (C, RC, RN, VCP), Australia (ACT, TAS, VIC), Mexico (COA, DF), United States (CA, CO, DC, HI, NJ, NV*, OR, WA, WI), Venezuela (ME) it is performed in some regions.

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