

Violations against Sexual Minority in India: A Study

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Introduction

Homosexuality has been existed from time immemorial in the world. In ancient India homosexual relations were considered as a sin and only heterosexual was permitted. Homosexuality has always been visited with social, legal and religious disapproval and sanctions. The position was not challenged until very recent times. From last few years voices of LGBT and activist have become audible due to awareness for their rights. Many countries have already legalized homosexuality and have removed unequal laws. For instance homosexuality between adults is not an offence in England, West Germany, Norway and several other western countries provided it is not done in a public place. In India it is punishable under Section 377 of Indian Penal Code.

Homosexuality: The Meaning

Various modes of sexual gratification in which two sides involved are of the same sex come under the general nomenclature of “homosexuality” which is not a legal term. Homosexual behaviour has a hoary past; it has been present in

varying extents in all cultures at all times. There are many references to homosexual characters in Greek history and mythology. It has been noted that the phenomenon increases significantly in flourishing societies. Not only among human beings, the behaviour is observable in all species of mammals as well as many non-mammalian species, but exclusive heterosexual behaviour, which is the usual phenomenon, and somewhat unusual, exclusive homosexual behaviour, is the peculiar characteristic of human beings.¹

Until recently the phenomenon and its significance were deliberately underplayed and minimised in all societies through the penal sanctions for such sexual behaviour, considered to be perverse and highly immoral, have been very severe and continue to be so even now in many of them.²

¹ S.M. AFZAL QADRI, AHMAD SIDDIQUE'S CRIMINOLOGY PENOLOGY AND VICTIMOLOGY 120 (7th ed., Eastern Book Company 2016).

² Under Section 377, Penal Code of India, imprisonment of life is possible for committing an “unnatural offence”, a term which includes buggery

The attitude of law has largely been shaped by religion, most of the major religious systems having condemned it in no uncertain terms. Tracing the early history of the offence, it was observed in *Khanu v. Emperor*³:

As it was this vice in particular which was rendered punishable by the early Christian State, for it was par excellence the vice of the Hellene and the Saracen. By making this vice particularly punishable, therefore, the State not only protected good morals but struck at its enemies. It is this vice, therefore, which attracted severest censures of State and Church, but in medieval times all emission other than in *in vas legitimum* was considered unchristian because such emission was supposed ultimately to cause conception of demons.

Equally strong abhorrence is manifested in Islamic teachings regarding homosexual behaviour. The ancient Indian Code was very strict on “perverse” sexual behaviour including homosexuality. Male

and other varieties of homosexual behavior, but the section does not appear to cover “lesbianism”, i.e. female homosexuality.

³ AIR 1925 Sind 286.

homosexuality (*maithunam purushahu*) was strongly forbidden and so was lesbian behaviour; stringent punishments, according to Manusmriti, were to be given both the acts.⁴

Social Apathy towards Homosexual

Discrimination is the basic problem with homosexuals or sexual minorities. The law which criminalized homosexuality (Section 377 of the Indian Penal Code) are sword in hand of police officials and other authorities, which they often use to discriminate homosexuals. One police tactic is to physically attack, rape, or blackmail this group of people and use the threat of prosecution under to make sure the victim does not report their crimes to other authorities. The consequences of the criminalization of homosexual behaviour can be still more severe.⁵

Neither Indian religions nor society recognize homosexuality and they are facing inhuman treatment from every corner of society. Hindu, Muslim⁶, Sikh⁷,

⁴ QADRI, *supra* note1, at 121.

⁵ Mithilesh Narayan Bhatt & Nidhi Saxena, *Recognition of Same- Sex Marriages under Legalising Homosexuality: A Socio-Legal Analysis*, III Punjabi University Law Journal 6-7 (2009).

⁶ “Homosexuality in the Light of Islam”, September 20, 2003, available at www.alinaam.org.za/library/homos.htm (All major Islamic sects disapprove homosexuality. Islam views same –sex desires as a natural temptation;

Jainism⁸, Buddhism⁹ and Christian¹⁰, all major religions in India oppose decriminalization of homosexuality which is big hurdle in process of recognition.

The extent of ill- treatment is that supreme Sikh religious body, the Akal takht, has issued an edict condemning gay marriage and has told Sikhs living in Canada not to support or allow gay marriages in Gurudwaras. In 2005, two

but, sexual relations are seen as a transgression of the natural role and aim of sexual activity.

⁷ CBC News, World Sikh group against gay marriage bill, Tuesday, 29 march 2005, available at www.cbc.ca/story/canada/national/2005/03/28/sikh_guy-050328.html, (Sikhism has no written view on the matter, but in 2005, the world's highest Sikh religious authority described homosexuality as "against the Sikh religion and the Sikh code of conduct and totally against the laws of nature," and called on Sikhs to support laws against gay marriage.

⁸ What Jains believe? Available at: www.beliefnet.com/story/80/story_8048_1.html. (Chastity is one of the five virtues in the fundamental ethical code of Jainism. For lay persons, the only appropriate avenue for sexuality is within marriage, and homosexuality is believed to lead to negative karma because the sexual act is outside marriage.

⁹ See, for example, the Pandakavatthu section of the Mahavagga. 1:61, 68, 69; Vinaya: Mahavagga, 1:71, 76. Additionally, "The Story of the Prohibition of the Ordination of Pandaka" justifies the ban by giving an example of a monk with an insatiable desire to be sexually penetrated by men, thus bringing shame upon the Buddhist community, Vinaya, Vol. 4, pp.141-142.

¹⁰ See Catechism of the Catholic Church, available at www.vatican.va/archive/catechism/p3s2c2a6.htm.

(The Roman Catholic Church and later, Reformed and Protestant churches traditionally condemned same-sex relations, based on scripture texts such as describing a man lying with another man 18:22 as sinful acts. Where the Catholic view is founded on the natural law argument informed by scripture.

unnamed women in Hyderabad asked the Darul Qaza, an Islamic court, for a fatwa allowing them to marry, but permission was denied with a rebuke from the chief Qazi. None of the principal Christian denominations in India allow same-sex marriages.¹¹

A lot of Family pressure and popular human psychology of our culture and society at large is strictly against the legalization of homosexuality. On the other hand due to continuous ill-treatment, the process of self- abuse in homosexual people leads to cycles of depression and self-rejection, leading to attempts at suicide and sometimes actual suicide. India is facing tremendous pressure to legalize homosexuality from international community. At a recent meeting of the UN Human rights Council in Geneva, India faced intense questioning from the international community on homosexuality and the widening gap between rich and poor. The Swedish delegation questioned India on homosexuality and was concerned that why it is still considered an offence in the country.¹²

¹¹ Homosexuality in India, available at http://en.wikipedia.org/wiki/Homosexuality_in_India.

¹² Dhananjay Mahapatra, UN body slams India on rights of gays, available at http://timesofindia.indiatimes.com/India/UN_body

172nd Report of Law Commission

In its 172nd Report, Law Commission of India has already recommended for the deletion of Section 377 IPC. The commission had recommended that, “In the light of the change effected by us in Section 375 IPC, we are of the opinion that Section 377 deserves to be deleted. However, the legislature has chosen not to amend the law. Such a conclusion (reluctance of legislature to amend the law or revisit it) is further strengthened by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, Parliament has not made any amendment in the law.¹³

Homosexuality and Legal Position in India

India has a very dynamic and progressive Constitution which in a way is the backbone of this very vast and complex nation. The Indian Constitution provides rights and protections to each and every citizen of this country whether he is in majority or in minority. The Constitution treats everyone equally

without any discrimination. It is the duty of the State to ensure that no one should be discriminated against.

LGBT community persons are in minority and they too have equal constitutional rights. But their right to equality and right to get equal treatment in the society are violated on regular basis. Not only society as whole but state machinery also treat them differently, especially police. They are regular victim of rights violations. They are deprived of their basic human right and right to life which includes right to enjoy life properly.

Chapter XVI of the drafted IPC titled “Of Offences Affecting the Human Body” contains sub- chapter titled “Of Unnatural Offences” with Section 377. Within this Chapter offence categorised under the Section 377 is repugnant on the main ones being:

- It does not distinguish between consensual and coercive sex. Thus cases of abuse and voluntary sex between two consenting adults can be prosecuted under this provision. This would violate the constitutionally protected right of

[_slams_India_on_rights_of_gays/articleshow/2977196.cms](http://www.timesofindia.indiatimes.com/_slams_India_on_rights_of_gays/articleshow/2977196.cms).

¹³ Law Commission had recommended Section 377 deletion 13 years ago, *The Times of India*, December 13, 2013, (August 25, 2015), <http://www.timesofindia.indiatimes.com>.

privacy under the expanded definition of right of life.¹⁴

- The definition of ‘unnatural offences’ is obsolete. It invites questions such as what is “the order of nature”. As conceived by whom? Previously, it was considered that the order of nature was that the sexual act be performed only for the sake of reproduction. But today it would not be considered “against the order of nature” if people have sex mainly for pleasure. Section 377 denies these people a right to their sexuality.
- It is also important to note that this section does not prohibit homosexuality, but only prohibits certain sexual acts, which both homosexuals and heterosexuals, married and unmarried people, might engage in.¹⁵

On a number of occasions the constitutional validity of section 377 of IPC was challenged in Courts. In a case¹⁶ before High Court challenged on the ground of violation of the right of

privacy¹⁷ guaranteed as a fundamental right under the Constitution. This petition was not followed up. Later on December 7, 2001 issue recaptured by Naz Foundation Trust who filed a petition¹⁸ in the Delhi High Court challenging the validity of this law.

Decision of Delhi High Court on Validity of Section 377 of IPC

Delhi High Court on the question of validity of Section 377 very well stated that the criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision’s objective both arbitrary and unreasonable. The states interest “must be legitimate and relevant” for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of section 377 IPC and its purpose is to criminalise private

¹⁴ Article 21, The Constitution of India.

¹⁵ Mithilesh, *supra* note 5, at 8.

¹⁶ *ABVA v. Union of India* Civil Writ Petition 1784/1994 (Delhi H.C.) (unreported).

¹⁷*Id.* Was the first case came before Delhi High Court. In this case AIDS Bhedhav Virodhi Andolan (ABVA), a human rights group, filed public interest litigation in the Delhi High Court challenging the constitutional validity of Section 377 of the Indian Penal Code (IPC). The petition argued that the section violated the right to privacy guaranteed as a fundamental right under the Constitution. This petition was not followed up.

¹⁸ *Naz Foundation v. Govt. of N.C.T. of Delhi & Ors.* W.P(C) 7455/2001 (Delhi H.C.) (Unreported).

conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society. The discrimination severely affects the rights and interest of homosexuals and deeply impairs their dignity.¹⁹

It is significant to note that *Naz Foundation*, an NGO had filed a PIL in 2001 seeking to decriminalise homosexuality on the ground that homosexuality as a crime under Section 377 of the Indian Penal Code, 1860 is violative of Articles 14, 15 and 21 of the Constitution and human rights and therefore, it needs to be legalized. The High Court of Delhi dismissed the petition in 2004. Thereupon the *Naz Foundation* approached the Supreme Court, which in 2006 directed the High Court of Delhi to consider and decide the case on merits. The High Court, vide its judgement delivered in July 2009 legalized gay sex among consenting adults and thus, homosexuality was decriminalised by the court holding that Section 377 of I.P.C. was unconstitutional. However, the High Court made it clear in its judgement that

the ruling given in the *Naz Foundation* case would be applicable only within the territorial jurisdiction of Delhi Court and not beyond it unless the Supreme Court upholds its verdict in case of appeal, if any.²⁰

Decision of the Supreme Court

Supreme Court of India on December 11, 2013 in *Suresh Kumar Koushal & Anothers v. NAZ Foundation and Others*²¹ case reversed the decision of Delhi High Court and again upheld the validity of Section 377 of Indian Penal Code negating the contentions of the respondents that the above section violates Articles 14, 15, 19(1)(a)-(d) & 21 of Indian Constitution. Delivering its final verdict in the case on December 11, 2013, the Division Bench of the Supreme Court comprising CJI, P. Sathasivam and Justice G.S. Singhvi, reversed the Delhi High Court verdict given in *Naz Foundation* case and upheld Section 377 of the IPC which prescribes imprisonment up to life as constitutional and valid. In its 98-page judgment, the court pronounced that homosexuality between adults even if it is consensual, is punishable under Section

¹⁹ Kuljit Kaur & Divya Sharma, *Section 377 of Indian Penal Code: A Revival of Hart Devlin Debate on Legal Moralism*, XLIII (2) Indian Bar Review 120 (2016).

²⁰ N.V. PARANJPEE, *CRIMINOLOGY & PENOLOGY WITH VICTIMOLOGY* 203(6th ed., Central Law Publications 2015).

²¹ Civil Appeal No. 10972 of 2013.

377, IPC as it does not suffer from the vice of unconstitutionality. However, a clarification made in the judgment said “notwithstanding this verdict, the competent Legislature shall be free to consider the desirability and propriety of deleting Section 377, IPC from the Statute Book or amend the same as per suggestion made by the Attorney – General.”²²

While arguing the case, the Attorney – General had informed the Apex Court that a group of Ministers which had looked into the issue relating to constitutionality of Section 377, IPC has recommended that there is no error in the Delhi High Court order and the Government did not have any problem with the Delhi High Court order and the Government did not have any problem with the decriminalizing of consensual homosexuality (gay sex) between adults in private.²³

This verdict of the Supreme Court has evoked vehement criticism from all quarters as it is being looked as a regressive step which is highly discriminatory and a blow to the fundamental right to personal liberty and

equality.²⁴ There is demand from people in general, barring a few, that the Parliament should de-criminalise homosexuality by passing an appropriate law so as to do away with the court’s ‘judicial over reach’ which has invaded the “executive and legislative turf”.²⁵

Conclusion

So it can be concluded by saying that Indian legal position is not satisfactory in this regard. But a ray of hope emerged when Delhi High Court pronounced latest verdict in favour of homosexuals and un-constitutionalized Section 377 of IPC. But in appeal against the Delhi High Court decision in *Naz Foundation* case, the Division Bench of the Supreme Court reversed the Delhi High Court verdict and upheld Section 377 which prescribes imprisonment up to life as constitutional and valid. The verdict of the Supreme Court has evoked vehement critic from all quarters as it is being looked as a regressive step which is highly discriminatory and a blow to the

²² PARANJAPÉE, *supra* note 20.

²³ *Id.*

²⁴ Amnesty International India commented that this Supreme Court ruling marks a ‘black day’ for freedom and it is body blow to people’s right to equality, privacy and dignity. Feminist organizations have also opposed the judgment as it is highly discriminatory for the entire LGPT community.

²⁵ PARANJAPÉE, *supra* note 20 at 204.

fundamental right of personal liberty and equality.

As a conclusion I would like to suggest broadly that as any fraction of the society, the most important need is to be recognized and treated as ‘persons’ before law. Once this is done, half the battle is won as then the community as a whole has made not only its presence felt in the society as well as put across their point of not being suppressed in the hands of powerful ‘haves’ of the society as this is a Democracy and hence everyone has a right to inclusion. Furthermore, the next important step in eliminating the stigma over LGBT people is to decriminalize section 377 of the IPC so that they could have a normal regular life like others and avail their basic human rights without harassment or discrimination. Hopefully our law makers would soon listen to their rightful plea and make necessary changes in the law.

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