SEXUALITY IN CONTEMPORARY INDIA: SECTION 377 OF INDIAN PENAL CODE

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ABSTRACT

India is a vast country depicting wide social, cultural and sexual variations. Indian concept of sexuality has evolved over time and has been immensely influenced by the decision of various courts in the country. What needs to be understood is that homosexuality is a person's sexual preference and not a disease and just because heterosexuality is "common" does not mean it is a norm and homosexuals violate it. We live in the 21st century and it is time to break free from the shackles of orthodoxy and embrace the progressive laws.

Section 377 of the Indian Penal Code has been a bone of contention in India for several years now. The provision under Section 377 of Indian Penal Code is unconstitutional in so far as Section 377 IPC is violative of Fundamental Rights, namely, right to equality (Article 14 and 15) and right to life and personal liberty (under Article 21). This impugned section targets a group of persons, hence making an unreasonable classification based on sexual preferences which are necessarily of a non-procreative nature. Also, the object and criterion of the statute are not vibrantly clear. Article 15 of the Constitution prohibits discrimination on several enumerated grounds, which includes "sex". Therefore, it can be construed that prohibition of discrimination on the ground of "sex" includes discrimination on grounds of "sexual orientation which violates the rights of homosexuals under Article 15 because of the impugned section of IPC. Article 21 of the Constitution protects privacy and dignity within the realm of personal liberty of all persons. Section 377 of IPC offends the dignity of homosexuals as a class, makes them second class citizens and denies them full moral citizenship because unfair discrimination provides a bulwark against invasions which impair human dignity.

INTRODUCTION

In many jurisdictions throughout the world, sexual minorities are considered a criminal class. Today most countries outlaw homosexuality through a variety of laws derived largely from European models. Sodomy laws, which ostensibly proscribe conduct, are also a powerful weapon for persecuting individuals based on actual or perceived sexual identity. The law serves as a justification for action against sexual minorities, both within and without the law. This is generally true whether the law is vague or gender-neutral, which means it is technically applicable to opposite-sex couples. Victorian British sodomy laws still in force describe the prohibited conduct as "carnal knowledge against the order of nature" or "gross indecency." Interestingly, none of these laws provide a detailed definition of what exactly is forbidden, giving the state flexibility in their enforcement.[1]

Interestingly, as the "private" becomes more and more commoditized, the role of law has become much more central in defining the rights of particular sexual minorities, particularly in times of tremendous cultural transition. The recent emergence of gay- or lesbian-identified individuals in postcolonial contexts has created complex ruptures in existing social fabrics, calling into question the universality of legal constructs governing sexuality and culture. Throughout the globe, various social norms, histories, symbols, and meanings create complex intersections with legal categories of sexual identity. Three perspectives dominate. On one side, some governments view the advent of gay rights movements as purely "Western" phenomena, devoid of local expression. On the other side, some global gay rights activists favor a universalized understanding of sexual identity that risks erasing the diversity of localized sexualities in favor of encouraging individuals to identify under the homogenizing categories of "gay," "lesbian," or "bisexual" identity. A third group, largely composed of social constructionists, favor particularized meanings of sexual identity and meaning that can often fail to reference their larger political significance as part of a global phenomenon.[2]

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[1] Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa,* 35 California Western International Law Journal 1, 4 (2004), available at http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1159&context=cwilj , last seen on 30/11/2017

[2] Sonia K. Katyal, *Sexuality and Sovereignity: The Global Limits and Possibilities of a Lawrence,* 14 William and Mary Bill of Rights Journal 1429, 1433 (2006), available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwiG-6Soz-XXAhUKOI8KHZS7BNcQFgg3MAE&url=http%3A%2F%2Fscholarship.law.wm.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1146%26context%3Dwmborj&usg=AOvVaw0eohk16tNLa9QA-2EgCHc4 , last seen on 30/11/2017

SECTION 377 OF INDIAN PENAL CODE: INCLUSIVE RIGHTS OF HOMOSEXUALS

Section 377 of the IPC states that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or any 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". These words compose Section 377 of the Indian Penal Code, the colonial era legislation that has been used to "persecute, blackmail, arrest and terrorize sexual minorities" in India since the inception of the Code, more than a hundred and fifty years ago. It is colonial legislation which criminalizes "carnal intercourse against the order of nature" which includes sexual intercourse between homosexuals. Although the language of the section is ostensibly gender neutral, it advocates uneven application, and has indeed been unequally applied, consequently it gives rise to a constitutional cause of action. This "not naming" is a characteristic that Section 377 shares with many anti-sodomy legislations.

Section 377's enforcement too followed that of its mirror legislations, in that heterosexual sodomy would escape the ambit of criminality, leaving homosexual sex to be proscribed. [3]This Section goes beyond by constituting a form of social reality in which all sexual behaviours which are antithetical to the heterosexual norm are viewed by ordinary people as unnatural. The very existence of Section 377 goes beyond the question of enforcement of the law and crystallizes the deep societal repugnance towards homosexuality by considering it perverted, animal like behaviour. Homosexuality is a victimless crime; the penalty is presumably based on the assumed offensiveness of the behaviour rather than the harm caused. The effectiveness of legal protections depends on the willingness and ability of lawmakers and judges to help affected groups realize their rights.

[3] Danish Sheikh, *The Road to Decriminalization: Litigating India's Anti- Sodomy Laws,* 16 Yale Human Rights and Development Journal 1, 16 (2014), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1117&context=yhrdlj , last seen at 30/11/12017

SEXUALITY AND SOVERIENGNITY: REMOVING BARRIERS TO HUMANITY

Constitutional Validity of Section 377 Of Indian Penal Code

EQUALITY: If one Constitutional principle is that the reach of criminal law should be declared by the legislature, leaving the courts to apply and to interpret the legislation, another is that criminal law should respect the fundamental rights and freedoms.[4] While constitutional protections can hasten the process by which sexual minorities realize their rights, they are not the only means available to challenge discriminatory laws. Even without explicit constitutional provisions dealing with sexual orientation, the constitutions and other laws of India contain provisions that can be invoked to promote the human rights of sexual minorities. If the objective of any legislation be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable.[5] Whenever we find unreasonableness, there is a denial of rule of law. Rule of Law requires that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the object is securing of paramount exigencies of law and order.[6] The provision of law branding one section of people criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed under Article 14 of the Constitution, i.e, repugnant to the right to equality. It targets a group of persons, hence making an unreasonable classification based on sexual preferences which are necessarily of a non-procreative nature. By criminalising sexual acts and assisted procreation engaged by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals.

DIGNITY: Law's most coercive and condemnatory technique (criminalization) should be reserved for the most serious invasions of interests. [7] Interfering with nature, doing battle with nature, using human will and reason and skill to thwart what might otherwise follow from the conditions that prevail in the world, is peculiarly human enterprise, one that can hardly be condemned merely because it does what is not natural. Thus, the provision criminalising the acts of sexual minorities particularly men who have sex with men disproportionately impacts

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[4] Andrew Ashworth, *Principles of Criminal Law*, 48 (6th edition)
[5] *Deepak Sibal v. Punjab University* (1989) 2 SCC 145
[6] Rubinder Singh v. Union of India, AIR 1983 SC 65
[7] A. Ashworth, *Is The Criminal Law A Lost Cause, (2000) 116 LQR 225*

them solely on the basis of their sexual orientation, which runs counter to the constitutional values and notions of human dignity which is the corner stone of our Constitution.

The Psychological and emotionally challenging effects of anti sodomy laws on the personal lives of gay men can be debilitating. A wide number of international cases have struck down similar anti sodomy laws as that of Section 377 IPC, doing just that, on the basis of fear and apprehension of arrest that the presence of such laws creates among homosexual men. It is unnecessary and inappropriate to expect someone to be incarcerated under an unfair law before they can actually bring a challenge to it. The real impact of anti sodomy laws is on the dignity of homosexual men-a reality that cannot be proven through a strict forensic lens of proof, but requires a more complex and creative attempt at understanding. Section 377 of IPC offends the dignity of homosexuals as a class, makes them second class citizens and denies them full moral citizenship because unfair discrimination provides a bulwark against invasions which impair human dignity. In the case of *Jayalakshmi v The State of Tamil Nadu*[8] where a eunuch had committed suicide while in police custody due to torture at the hand of police is a clear example that such people are subjected to mistreatment due to tyranny of others

If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.[9] Criminal convictions for adult consensual sexual intimacy violate vital interests of this Section of IPC seeks to control a personal relationship that, whether or not entitled to formal recognition in the law is within the "liberty" of person to choose without being punished as criminals. Changes are taking place in this country with a globalization of desire and where there has been formation of non-conventional and 'alternative' identities helping them consolidate their struggle in the social front. In *John Vallamatton v. Union of India*[10], it was observed by the Hon'ble Court that "the constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by the passage of time.... the law although may be constitutional when enacted but with passage of time the same may be held to be

[8] (2007) 4 MLJ 849
[9] *National Legal Services Authority v. Union of India,* (2014)5 SCC 438
[10] (2003)6 SCC 611.

unconstitutional in view of the changed situation." liberty and privacy protected by the due process clause in Article 21. In the international sphere too, referring to cases like *Toonen v. State of Tasmania* [11] and *Leung T William v. Secretary of Justice*[12] , the apprehension based on by the mere presence of law in statute books has been held good by the United Nations Human Rights Committee and the High Court of Hong Kong , respectively.

PRIVACY: Although the Indian Constitution recognized the right to privacy, there was a lack of jurisprudence until recently defining the boundaries of the right. Privacy provisions in the Constitution under Article 21 and also the interpretation of various courts in the country focused on the state intrusion into the home, but this indicates nothing about the right of individuals within families or vis-à-vis other individuals. In the case of *Gobind v. State of Madhya Pradesh* [13], the judges crafted the right to privacy based on US Supreme Court precedents on personal liberty and autonomy but stopped short at the point that : If the enforcement of morality were held to be a compelling as well as a permissible state interest , the characterization of a claimed right as a fundamental privacy right would be of far less significance .The question whether enforcement of morality is a state interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the controversial thicket whether enforcement of morality is a function of state.

BEYOND THE ENFORCEMENT PRINCIPLE: GLOBAL AND SOCIAL PANOPTICS

When sexuality finds out expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring and the "liberty" protected by the Constitution allows homosexuals the right to make the choice. Thus, a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take into account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems.[14] There is no denying to the necessity of liberty and for that reason, there is a kind of "presumption in favour of liberty" requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at

[11] CCPR/C/50/D/488/1992
[12] (2006) H.K.L.R.T. 211(C.A.)
[13] (1975) 2 SCC 148
[14] *Francis Coralie Mullin v. Union Territory of Delhi* (1981)1 SCC 608.

liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.[15]

Minority rights are an integral part of International Human Rights Law like the International Covenant on Civil and Political Rights (Article 27), United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious & Linguistic Minorities and the U.N Declaration on Rights of Indigenous People (2007). It is humbly submitted that Section 377 is not just a law, but a view which remains entrenched in our legal structures which is not in par with the present globalised world and in this country where the rights to life and liberty are inherent to the citizens. The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, and degrading treatment at the hands of law enforcement machinery. Principle 2(b) of the Yogyakarta Principles[16] states that "*States shall repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same sex and different sexual activity.*"

Age of Consent

Consent may constitute the difference between the sexual expression of shared love between two people and serious offences such as rape or sexual penetration. The absence of consent is an element in the offence and the presence of consent is a defence. Individual autonomy has both its positive and negative aspects: on the one hand it argues for liberty from attack or interference, whereas on the other hand it argues for the liberty to do with one's body as one wishes. In principle just as the owner of property can consent to someone destroying or damaging that property so individuals may consent to the infliction of physical harm on themselves.[17] Section 377 does not exclude consensual activities; however, the use of the term "voluntary" in the language of it makes consent irrelevant. Therefore, the acts of oral, anal, thigh sex along with mutual masturbation, are punishable even when two consenting adults may indulge into the acts within a private sphere. In fact, in the case of Mihir v. State of

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[15] J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* , 9 (Oxford: Oxford University Press, 1984)

[16] International Commission of Jurists, Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007

[17] Supra 20, at 307

Orissa[18], Pasayat J. has clarified that "consent of the victim is immaterial" in Section 377 as "unnatural carnal intercourse is abhorred by civilized society".

The utility of sodomy laws is limited to prosecuting cases of non- consensual sex. However, this cannot be a defence for retaining the anti-sodomy laws nor does it legitimise the common law offence of sodomy.[19] Justice Ackermann in his opinion decriminalizing consensual sodomy in South Africa in the case of *The National Coalition for Gay and Lesbian Equality & The South African Human Rights Commission v. The Minister of Justice and Another*[20] stated that "the fact that the ambit of the offence was extensive enough to include 'male rape' was really coincidental. Rape is a crime against human rights and it is violative of the victim's most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.[21] Section 375 and 376 of the IPC, 1860 that deal with rape and its punishment, do not provide any protection to the male victims of the offence. Hence Section 377 IPC remains the only law of the country that opens a door for the male sufferers of rape, a minority unidentified.

Legalising Same Sex Marriage In India

The most satisfactory course would be the recognition of same-sex marriages under Indian personal marriage laws. In India, Christians, Muslims and Hindus have different laws in relation to marriage, succession etc. The Hindu Marriage Act that governs Hindus, Sikhs, Jains and Buddhists states that a marriage may be solemnized between any two Hindus. Recognition of same-sex marriages under Hindu personal laws can be obtained by any one of the following approaches: (i) interpreting the existing law to permit same-sex marriages, (ii) interpreting that the LGBT community constitutes a separate community, the customs of which permit same-sex marriages, (iii) reading down the Hindu Marriage Act, 1956 ('Act') to allow same-sex relationships, on the ground that it would otherwise be rendered unconstitutional, or (iv) amending the Act to permit same-sex relationships. The LGBT community could agree on a common marriage practice and seek recognition under the Act. But the difficulty is that members of the LGBT community are governed by different personal laws and follow different customs and practices. Unlike the Arya Samaj is or the followers of the anti-Brahmin

[18] 1992 CriLJ 488

[19] Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals, 41 Economic and Political Weekly 4815, 4818 (2006) available at https://www.jstor.org/stable/4418926 , last seen on 29/11/2017*

[20] (1998) ZACC 15

[21] Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922

movement, they are not united by a desire to bring about specific reforms in Hindu marriage ceremonies. The third approach would be to demand reading down of the provisions in the legislation governing Hindu and Christian marriage laws by the judiciary so that same-sex marriages are recognized, on the ground that a reading of these laws as prohibiting such marriages, would render the relevant provisions unconstitutional by discriminating on the basis of sexual orientation.[22]

UNNATURAL LAW: MORALITY AND SEXUAL EQUALITY

Law in action is not a mere system of rules, but involves the use of certain principles, such as that of the equitable and the good. By the skilled application of these principles to legal rules, the judicial process distils a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the ground of their immorality. [23]According to Black's Law Dictionary[24], "public morality" means the ideals or general moral beliefs of a society. It is not always necessary that legal system should accurately mirror the normative vision of society in every respect. Moral analysis of the human activity of law making must take into account far more than the moral content of the law in question and how will a law function in a particular time, place and community which is in the instant case where the appellant suffers from Section 377 of IPC. Moral justifications infringing on rights are anathema to a liberal democracy which exists in the country. Hart emphasizes that law is morally relevant; it is not morally conclusive. Laws exist because they meet legal structural standards necessary for a particular social rule to be called a law. Once enacted the law is still subject to moral scrutiny. If a law is immoral, a question arises as to whether the law ought or ought to not be obeyed. Numerous factors must be considered in deciding on a course of action. Is the law horribly immoral? Is change likely by going through official channels? Will others support disobedience? Is punishment likely for disobedience?

There are no universally accepted solutions.[25] There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage

[22] Nayantara Ravichandran, *Legal Recognition of Same Sex Relationships in India,* available at http://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf , last seen on 30/11/2017

[23] Michael Freeman, *Introduction to Jurisprudence*, 16 (9th edition)

[24] B.A Garner, *Black's Law Dictionary* (8th Edition, 2008)

[25] William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 Marquette Law Review 673, 689 (1984), available at scholarship.law.marquette.edu/cgi/viewcontent.cgi? article=1941&context=mulr , last seen on 28/11/2017

of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government. The suppression of vice is as much the law's business as the suppression of subversive activities.[26]A theory about morality and the criminal law must be based on a defensible definition of morality, not one which confuses it with mere feelings of distaste and disgust. The difficulty is that the feelings of ordinary people may be more the expression of prejudice than of moral judgment. If a person's reaction to certain behaviour is to be termed as 'moral', it ought to be grounded in reasons as well as in feelings, and those reasons ought to be consistent with other standard used by that individual to judge personal behaviour.[27]Immorality is to be defined and measured according to the strength of feelings of ordinary people. If certain behaviour evokes feelings of intolerance, indignation, and disgust among ordinary members of society, that is a sufficient indication that the behaviour threatens the common morality and is therefore a proper object of the criminal law.[28] The judge stated in the case of *Anil Kumar Sheel v. The Principal, Madan Mohan Malvia Engg College*[29] that Lord Devlin maintained that "law should continue to support a minimum morality. However, in my opinion, the problem would always be as to how far laws should uphold morality and it depends upon the facts and circumstances of the case. A judge is to keep his finger on the pulse of the society. The Law cannot undertake not to interfere."

CONCLUSION

The Wolfeden Committee Report on Homosexuals and Prostitution in September 1957 was pioneering as it set out to rectify the English Criminal Law by implementing rationalising views of John Stuart Mill who argued passionately for a private space, free from State interference, even if it involves activities that members of a society don't like, as long as they don't harm anyone- popularly known as the Harm test. This 'harm principle' may appear to be a simple yardstick by which to establish the borders of the criminal law. But snags arise. First, is the criminal law not justified in punishing what another Victorian utilitarian, Sir James Fitzjames Stephen called 'the grosser forms of vice? And, secondly, who is to say what constitutes 'harm'? Lord Devlin contended that harm is irrelevant; the fabric of society is maintained by a shared morality. This social cohesion is undermined when immoral acts are committed – even

[26] Patrick Devlin, *The Enforcement of Morals*, 14 (Oxford: Oxford University Press, 1965)
[27] Andrew Ashworth, *Principles of Criminal Law*, 35 (6th edition)
[28] ibid
[29] AIR 1991 All 120

in private, and even if they harm no one. Societies disintegrate from within, more often than they are destroyed by external forces.[30]

[30] *Supra* 26, at 45