

## AN EVOLVING PERSPECTIVE TOWARDS HOMOSEXUALS

Debajyoti Saha<sup>397</sup> & Saurav Das<sup>398</sup>

### INTRODUCTION

India is the land of diversities, opportunities, welfare and fairness. Once considered to be the land of the snakes and serpents, in now one of the fastest developing economies in the world. India now stands still at ten in the world economic growth in terms of GDP and has the 4<sup>th</sup> largest defence force in the world. After the independence India has grown unanimously all forms of the society be it in cultural, economic and political sense.

Indian society is very liberal when it comes to expressing affection to each other, though there is a huge difference between the Indian society and the societies in the Western countries, India still faces a restricted cultural growth due to the diversity of this country and other major religious and political factors that form a major part in the country. The social attitude towards the same sex marriage and homosexuals has been in a varied form in the life of the people in different regions. In the past, social integration of men, seeing each other and other forms of same sex sexual acts was considered to be a grave social stigma in the society and was seen as an act of moral sin. Morality was the one of the main factors in the past that was considered, and morality was often related to religious rights and rituals in the society. A sin committed was considered to be a sin committed against the god and hence the person was penalised by the society or the king. Likewise the act of homosexual act was also a part of the penal provisions and was a criminalised act in the historical world.

### WESTERN HISTORY

Many famous persons and historical figures like the Edward II, Socrates, Hadrian and Lord Byron has imbibed and favoured homosexuality in the past. Many continents like Europe used to favour the same sex relationship and used to consider it as a relationship between two same sex people. But in the India context the same sex relationship or marriage has always been a situation with perverse debate over and over again.

---

<sup>397</sup> Student, School of Law, Christ University

<sup>398</sup> Student, School of Law, Christ University

Acts of sodomy were punished during the era of 1200 and 1300s in the Fleta and Britton. Sodomites were burnt alive or were hanged, the act was favoured in the Buggery Act, 1533. Oral genital sexual acts were later removed from the definition of buggery in 1817. In 1861, the death penalty for buggery was formally abolished in England and Wales.

### INDIAN HISTORY

Homosexual is one of the same gene that is criminalised in our country. In Indian epics and chronicles, there are occasional references to same-sex intercourse. For example, in the Valmiki Ramayana, Hanuman is said to have seen Rakshasa women kissing and embracing those women who have been kissed and embraced by Ravana. Padma Purana is the story of a king who dies before he can give his two queens the magic potion that will make them pregnant.<sup>399</sup>

In the Kamasutra, there is a rather disdainful reference to male masseurs who indulge in oral sex (auparashtika). The author of Kamasutra sex manual was not a fan of homosexual activities though he did refer to them in his book. Reference, but not approval, to homosexual conduct did occur in many Dharmashastras.

The range of erotic sculptures is wide, from dignified couples exchanging romantic glances, to wild orgies involving warriors, sages and courtesans. Occasionally one finds images depicting bestiality coupled with friezes of animals in intercourse. All rules are broken: elephants are shown copulating with tigers, monkeys molest women while men mate with asses. Homosexuality, in our country was never considered as a pure form of amalgamation between the men. Rather it was an act that was looked upon with down eyes and depraved looks on the person who committed such sin. Indian Penal Code was drafted by Lord Macaulay and introduced in 1861 in British India.

Section 377 of the IPC reads:

*Unnatural offences. — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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.*

---

<sup>399</sup> Did Homosexuality exist in ancient India?, <http://devdutt.com/blog/did-homosexuality-exist-in-ancient-india.html>, Last Accessed on 28<sup>th</sup> August, 2015.

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

IPC has defined such act as a crime in the eyes of law. The section 377 of the IPC bans and criminalises a:

- a. A voluntary carnal intercourse which is not natural and against the order of nature.
- b. Such act done with any man, woman or animal

The fine for the above nature is 1 or life imprisonment. The term may extend to 10 years and will be liable for a fine.

According to the Concise Oxford Dictionary (ninth edition, 1995), the term “carnal” means “of the body or flesh; worldly” and “sensual, sexual”. In *Khanu v. Emperor*<sup>400</sup>, the court held that where a person commits carnal intercourse against the order of nature, even if it is oral sex, because the main objective behind carnal intercourse is procreation.

The English law was reformed in Britain by the Sexual Offences Act, 1967, which de-criminalised homosexuality and acts of sodomy between consenting adults (above age of 21) pursuant to the report of Wolfenden Committee.

Sec. 377 is based on traditional Judeo-Christian moral and ethical standards which looks the section only functionally i.e. Procreation has to be there. Sometimes criminalizing private consensual same sex conduct put the homosexuals into vulnerable section. The police try to abuse, detain and question, extort money from them. This directly led to spreading of negative feelings towards them in the society. Sexual orientation is not the fault of any person. If a person is homosexual, he has every right as the normal human being to live in the society. But our society does not seems to be accepting that view at all.

### MORALITY

Jurisprudence gives the law a thought and the subject of jurisprudence helps us to analyse as to why this law is in practice in the society. Jurisprudence helps to identify the birth of a law and

---

<sup>400</sup> AIR 1925 Sind 286.

questions the existence of a current law in question. Morality, a word which is defined by many scholars and jurists.

The term “morality” can be used either as

1. Descriptively to refer to some codes of conduct put forward by a society or,
  - a. some other group, such as a religion, or
  - b. accepted by an individual for her own behaviour or
2. Normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons<sup>401</sup>.

Morality is a fundamental aspect in the vigour of the state for its people. For a society to function we need to have good morals and values imbibed in the society. We have an applicability of individual autonomy but such autonomy must have restrictions so that the balance of nature and values are maintained.

Such aspect can be analysed from the rights of the gays or simply homosexuals. Homosexuals are people who are attracted to the same sex and can have consummation and sexual intercourse amongst them. Thought there has been lots of controversies regarding the same but things are quiet clear and straight forward.

The morality aspect of the same sex intercourse or the gay rights is nothing new and is in the law books since the start of the 19<sup>th</sup> century itself as mentioned earlier. But still as the world evolves the laws have also evolved and has come to a stage where people, be it a normal human being or a gay are given their rights and the right to express their love and expression to any one they like, till it does not violate the rights of the other.

The transformation is a rampage but it's still a deep secret willing to be unearthed. One of the major case that India has ever come across with respect to the morality and the aspect value of section 377 are through the discussions and the aspect value in Suresh Kumar Kaushal and Another vs. Naz Foundation and Another<sup>402</sup>. This case is considered to be one of the major land mark

---

<sup>401</sup>The Definition of Morality, Stanford Encyclopaedia of Philosophy, <http://plato.stanford.edu/entries/morality-definition/> last seen August 29, 2015.

<sup>402</sup>Civil Appeal No. 10972 of 2013.

decisions given by the Hon'ble Supreme Court of India. The judgement given by the court almost made a change in the lives of the people who are gays and who want to express their love by how they are. This case is an example of two courts and the thinking of two different courts to give a contradictory judgement.

### FUNDAMENTAL RIGHTS

If we criminalise a homosexual intercourse act then it will violate the right of privacy. Right to Privacy has been enshrined in Right to Life and Liberty. It respects the individual autonomy of the concerned person. There is always a personal sphere that should be respected by the society. If anything occurs within the four walls of the house, for example private, consensual sexual relations etc., no one has a right to oppose the same until and unless it affects them. The right to have sexual relations with homosexuals or with anyone is one of the rights that are related to the private space of the individual. In that respect, those rights that are inalienable rights.

Section 377 of the IPC can violate Art.14 of the Constitution because we know that every law has to have reasonable nexus with the object to be attained. The classification between the procreative and non-procreative acts does not have any link to the objective of penalizing the unnatural sexual offences. The state cannot discriminate individuals on the ground of sex. But whether the term 'sex' includes 'sexual orientation' also? That is the point of debate in the courts. Sexual orientation is related to the sex of an individual. Each of us has a biological sex — whether we are female, male, or intersex. Our gender is our social and legal status as men or women. And sexual orientation is the term used to describe whether a person feels sexual desire for people of the other gender, same gender, or both genders.<sup>403</sup> Sexual orientation is different from the gender identity in the way that the former one means to whom you are attracted and have intimate relations with whereas the latter one means how you are expressing your gender. If sex is one of the grounds for non-discrimination, then sexual orientation should also be another ground.

If we analyse the rights given under Art.19 of the Constitution of India, we are having the right to express our thoughts and expressions, right to associations etc. But if the state criminalize the

---

<sup>403</sup> Sexual Orientation & Gender, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/>. Last Accessed on 28<sup>th</sup> August 2015.

sexual activities between the homosexuals on the ground of ‘morality’ or ‘against the order of the nature’, then the homosexuals will have problem in expressing themselves in the society.

In *Jayalakshmi v. The State of Tamil Nadu*<sup>404</sup>, one eunuch committed suicide due to the harassment and torture committed by the police officials in the police custody. The eunuch was arrested on the allegation of theft and the police officials tried to put wooden stick into his anus and also tried to have oral sex with it. This kind of atrocities the eunuchs have to face because they are not recognized as a part of the society.

In the case of *Maneka Gandhi v. Union of India*,<sup>405</sup> Justice Bhagwati described the importance of Art.21 of the Constitution of India. The procedure established by the law enshrined in the Art.21 has to be just, fair and reasonable. The right to life includes right to life with dignity. The criminalization of sex between the homosexuals and other activities between them can be said to be arbitrary. They are not given the adequate protection. In many cases they are tortured because of the social stigma attached to them. We have the formula of golden triangle between Art.14, 19 and 21 of the Constitution of India. Dignity is a very wide term. It means to respect each of the individuals as a member of the society irrespective of their caste, sex, colour etc. It is to acknowledge the value and worth of them. It refers to the right to develop his or her body as per his or her wish. An autonomy’s private will and freedom of choice and action comes into the picture.

V.R. Krishna Iyer, J. observed that the guarantee of human dignity forms part of our constitutional culture [*Prem Shankar Shukla v. Delhi Admn.*<sup>406</sup>]. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others*<sup>407</sup>, Justice P.N. Bhagwati stated that right to life includes right to live with dignity which is more than fulfilling the basic necessities of life that are nutrition, food and shelter. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states:

---

<sup>404</sup> (2007) 4 MLJ 849.

<sup>405</sup> (1978) 1 SCC 248.

<sup>406</sup> (1980) 3 SCC 529.

<sup>407</sup> (1981) 1 SCC 608.

*"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

Article 17 of the International Covenant of Civil and Political Rights (to which India is a party), refers to privacy and states that:

*"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."*

Right to privacy under the right to life can only be curbed when it complies with the “compelling state interest”. The state interest has to be of paramount importance, then only the right can be taken away. Whether the morality aspect comes into the compelling state interest has to be decided first. Section 377 of the Indian Penal Code is made on the basis of the society. What was morality at the period of making the statute is totally different from the current one. There is no doubt in the responsibility aspect of the state which it has to protect in all circumstances. In today’s era, where most of the other countries have decriminalized the same sex marriages, then why cannot India. India’s morality is different from the world over. But the morality cannot be such a compelling state interest to remain criminalizing the sex between the homosexuals?

R. Rajagopal v. State of T.N.,<sup>408</sup> the court held that A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.

Mathew J. in Gobind v. State of M.P. (supra) referring to the famous article, “The Right to Privacy” by Charles Warren and Louis D. Brandeis,<sup>409</sup> stressed that privacy - the right to be let alone – was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests.

The way that one gives effect to one’s sexuality is the core of private intimacy. Paris Adult Theatre I vs. Slaton<sup>410</sup>. The sense of sexual and gender orientation is such that every individual carries it everywhere he or she goes. A person cannot leave that behind at home. It is not for the state to

---

<sup>408</sup> (1994) 6 SCC 632.

<sup>409</sup> (4 HLR 193).

<sup>410</sup> [413 US 49 (1973), page 63].

decide partners for the individuals but it is the individuals who are having the right to decide their partners.

The Suresh Kumar Kaushal followed the case after the NAZ Foundation vs. Government of NCT Delhi<sup>411</sup>. The petitioner raised the matter in the Supreme Court of India to reverse the judgement given by the Delhi High Court. In the Suresh Kumar Kaushal Case, where the Petitioners contended that Section 377 of the Indian Penal Code (IPC) is not violating the Article 14 and is completely gender neutral. The petitioners were also worried about the status of the Indian Society that was conservative and were concerned about the improvements and the impacts in the society after the implementation of such acts. The respondents based their arguments with the provisions of the Constitution and the Article 14, 15 and 19. The main question before the court was whether the Section 377 of the IPC was violative to the Part III of the Constitution of India.

The court may have rightly given a decision, adjudicating that Section 377 was not violative to the Constitution and is a valid law of the land. But the perspectives may be different.

#### PHILOSOPHICAL PERSPECTIVE

Nils Jareborg stated the process of criminalization i.e. the circulatory process of acts/omissions, penal system, moral justification, penal design, greater good and common good. Section 377 of the code describes the act of commission of unnatural sex against the order of nature which is against the morality of the society. This provision was implemented for the greater good of people. But we can challenge the validity in the respect that it violates the fundamental rights of the homosexuals. It curtails the freedom of them. The punishment for the same is preventive in nature. But even if we are imposing strong punishment on the homosexuals, we are not getting good response from the public. The society is divided into two parts. One in support of homosexual rights and one is against it. Over and above the penal provisions, the homosexuals are harassed and discriminated in the society. The main motive of punishing them is lost under this process. That is why the activities of the homosexuals cannot be considered as crimes only on the basis of moral justification.

J.S.Mill stated about the harm principle where he described about the violation of interests of the citizens. He differentiated offence and harm. Offence included harms which are not bodily, mental etc. But harm includes bodily and mental injury. Offences mainly include one v. one or one v. few.

---

<sup>411</sup> 160 DLT 277.



The offences do not have to be penalized as there can be negotiation among the few people. What the Homosexuals are doing in the private should not be the concern of the society. It should not be considered as harm as it is not harming the society at large. Even if it is creating problem, it is upon a few number of people. They can easily negotiate without disturbing the harmonious relationship among the citizens of the society. There is no direct relationship between the harm and the victim.

### CONCLUSION

In United States of America, the US Supreme Court has currently ruled that same-sex couples can marry nationwide, establishing a new civil right and handing gay rights advocates a historic victory. Justice Anthony Kennedy stated that in forming a marital union, both the parties become something greater than they usually were. The homosexuals demanded for the equal dignity before the law and they were granted the same.<sup>412</sup>

In a society that we live in, we live because we have a surrounding of humans and a valid human race. If we were staying with animals hardly a person could have lived because for a human to live in this society we need to communicate, love and express. In a human society communication and expression is important factor where we want to prove a point and get a point proved. The Constitution of India also gives a valid requisition for all persons who are the citizens of India to express them. The connotation of Article 19 is quiet negative in nature, with a proviso in it. The Article 19 says that there will be a freedom of speech and expression which will be guaranteed to the citizens but with a reasonable restriction. Community is a mix of people with different race, religion, caste, creed and sex. There can be different forms in this vast community and there can also be people who are not of the same race but of a different and an unusual race of life due to certain circumstances like an accident or may be by birth. If a person is not of the same nature in the society in that case we cannot blame the person himself for being such. It is never the person's fault that he was born such. The person should be considered at an equal level with the others in the community, where there is an equal level of laws for everyone with the same penal provisions. We cannot make a person punishable for him being unnatural and out of the crowd in this society. Though the person is unnatural and wants homosexual pleasures for self-pleasure, such persons

---

<sup>412</sup>Ariane de Vogue and Jeremy Diamond, Supreme Court rules in favor of same-sex marriage nationwide <http://edition.cnn.com/2015/06/26/politics/supreme-court-same-sex-marriage-ruling/index.html>, Last Accessed on 28 August, 2015.

are also guarded by certain rights and liabilities of the state. The community of homosexuals also have a right to express their feelings and their act with each other, if the other partner is ready for such sexual pleasure.

Humans are the creation of nature and this cannot be challenged. It is not the fault of the human that he is born such, but was made such. He might be having different feelings which are not at par with the order of nature or what the nature follows, but still they also have a right to express their love and expression as they have humans. Salmond in his theory of Jurisprudence has cleared the concept of persons and a person cannot be a dead man but anyone who can think and has reasoning abilities. A person who is not born as an ordinary human being and who has an affection towards the person of the same sex is also a human and has an ability to think. Such persons be it humans should be treated equally and like other humans in the race. There cannot be a reasonable distinction in such cases where we differentiate between a man who is normal and a man who is not normal.

It is an observed fact that every human on this earth has a sexual orientation and a sexual identity which is unique in this world in itself. In a human a sexual orientation comprises of the person's feelings, his or her wants from a person of same sex or of a different sex. What the Hon'ble Supreme Court has said is now the law of the land but we also need to see the individual autonomy of a person before coming to such a conclusion. On this earth, anyone who is born enjoys natural rights and enjoys specific rights that are required for the human to survive. There are several provisions worldwide like the *Universal Declaration of Human Rights (UDHR)* that it speaks of the protection of the rights of the people and humans all over the world and keeps a check on the countries violating such. The UDHR has not provided for any specific gender identity provision in the Declaration, but it includes a broad concept and interpretation of the rights of the Lesbians, Gays, Bisexuals and Transgender (LGBT).

However in 2006, a law relating to the sexual orientation of human beings came up. It was the *Yogyakarta Principles, 2006*. It is a law that has an international presence and is enacted to uphold the rights of the LGBT community all over the world. The Yogyakarta Principles address the broad range of human rights standards and their application to issues of sexual orientation and gender identity. These include extrajudicial executions, violence and torture, access to justice, privacy,

non-discrimination, rights to freedom of expression and assembly, employment, health, education, immigration and refugee issues, public participation, and a variety of other rights<sup>413</sup>.

Even though there is no commandment that the heterosexual relations are only the right way to live but at least 50% of the Indian population believe that only and consider homosexual relations as wrong. Over that most of the Indian population is religious. The religious leaders consider the gay marriages as sin as it involves violation of the morality of the society. Legalizing the homosexual marriages can prevent the illegitimate secret relations. There are concerns that the Indian society is not ready to accept the homosexual relations. So if only they are adopting any kids, how will they sustain in the society as there will be a stigma attached to them? Here the courts cannot be said as stupid. The courts have been taking their progressive steps in a number of occasions. But the Supreme Court knows that if they give a ruling tomorrow in favour of the relations among the homosexuals, then the parliament will be surely rejecting it. For example the aftermath of Shah Bano decision<sup>414</sup> where the government brought amendment to protect the feelings of the Muslim religious community. The conservative nature and the people who are the supporters of the Indian culture actually do not know of the same. Homosexuals still existed in the 6<sup>th</sup> century also. Our society needs a huge makeover which can be possible if the society changes its approach towards the homosexual relations. If we will be waiting for the right moment to come, then that will never come. Our country is a democratic country. The participation of the people is of utmost importance. If the people show their changed attitude then it will be conducive towards making an amendment in the IPC.

Hence, we cannot deny the rights of the gays and other people who come under the concept of LGBT. They are humans and humans are supposed to enjoy the equal rights as other equal men. When we make a distinction between the homosexuals and the ordinary men we are indirectly making a distinction between them, and on an unreasonable ground rather no ground rather. The person be it a gay or an ordinary human being needs to be given equal rights and to express the thoughts equally. By means of Section 377 we are actually cribbing the rights on the homosexuals and their rights to express their freedom in a free and a will full manner. Over viewing the judgement, the petitioners have also stated in their arguments that they want to save the cultural

---

<sup>413</sup>The Yogyakarta Principles. [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) , last accessed August 29, 2015.

<sup>414</sup> 1985 SCR (3) 844.

and the social rights of the country. As per India is concerned, India has made a convincing mark in the world with its art and culture and the developing culture and diversity has left an impression of wellbeing and growth on world. Cultures develop from time to time and IPC, which was written in 1860, might have got more than ten amendments till date but it has to be still liberalised with respect to the homosexuals and the rights of the homosexuals should be taken care of with all due respect. With the feelings of the rights we do not mean doing immoral activity in a public place, but simple an act involving two persons in private should not be punished even though they are of the homosexuals.