

SECTION 377 OF IPC QUIT INDIA: THE TENSION BETWEEN THE HUMAN RIGHTS OF LGBT AND NORMATIVE VALUES

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I

Section 377 of Indian Penal Code, titled "**Unnatural Offences**" penalizes what it calls "**carnal intercourse against the order of the nature**" does not make any difference between consensual and coercive sex heterosexual or homosexual affiliation and bestiality. It does not discriminate on the basis of identities, but certain acts, including oral sex and anal sex, whether between opposite sex or same sex partners. Furthermore, laws of the nature of section 377 do not merely express social disapproval; they go much further by creating a criminal class which is not defined by the conduct but by the sexual orientation. This anti-sodomy law of the British Raj, introduced in India in 1860, stands today, almost 150 years later, unchanged as section 377 of IPC. Ironically the penalization ceased to exist in the place of its origin (United Kingdom) in 1967, after the **Wolfenden Committee** Report of 1957, which recommended that private homosexual sex between consenting adults should not be considered as crime. But this anti-sodomy law still continues to flourish in former British colonies including India.

II

Acceptance of homosexuality has existed in Indian history and culture for a long time — in ancient India when homosexuality was recognized as the third gender (tritya prakriti) and in the medieval era when castrated eunuchs were considered the most reputable and trustworthy servants. Homosexuality was not a condemned mode of sexual

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gratification when the temple structure of Konark and Khajuraho were depicting it in stones for all posterity to see. Ancient Hindu texts, from the 1st century onwards categorize **ayoni** (non-vaginal sex) as impure. Our ancient text **Kamasutra** says that homosexuality is accepted by Dharma Shastras. Our cultural traditions such as jogtas, joggapas, hijras, kothis and ShivShakti as well as Tantra have celebrated homosexuality for hundred years. In **Mahabharata**, references of Drupada's daughter **shikhandini** turning to male, and Arjuna changing to a eunuch named **Brihanalla** show that homosexuals and trans-genders were not unknown in the ancient India. But gender and sexuality has found little open articulation in the Indian judicial discourse. The most common jurisprudential justification given for criminalizing homosexuality is that the state can dictate what morality is and has the power to punish acts which are immoral. If certain behaviour is regarded as morally wrong, is this sufficient justification for the creation of a criminal offence?

Sex is accorded the protection of 'privacy' only if it is within the normative boundaries of heterosexual marriage, where sex is not loveless, not for reward and not indiscriminate. Non-normative sexualities are called 'counter-hetero normative' sexualities by Nivedita Menon. It refers to a range of political assertions that implicitly or explicitly challenge hetero normativity and the institution of monogamous patriarchal marriage. These are assertions that required the shape of a movement in India over the last two decades, due to increased visibility and legitimacy accorded to sexuality as an issue. There are numerous instances in India in which the use of section 377 has had worrying consequences in the form of harassment of the lesbians, gay, bisexual & transgender (herein after LGBT).

Lesbian suicide appeared first in 1979, when partners Jyotsana and Jayshree, after being forced to marry men, jumped in front of a moving train together. On 29th June 1980, college students Mallika, and Lalitambica, both aged 20, tied themselves together and leaped in to a canal but were saved against their will. In 2001, a patient who was undergoing treatment in AIIMS (All India Institute of Medical Sciences) for curing his homosexuality was unethically treated by doctor in psychiatry department and became victim of trials of new drugs, then through Naz Foundation, he filed a complaint with NHRC (National Human Rights Commission) but chairman of NHRC rejected the petition &

said until section 377 was deleted.

Sumit Baudh, a senior programme associate at TARSHI (Talking about Sexual and Reproductive Health Issues), says: "Section 377 is a breach of the rights to privacy, human dignity and the right to life." Though section 377 has been used only sparingly to make arrests and convictions, but it is often used by police and social bigots to intimidate, threaten and harass the gay community." One gay named Ashu Seghal recounts how two neighbourhood policemen, aware of his gay identity, beat him with a bamboo stick and forced him to perform oral sex on them. After the incident, they advised him to "forget it as a bad dream" and not think of seeking justice as they could arrest him under section 377.

Recently Prof. S.R. Siras head of the department of Modern Indian languages at AMU (Aligarh Muslim University) was suspended on 9th Feb., 2010 following an operation where media personnel & university authorities entered his house & filmed him having consensual sex with a male friend. So this is openly can be said as violation of the fundamental rights to privacy & dignity.

This penal provision creates a climate of fear for LGBT people and offer official justification for homophobic hatred and violence. In addition to unfair imprisonment, anti-homosexuality laws are used to deny access to employment, education, health care, and housing, and form the basis of extortion and blackmail claims. In the most extreme cases, same-sex practicing people have been subjected to physical abuse and execution.

III

Same sex relations in India has also been criticized due to its unhealthy nature, people indulging in such acts are more prone to disease like **HIV/AIDS**, cancer(specially anal cancer), **lymphogranuloma, gonorrhoea, tumors, bacteria, viruses like hepatitis B, alcohol abuse** etc. In 1994, following a report of rampant homosexuality in Tihar jail, ABVA (Aids Bhedbhav Vrodhi Andolan) recommended to the prison authorities that condoms be made available to prevent the transmission of HIV. The plea was denied on the grounds that distribution of condoms would connote that government is promoting homosexuality by violating Section 377. Officials further denied reports of homosexuality being prevalent within jail.

In June 2004, the journal '**Nursing Clinics of North America**' reported that men who have sex with men is nine times more likely to become infected with HIV than their heterosexual counterparts. Organisations working on HIV/AIDS have also condemned this law for interfering with their efforts to provide health services and HIV/AIDS related information to sexual minority groups, including high-risk groups such as men who have sex with man (herein after MSMs). Apprehensions about being arrested under this law discourage MSMs from seeking help and the law itself proves to be a barrier to the efforts of the organisations to reach out to them.

Though homosexuality has been removed from the list of mental disorders by **American Psychiatric Association** in 1973, and by the **World Health Organization** in 1992, yet it is a myth among the Indians that homosexuality is unnatural and it is a disease which need to be cured and deletion of section 377 would open the flood gates of delinquent behaviour and be misconstrued as providing unbridled license to the same.

One of the main pillars on which Justice Shah and Murlidhar found Section 377 of the Indian Penal Code to be bad in law was that it violated the right to privacy of adult homosexual citizens. The judge held that Section 377 authorized the state not to enter the private domain of the citizens; it also gave the state the power to interfere with their private decisions. The famous **Wolfenden Committee** report that led decriminalization of homosexuality in Britain was based on the principal that 'it is not the function of the law to interfere in the private lives of citizen, or to seek to enhance any particular pattern of behaviour' respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity. The strongest evidence of the limited role the 'privacy argument' in any counter-heteronormative politics, is that the Delhi high court in Naz Foundation judgment on 2nd July 2009, decriminalized same-sex between consenting adults but left the ideas of 'natural' and 'unnatural sex' untouched and unexamined.

IV

For the retention of section 377 of IPC one of the pleas given by the government in the Naz foundation case was that in order to undertake criminal prosecution for

sexual abuse of the boy only section 377 can be used. Section 375 of IPC which relates to rape criminalizes only vaginal penetration by the penis. It is well known that most often child sexual abuse (CSA) does not take this form. CSA ranges from exhibitionism, touching, to all forms of penetration (including penile-anal, penile-oral, object vaginal and finger vaginal).

In the constitution of India under **Article 39(f)**, one of the **Directive Principles of the State Policy** requires the State to direct its policy, inter alia, towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. There is, therefore, great need for tightening the existing provisions relating to child sexual abuse or assault.

Due to this provision we need to take care the child health and rights. Keeping in view the gravity of the crime related to CSA, the Law Commission in its 172nd Report, chaired by Justice Jeevan Reddy (recd.), recommended the deletion of section 377 of IPC in the context of redefined law on sexual assault to replace the old law on rape. The purport of these new sections is to substitute the offence of 'rape' under section 375 with the offence of '**sexual assault**' by including all kinds of penetration in the vagina, anus or urethra of another, whether by a part of the human body or by an object. A new offence, namely, section 376E with the title 'unlawful sexual contact' is sought to be created. Besides the above, section 377 is proposed to be deleted as unnecessary in the light of the preceding provisions. Only content left in section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just deserts. Section 509 of IPC, is also sought to be amended providing higher punishment where the offence set out in the said section is committed with sexual intent.

The sexual orientation and gender identity – related human rights legal doctrine can be categorized as follows: (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity. On 26th March 2007, '**Yogyakarta Principles**' drafted by experts from 25 countries, represented of all the regions of the world imposes obligations on the states: The principles are intended as a coherent and comprehensive identification of the obligation of States -to respect, protect and fulfill the

human rights of all persons regardless of their sexual orientation or gender identity and repeal all laws that criminalize consensual sexual activity among persons of the same sex who are over the age of consent. **International Covenant on Civil and Political Rights** (ICCPR) recognizes the right to equality and states that, "the law shall prohibit any discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social region, property, birth or other status".

V

In this way, we conclude that many LGBT people have struggled to gain recognition of their human rights internationally. Many states refuse even to consider these issues and strive to keep them off the international agenda. Millions of our fellow human beings live in societies still blighted by stigma, prejudice and shame. Their suffering is unseen and unheard. These will be difficult issues to raise, but we must speak up for these who cannot speak up for themselves and to help India to be the 127th country to decriminalize homosexuality.

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