LGBT COMMUNITY AND THEIR DEPLORABLE CONDITION IN INDIA: A CRITICAL ANALYSIS

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India accepts certain rights that have always been understood by people to be basic such as the right to life and liberty. On the off chance that Human Rights are indistinguishable from man, they ought to be equivalent in their application to every person at all spots and consistently. These rights are basic to the very presence of humanity and not just for the advantage of one class or one area of the society. Our Constitution mirrors this position. The right to life and personal liberty is accessible to all individuals inside its territory and not only its citizens. Then why there exist a discrimination on the basis of caste, creed, gender or even sexual orientation? People across the nation face brutality and imbalance—and now and again torment, even execution—merely because who they cherish, who they are, or what they look like. Sexual orientation and knowing our gender identity is the basic part of our selves and ought to never prompt segregation or abuse. The main aim of this paper is to explain in detail the deplorable condition of the LGBT community is India and also to explain how an unnatural sexual orientation is a crime in India.

INTRODUCTION

The very first question that comes to mind is that the criminal proscription under Section 377 of the Indian Penal Code, 1860 restricted to certain sexual acts or homosexuality in general? This question is nothing but an outcome of the discharge of a recent petition challenging the constitutionality of Section 377. The said challenge to the law was brought by Naz Foundation, India, an NGO working on health-related issues of men who indulge in sexual intercourse with other men.

Since, there haven't been a handful of prosecutions, due to which adults indulging in consensual homosexual sex, that too even in private have been arrested and prosecuted and the Delhi High Court stated that: "In this petition we find there is no cause of action as

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no enactment is lying against the petitioner".[1] Despite of the fact that the Hon'ble Supreme Court directed the High Court to hear the case on merits again, the reasons behind the Delhi High Court's dismissal have raised certain integral questions: Is the actual harm caused by S 377 confined to police and judicial records? And secondly, is the meaning of S 377 confined only to the domain of anal sex?

The main idea of research behind this paper is to determine the domain, range and the manner in which the proscription of "carnal intercourse against the order of nature" under S 377 makes criminals out of homosexuals.

The implementation of S 377 has been carried out in various creative ways and is increasing by every passing minute. It is to be noted that prosecutions based on consensual sex between adults in private would require the prosecutorial powers of the state to gain access to the bedrooms of gay people in this country, which, both as impracticality and abomination under Indian law, is next to impossible. Further, only the presence of a law like Section 377 in its present form, creates fear of arrest among gays, bisexuals, and transgender people in India- apparent through a profuse evidence of blackmail, sufficient to constitute a "cause of action" by itself.

MEANING OF SECTION 377

With S 377 still prevailing and in power as per the Indian Penal Code, it becomes important to go back in 1835 and analyse the situation that constituted it. Thomas Babbington Macaulay, the president of the Indian Law Commission, was charged with the testing work of drafting the Indian Penal Code also as a unifying effort to consolidate and justify the "splintered systems prevailing in the Indian Subcontinent".[2] Before S 377, it was clause 361 in the Macaulay's first draft of the Penal Code which defined a severe punishment for touching another for the purpose of unnatural lust.[3] In the Introductory Report it was stated that:

Clause 361 and 362 relate to an odious class of offences respecting which it is advisable that as little as viable should be said […we] are unwilling to insert, either in the text or in the notes, anything which could advance to public discussion on this revolting subject; as we are decidedly of the view that the injury which would happen to the morals of the

[1] Unreported Order September 2, 2004 of the Delhi High Court in Writ Petition No 7455/2001

[2] The different prevailing systems were in the Bombay, Madras and in the Bengal Presidencies.

[3] Cl 361: "Whoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to 14 years, and must not be less than two years". Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp 3990-91.

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community by such discussion would far more than make up for any advantages which might be obtained from legislative measures framed with the greatest precision.[4]

The objective of S 377 has remained uncertain and unsubstantiated. The said offence was introduced into British India with a presumption of a shared Biblical morality. Whether this oriental vice is a sexual activity, or also the person associated with the sexual activity, is a something that begins with the case of Queen-Empress v Khairati.[5] In this case, a "eunuch", was put under continuous "supervision" by the police and arrested upon being "found singing dressed as a woman". The only implicating evidence was the misrepresentation of the orifice of the anus into the shape of a trumpet[6]-a mark of a habitual sodomite. A question is raised here that, is this offence meant to criminalise the act of sodomy or people who appear to be likely to commit this offence? There have been other instances regarding the same issue such as, Noshirwan v Emperor[7] where having seen two young men, both adults, walking into the house of one of them, Solomon, the neighbour, peeped "through a chink in the door panels" and noticed that the two were attempting to commit sodomy. He walked into the house and forced them to the Police station. The said accused were released and their conviction was set aside as the very act of sodomy was never completed, although the judge did reprimand one of the men, Ratansi, as a "despicable" specimen of humanity. It has also been desperately attempted to redeem oneself, by submitting themselves to a medical examination in order to convince the court that his anal orifice was not shaped like a "funnel", which is a sign of a habitual sodomite.[8]

Cases like Khairati, Noshirwan and Minwalla, all deal with the idea of bodies marked with signs and impressions that show the chances of committing sodomy. This brings out the fact, that S 377 could therefore be used against not only the persons who are actually involved in the act, but also those who give the appearance of being homosexual and hence likely to do the act. This has in turn, legitimised the manner of police harassment and abuse of homosexual men. The scope and application of 377 continued in independent India way into the 1960s and 1980s as well. The court conceived the test of "imitative" sexual intercourse, that oral sex was imitative of anal sex in terms of penetration, perforation, enclosure and sexual pleasure therefore similar to anal sex and worthy of punishment under S 377. This test was further applied in the case of State of Kerala v K Govindan[9] wherein even thigh sex was also added to the list of unnatural offences. The important thing here is not the coercive element of the sexual activity, which would be just to the case, but the

[4] *Ibid.*
[5] 1884 ILR 6 ALL 204.
[6] *Ibid* at p 602.
[7] AIR 1934 Sind 206
[8] *D P Minwalla* v *Emperor* AIR 1935 Sind 78
[9] (1969) CriLJ 818

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ability of the act to be accommodated within the meaning of "carnal intercourse against the order of nature".

While dealing with the prison conditions in India, it has been recorded that the presence of homosexuals and the impending chances of homosexual sex as a serious increasing factor to the dismal prison condition. Homosexuals here become, easily acknowledged figures as predators and importantly forcible sexual partners. And homosexuality has become the face of the general discourse on perversity.

Today, the failure of the courts to distinguish between non-consensual sex and consensual sexual relations, suggest that "male adult abusers of boys, males who forcibly rape other men, and male homosexuals are all one and the same. Most surprisingly S 377 does not exclude the activities that are consensual, however the use of the term "voluntary" in the language of 377 make the consent irrelevant. Therefore, the acts of anal, oral, thigh sex along with mutual masturbation, are punishable also when two consenting adults may indulge into the acts within a private sphere. The utility of sodomy is reasonable and limited to prosecuting cases of non-consensual sex. However, this cannot be treated as a defence for retaining the anti-sodomy laws nor does it legitimise the common law offence of sodomy. In Lohana Vasantlal, the judgment is so caught up with the inclusion of oral sex under 377, in a conceptual composition of "sexual perversity" bigger than Khanu that it completely forgets and belittles the actual damage and loss caused to the boy who was forced into the sexual act. The ratio of the judgement would apply equally to consensual acts as it totally nullifies the coercive elements of the offence. In the words of Upendra Baxi, "Appellate judges are not bound to say what they do not mean or to mean what they do not say. For what they say and mean is accepted everywhere".[10] September 1957, there evolved an idea known as the Harm Test. It was based entirely on the views of John Stuart Mill, who put forward passionately for a private space, fully free from state interference, even if it involves tasks that people of a society don't like, as long as they don't harm anyone. This idea was as a result an integral part of the Wolfenden Committee Report of Homosexuality and Prostitution.[11] It has been observed that the Indian courts have never had the chance to decide the question of state enforcement of private morality.

Having explained S 377 to the range of almost the obvious, that it does in face stand to criminalise homosexual conduct and homosexuality, it is also important to be bring in light the difficulty this offence creates in arresting people for sexual activity in private, the enforcement of S 377 has also become endemic and is being used against homosexuals in a more general and arbitrary manner.

[10] Upendra Baxi, 'The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment' [(1974) 1 Supreme Court Cases 45]

[11] Section 61 of the Wolfenden Committee Report on Homosexuality and Prostitution

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PUBLIC AND PRIVATE IMMORALITIES

The Wolfenden Committee Report on Homosexuality and Prostitution in September 1957 was spearheading as it set out to amend the English criminal law by actualizing think perspectives of John Stuart Mill who contended energetically for a private space, free from state impedance, regardless of the possibility that it includes exercises that individuals from a general public don't care, for whatever length of time that they don't hurt anybody – prominently known as the Harm test. Wolfenden report had broadly contended that:[12]There must remain a domain of private profound quality and impropriety which is, to sum things up and unrefined terms, not the law's business. Indian courts have never had the chance to choose the question of state authorization of private morality.[13] However legal advisors, attempting each trap in the book to make moderating elements, frequently argue that their client, a man who has sexually attacked an underage youngster or a grown-up lady charged under S 377 ought to be offered some mercy as consensual sodomy is no more an offense in England. The judges have recorded these entries also, even gone onto guard the social orders part in controlling consensual homosexual conduct, alluding to the well-known Hart Devlin banters about. In Anil Kumar Sheel versus The Principal, Madan Mohan MalviaEngg College, the judge expressed that: "the law should continue to support a minimum morality…However, according to me, the issue would always be as to how far laws should uphold morality and it depends upon the facts and conditions of the case. A judge is to keep his finger on the pulse of the society. … The law cannot undertake not to interfere".[14]

DIFFICULTY OF PROSECUTING CONSENSUAL CONDUCT UNDER S. 377

By the absence of a "cause of action" the Delhi High Court was alluding to government records of actual prosecution, arrest, conviction and sentence under 377 of consenting adults who were caught for engaging in sexual relations in private. Notwithstanding when S 377 applies to any "voluntary" act, it is practically difficult to locate a solitary reported case in the most recent 50 years where two adults have been rebuffed in the courts for consensual homosexual sex in private. A few studies62 concentrating on the genuine utilization of S 377 of the IPC demonstrate that most cases that really go under it manage non-consensual furthermore, coercive sexual activities. The Delhi High Court was correct that S 377, at any rate in autonomous India, does not seem, by all accounts, to be authorized against consenting homosexual people. Yet, there is an immense false notion in this kind of conclusion. Dependence on reported judgments of the courts of advance are constraining as trial court procedures are not also chronicled. So we have no information on cases under

[12]Section 61 of the Wolfenden Committee Report on Homosexuality and Prostitution
[13]Gobind vs State of Madhya Pradesh (1975)2SCC148
[14]Anil Kumar Sheel vs The Principal, Madan Mohan MalviaEngg College AIR 1991

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S 377 that went to trial, and were never advanced furthermore, stay unreported. To completely comprehend the effect of anti-sodomy laws our own benchmarks of what comprises proof and record of harm, cause and damage require to be modified and re-looked – far from the old necessity of government records.

APPEARANCE AND LIKELIHOOD OF COMMITTING SODOMY

In Khairati, Noshirwan and Minwalla the appearance or probability of the respondents to submit sodomy constantly, instead of the specificity of the specific demonstration was a substantive thought – progressively creating a relationship between the demonstration of sodomy with particular sorts of "individuals" – who are currently known as homosexual, gay or bi-sexual. These choices alongside Anil Kumar Sheel and Kailash criminalizing consensual homosexuality give a conviction of authenticity to police activities. It is impractical to catch homosexuals in the act of the offense, the police are getting homosexuals men and transgender people constantly, just on the suspicion that as a result of their appearance they are reveling in homosexual sex. The Indian police frequently get homosexuals in a public park, on the other hand a peaceful corner in a dim road associating with companions, looking to meet mates or potential sexual accomplices, or demonstrating a few level of same sex fondness in broad daylight – pretty much as is basic with heteros. Be that as it may, the police are confronted with a profound perplexity on the best way to apply S 377. The police would regularly start by making dangers under S 377, just to understand that is excessively troublesome to put forth out a defense. The base prerequisite as far as medicinal proof to demonstrate a sexual offense would require the couple to be raced to a healing facility, examination to be led of their private parts to record any physical signs showing that "carnal intercourse" occurred. That does not generally imply that the police simply let you go off with an inviting cautioning. For the most part the police, mindful of the troubles in arraignment either:

(a) Ask the men for sexual favors (humorously carrying out the same wrongdoing they need to stop)

(b) Or get some cash out of them. This to a great degree pervasive shape of harassing under S 377, yet truant from the record books, is the most crippling reality confronting the gay community in battling this law in a lawful situation that lone has faith in confirmation that can sourced to government records. Katyal has properly contended that it renders imperceptible "the bunch routes" in which "extortion, corruption, rape, and threatened arrest" of the males with same sex wants occurs. The Delhi high court neglected to perceive the need to contemplate the levels and types of harassment that happen in such backhanded employments of S 377 – constituting an intense and solid damage to several men in this nation with same sex desires.

DIGNITY

Justice Ackermann writing in National Coalition of Gay and Lesbian Equality vs Minister of Justice has articulated this connection between the existence and forcing of anti-sodomy laws and their impact on the dignity of gays and lesbians: "The common-law proscription on sodomy criminalises all sexual intercourse per annum between men: regardless of the relationship of the couple who indulge therein, of the age of such couple, of the place where it occurs, or indeed of any other conditions whatsoever. In so doing, it penalizes a form of sexual conduct which is identified by our broader society with homosexuals. Its allusive effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a considerable part of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy just because they seek to indulge in sexual conduct which is part of their experience of being human. Just as apartheid legislation provided the lives of couples of different racial groups perpetually at risk, the sodomy offence constructs insecurity and exposure into the daily lives of gay men. There can be no doubt that the existence of a law which penalizes a form of sexual conduct for gay men degrades and devalues gay men in our broader society. As such it is a tangible seizure of their dignity"

CONCLUSION

Justice Kennedy referring to the impact of anti-sodomy laws on the lives of gays, lesbians and transgender in Lawrence stated that: "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime". The Indian courts need to perceive that they can't allow the state to keep on demeaning the presence of individuals with same sex desires in this nation. S 377 with its more extensive shadow of culpability is the greatest attack against the dignity and humanity of a significant minority of Indian nationals. The courts need to recognize that by decriminalizing sodomy they won't allow a negligible sexual action, yet decriminalize the lives of real natives who are associated with that sexual act. People in general advantages of this decriminalization would begin with a feeling of self-acknowledgment, solace, certainty and advancing pride among homosexuals, bisexuals, lesbians, transgender, hijras – all of whom are somehow or the other got inside the more extensive significance of 377. Decriminalization will keep another Khairati and take into consideration the open doors and space for the homosexual development to rise up out of the shadows out into the open and make a space for itself to collaborate with whatever is left of the common society, in a generally more equivalent position.

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