

An analysis of Section 377

Indian Penal Code

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Abstract — The section 377 of the Indian Penal Code punishes the voluntary carnal intercourse against the order of the nature with any man, woman or animal or aims at punishing non procreative sexual activity that now implies sexual perversity. This paper aims to deeply analyse the philosophical arguments in the favour of reading down and against the reading down of the section from the Indian Penal Code. It also elaborates on homosexuality and its relation to the public health system.

Keywords — Indian Penal Code, Section 377; Mill's Harm Principle; Wolfenden Report; Hart; Devline.

I. INTRODUCTION

The section 377 of the Indian Penal Code punishes the voluntary carnal intercourse against the order of the nature with any man, woman or animal or aims at punishing non procreative sexual activity that now implies sexual perversity.

II. ARGUMENTS IN FAVOUR

The philosophical arguments in favour of reading down Section 377 IPC mostly use the fervour of humanity, privacy, dignity and equality for all.

A. Using Mill's Harm Principle

According to Mill's Harm Principle, state and society would have no right in curbing the consensual homosexual acts done privately. The consensual act between homosexuals is happening in private and is not causing any harm to its participants as well as the society. Even if harm is caused to the participants (homosexuals engaged in the act), it is not really counted as a harm as they have given their consent to it. It can be seen as a self regarding act, in which no harm is done to other people of the society and state. This act is causing mere offence to the people of the

society or law and those who regard this as an "unnatural act against the order of the nature". But according to the Mill's principle, being offended by an act is not counted as being harmed. An act can be prohibited by the state only if it causes harm to others. No matter how deeply offended you are by the act, that act cannot be curbed purely on the basis of offence (provided that the offence does not cause any psychological harm). Assuming that homosexuality is considered to be immoral and a bad deed, even paternalism cannot be used to curb the act as the Harm Principle states that a person should not be stopped from doing something just because it would not be good for him. Considering all the arguments stated in lines of the Harm principle, Section 377 IPC should not be taken down.

Homosexuality is not causing harm to the members of the society and it is just violating the moral and cultural codes of our society. I think that morals and cultural norms are important for a society as these are the features that have a heavy impact on our mindsets and identities. So, being offended by an act should have an impact on its ultimate fate.

B. According to Wolfenden Report

The society should give freedom of choice in terms of private morality. As long as the act does not involve corruption, exploitation and doesn't disrupt public order, the law has no right to object it. The consenting acts that happen in private (such as carnal intercourse against the order of nature) should not be the concern of the law as it doesn't fit in the criteria stated above. Although homosexuality might be considered morally incorrect but as long as it is being done privately and consensually, state has no right to curb this act. Law shouldn't enter into the domain of private immorality and it shouldn't concern it with one's sexual preferences and the consensual sexual activities that one is doing privately without causing harm to others.

Privacy of each individual should be respected and a balance needs to be maintained between the society and its individuals. It depends on the context when privacy should be given a higher stand. Sexual preferences are one of the most private part of one's life and invading it needs a very strong reason.

C. In lines of Hart's and Devlin's reply

People might argue that the law is a perception of the public opinion and it is alright to enforce what is seen as the shared opinion (by whatever steps it takes) in order to preserve the society. But this notion depends on the cause that we are trying to preserve and the type of society that we live in. Assuming that it is true, sometimes it is better to let the society fall apart than letting some people be denied of their basic fundamental rights and proper treatment. The Section 377 supposedly reflects that the shared opinion of citizens considers homosexuality to be immoral and against the order of the nature. Devlin might argue that one must take all steps to in order to curb homosexuality (and follow the public opinion), so that the society doesn't fall apart. But, if we consider the wider view, homosexuals have to bear the prejudices, violence, exploitation, torture from the society. So it is better to let the society fall apart than offer such ruthless treatment to the citizens of India. The well being, fundamental rights, happiness and liberty of a person comes prior to public opinions (which are susceptible to change) of the society. The positive morality in India dictates that homosexuality is against the cultural and morals norms of India. Critical morality considers a broader picture and agrees that positive morality can change (seen from other countries). There is a difference between the positive and critical morality and our laws should be based

on critical morality as positive morality tends to change with time. A very strong reason is required in order to justify the punishments and mistreatments for homosexuals.

Homosexuals are forced to suppress their sexual impulses which affect their development, personality, emotional lives and happiness. The shield of "public morality" does not justify all the tortures and punishments they have to go through.

D. Right to dignity and life

Due to section 377, individuals are forced to deny the core of their identity and vital dimensions of their personality. It infringes upon the right to privacy (Article 19(d) and Article 21) of a person and their right to live with dignity. They don't feel their self respect and self worth. Homosexuals are treated unfairly on the premise of their personal choices, sexual preferences and their orientation, thus curbing their right to live with dignity and respect (Article 21). They are forced to hide their identity and are not provided with an enriching and positive atmosphere that can help them in realizing their full potential. The Section 377 IPC portrays that homosexuals are of less value and are demeaned by the society. Public disapproval or disgust is not justified reasons to curb one's freedom. The constitutional protection of dignity requires that we respect and value of each individual as a member of the society. As a right to dignity, each individual (here homosexual) has a freedom of choice and action. The constitution of India respects, celebrates diversity and it would never intend to discriminate people on the basis of their sexual orientation just because of the public morality (Our constitution follows the constitutional morality).

Public morality has a huge role to play in shaping law. But, right to life and dignity have a higher standing and doing something unnatural is not a valid reason to infringe upon this right.

E. Right to privacy

Each individual has a right to privacy and it extends on the matter of marriage, procreation, education, family relationships etc. They have a right to be let alone and have a personal sphere that is free from government intrusion and make decisions on intimate relations without being penalised. Homosexuals just express their sexuality, consensually and without harming others. The matters of one's sexual preferences and personal choices centre on

one's dignity and autonomy. This right to privacy is a necessity for the pursuit of happiness and one's sexuality is at the core of this area of privacy. Curbing this right requires a very strong reason and one's sexual preferences and sexual orientation aren't of that paramount importance that it would justify this infringement of one's rights.

F. Harsh treatment and discrimination by the society

Section 377 IPC does not serve any public purpose and legitimate state interest. Homosexuals are subjected to harsh treatment from society and law. They are denied basic rights and are victims of discrimination in various spheres of life, only on the basis of their sexual orientation which is considered to be unnatural. Their basic fundamental rights are taken away and they become victims caught by fear, misery and despair. They are harassed, exploited, blackmailed and are victims of discrimination. The seclusion, discrimination, humiliation and degraded treatment from the society is the result of Section 377 IPC as it enables and encourages the society to curb this "evil".

G. Freedom to choose

For every person (whether homosexual or not) the sense of his sexual orientation and gender is a major part of his personality and identity, that he is bound to carry everywhere. It the decision of the person to choose his partner (irrespective of his sexuality, culture, religion) and the law or the society has no right to interfere in that decision. Taking charge and making one's decisions oneself enables an individual to grow, attain confidence and fulfil all goals that one has set. The law is not justified in controlling the behaviour of homosexuals (because of their sexual orientation) and punish them for the way they are.

Each individual has a right to choose (irrespective of how unnatural and unconventional the choice is) and I think this is one of the strongest reasons to read down Section 377 IPC. One should be provided with a positive atmosphere to grow and fulfil dreams.

III. THE DEFENCE

The philosophical arguments that are favour of keeping the Section 377 IPC are based on the moral, cultural norms of India that have been followed since time immemorial. They are based on the moral values that bind our society together and the traditions that define us.

A. Devlin's argument on enforcing morality

Homosexuality is considered to immoral (according to our Indian traditions and values) and any immoral act, whether it is done publically or privately or is purely self-regarding, should be condemned as it is wrong in itself. Sin and crime are intermingled and so are law and immorality. Immorality cannot be separated from the law which is majorly based on the moral codes of our society and the sanctity of human life. The concept of private immorality is non-existent and it simply means what morals are practiced privately. An act that is immoral would remain a sin irrespective of where it is done. Homosexuality is considered to be against the order of nature and anything that has the tendency to harm the moral perceptions of our society (and its basic foundations) should be curbed. The freedom of choice and expression to which every citizen is entitled, does not include the freedom to be immoral. The purpose of the law is to enforce morality and hence, Devlin thinks that if homosexuality is considered to be immoral, it should be prohibited (whether it is done privately or publically).

B. Importance of public opinion

Every society has a political as well as a moral structure and the law is a perception of both of these. There exist shared ideas on politics, morals and ethics that are form the basis of the society without which the society would disintegrate. In India, there is a shared opinion (or according to public morality) that homosexuality is against the traditions and culture of our society and going against this opinion would not be good for the society as it is held by an invisible bond of common thoughts. Homosexuality is a threat to positive morality in this case. It tends to threaten the basic morals that our society stands on and the tradition that the generations inculcate. According to Union of India, law cannot run separately from the society since it only reflects the perceptions of the society and thus, acts that hurt the public feelings, morals and sentiments should be prohibited. It is alright to infringe the freedom of the citizens if their act supports indecency, immorality and disrupt public order.

The shared opinion in India follows the ancient traditions and the moral codes, which regards homosexuality to be against the order of nature. Hence, it would be foolish to raise objections against this section until unless the shared opinion regarding it changes.

C. Sexual intercourse is only to conceive

Section 377 IPC is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, i.e., for the purpose of procreation only. Even the Vedas, our society follows and respects so dearly, mentions that the only purpose of sexual activities is procreation and therefore, our Indian society considers the otherwise to be just sexual perversity. Homosexuals cannot give birth to a child and their sexual activities are only for pleasure which is condemned by our society as it tramples on its basic fabric and challenges the moral standards that are being followed since ages.

Sexual intercourse increases the chances of sexually transmitted diseases and according to our moral norms; sexual intercourse is only for conceiving. In the case of homosexuality, sexual activities do not lead to procreation (i.e the sole purpose of intercourse is defeated according to the Indian culture). As more people indulge in homosexuality, the cases for STDs increase. Section 377 IPC prevents AIDS by discouraging rampant homosexuality. This shows that infringing the right to have “unnatural sex” decreases the chances of getting STDs. This is in accordance with Mill’s Harm Principle as homosexuality is having a direct impact on the public health of the country and any act which has a harmful consequence can be curbed by the law. This justifies why Section 377 IPC should not be taken down.

D. Morality vs. Privacy

Invasion in right to privacy and life is justifiable in the interest of public safety, health and morals (According to the submission in Union of India). Morals form an integral part of our lives and in order to protect the common perceptions of our society, the law has a right to curb our other rights. Right to privacy is not absolute and can be infringed upon in the interest of public order, morality, state security etc. Article 19(2A) allows restrictions for the cause of decency and morality. Even the right to dignity is a relative concept and it would in no world support that we hurt the values and sentiments of our society and other people while exercising this right.

Respecting one’s privacy is a relative concept. It depends on the situation and what we are compromising in order to protect our privacy. In this case, morality and decency (forming the foundation of a society) hold much more importance than one’s privacy. An immoral act remains immoral, whether it is done privately or publically.

E. Changing toleration levels

Several societies have decriminalized homosexuality and have started showing much more tolerance towards it. It depends on that society’s pace and their susceptibility to change. Until the perceptions and thoughts of people don’t change regarding homosexuality, it would not gain social acceptability in India (which is a conservative society and 70% of the Indians still live in the 90’s era). It is argued that India can’t lose its morals, cultures and replace it under the influence of western culture. At this point of time, India is still accepting this notion and still considers it to be immoral and contrary to the cultural norms of our society.

F. Importance of moral values and traditional norms

The shared opinion in India considers homosexuality to be against the order of nature and there are certain cultural and social values that need to be protected as they form the foundation of our society. Our traditions and values are a part of our identity and following them has been an old legacy. Our society has always been against homosexuality and considers it to be unnatural and it is condemned by all religions equally. Promoting this would destroy the basic moral values that our society has imbibed since ages. Any act which causes harm to the values of society can’t be justified on the grounds of human dignity. Respect of rights for other’s sentiments and moral standards come first. Hence homosexuality, which is against the order of nature and our moral norms, has no place in the Indian culture.

According to the Indian traditions and value system, gay marriages jeopardize the institution of marriage. Gay marriages are against the religious morality that forbids us from marrying our blood relatives. It offends the positive morality of the Indian society and is against the values that we imbibe according to our culture. It is against the ancient concept of family and our cultural richness and heritage. If they are forced to marry a person of opposite gender, they tend to be untrue to them and often engage in extra marital affairs which in turn ruin the lives of their marriage partners as well as that of other people involved. It would also promote some unethical concepts like adultery, live ins, male prostitution which are again against the morality that our society upholds.

Morals and cultural norms need to be respected as they are the building blocks of a society and they reflect the public opinion. But considering the whole argument, I feel that homosexuality is a personal choice and it needs to be left to the individuals to decide. It is not a choice and we

need to respect each individual for what they are. It is an expression of one's sexuality and which need not be change only because they are a bit unnatural or unconventional. The norms of the society are susceptible to change and following them blindly can be harmful.

IV. HOMOSEXUALITY AND PUBLIC HEALTH

The arguments for and against the Section 377 IPC are not only based on philosophical issues but also on questions of facts. There are some intriguing questions of facts that have played a huge role in determining the fate of Section IPC. The most important questions are "Is homosexuality a threat to public health", "Are homosexuals victims of crimes and are devoid of basic medication and preventive measures" and "Is homosexuality a curable disease or just an expression of sexuality". The answer to these questions can only be guided and highlighted by the recent studies and researches happening in this field.

A. Homosexuality: A threat to public health or devoid of health and welfare?

Is health and welfare of homosexual at stake?

Due to the adverse and harsh atmosphere of exploitation and torture created for homosexuals by Section 377 IPC, they are compelled to deny a core part of their personality. They are afraid to be open about their sexual orientation and often resort to secrecy because of the discrimination and mistreatment that they face. They become victims of blackmailing, assault, rapes and violence and are mentally and physically harassed (Cases reported by the LGBT community). Due to the enforcement of Section 377 IPC, HIV/AIDS prevention efforts for them are highly ineffective, owing to the discriminatory attitude shown towards them by the state agencies and they are often subjected to assault, harassment and abuse. Data provided by National Sentinel Surveillance shows that 8 percent of homosexuals were infected with HIV in comparison to one percent of the general population. The fear of law enforcement agencies drives their activities underground and hence making them devoid of the AIDs prevention measures. According to a report by NACO, homosexuals represent a segment of the population which are highly vulnerable to AIDs/HIV. Their risky sexual activities are underground and they resort to unsafe sex (hurried due to lack of place, fear of police agencies). They are afraid to disclose their sexual orientation and have unsafe sexual encounters, making all the NACO preventive efforts go in vain. Even former Prime Minister Manmohan Singh (at

Commission of AIDS Asia) agreed that discrimination against homosexuals have to be removed for the treatment and preventive plans to succeed. Hence, according to the aforementioned facts and arguments, Section 377 IPC leads to decline in public health due to increased cases of AIDS/HIV, assaults, rapes etc. If Section 377 IPC was not enforced, homosexuals would have been more comfortable to seek the preventive measures and wouldn't have resorted to unsafe sexual practices. They would not have been exposed to the tortures and cruelties due to their sexual orientation. The cases for HIV/AIDS would have decreased drastically (as shown by the empirical results of general population).

Does homosexuality lead to an increase in the cases of STDs?

Au contraire, it is believed that the only purpose of indulging in sexual activities is to conceive. This is not possible in case of intercourse between two homosexuals (they are thus slaves of their sexual impulses). They resort to anal intercourse, which is considered to be against the order of nature, and tend to foster AIDS and hence lead to decline in public health. Anal sex causes rectal bleeding and thereby, allows easy transmission of HIV. MSM accounts for 49 percent cases of HIV in America. It has been proved by many studies that male-male transmission is easier than male-female. The enforcement of Section IPC discourages unnecessary sexual conduct between homosexuals (considered against the moral and cultural norms of India) and thus reduces the chances of spreading AIDS and prevents HIV. It is believed that homosexuality comes with the curse of AIDS (which is definitely not true). According to studies conducted worldwide, homosexuals are found to have more sex partners, which include people of same sex as well as opposite sex. Thus, this increases the chances of HIV/AIDS. The Additional Solicitor General (AGS) argued that this section should be retained in the IPC and decriminalizing it is not the cure for HIV and instead of that, education and safe sex practices should be advocated. According to them, criminalizing consensual and unnatural sexual acts of adults in private, serves better for the public health. Each organ of human body has a unique function and using another organ which has not been designed for the purpose of intercourse would cause harm to the human body. The rectum is not made for the purpose of penetration into the male body. This unnatural penetration might cause bleeding and this bleeding is the reason why male to male sexual intercourse has higher chances of spreading AIDS/HIV. Hence, enforcement of Section 377 IPC is

necessary to discourage unnatural sexual intercourse and improve the public health in India (this law would substantially decrease the STD case). But a fact that cannot be ignored is that STDs spread through both heterosexual and homosexual conduct and sexual intercourse is not its only cause.

Is homosexuality a disease?

Earlier homosexuality was regarded as being socially and mentally unwell. The Ramdev- Tijrawala case argued on the basis of false and relatively old research conducted by Dr. Enrique Rojas, who claimed that homosexuality is a curable disorder. He popularized a false belief that homosexuality is caused due to environmental factors. Such researches and arguments are not only misleading but they also have a potential to wrongly influence and incite the minds of people.

It has been stated that according to recent studies (Diagnostic and Statistical Manual of Mental disorders) in the field of psychology, homosexuality is not a disease and it is a major part of one's identity. It has even been removed from the list of mental illnesses by the WHO. It is one's sexual preference and orientation. It is a core part of a person's personality that he carries everywhere and it is not something curable or something that needs cure. Gender and orientation are embedded in one's identity and it is something that the law should not try to infringe or change. Now, it has been proven through researches and studies that homosexuality is not a disease. So, the argument (homosexuality is a mental disease which can be cured) for enforcing Section 377 IPC remains invalid.

V. CONCLUSION

It can be understood from the aforementioned facts that there are problems with encouraging homosexuality, but we can't say that the same do not exist for heterosexuality as well. The problem of multiple sexual partners, in case of homosexuality, cannot be generalized and extended to the whole community. Although, scientifically speaking, homosexual intercourses involve anal sex which leads to bleeding and hence, enables easier transfer of STDs. Also, sexual intercourse is not the only cause of STD. One thing that is clear from the above discussion is that homosexuality is not a mental disease. It is a way of life (maybe considered unnatural by many), yet a way of life.

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