

Decriminalization of Homosexuality

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Abstract — s. 377 - Unnatural Offences : “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or 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.” Section 377 of the Indian Penal Code criminalizes several sexual activities such as homosexual acts. It was introduced more than a century ago during the British rule in India. In spite of being decriminalized by High Court once, the Supreme Court of India overturned the decision stating that it can be only be decriminalized by the legislature.

This is a paper that analyses the arguments in favor of as well as the arguments against the decriminalization of Homosexuality in India. The paper will also scrutinize some facts about Homosexuality and will finally arrive at the conclusion that it is fair to decriminalize Homosexuality.

Keywords — 377 Indian Penal Code; Arguments; Homosexuality.

I. IN FAVOR OF DECRIMINALIZATION

A. BASIC ARGUMENTS

Section 377 of the Indian Penal Code brutalizes and unfairly targets the homosexual community of India. A person's private, consensual sexual relations and preferences form a prominent basis of his individuality and lie at the very core of his private space. Under Article 21 of the Indian Constitution – “No person shall be deprived of his life or personal liberty except according to procedure established by law”, this private sphere can be infringed upon by the government only for a compelling state interest. Societal revulsion and traditional customs in no way provide enough license to the government to demean the value and snatch the personal liberty of a vulnerable section of the society. Rather, it is the duty of the Indian constitution to respect diversity and ensure justice and freedom to all.

B. FUNCTION AND EFFECT OF LAW

As per the Wolfenden Report drafted in 1957, the only function of law is “...to preserve public order and decency, protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption.”

A very crucial point in this debate is to whether or not the judiciary should be a reflection of society, and if yes, to what extent. A judiciary that is utterly misplaced in its morality with respect to the society will obviously not garner any respect or support from its subject. What we need to understand here is the dynamic and vague nature of ‘public morality’ and that public tolerance towards different activities undergoes a constant change. Take the case of Sati and Child Marriage, acts that were considered usual as per traditional Indian customs that now hide within the remote crannies of rural India.

These examples show that the Law not only has to remain flexible to the dynamicity of thoughts, but also on sensing an emerging change has to take the lead to provide the necessary impetus for the metamorphosis to take place in its entirety. Not to continue to stay rigid and further the evil of the custom by proclaiming its constitutional validity. What use are those customs that traumatize your own countrymen?

It is indeed no empirical claim that support for those of the 'third nature' has seen a drastic rise in India over the last decade, even among the heterosexuals. This does show that the extreme revulsion that was used to justify the ostracizing of the homosexual community is vanishing, and hence there is no basis for the law to continue with the same.

Another aspect that we need to analyze is the amount of deterrence that the law even brings about in trying to control traits that are an inherent part of a person's being. As Prof. Ryan Goodman of Harvard Law School rightly said, "Individuals ultimately do not try to conform to the law's directive, but the disapproval communicated through it, nevertheless, substantively affects their sense of self-esteem, personal identity and their relationship to the wider society." I shall build on the identity argument further in the paper, but what we need to see here is the unfair demand on the part of the government to force people to shed their bodily urges just because they seem 'unnatural' as per traditional customs.

C. PERSONAL LIBERTY AND AUTONOMY

Carrying on from my previous argument, the question that now arises is that even if we assume that revulsion does exist, till what extent does the state have the power to enter the privacy of its citizens. That is, where does one draw the impenetrable lines beyond which lies the aspects of a person's life that are devoid of the influence of anyone but himself? Surely, there is nothing more private and confidential in any Indian's life than his sexual relations. For restraining the person from going ahead with his sexual life smoothly, the state has to show some clear-cut harm that is befalling another being.

It is highly improbable how acts done in the privacy of people's bedrooms can be the cause of such great trauma to another person. It is neither causing him any injury, nor driving him to mental instability, nor is the person being pulled out of his comfort zone to be forcefully shown homosexual sex so as to slap his religious principles in the face. The only harm homophobes might be able to show is

that its mere existence in their surroundings makes them feel offended.

There will always be such people whose existence irritates me, offends me, even makes me feel nauseated, but that doesn't give me the warrant to go on an all out rant against them, demean them, extort them, blackmail them, harass them, make them feel unwanted and ostracize them from the society no matter how many people feel the same as me. The Indian society is known to be diverse and such conflicts are bound to exist. The government cannot go about criminalizing one of the sects involved in all such conflicts.

This is because each individual has a right to lead his life in a particular way as long as he/she isn't causing any direct harm to another individual. He should be allowed to shape his opinions and thoughts the way he wants to. He belongs to himself and not to society as a whole. This is the only way in which a person can actually grow and prosper in any society.

Section 377 unfairly takes away this right to personal liberty and privacy of a large number of Indian citizens. It imposes on them a lifestyle they don't naturally relate to. They cannot be open about their sexual preferences, they cannot have consensual intercourse without the fear of being caught and prosecuted and they cannot commit innocuous acts by their own will in their private space.

D. PERSONAL DIGNITY

All the above-mentioned arguments link to the person's dignity and individuality. Before we proceed, we need to understand the deep importance of dignity in any being's life. Imagine a life without self-esteem, one in which you see your own worth as zero and one where you amount to nothing in the eyes of society as well as your parents. Denial of this dignity denies the person "*moral full citizenship*".

This dignity should be seen as being for the sake of dignity. Each individual requires a certain level of acceptance and compassion from the society to consider being a part of it. He requires a certain level of autonomy and liberty so as to realize his own worth. Till the time this does not happen, the person is "*not technically free*". This abhorrence lead to them feeling inferior to everyone else who is a part of the society.

Consequently, the person has to remain hesitant and secretive about his own sexuality. He prefers marrying someone he doesn't even feel attracted to just to avoid

public shame, thus jeopardizing two lives at the same time. He cannot exist in the society with his head held high and thus has to resort to meek routes and becomes a fugitive escaping from his own destiny.

Section 377 is largely responsible for this vendetta to exist as it gives a national verification to homosexuals being of lesser value than the rest of the citizens. This then gives no reason to even the citizens to analyze the situation with an open mind and hence the dogma keeps carrying on. This freedom for the person to “*want to be himself*” is critical for the person to feel of any value to the state and consider himself a part of society. The law at this juncture must realize that its true motive is not to preserve the culture and traditions of the state, but to maintain a fair, just and equitable judicial system, even if it may face criticism for the same. These are the reasons why I believe that the court could go ahead and read down Section 377.

II. AGAINST DECRIMINALIZATION

A. BASIC ARGUMENTS

A society is not merely a collection of people but rather a region where people who share the collective thoughts come together. Since these thoughts and ideals are the very identity of the society, the members of the society cannot be blamed to weed out beliefs that may jeopardize its own roots. The Indian culture is based on a traditional value system and unnatural behavior goes completely against all its religious beliefs and the way God wanted us to be. Along with this, neither the right to dignity nor the one to privacy are by any means absolute. Each right comes with confines and restrictions that must be adhered, even in one's private space. Because of this, there seems no way in which the Indian society can be expected to go ahead and accept homosexuals as a part of their own.

B. GROUNDS FOR ABHORRENCE:

It isn't that the Indian society feels revulsion against homosexuals just because of their whims and fancies. There exists a proper rationale that they believe in and which has been conditioned into their brains since childbirth. These beliefs have been ingrained in their value system and are not something they can easily compromise on.

God made two sexes so that they could come together and further the human race. Sexual acts between man and woman are seen as natural and divine. Even more so cause of the institution of marriage, which is seen as a godly

consent to the coming together of the two genders. Attraction towards the same sex is hence not something that is natural or usual and is not something that is allowed in our culture. It is as preposterous a thought as the coming together of blood brothers and sisters. Also, the only route for their carnal intercourse is anal sex, which is absurd, as the anus is not meant for sexual urge fulfillment but for natural bodily functions. Penetration of it is not only unnatural, but also harmful and dangerous to the body.

Their intercourse is also incapable of procreation. They cannot bear babies and cannot carry forward the human race. Their desire for flesh leaves them with no respect for commitment, which is also seen through the rampant polygamy and domestic violence seen among domestic couples. If allowed to flourish, their indecent acts will destroy the moral fabric of society. There exists no basis for the law to actually be removed while one exists for prostitution, as even that is private consensual sex between adults. More so, it is at least between a male and a female.

Before the social activists vehemently claim the rise of support in favor of homosexuals, they need to realize that more than 80% of the Indian population reside in rural and remote parts of the country. This openness and liberalness towards sodomy is more of a metropolitan thing where everyone has already shed their morals and customs in the name of modernization. There exists a huge dichotomy in the thinking of these “*sheherwaalas*” and the “*gaowaalas*” who are still living in the social and cultural age. There is no way this percolation of ideas is happening any soon and the government definitely cannot ignore the opinions of such a large part of the country.

C. ABSOLUTION OF RIGHTS:

The respected Delhi High Court interpreted right to privacy and dignity from the constitution to come up with a historical verdict of decriminalizing homosexuality in India. Where they erred was in interpreting these rights as absolute. In a country as large and diverse as India, the government can't ensure full rights to everybody. Privacy and dignity are more for the society in its entirety, where people respect the same for each other. There are always certain restrictions that are imposed on rights, as clashes will always happen. Hence, the state is completely justified in infringing upon a person.

Now, the Indian society deserves the state to side with them. One needs to understand that with every right there is also a corresponding duty, only on the fulfillment of which

can the given right be justified. The homosexuals are audacious enough to demand privacy, dignity, freedom of expression, etc., but throughout their life they have in no way respected their correlative duties towards the nation like those of maintaining law and order, upholding public morality, promoting harmony and respecting our rich and composite culture. The state in giving them these rights is completely tilting the scales that balance a person's right and duties.

The arguments homosexuals use for gaining freedom are completely illogical and against the law. Sexual orientation being embedded in a person's identity in no way serves as a warrant for preferential treatment. The argument if given weightage can also be applied to mentally sick murderers and rapists who too have these tendencies ingrained within their very nature. The same goes for their demand of dignity. Even thieves may go ahead and feel dignified about the acts they are committing, but that doesn't mean that the state has the responsibility of upholding such an irrational sense of dignity and pride.

The repercussions of this move too are catastrophic. Even if I go ahead and accept that probably a few people here and there in the country might have started supporting homosexuality, this kind of a decision will give an unfettered license for homosexuals to flourish and proselytize. The country is definitely not ready for such an opening of the floodgates and it will completely rip the social fabric that exists to shreds. For example, the soldiers at the borders who rarely get to go home can misuse this liberty out of their sexual deprivation and degrade the defense system of the country in its entirety. Something the state surely cannot afford. Due to these reasons, there is no basis for the state to agree to this demand for rights on the part of the homosexuals.

D. HOMOSEXUALS AS A PART OF SOCIETY

Nobody any way gets to about something that is actually private. The very fact that incidents of homosexuality are reported to the police means that many times such deeds cease to be private. This is where the problem arises.

As stated earlier, a society is a region of collective thought. When somebody becomes a part of a society, he/she subscribes to the ideals of that region. This does not mean that the society doesn't remain flexible in the thoughts of a subclass of itself, but if certain people go completely against the notions of the society, then they cannot even be given the status of a subclass.

Without these ideas and thoughts, the society will disintegrate. This serves as an enough compelling state interest for the government to consider homosexuals to be criminals. One needs to fathom the rationale behind this law coming up in the first place. We can't blame the law to be repulsive of a vulnerable section, rather, the law exists because a large part of society considers them repugnant.

Simply changing the law based on some words in the constitution will not change the people of the society. Revulsion is a strong emotion and constitutional morality has to go hand in hand with societal morals. So even if the government does go ahead and allow their indecent acts, their status in the society will not change by much. They have to live amongst the same people, interact with them and expect acceptance from them. But that won't happen, rather it will just corrupt the society further and spark greater revulsion.

The foreign principles and laws that were used as examples by the High court to decriminalize homosexuality have no basis in a society of such high moral uprightness as India. These immoral beings can go and reside in those free and liberal foreign societies, but they surely can't have a place in India. Based on these reasons, the reading down of Section 377 of IPC is baseless, has no rationale and lacks an attainable goal.

III. FACTUAL ANALYSIS

A. THE RISK OF AIDS

The one uncontested fact that both sides agreed to throughout the readings was that MSMs (men who have sex with men) are an HRG (High Risk Group) for AIDS. More than 8% of the MSM population in India suffer with HIV, while among the general population, this number is just around 1%. This is due to multiple reasons as cited in the text.

Firstly, large numbers of homosexuals are inaccessible to HIV prevention agencies like NACO due to their hesitance in speaking up about their sexuality and the existence of this disease. Since they fear prosecution, they do not reveal their sexual orientation in public due to their fear of being prosecuted by law enforcement agencies. Hence, even though 68.6% of MSMs are aware about safe sex practices, only 36% of them actually garner the courage of procuring and using condoms.

Secondly, homosexual sex is mostly hurried, particularly because these groups lack a 'safe place', so they utilize public places for their indulgence and do not have the option to consider or negotiate safer sex practices.

Thirdly, homosexuals tend to have sex with numerous partners throughout their lifespan. This makes their potential of serving as a carrier for the virus stronger and puts their future partners at risk.

Fourthly, the main route of sexual intercourse for them is anal sex that many a times cause rectal bleeding as the walls of the rectum are much weaker compared to the vaginal tracts in bearing penetration. This increases the chances for the transfer of virus through blood multifold.

This having been established, what NACO claims is that it is because of Section 377 that homosexuals lack access to prevention and health care facilities and hence it is a violation of their fundamental rights. In reply to this, the argument given by the homophobes is that of the greater good. That is, to increase the probability of preventing HIV for a particular section of the society, you will be putting a much larger number in danger. AIDS, once procured, can only die delayed not cured. Hence, if the state decriminalizes homosexuality, it puts an 8 times greater number of people in danger of death.

This argument can be explained very simply through this mathematical example. Say there are 10 homosexuals in the country and you are able to prevent 0% of them from AIDS, 10 citizens die. But on decriminalizing, even if the probability of prevention is now 50%, there will be around 50 homosexuals in the country due to proselytization and fearless sexual intercourse. In this scenario, 25 citizens, a greater number than the previous case, still die.

This fact about the sexual activity of homosexuals being highly vulnerable to the spread of AIDS is a highly favorable argument towards criminalization. Encouraging homosexual activity is encouraging the spread of AIDS. This puts a large part of the country in danger since many homosexual men are bisexuals, thus acting as a bridge for the virus and spreading the germ to females as well.

What is also said is that there is greater need of general safe sex awareness rather than going personally to each homosexual and teaching him, since the latter is a problem-solution mismatch as it only stigmatizes them further in the society. The society will now consider each homosexual as an HIV carrier, similar to the case of truck drivers. This will

lead to them being ostracized by the society not only in terms of being seen as unnatural but also as disease carriers.

The harm principle acts severely in this case, as decriminalizing homosexuality will jeopardize the lives of many. However, one thing to be noticed is that the hurried sex and polygamy points even exist in the first place due to the imposition of legal restrictions on same gender sex. In a free and liberal society, homosexuals can have sexual intercourse in peace and spend their lives with the partner of their choice without fear.

But the fact that anal sex carries with it a 20 times greater HIV risk than penile vaginal intercourse, leads me to believe that substantial harm will still be incurred to the rest of the society.

B. IS HOMOSEXUALITY A DISEASE?

The unclear factual point of contention through the reading was that what homosexuality actually is. Whether it is a tendency of the human mind inherent to one's personality or disease/state of mental disorder. If the former, it cannot be cured and hence there is no way in which the state can demand to any person to change his/her sexual orientation. That person, by the virtue of his birth, will remain a criminal. On the other hand, if it is the latter, the state can be driven by the motive to try to convert homosexuals and heterosexuals for their own as well as the societal good. (Assuming the state strongly believes that homosexuality is a corrupt style of living)

"Sexual Orientation is understood to refer to each person's capacity for profound emotional, affectionate and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

This affection is more of an internal feeling that doesn't really come to surface as per the person's choice. As a result, fields of psychiatry and psychology no longer treat homosexuality as a disease and regard sexual orientation to be a deeply held, core part of the identities of individuals.

Though, there are claims that conversion therapy exists. For example, Baba Ramdev declares that Yoga and Pranayama affect a person's consciousness and its psycho-physiological effects can actually get a person to change his sexual preferences.

But, till date, no scientific proof exists for the foolproof possibility of the same. Even if some therapies do claim

success, they have been cited as potentially harmful to the mind as well as the body.

Therefore, there isn't much scientific basis for one to believe that an internally arisen feeling can be cured. Calling it natural or unnatural is more of a philosophical question as there cannot be a non-scientific definition of what is natural. Hence, calling it a disease or a mental disorder is weird and unfairly shows an intrinsic human capacity in bad light.

IV. CONCLUSION

I preferred stating both sides of the argument before analyzing as to what I find more persuasive. There are two main reasons as per the Harm Principle to criminalize morality. Firstly, risk of health and secondly, degradation of society and offense to public.

The risk to health argument stands only if I assume that the number of homosexuals will increase alarmingly. But, on considering that sexual orientation is an inherent capacity and that the law cannot really deter a person's inherent sexual preference, it becomes tough for me to buy that a large amount of proselytization will happen. Their frequency of sexual intercourse may increase, but their number won't change by a lot.

As far as preserving the public morality is concerned, as stated earlier that the very fact that such protests are now happening shows to us that a certain change of mentality is on the rise. Change is always unwelcome to society, but at times it is necessary and can be enforced if it is for the good. We didn't go around shoving the widows and untouchables out of the country, simply because they too are valuable citizens of this democracy. Hence, that won't be done now either. With an already rising change in mentality, and a further impetus from the government, public morality can be swayed. This in no way means that the society has fallen apart, rather it has just entered a new phase of its existence.

The learned ASG makes it a lot easier by himself stating that the government doesn't have this law in place to 'just' to protect minors and prevent non-consensual sex.

Hence, I believe that the decriminalization of homosexuality was absolutely justified on the grounds that it was inclusive and fair towards a sector of society that was until now unfairly targeted and ostracized.

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