



## Judicial Approaches to LGBT Rights in India

Dr. Mayank Shekher Tiwari, Assistant Professor, Mathura College of Law, Mirzapur, Uttar Pradesh,  
India

Dr. Swapnil Tripathi, Assistant Professor, Nehru Gram Bharati University, Prayagraj, Uttar Pradesh,  
India

### ABSTRACT :

The Human Rights discourse that maintains every individual's right to live freely provides a framework for individuals to choose and live a life style that is centered on the same sex relationships. Thus, decriminalization of homosexuality, right to protection from human rights abuses/hate crimes and non-discrimination on the basis of sexual orientation should be on the agenda of any human rights organisation. However, it was only in 1994, that an International Human Rights Organisation- Amnesty International finally publicly acknowledged that violence and abuse of lesbians and gay men because of their sexual orientation constituted an infringement of human rights. Another ground-breaking verdict was issued by the United Nations Human Rights Committee in the case of Nicholas Toonen vs the State of Australia<sup>1</sup> in which the committee acknowledged that the criminalization of homosexuality in the State of Tasmania, Australia was a violation of Articles 2 and 26 (right to privacy and right to equal protection under the law) of the International Covenant on Civil and Political Rights.

**Keywords:** Decriminalization Of Homosexuality, Section 377 : An Annotation, The Cause For The Repeal Of Section 377, Protection From Human Rights Abuses/Hate Crimes, Anti-Discrimination/ Equal Opportunity Laws, Position In Us, Position In India, Right To Privacy, Freedom Of Expression And Equality, Social Norms.

A decade of lesbian and gay activism and lobbying in the U.S and Europe has resulted in a few gains in terms of putting lesbian and gay rights on the human rights agenda. Human rights groups in India have not yet raised the issues of lesbian and gay rights in spite of the stark criminalization faced by gay men and lesbian women. The only initiative undertaken was the conference on Gender Just Laws organised by women's groups and human rights groups in 1996 where lesbian and gay rights were discussed openly on a broad platform with people from various backgrounds.

Lesbians and bisexuals, like other sexual minorities (transgenders, hijras, and prostitutes)

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<sup>1</sup> United Nations Report of the Human Rights Committee vol. General Assembly Official Records, Communication No.488/1992, 9th Session, Supplement No.40 (A/49/40). New York: 1994 pp.226-237.

challenge the norms of traditional families that are constructed on the premises of heterosexuality patriarchy, monogamy, and control of women's sexuality. Inherent in this challenge, is the recognition of other kinds of families - single parent families, same-sex domestic partnerships, multiple adult related (and not just sexually) families, etc.

At one level, the accepted norm of the family needs to be questioned at its very roots. Simultaneously, the law should endeavour to broaden the legal definition of "family". We believe that the definition of the family must be looked at again and not just through the lens of hetero-patriarchy but also through various lenses that reflect lived realities.

The family is not a static institution as it appears to be, or as people discuss it. The overall function of the family is in essence the same in various societies - i.e., provision of legal heirs. In a majority of communities where social, caste and gender discrimination and hierarchical status exists, heterosexuality is the norm, and reproduction is the main function of the family. Another essential function of the family is to maintain and reproduce cultural and social values and carry them forward through generations. Violence against the powerless within the heterosexual, patriarchal family is an important "hidden" norm that has social sanction. This is because family is considered to be a sacred institution, which should be maintained "at all costs" - even that of violence. Other forms and structures based on trust and faith and without defined hierarchies in the relationships between members do not have legal and social sanction because they affect and violate the norms and values that are perpetuated by the heterosexual family structure of patriarchy.

Lesbianism by its very existence raises issues that the women's movement is concerned with, and therefore feels it is important to create and articulate a space for lesbian rights within the context of the women's movement.

Within the women's movement in India, lesbian issues have been raised occasionally over the past decade. The range of responses has varied from hostility and dismissal cautious acknowledgement. Rarely has acknowledgement led to action. We do recognise that an important reason for the lack of dialogue and action within the women's movement on this issue has been the lack of visibility of lesbian women in the movement with the exception of a few brave women for whom there has been little or no support. This has then led to a vicious spiral where on the one hand, lesbian women do not "come out" because of lack of support or resources. On the other hand, because there are very few women who do "come out" their energies are expended in survival, leaving very little left for activism/ mobilisation or organisation within the movement.

However, in asserting the rights of lesbians and gay men to marriage/ civil contract unions / domestic partnerships as a prerequisite the decriminalization of homosexuality and the protection of lesbians and gay men from human rights abuses and discrimination. Lesbian and gay rights have the following four sections:

- I. Decriminalization of homosexuality.
- II. Protection of lesbians, gay men and other sexual minorities from human rights abuses.
- III. Anti-discrimination on the basis of sexual orientation.
- IV. Domestic partnerships for lesbians and gays.

### 1.1 DECRIMINALIZATION OF HOMOSEXUALITY

Section 377 of the Indian Penal Code (1860) criminalizes homosexual acts. This statute is based on the British law-Offences. Against the Person Act (1861) - which was subsequently instituted in all colonized countries, including India and Ireland. The experiences of gay men who have been threatened and violated - physically and emotionally - by this law have only been documented in the last decade.

The current usage of Section 377 is therefore, primarily by the police to sexually harass and blackmail gay men even though it is a criminal offence to blackmail people.

Section 377 has also been used to intimidate women - particularly those who have run away together, or those who have made their relationship known. The story of Tarulata/Tarun Kumar<sup>2</sup> who, in 1987, underwent a female to male sex change operation and married Lila Chavda in 1989. They had met five years previously, when Tarulata's sister, who was running for elections, campaigned in Dasade. Muljibhai Chavda, Lila's father has gone to the Gujarat High Court saying that it is a lesbian relationship and that the marriage should be annulled. The petition contends that, "Tarunkumar possesses neither the male organ nor any natural mechanism of cohabitation, sexual intercourse and procreation of children. Adoption of any unnatural mechanism does not create manhood and as such Tarunkumar is not a male." Muljibhai has called for criminal action under Section 377. The Gujarat High Court has accepted the petition in this case.

Parul and Mehernaaz<sup>3</sup> (names changed in report) two young woman ran away from their respective homes and spent 10 months roaming around the country trying to live together. Finally they returned to Bombay only to be put in custody, as Parul's father had filed a case of kidnapping against Mehernaaz.

### 1.2 SECTION 377 : AN ANNOTATION

- I. It does not distinguish between consensual and coercive sex.
- II. The act of sodomy, and not homosexuality per se, is a cognizable offence.
- III. It has not been used in cases against lesbian women, except for intimidation, and in the exceptional case of Tarulata / Tarunkumar described earlier.
- IV. Heterosexual couples engaging in sodomy can be indicted under Section 377, and women

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<sup>2</sup> India Today, April 18th 1990.

<sup>3</sup> Bombay Times (Times of India), August 8th, 1995.

often cite this as a cause for divorce.

- V. It is currently being used actively by groups working to register cases of child sexual abuse, since the existing rape laws do not cover child sexual abuse. The clause in Section 377 "against the order of nature" is used in cases of sexual abuse of children.

### **1.3 THE CAUSE FOR THE REPEAL OF SECTION 377**

First of all, the definition of "unnatural acts" is Victorian and obsolete. Consensual sex between two adults (over 18) should be protected by an individual's constitutional right to privacy. Further, section 377 violates Article 14 of the Constitution since it discriminates against persons on the basis of sex and therefore sexual orientation. In fact, this antiquated statute has been repealed even in Britain, the country of its origin.

Along with the repeal of Section 377, there is an urgent need for the enactment of a comprehensive sexual assault law which firstly, broadens the definition of sexual assault beyond the limited scope of 'penile penetration' (heterosexual or homosexual); and secondly differentiates assault on minors and adults. Such a law should also determine a common age of consent for sexual activity (lesbian, gay or heterosexual).

### **1.4 PROTECTION FROM HUMAN RIGHTS ABUSES/HATE CRIMES**

Men and women who are identifiably, openly lesbian and gay face violence and the persistent threat of violence. This may take the form of verbal and physical assault on the streets, death threats, and even murder. This has been justified "because he/she was gay".

It also takes the form of psychological violence on men and women who are subjected to shock therapy, aversion therapy and incarceration as "treatment" for their "problem". Many women have gone through the humiliation and trauma of having their bodies mutilated in this "normalisation" process. This happens even for women who are not transsexual (Le, who does not feel that they were born into the wrong sex or in the wrong body). In a society which sees the Possibility/of a relationship only between men and women, women who love women are considered aberrations and the medical community thus "cures" them by these extreme steps.

In 1994, after a 17 year debate, Amnesty International finally recognized violence against lesbians and gays as a human rights abuse in its book, "Breaking the Silence: Human Rights Violations on the Basis of Sexual Orientation".

### **1.5 ANTI-DISCRIMINATION/ EQUAL OPPORTUNITY LAWS**

The law reflects the prejudices and norms of existing societies, and thus marginalizes some members within the framework of society. This is the case all over the world. But it need not be so. In fact, the law should help counter the prejudices and protect the rights of marginalized sections. This would mean having clear anti-discrimination laws for the threatened communities. The enactment of such legislation would ensure that the rights of lesbians and gay men are protected

particularly in the areas of housing, education, employment, insurance and health care.

Article 2 of the Universal Declaration of Human Rights states that, "No person should be discriminated against on the basis of race, sex, religion, caste, colour, or any other status." Many countries have introduced "Sexual Orientation" as a clause within this anti-discrimination framework.

### 1.6 POSITION IN US

Most states in the USA had sodomy statutes of their own, and those that did not, incorporated the common law principles from the old English laws. At least half the statutes still retain sodomy statutes defining it variously. The age of consent also varies.

Foreigners/immigrants found to be homosexual are liable to be deported immediately. Homosexuals, both gay men and lesbians, are barred from the armed forces. Since 1943, when military psychiatrists redefined homosexuality as a medical disorder rather than a crime, the US armed forces have ousted between 80,000 and 100,000 gay men and lesbians.

### 1.7 POSITION IN INDIA

In India, homosexuality has traditionally been tolerated, even celebrated, although the Manu Smriti pronounces severe punishments for male as well as female homosexuality. The Kamasutra contains an entire chapter entitled 'Auparishtaka' (oral congress) and Vatsyayana, the author insists that the practice is permitted by the orders of the holy writ (Dharma Shastras) with just a few exceptions. One of the forms in which Shiva is worshipped is Ardhanarishwara, containing both the male and the female energies.

Alain Danielou in his book "Shiva and Dionysius" examines the tantric rite of anal penetration and goes on to state "the hermaphrodite, the homosexual and the transvestite have a symbolic value and are considered privileged beings, images of Ardhanarishwara.

The British obviously found the practice unchristian and abhorrent and in 1860, enacted the Indian Penal Code which in Section 377 states:

**"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 or either description for a term which may extend to 10 years, and shall also be liable to fine".

**Explanation.-** Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. The exact scope of this vague definition - "carnal intercourse against the order of nature" - has been a major subject of debate in the existing case law. It has generally been interpreted to include acts of anal sex (*coitus per anum*) as well as oral sex (*coitus per os*) between males. The possibility of this definition being extended to heterosexual acts of anal or oral sex also exists, but has not been tested. Consent of the other party is completely irrelevant for conviction, but it may be a relevant consideration while

fixing the quantum of punishment.

## 1.8 RIGHT TO PRIVACY

In 1955, the American Law Institute Model Penal Code stated that every individual is entitled to protection "against state interference in his personal affairs when he is not harming others" and eliminated the sodomy statues. In 1957, the Wolfenden Committee (UK) stated that "it is not the function of criminal law to intervene in the lives of citizens or to seek to enforce any particular pattern of behaviour. There must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business." After examining extensive data and various arguments for and against. It recommended that private consensual sexual activity between adult males be removed from the operation of criminal law.

The Constitution of India guarantees that "No person shall be deprived of his life or personal liberty except according to procedure established by law." (Article 21). The provision has been through considerable judicial interpretation and a fledgling right to privacy has been read into the right to life and personal liberty.

In *Kharak Singh vs State of U.P.*<sup>4</sup>, while considering the verse of certain police regulations which allowed surveillance, including domiciliary visit, stated that the right to privacy "is an essential ingredient of personal liberty" and that "nothing is more deleterious to man's physical happiness and or than a calculated interference with his privacy,"

In *Govind Singh vs State of M.P.*<sup>5</sup> 1975' 3 SCR 946 a right to privacy emanating from the right to personal liberty and the freedom of speech was contemplated.

The 5th and 14th Amendments to the U.S Constitution state that "no person shall be deprived of its life liberty or property, without due process of law" and a right to privacy, or a "right to be let alone" has been interpreted into these provisions for over a century. The concept initially evolved in response to the development of new sophisticated methods of surveillance, like wiretaps etc, akin to right to property. More recently, privacy of a human .personality has also been recognized.

*Griswold vs Connecticut*<sup>6</sup>, in 1965, recognized the privacy of the bedroom of married couples" Following this principle, the U.S Supreme Court has held that private consensual acts of sodomy between married couples cannot be criminalized by state statues (Charles O. Cotnery Jerome Henry, 393 US 847 : *Buchatla vs. Bachelor* 4DI US489).

In *Einsenstadt vs Baird*<sup>7</sup>, the court held "the Griswold principle protected more than the

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<sup>4</sup> AIR 1961, SC 1295

<sup>5</sup> 1975, 3 SCR 946

<sup>6</sup> 381 (1965) US 479

<sup>7</sup> 405 (1972) US 438

marital relationship alone. It extended protection to persons who had a significant personal relationship and desired to choose for themselves, free from state pressures, whether or not they wanted to use contraception”.

In *Roey Woed*<sup>8</sup>, it was held that a Texas abortion law could not prohibit voluntary abortions during the first 3 months of pregnancy, on the basis of a constitutional right to privacy. That right includes the privilege of an individual to plan his own affairs, for outside the areas of plainly harmful conduct, every American is left to sharp is own life as he thinks best, do what he pleases, go where he pleases”.

In spite of the recognition of these basic principles of human behaviour, the U.S Supreme Court has displayed singular lack of understanding when it comes to statutes criminalizing sodomy. The constitutionality of these statutes has been challenged several times and has largely been upheld.

Most recently in *Bowers vs Hardwick* (1986)<sup>9</sup>, the State of Georgia statue which criminalized sodomy was challenged after a homosexual was charged with committing sodomy on a consenting male adult in the bedroom of his house. The U.S Court of Appeals for the Eleventh Circuit upheld the challenge and put the burden on the state "to provide that it has a compelling interest in regular such behaviour and that the statue was the most narrowly drawn means of achieving that end.

The U.S Supreme Court reversed the judgment with a narrow 5:4 margin. The dissenting judges observed “the concept of privacy embodies the moral fact that a person belongs neither to himself and not others nor to society as a whole”.

The question also came before the European Court of Hunan Rights in *Jeffry Dudgeon v Northern Ireland*. Jeffrey Dudgeon, 35 years old and consciously homosexual from the age of 14 lived in Belfast, Northern Ireland. He along with some others had been conducting a campaign aimed at bringing the law in Northern Ireland in line with that in England and wales<sup>10</sup>.

On 21 January 1976, the police went to his house, and seized personal papers including diaries and correspondence. He was asked to go to police station where he was questioned for almost 4½ hours about his sexual life. With a view to institute proceedings for gross indecency, the police sent his file to the Director (Public Prosecutions. One year later, in February 1977.

Mr. Dudgeon was informed that charges were not being pressed and his papers returned. W.J.Dudgeon petitioned the European Commission of Human Rights.

The European Court of Hunan Rights held: "the legislation complained of interferes with Dudgeon's right to respect for his private life guaranteed by Article 8.1 (ECOHR) in so far as it prohibits homosexual acts committed in private between consenting males." On whether this breach

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<sup>8</sup> 410 US 113

<sup>9</sup> 760 FZD 1202, 1986

<sup>10</sup> European court of Human Rights series A, Volume 45.

was justified, the majority opinion was that it was not.

The fact that the authorities in Northern Ireland had refrained in the past years from prosecuting homosexual acts in private between consenting men over the age of 21 years and capable of valid consent and that no evidence was brought to show this had been injurious to the moral standards in the country was noted by the Court.

The Court accepted that in a democratic society some degree of regulation of male homosexual conduct is necessary, but that the present legislation was totally unjustified and its very existence caused anxiety, suffering and psychological distress to homosexual men.

As a result of this ruling, in October 1982, Northern Ireland issued an order in council bringing the law in line with that in England and Wales.

### **1.9 FREEDOM OF EXPRESSION AND EQUALITY**

Article 19, Universal Declaration of Human Rights (UDHR) and Articles 18 and 19, International Covenant on Civil and Political Rights (ICCPR) guarantee the freedom of thought and expression. A right to freedom of speech and expression is recognized in Article 19(1) (a) of the Indian Constitution.

Article 2 UDHR bars "distinction of any kind such as race, colour, sex, language, opinion, national or social origin, property, birth or status." A similar right is recognized in Article 26 ICCPR, and in Articles 14 and 15 of our constitution as interpreted by the Supreme Court.

The Siracusa Principles recognise certain limitations, which can be put in the rights in the ICCPR, but also state in the "General Interpretative principles Relating to the Justification of Limitation".

Any assessment of the necessity of a limitation shall be made on objective considerations".  
"(12) "The burden of justifying a limitation upon a right guaranteed by the Covenant lies with the state."

Attention must also be drawn to the fact that even in times of public emergency, the ICCPR prescribes in Article 4.1 that a derogation of the obligation is not allowed if involving "discrimination solely on the ground of race, colour, sex, language, religion or social origin." It is clear that the right against discrimination is not to be violated even in the most desperate times.

In the U.K., in spite of the 1967 amendment to the criminal law, serious onslaughts on the rights of gay men and lesbians continue. In 1986, the British government enacted Clause 28 banning the "promotion of homosexuality (as a) pretended family relationship."

Clause 25 of the Criminal Justice Bill, still under debate in the U.K., includes provisions for higher sentences for soliciting, procuring and indecency by gay men. The Children's Bill, 1991 seeks to ban lesbians and gay men from fostering children. Clearly, merely to decriminalize is not the end



of the problem.

In India, the very existence of homosexuality is denied, and those who are 'found out' face severe ostracism and summary dismissal from their jobs. When Lila Srivastava & Urmila Namdeo decided to cement their long-standing friendship with marriage, they were dismissed from the police service without issuing a show cause notice. Though the authorities freely vocalized their fear for "discipline" in the ranks, on paper the reason for dismissal was "absence without leave."

### 1.10 SOCIAL NORMS

Homosexuality has been treated in various ways by society. A sin against god, a heresy which can only be absolved by fire, a sexual deviance which must be given deterrent punishment, a mental aberration that must be treated.

However, evidence is piling up that homosexuality is neither a disease nor a crime, but is inherent to human nature. 111(" Kinsey reports on male and female sexual behaviour (1948 and 1953) concluded that homosexual behaviour was neither unnatural, abnormal nor neurotic, but that it represented as "inherent physiologic capacity", and is found "in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas."

To quote just one instance, a report from the Indiana Institute for Sex Research (Bell, Weinberg and Hammersmith, 1991) based on exhaustive questioning of persons of contrasting sexual orientation found that "there is no reason to think it would be an easier for homosexual men and women to reverse their sexual orientation than it would be for heterosexual (persons) to become predominantly or exclusively homosexual"

### CONCLUSION:

Homosexuality is not a mental disease. It is as natural as heterosexual. The human cannot control on it. In India the LGBT community face harassment, violence. It is very necessary to make people aware of the presence of LGBT community. The Government of India should wipe away its conservative nature and take concrete steps for the welfare of sexual minority. The supreme court's verdict on Decriminalization of section 377 was a significant landmark for the LGBT community. finally, we can say that, the judgment by the Hon'ble Supreme Court was given within the favor of the LGBT community it should work effectively both on paper and in practicality.