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The Law and Homosexuality in India

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While talking about law and homosexuality, I am reminded of a story of a washerman and his donkey. The donkey refused to move with the heavy bundle of clothes on his back from his house to the pond. The washerman nailed a carrot to a stick, which was tied in front of the animal's mouth. The donkey kept on moving with a view to eat the priced vegetable - the ass goes on and the carrot is un-reached. In the field of jurisprudence this shows how some laws the proverbial ass, pursue, perpetually, the carrot of the moral ideal.

Homosexuality has an ancient history in India. Ancient texts like Rig-Veda which dates back around 1500 BC and sculptures and vestiges depict sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility [1]. The description of homosexual acts in the Kamasutra, the harems of young boys kept by Muslim Nawabs and Hindu Aristocrats, male homosexuality in the Medieval Muslim history, evidences of sodomy in the Tantric rituals are some historical evidences of same-sex relationships. [2]

However, these experiences started losing their significance with the advent of Vedic Brahmanism and, later on, of British Colonialism. Giti claims that Aryan invasion dating to 1500 B.C began to suppress homosexuality through the emerging dominance of patriarchy. [3]

In the Manusmriti there are references to punishments like loss of caste, heavy monetary fines and strokes of the whip for gay and lesbian behaviour. In the case of married women, it is mentioned that 'luring of maids' is to be punished by shaving the women bald, cutting of two fingers and then parading her on a donkey. Manu's specifications of more severe punishments for married women can suggest either a wide prevalence of such relationships among married women or a greater acceptance of these practices among unmarried women. In

either cases, these references point to the tensions in the norms of compulsory heterosexuality prescribed by Brahmanical partite.

Both sexual systems coexisted, despite fluctuations in relative repression and freedom, until British Colonialism when the destruction of images of homosexual expression and sexual expression in general became more systematic and blatant. The homophobic and Victorian puritanical values regarded the display of explicit sexual images as 'pornographic and evil'. The Western view, since the time of Colonial expansion, has been strongly influenced by reproductive assumption about sexuality. These puritanical values and attitudes were in turn mapped into the interpretation of sexual activity among colonial people which is evident from the responses to all forms of 'unnatural' sexual practices. The Indian psyche accepted the Western 'moral and psychological' idea of sexuality being 'pathological' rather than the natural expression of desire, which once used to be part of Indian culture.

The last century witnessed major changes in the conception of homosexuality. Since 1974, homosexuality ceased to be considered an abnormal behaviour and was removed from the classification of mental disorder. It was also decriminalised in different countries. Since then various states across the globe enacted anti-discriminatory or equal opportunity laws and policies to protect the rights of gays and lesbians. In 1994, South Africa became the first nation to constitutionally safeguard the rights of lesbians and gays. Canada, France, Luxembourg, Holland, Slovenia, Spain, Norway, Denmark, Sweden and New Zealand also have similar laws. In 1996, the US Supreme Court ordered that no state could pass legislation that discriminated against homosexuals. In India, so far no such progressive changes have taken place and the homosexuals remain victims of violence in different forms supported by the state and society. This paper attempts to see how the state through the legal machinery violates the rights of homosexual people.

Is homosexuality a crime?

A frequently asked question is whether homosexuality is a crime or not in India. An affirmation would be the most frequent answer. How does the Indian laws view homosexuality?

There is no explicit mention of homosexuality or homophilia [4] in any of the statute books of India. A person cannot be prosecuted for being a homosexual or homophilic. But the sexual act of sodomy is a criminal offence. The major

provisions of criminalisation of same-sex acts if found in the Section 377 of the Indian Penal Code (IPC) of 1860.

Section 377 of IPC reads, "of unnatural offences: Who ever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine."

Explanation: Penetration is sufficient to constitute carnal intercourse necessary of the offence described in this section"

What does this non-bailable and cognisable offence imply? It is based on the centuries old misconception that sodomy and homosexuality is one and the same thing. A homosexual man is viewed as a 'type of person' who has only anal intercourse with his partner. However the emotional attachments, fantasies and affectionate and erotic desire are not been given due consideration. Thus, de jure, it is an attempt to criminalise sodomy while de facto it is an attempt to criminalise and stigmatise homosexuality. Hence conventionally homosexuality is bought as an offence under the IPC.

In the history of the statute from, 1860 in 1992 there was only 30 cases in the High Courts and Supreme Court. [5]" The small number of cases filed under this section shows that this section is redundant and outdated and needs to be repealed.

This section raises interesting questions like what is 'natural'? What is the 'order of nature'? "Nature conceived by whom? And 'Order' perceived by whom? Even if one assumes that the 'order of nature' is penile-vaginal intercourse between a man and woman, Sec 377 remains ambiguous about which sexual acts it seeks to prescribe. For some reason, sodomy between males and male and female and bestiality has been considered 'carnal intercourse' against the order of nature. But there is no reported judgements of the High Courts or the Supreme Court declaring that cunnilingus or fellatio would consider an offence punishable under Sec. 377 of IPC.

Even though this section does not distinguish sodomy between males and between male and female, this section is targeted against males more so than females. In 1992, 18 men were arrested from a park in New Delhi on the suspicion that they were homosexuals. After protest and demonstration by, gays,

lesbians and human rights groups, they were released from police custody after filing a petty case against them. In fact they were not indicted under Sec. 377 but under the provision of public nuisance under the Delhi Police Act. There are similar sections in the Police Acts of different states of India. This section is used by the police and heterosexuals to blackmail gay men and other men who have sex with men and to extort money and valuables from them. This more so happens in parks, certain streets and public toilets, which function as an informal sexual networking area for homosexual men.

This section has been used to intimidate women, particularly in the case of women who have run away together or if they make their relationship-known. In 1987, Tarulata/Tarun Kumar underwent a female to male sex change operation and married Lila in 1989. Lila's father filed a petition in the Gujarat High Court saying that it is a lesbian relationship and that the marriage be annulled. The petition contends that 'Tarun Kumar possesses neither the male organ nor any natural mechanism of cohabitation, sexual intercourse and procreation of children'. Adoption of any unnatural mechanisms does not create manhood and as such Tarun Kumar is not a male. The petition called for criminal action under Sec. 377 and the case is now pending in Gujarat High Court.

No distinction is been made between consensual and coercive sex. From 1860 to 1992, out of the 30 cases, 18 were non-consensual, 4 were consensual of which 3 were before 1940 and 8 were unspecified. In a judgement (Fazal Rab Vs State of Bihar) the Supreme Court was dealing with a case where a man had homosexual relations with a boy with the consent of the boy. The Supreme Court in 1983 observed that: 'the offence is one under Sec. 377, IPC which implies sexual perversity. No force appears to have been used neither omissions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking'. Considering the consent of the boy, the Supreme Court reduced the sentence from 3 years rigorous imprisonment to six months rigorous imprisonment. Under this clause, a third party can sue the partners who voluntarily entered into sodomy thereby infringing on the right to personal liberty and privacy as enshrined in the Fundamental Rights of the Constitution.

Heterosexual couples engaged in sodomy can also be indicted under this section. Marriage is taken as an implied consent by the wife for 'normal' intercourse and not for anal intercourse. If the wife consented, both are guilty. If she did not, the husband alone is guilty. Under Sec. 13 of the Hindu Marriage Act, 1955 and Sec. 11 of Indian Divorce Act, 1869 a wife can apply for divorce if the husband has been guilty of sodomy/bestiality.

This section (377) is mostly been used to register cases on the child sexual abuse, since the rape laws do not have scope to include male rape. On the other hand 'Against the order of nature' is broad enough to include sexual abuse of male children. During the period of 1860 to 1992, 15 out of 30 cases registered were assault on minors.

Constitution and other provisions

The Indian Constitution states that 'there shall be no discrimination on the basis of the sex of a person' which is a Fundamental Right of the citizens, 'The term 'sex' although refers to the biological sex of a person as male or female, is broad enough to include sexual orientation also in the present context,

Section 292 of IPC refers to obscenity and there is ample scope to include homosexuality under this section. Last year a parcel containing a few copies of a gay and lesbian magazines for the South Asians from the US sent to a gay group in Calcutta for distribution of subscribers was confiscated by the Customs authority. They contended that as per law this publication amounts to obscenity and offensive to the morality of the country. This case was closed when the addressee discarded the parcel seeing no way out.

The concept of family refers to a universal, permanent and pervasive institution characterised by socially approved sexual access and reproduction, common residence, domestic services and economic co-operation. Let me quote two instances of alternate marriage system as existing in India. Amongst the Nayar community in South India, who followed the matrilineal system of descent, several men could have access to a woman through the tali rites and subsequent Sambandham unions. The Tali chain and locket worn a round the neck was tied by a man of appropriate ritual status on behalf of his sub-caste collectively, which acquired sexual rights over the woman concerned. These rights were extended to any member of the higher caste usually Nambudiri who was attracted to and was found acceptable for the woman.

Men who had Sambandham relations did not have any exclusive rights as husband or as father; the woman could withdraw the sexual access allowed to them at any time if she so wished. The right over her progeny was vested in her Tarawad (household of matrilineal kin). In the NayarNambudiri Sambandham, the latter could not ever dine with his wife or children, not to speak of sharing any domestic chores or economic activity.

In a small village Angaar in Gujarat, among the Kutchi community a ritualistic transgender marriage is performed during the time of Holi festival. This wedding which is being celebrated every year, for the past 150 years is unusual because Ishaak, the bridegroom and Ishakali the bride are both men.

In spite of the existence of alternative marriage systems and customs, the conventional definition of a family includes a man and a woman along with their resultant children. This definition is based on the notion of compulsory heterosexuality and homophobia. There is no legislation at present in India where same-sex couples could register as domestic partnership or civic contract unions.

Under the labour laws, the provision under 'moral turpitude' is anti-homosexual. Mere claim of an employee is enough for dismissal from the job. A relationship not based on blood or marriage is not entitled for Social Security benefits under Employee Provident Fund Act, Pension Act, Workmen Compensation Act, Insurance Act, Housing Act etc.

The legal status of homosexuality in the Indian Armed Forces follows the model set by Sec. 377 of IPC. Sec. 46 of chapter VI - offences of the Army Act, 1950 states: any person subject to this Act who is guilty of any disgraceful conduct of a crude, indecent or unnatural kind shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or much less punishments as is this Act mentioned. Similar provisions exist in the Air force Act and Navy Act.

Legal remedy

In 1994, a controversy emerged when a medical team visited the Tihar Jail in Delhi and reported a high incidence of sodomy in the male wards. They recommended making provisions for condoms, as there was a risk of HIV infection being transmitted into the jail inmates. The jail authorities abstained from making provisions for condoms since it will mean that they are approving a crime and aiding and abetting an offence under the IPC.

A human rights activist group ABVA filed a Public Interest Litigation in the Delhi High Court. The petition challenges the constitutional validity of Sec. 377 of IPC and advocates supply of condoms to jail inmates, with a plea to restrain

the authorities from segregating or isolating prisoners with homosexual orientations or those suffering from HIV/AIDS.

The petition urges that Sec. 377 is obsolete and must be struck down as being unconstitutional on the grounds that Right for Privacy is part and parcel of the Fundamental Rights of life and liberty under Article 21 of the constitution and recognised by the 1948 International Convention on Human Rights; Sec. 377 is a violation of Article 14 of the constitution since it discriminates persons on the basis of their sexual orientation; having been enacted in 1860, Sec. 377 is archaic, absurd and implemented by the British in all its colonies, including India, but now been repealed in England, the country of origin.

The initial response of the judges during hearing of the petition was quite homophobic. They questioned whether the petitioner wanted to promote 'free-sex and pervasive sex'. When a senior advocate appeared for the petitioner, the judges quickly changed their attitude and heard the petition with sympathy. This case is also pending for argument in the court.

This is the only case, which has been filed against anti-discriminatory homosexual laws in India. The point of argument in this case is more from a sexual health perspective and less from the gay right perspective. Seeing the Indian sociocultural and political situation, gays and lesbians will take more time to come forward to fight for their rights. However an increasing number of gay groups through out the country and serious thinking among them is seen in India in the last few years.

We know that the law enacted in any country is often the product of majoritarian popular consenses. Some of the laws reflect the prejudices and myths of existing societies and thus try to marginalize some minority groups like homosexuals. Shouldn't the law help counter the prejudices and silencing and protest the rights of the marginalised section?

Notes

1. Giti Thadani-Independent lesbian researcher'. Interview with Lesbia magazine reprinted in Shakti Khabar, Issue 14,1991.

2. Joseph Sherry: 'Emerging gay movement in India: a liberal- conservative movement' in Balachandran and Baalagaopal (ed): The Indian Closet : 'In and Out', University of Illinois Press, USA, (forthcoming)
3. Ibid
4. Homophilia emphasis love(philia) instead of only sexual behaviour. It focuses on affectionate and erotic desire instead of viewing homosexuals as 'certain kind of people'
5. Khanna Shamona: 'Gay Rights', Ale Lawyers, June 1992.