Legal recognition of same sex marriages in India: An Overview

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Cite as: (2011) PL June 36 The sexual attraction or the romantic behaviour among people belonging to same sex group leads to homosexuality. It could be either situational or enduring disposition. As a sexual orientation, homosexuality is considered to lie within the heterosexual-homosexual continuum of human sexuality, and refers to an individual’s identity based on those attractions and membership in a community of others who share them. Homosexuality is found in many animal species. It is really difficult to determine accurately the prevalence of homosexual nature among the human beings. However, research and studies suggest that between two and twenty per cent of the population exhibits some degree of homosexual tendency, though in many earlier cultures homosexual relations were highly prevalent.

One of the most important points of inclination of our debate is that homosexuality is inborn and is immutable in nature. And in this form only it is widely accepted by the public, provided they are convinced of the fact that the homosexuality is inborn. Neuroscientist and homosexual Simon Levay stated: â€œâ€¦ people who think that gays and lesbians are born that way are also more likely to support gay rights.â€

Homosexuality is generally considered a taboo subject by both Indian civil society and the Government. Public discussion of homosexuality in India has been inhibited by the fact that sexuality in any form is rarely discussed openly. In recent years, however, attitudes towards homosexuality have shifted slightly. In particular, there have been more depictions and discussions of homosexuality in the Indian news media and by Bollywood. On 2-7-2009, the Delhi High Court decriminalised homosexual intercourse between consenting adults, throughout India, where Section 377 of the Penal Code, 1860 was adjudged to violate the fundamental right to life and liberty and the right to equality as guaranteed by the Constitution of India.

Historical background The Arthashastra, an ancient Indian treatise on statecraft, mentions a wide variety of non-vaginal sexual practices which, whether performed with a man or a woman, were sought to be punished with the lowest grade of fine. While homosexual intercourse was not sanctioned, it was treated as a very minor offence, and several kinds of heterosexual intercourse were punished more severely.

The Manusmriti, which lists the oldest codes of conduct that were proposed to be followed by a Hindu, does include mention of homosexual practices, but only as something to be regulated. Though homosexuality was considered a part of sexual practices, it was not always well accepted. There were punishments prescribed for homosexual behaviour. For instance, the verse referring to sexual relations between an older woman and a virgin (woman) reads â€œâ€¦ a woman who pollutes a damsel (virgin) shall instantly have (her head) shaved or two fingers cut off, and be made to ride (through the town) on a donkeyâ€œ, suggesting a severe punishment. However, the verse referring to sexual relations between two virgins suggests a relatively milder punishmentâ€œ â€œâ€¦ a damsel who pollutes (another) damsel must be fined two hundred (panas), pay the double of her (nuptial) fee, and receive ten (lashes with a) rodâ€œ.

These provisions, quoted out of context, seem homophobic, but in fact they are concerned not with the gender of the partners but with the loss of virginity that rendered a young woman unworthy of marriage. For instance, the punishment for a forced sexual act between a man and a woman states â€œâ€¦ if any man through insolence forcibly contaminates a maiden, two of his fingers shall be instantly cut off, and he shall pay a fine of six hundred (panas)â€œ, which seems more severe in comparison to the punishment prescribed for the same act between two virgins. Sex between non-virgin women incurred a very small fine, while homosexual intercourse between men was sought to be censured by a prescription of a bath with oneâ€™s clothes on, and a penance of â€œeating the five products of the cow and keeping a oneâ€™s fastâ€œ the penance being a replacement of the traditional concept of homosexual intercourse resulting in a loss of caste. The discrepancy in treatment may have been due to the textâ€™s non-equal views on males and females, considering that the Manusmriti is the same scripture that has stated that the status of woman in the society is the same (or even lower than) that of a manâ€™s land, his cattle and other possessions.

The classic Indian text Kama Sutra deals without ambiguity or hypocrisy with all aspects of sexual life including marriage, adultery, prostitution, group sex, sadomasochism, male and female homosexuality, and transvestism. The text paints a fascinating portrait of an India whose openness to sexuality gave rise to a highly developed expression of the erotic.

The issue of homosexual conduct to this fore in recent legal and political debate for three main reasons, which are as follows:

(i) Liberalisation of the law (in the UK, by the Sexual Offences Act, 1967 as amended in 2000 and some other countries by a similar legislation) has brought with it a change in social attitudes, so that the stigma attached to the homosexuality has to a greater extent disappeared.

(ii) Campaigns for lesbian and gay rights especially in the US have taken on an increasingly radical character, arguing for an end to all forms of discrimination against homosexuality, and even for the legalisation of same sex marriages.

(iii) The outbreak of HIV/AIDS which has been spread in the western countries to a great extent by homosexual activity between males, has led to accusations and counter-accusations, often of a bitter kind on Spain, Belgium and the
Netherlands, as well as Canada in allowing same sex marriages. Same sex acts are punishable by death in nine countries around the world.

Present legal status of same sex marriage in India Homosexual intercourse was a criminal offence in India until 2009 under Section 377 of the Penal Code. This made it an offence for a person to voluntarily have â€œcarnal intercourse against the order of natureâ€. Whilst convictions under this section were rare, with no convictions at all for homosexual intercourse in the twenty years to 2009, Human Rights Watch have said that the law was used to harass HIV/AIDS prevention activists, as well as sex workers, men who have sex with men, and other LGBT groups. The group documents arrests in Lucknow of four men in 2006 and another four in 2001. The Peopleâ€™s Union for Civil Liberties has published two reports of the rights violations faced by sexual minorities and, in particular, transsexuals (hijras and kothis) in India. The Law Commission of India had historically favoured the retention of this section, but in its 172nd report, delivered in 2000 it recommended its repeal, as did the then Health Minister, Anbumani Ramadoss.

On 2-7-2009, in Naz Foundation v. Govt. of NCT of Delhi2, the High Court of Delhi struck down much of Section 377 IPC as being unconstitutional. The Court held that to the extent Section 377 criminalised consensual non-vaginal sexual acts between adults, it violated an individualâ€™s fundamental rights to equality before the law, freedom from discrimination and to life and personal liberty under Articles 14, 15 and 21 of the Constitution of India. The High Court did not strike down Section 377 completelyâ€“it held the section was valid to the extent it related to non-consensual non-vaginal intercourse or to intercourse with minorsâ€ and it expressed the hope that Parliament would soon legislatively address the issue. Decisions of a High Court on the constitutionality of a law apply throughout India, and not just to the territory of the State over which the High Court in question has jurisdiction.

Advocacy for legalising homosexuality in India Advocacy for legalising homosexuality in India by different organisations and persons from time to time is as under:

The Naz Foundation (India), a New Delhi-based NGO is at the forefront of the campaign to decriminalise homosexuality. The organisation aims to sensitize the community to the prevalence of HIV, as well as highlight issues related to sexuality and sexual health. The organisation has strong linkages with human rights groups and agencies such as Lawyers Collective, Human Right Law Network, Amnesty International, International Gay and Lesbian Human Rights Commission. Naz India has collaborated with these agencies to address cases of sexual rights abuse. Naz Indiaâ€™s efforts in sensitising the Government to different issues related to the epidemic include the amendment of Section 377 of the Penal Code commonly known as the â€œAnti-sodomy Lawâ€. This act criminalises same sex sexual behaviour irrespective of the age and consent of the people involved, posing one of the most significant challenges in effective HIV/AIDS interventions with sexual minorities. In December 2002 Naz India filed a public interest litigation (PIL) to challenge Section 377 IPC in the Delhi High Court.

In September 2006, Nobel Laureate Amartya Sen and acclaimed writer Vikram Seth came together with scores of other prominent Indians in public life to publicly demand this change in the legal regime. The open letter demands that â€œIn the name of humanity and of our Constitution, this cruel and discriminatory law should be struck down.â€

On 30-6-2008, Indian Labour Minister Oscar Fernandes backed calls for decriminalisation of consensual gay sex, and the Prime Minister Manmohan Singh called for greater tolerance towards homosexuals.

On 4-7-2008, gay activists fighting for decriminalisation of consensual homosexuality at the Delhi High Court got a shot in the arm when the Court opined that there was nothing unusual in holding a gay rally, something which is common outside India.

On 23-7-2008, the Bombay High Court Judge Bilal Nazki said that Indiaâ€™s unnatural sex law should be reviewed. Former Indian Health Minister Anbumani Ramadoss advocated legalising homosexuality in India. On 9-8-2008, he campaigned for changing â€œSection 377â€ of the Penal Code, which makes homosexuality an unnatural act and thus illegal. At the International AIDS Conference in Mexico City, he said, â€œSection 377 IPC, which criminalises men who have sex with men, must go.â€ His ministerial portfolio had put him at odds with the Indian Home Ministry in seeking to scrap Section 377. In late 2008, he changed his argument saying he does not want the â€œscrappingâ€ of Section 377 but a mere â€œmodificationâ€ of the law treating homosexuality as a criminal offence punishable up to life imprisonment. He said he wants Prime Minister Manmohan Singh to resolve the matter, while he wanted to avoid discord with the Home Ministry, who said the altered law would then result in an increase in criminal incidences of sodomy or offences involving sexual abuse of children, particularly boys. In doing so he alleged that the law even penalises health workers for â€œabettingâ€, while making this a cognizable and non-bailable offence. â€œThe entire objective of getting homosexuality decriminalised is primarily to reach out to an estimated 4.5 million MSMs across the country as about 86% HIV/AIDS-affected persons in India are â€œMen Having Sex with Menâ€™ (MSM). My concern is purely on health grounds because Section 377 in its present form interferes with Health Ministryâ€™s efforts to tackle HIV/AIDS epidemic, as even the doctors treating gay patients could be punished. Hence unless we take appropriate steps it would be difficult to contain the spread of the virus.â€

About the Naz Foundation case In 2001, Naz Foundation filed a public interest litigation before the Delhi High Court challenging the constitutional validity of Section 377 of the Penal Code. The Delhi High Court dismissed the petition in 2004 holding that the question was merely academic and there did not lay a cause of action. A subsequent review petition was also dismissed.
Naz Foundation then filed a special leave petition before the Supreme Court of India challenging the orders of the Delhi High Court. On 3-2-2006, the Supreme Court set aside the order of the Delhi High Court and remanded the case back to the Delhi High Court for a decision on the merits of the case. On 2-7-2009, the Delhi High Court annulled the law that criminalises adult homosexual relations, ending an eight-year-old legal battle for gay rights. Again on 20-7-2009 one Mr Suresh Kumar Koushal filed a petition in the Supreme Court against the Delhi High Court judgment which decriminalised consensual sex between adults under Section 377.

International pressure on India The United Nations urged India to decriminalise homosexuality by saying it would help the fight against HIV/AIDS by allowing intervention programmes, much like the successful ones in China and Brazil. Jeffrey O'Malley, Director of the United Nations Development Programme on HIV/AIDS, said “countries protecting homosexuals from discrimination had better records of protecting them from getting infected by the diseases. But unfortunately in India, the rates of new infections among men who have sex with men continue to go up. Until we acknowledge these behaviours and work with people involved with these behaviours, we are not going to halt and reverse the HIV epidemic. Countries which protect men who have sex with men have doubled the rate of coverage of HIV prevention services, as much as 60%. In talking to The Hindu, he added that “The United Progressive Alliance Government here is in a difficult position as far as amending Section 377 of the Constitution is concerned because of the coming elections as any changes could be misrepresented. We need to change the laws, sensitise the police and judiciary. But when discriminatory laws have been removed, marginalised people have got access to treatment and prevention facilities like condoms. Warning of the urgency he said, “India has achieved success in checking the spread of this dreaded disease through commercial sex workers but transmission through gay sex, and injectable drug users is still an area of concern. Injectable drug use can also be controlled through targeted interventions but is difficult to control or change people’s sexual orientation.”

Conclusion On the basis of the whole discussion on the aspect of same sex marriage that is should it be legalised or not, this is more of a religious debate than a political one, in which I have given my arguments in favour of decriminalizing it, I finally conclude by saying that homosexuality is not an offence, it is just a way of pursuit of happiness, a way to achieve sexual happiness or desire. I can see absolutely no reason, apart from blind prejudice, which prevents two gay people going through a civil ceremony which will give them the rights and securities which heterosexual couples enjoy. Marriage is a sign of commitment and love. If two men or two women want to show that commitment, how does that destroy or damage the ideals of marriage. In my view, it clearly demonstrates it. Aren’t we living in an age which respects the individual’s rights to choose. Isn’t India supposed to be the land of the free. In our society people have branded homosexuals as queer. Yet homosexuality is not new nor is it against the Indian culture, it has always existed and with much lesser prosecution, than under Section 377 IPC, which is based on the British Offences against the Persons Act.

What should be the right approach to deal with same sex marriages, the issues are quite vast and complex. However, the desirability and feasibility of such an approach remain to be ascertained. In any event there is a growing conviction that our present method of criminalising the same sex sexual activity neither helps the homosexuals nor protects the society in general. We thus need to legitimate same sex marriages in order to move forward in the direction of human rights.

The principle of sexuality, as I have gone over, is an inherent part of something even larger. The creed that all conscious beings deserve affection and fairness, the sum of every humane organ in the bodies of intimacy, the belief that justice is not vestigial, that to maximise happiness is the greatest of all deeds that is where the principle of sexuality comes from. Free love and freedom of sexuality are founded in the same reason why we sympathise with each other’s suffering, it is founded in the same belief that we ought to respect each other, it is the same idea that humaneness contains more rationality and beauty than any other ideology. Further, if we look at Article 21 of the Constitution it includes right to privacy. Hence, we can conclude that if the State has no say in the birth of an individual, why should it interfere in someone’s orientation, which is entirely his/her right, right to lead his personal or private life.

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