

## Article 377 Indian Penal Code: A Medico-Legal journey of one and a Half Century

Hallikeri Vinay Rudrappa\*  
Prasad D. R. Mahadeshwara\*\*  
Vijay Kumar A. G.\*\*\*  
Shivanand Kadagoudar\*\*\*\*

### ABSTRACT

Lord Macaulay in 1860 introduced section 377 as part of Indian Penal Code; convictions under this law have been extremely rare. The Naz foundation, an activist group, filed public interest litigation in the Delhi High Court in 2001, seeking legalization of homosexual intercourse between consenting adults. In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law. In 2006 it came under criticism from 100 Indian literary figures. On 12<sup>th</sup> June 2009, India's new Law Minister agreed that Section 377 might be outdated. Eventually, in a historic judgment delivered on 2 Jul 2009, Delhi High Court overturned the 150 year old section, legalizing consensual homosexual activities between adults. Till date there have been no grounds for the fulfillment of any criteria to place homosexuality as a disease or have any claims of finding genetic markers for homosexuality been replicated either. A lot has changed and a lot needs to be changed with regards to India's stand on homosexuality and related aspects. "Any form of consensual sexual act between 'humans' of appropriate age and sound mental health under adequate conditions of privacy and safety" should be considered as "natural" and legal!

**Key words:** Homosexuality, Unnatural Sexual Offenses, Sec 377 Indian Penal Code, Kamasutra.

### INTRODUCTION

Sexual behavior is diverse and determined by complex interactions of various factors. Sexuality is determined by anatomy, physiology, the culture in which the person lives, relationship with others and developmental experiences

throughout the life. Sexual orientation refers to a person's erotic response tendency or sexual attractions, be they homosexual, bisexual or heterosexual. Homosexuality refers to an erotic desire for some one of same biological sex<sup>1</sup>.

Laws governing sexual practices and offences vary from country to country and from time to time. India is a multicultural, multilingual country with a vast population which is spread over a huge socioeconomic gap. In India, the legal system is largely a gift from the British rulers<sup>2</sup>. The law governing the unnatural sexual offences in India comes under the ambit of section 377 Indian Penal Code (IPC)<sup>3</sup>.

Apart from the various homosexual associations, even consensual heterosexual acts

**Author's affiliation:** \*+\*\*\*+\*\*\*\*Dept of Forensic Medicine & Toxicology, Jawaharlal Nehru Medical College KLE University, Belgaum, Karnataka. \*\*\*\*Department of Forensic Medicine and Toxicology, Adichunchanagiri Institute of Medical Sciences, Bellur, Mandya Dist, Karnataka.

**Reprint's request:** Dr. Vinay Rudrappa Hallikeri, Department of Forensic Medicine and Toxicology, Jawaharlal Nehru Medical College, KLE University, Belgaum, Karnataka-590010. E-mail: vrhallikeri@gmail.com, vrhallikeri@yahoo.com.

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such as fellatio, digital penetration and thigh intercourse may be a punishable offense under this law. The furious Indian homosexual community is going round the capital with a slogan 'Angrezchaley gaye 377 chhod gaye,' meaning 'Britishers left India as boon, however they gifted 377 as a bane'<sup>4</sup>. Though this law was recently read down by the Delhi High Court on July 2<sup>nd</sup> 2009 stating it as unconstitutional and violation of human rights, where in this law can no longer be applied to consensual sex between adults (of any gender) in private, however, the stand of the Indian government on the issue is unclear and the decision of the parliament is kept pending<sup>5</sup>.

### THE LEGAL TRANSITION FROM 1860 AD TO 2010 AD

Lord Macaulay in 1860 introduced section 377 as part of Indian Penal Code, and it reads as: "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". (Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section)<sup>3</sup>, his main aim was to prevent "unnatural offences"<sup>6</sup> especially the acts of sodomy amongst the homosexual men. This law remained undebated and untouched for more than a century, only recently this decade has seen a considerable change with perception and attitude of people regarding this legislation. Convictions under this law have been extremely rare, and in the last twenty years there have been no convictions for homosexual relations in India. However, Human rights watch group argues that the law has been used to harass sex workers, men who have sex with men, and other groups at risk.<sup>7</sup> SANGAMA a Non Governmental, Nonprofit organization working for upliftment of homosexual/bisexual men, lesbian/bisexual/homosexual women, hijras and other transgender

people particularly from the poor and non-English speaking backgrounds in Bangalore, has published reports of the rights violations faced by sexual minorities and in particular transsexuals in India.<sup>8</sup>

The legal battle for homosexuals in India has been led by the NAZ Foundation, an activist group, which filed a public interest litigation in the Delhi High Court in 2001, seeking legalization of homosexual intercourse between consenting adults.<sup>9</sup> In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law, saying that the petitioners, had no locus standi in the matter. Since nobody had been prosecuted in the recent past under this section it seemed unlikely that the section would be struck down as illegal by the Delhi High Court in the absence of a petitioner with standing. Naz Foundation appealed to the Supreme Court against the decision of the High Court to dismiss the petition on technical grounds. The Supreme Court decided that Naz Foundation had the standing to file a PIL in this case and sent the case back to the Delhi High Court to reconsider it on merit.<sup>10</sup> Subsequently, there was a significant intervention in the case by a Delhi-based coalition of LGBT (Lesbians, Gays, Bisexuals, and Transsexual), women's and human rights activists called 'Voices Against 377', which supported the demand to 'read down' section 377 to exclude adult consensual sex from within its purview.<sup>11</sup> In 2006 it came under criticism from 100 Indian literary figures.<sup>12</sup> The law subsequently came in for criticism from several ministers.<sup>13,14</sup> In 2008, a judge of the Bombay High Court also called for the scrapping of the law.<sup>15</sup>

However, in 2008 Additional solicitor general of India PP Malhotra stated: Homosexuality is a social vice and the state has the power to contain it. Decriminalizing homosexuality may create a breach in peace, lead to a big health hazard and degrade moral values of society, a view similarly shared by the Home ministry. He argued before the bench of the Delhi High Court that it was

crucial to hold such “unnatural” behavior as a criminal offence and that its deletion would lead to moral degradation. Citing an Orissa court judgment, he also added that such behavior resulted from a perverse mind that needed to be controlled.<sup>16</sup>

In May 2008, the case came up for hearing in the Delhi High Court, but the Government was undecided on its position, with The Ministry of Home Affairs maintaining a contradictory position to that of The Ministry of Health on the issue of enforcement of Section 377 with respect to homosexuality.<sup>17</sup> On 7 November 2008, the seven-year-old petition finished hearings. The Indian Health Ministry supported this petition; while the Home Ministry opposed such a move.<sup>18</sup> But the Centre is likely to repeal a controversial section of the penal law which criminalizes homosexuality. The two key Ministries – Home and Health – have held diverse views on it. Many Christian organizations have raised protests against the government’s move to repeal the controversial section of the IPC. The Home Ministry had earlier argued before the High Court that homosexuality is not accepted by Indian society and repealing Section 377 from the IPC would encourage more anti-social activities.<sup>19</sup> On 12 June 2009, India’s new Law Minister agreed that Section 377 might be outdated.<sup>21</sup> Eventually, in a historic judgment delivered on 2 Jul 2009, Delhi High Court overturned the 150 year old section,<sup>22</sup> legalizing consensual homosexual activities between adults.<sup>22</sup> The essence of the section goes against the fundamental right of human citizens, stated the high court while striking it down. In a 105-page judgment, a bench of Chief Justice Ajit Prakash Shah and Justice S Muralidhar said that if not amended, section 377 of the IPC would violate Article 14 of the Indian constitution, which states that every citizen has equal opportunity of life and is equal before law.<sup>6</sup> The verdict triggered protests from religious leaders across the spectrum who invoked the ‘will of God’ to claim that the ruling would lead to the ‘ruination’ of society and family values. Social workers and psychologists, however, welcomed the order, describing it as ‘scientific and humane’. There is almost unanimous medical and

psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality, the court observed.<sup>23</sup>

### **SHOULD HOMOSEXUALITY BE LEGALIZED IN INDIA? EVOLUTIONARY BASIS**

All species require reproduction for their perpetuation. For this purpose the nature has devised its own indigenous mechanism. When it comes to mammals, mating/sexual intercourse is very essential and this act is accompanied with a high quantum of pleasure (in the form of orgasm<sup>1</sup>). Food, shelter and sex as the basic necessities of Human life. Man is intellectual and is gifted with logical thinking and experimentation. Therefore, man experiments and tries to find newer modalities and techniques of deriving and optimizing pleasure, whereas logical thinking results in the concept of morality, the thought of good and bad, the concept of right and wrong. It is the balance between these two forces that decides the attitude of a society towards any trend.

### **PSYCHOPATHOLOGICAL BASIS**

In 1973 American psychiatric association officially accepted a normal variant model and removed homosexuality per se from its diagnostic and statistical manual of mental disorders (DSM). In 1992 World Health Organization followed the American example and made similar change in 10<sup>th</sup> revision of International Classification of Diseases (ICD-10<sup>1</sup>). In a Survey, ‘Study in sexuality of medical college students in India’ conducted at a medical college in New Delhi, India; the authors found that 83.40% of the participants opined homosexuality as a normal behavior<sup>24</sup>. Till date there have been no grounds for the fulfillment of any criteria to place homosexuality as a disease or have any claims of finding genetic markers for homosexuality been replicated either<sup>1</sup>

## CULTURAL BASIS

As an indicator of the liberal Hindu heritage, Kama Sutra (the literal meaning being, "the technique of sex"), a classic written in the first millennium by Sage Vatsyayana, devotes a whole chapter to homosexual sex saying "it is to be engaged in and enjoyed for its own sake as one of the arts." Besides providing a detailed description of oral sex between men, Kama Sutra categorizes men who desire other men as "third nature" and refers to long-term unions between men<sup>25</sup>. If proved guilty under section 377 IPC, the person can be charged life imprisonment or up to ten years rigorous imprisonment with or without fine. According to Manusmriti, the most popular Hindu law book of medieval and ancient India. "If a man has shed his semen in non-human females, in a man, in a menstruating woman, in something other than a vagina, or in water, he should carry out the 'painful heating' vow." This peculiar vow, which involves application of cow's urine and dung, over the accused body, was meant not only for homosexuals but also for the errant heterosexuals. The penalty is even milder if the homosexual belongs to an upper caste. As Manusmriti puts it, "If a twice-born man unites sexually with a man or a woman in a cart pulled by a cow, or in water, or by day, he should bathe with his clothes on"<sup>25</sup>. This is another example of the liberal ancient Indian laws with regards to sexual offences.

## DEMOGRAPHIC BASIS

No long term studies have been conducted so far to know impact of same sex marriages on demography<sup>26</sup>, especially on the population growth and regarding the variation in trends. There is no statistical data available regarding the number of homosexual population in India, however according to Ashok Row-kavi a self acclaimed homosexual activist, the number of exclusively or predominantly homosexual men in India may be over 50 million<sup>27</sup>. A great proportion of participants in a survey conducted amongst the medical students at a medical college at Belgaum, Karnataka opined that homosexuality is on rising trend in India.<sup>28</sup>

## RELIGIOUS BASIS

Religious chauvinism is deeply rooted in the subcontinent, any debate or change with stand on issues related with sexuality has always been strongly opposed since time immemorial.

## PHILOSOPHICAL BASIS

Nicolaus Copernicus once challenged the geocentric model of universe which followed great resistance and concept was then considered 'unnatural' and against the order of God. Today we know beyond doubt that it's the heliocentric model proposed by him which is the irrefutable scientific truth<sup>29</sup>. Most of the concepts once considered eccentric are not only widely accepted today but also form cornerstones of science and technology. Man has always experimented and challenged the nature and most of the times he has won. Contraception, medical termination of pregnancy, organ transplantation and recombinant technology are a few of the examples. Initially they were considered to be unnatural and had the resistance from the society on grounds of morality, today they are all widely accepted and not much heated discussion occurs on these issues.

## CONCLUSIONS

A lot has changed and a lot needs to be changed with regards to India's stand on homosexuality and related aspects, though it is the need of the hour, it can only be done gradually, as abrupt changes are unacceptable in India on the basis of social religious and cultural background. Authors are of the opinion that section 377 IPC, need not be abolished, however it needs to be suitably considered and amended. The demographic impact of legalizing same sex marriage is unpredictable as statistical data is lacking. "Any form of consensual sexual act between 'humans' of appropriate age and sound mental health under adequate conditions of privacy and safety" should be considered as "natural"!

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