

Golden Research Thoughts



Ashutosh Bairagi

Senior Assistant Professor, Shri
Vaishnav Institute
of Law, Indore (M.P.)

Abstract:-

Homosexuality, a kind of sexual orientation exist in Indian society and all the countries of world and considered as crime in many countries and in India under the purview of unnatural offences. The Delhi High Court decriminalized the act of homosexuality but after than the Supreme Court of India overruled the

decision of Delhi HC and thus the homosexuals or the LGBTs have been refrained to enjoy the privileges guaranteed under the part III of Indian Constitution and are considered as criminals. Homosexuality exist in India in ancient times also which is evident from the texts of Manusmriti , Kamasutra, Arthshastra etc . additionally, the hijras have been part of Indian society and culture for thousands of years. Indian culture and society is under the state of transformation, then also homosexuality is remained unaccepted by the Indian Society and legal system as well, it caused a severe setback to HIV/AIDS prevention efforts, especially among men who have sex with men (MSM). This paper elaborates the concept of homosexuality with different approaches and highlights the religious tolerability and legal acceptability of the homosexual acts, especially in India.

Keywords:

HOMOSEXUALITY IN INDIA: A SOCIO LEGAL STUDY



INTRODUCTION

There is no precise, all-inclusive definition of homosexuality. It is probably much easier to say what homosexuality is not. Homosexuality is a sexual orientation which is not: a genetic defect, a hormonal imbalance, or a mental illness.

Homosexuality is the romantic or sexual attraction or behavior among members of the same sex, situationally or as an enduring disposition. Homosexuality means that men are sexually and emotionally attracted to men, and women are sexually and emotionally attracted to women. This is also called same-sex attraction. Homosexuality is widely encountered in the animal kingdom.

Till march 2014, India has an estimated 25 lakh gay population and about 7 per cent (1.75 lakh) of them have HIV.

Is Homosexuality a mental disorder ?

No, lesbian, gay and bisexual orientations are not disorders. Research has found no inherent association between any of these sexual orientations and psychopathology. Both heterosexual behavior and homosexual behavior are normal aspects of human sexuality. Both have been documented in many different cultures and historical eras. Despite the persistence of stereotypes that portray lesbian, gay and bisexual people as disturbed, several decades of research and clinical experience have led all mainstream medical and mental health organizations in this country to conclude that these orientations represent normal forms of human experience. Lesbian, gay and bisexual relationships are normal forms of human bonding. Therefore, these mainstream organizations long ago abandoned classifications of homosexuality as a mental disorder.

Causes of Homosexuality:

Clinical approach : In evolutionary terms, homosexuality presents something of a paradox. According to Darwin, any trait that makes an animal less likely to reproduce will die out in a few generations, yet the percentage of people born gay or lesbian remains more or less constant. Now researchers at the University of Portsmouth believe they may have found the evolutionary reason for homosexual behavior: it helps us bond with people of the same sex. A study of predominantly heterosexual men and women found that people with higher levels of the hormone progesterone are more likely to have homoerotic thoughts. Because progesterone, which is produced by both men and women, is associated with affiliation, the researchers concluded that homosexual thoughts can go hand in hand with the need to forge same-sex alliances, which can be traced back to the teamwork of the earliest hunter-gatherers.

Another approach: Same-sex attraction is the result of a complex interaction of personality, biological inheritance, and developmental experiences. the website for the American Psychological Association states the following: "There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles; most people experience little or no sense of choice about their sexual orientation." Same-sex urges are not unrealistic or rebellious. It is not a fear of, or a flight from, heterosexuality. It is actually an unconscious attempt to fill normal emotional needs.

Acceptability of Homosexuality :

Religious outlook :

Religion	Views of Homosexual Orientation	View of Homosexual Acts	Quotes
Ancient Greeks	No conception of "homosexuality" versus "heterosexuality." Same-sex desires not categorized separately from other sexual desires.	Not generally condemned and often idealized and romanticized. But the social status of the partners and the playing of the passive role were important considerations.	"The noble lover of beauty engages in love wherever he sees excellence and splendid natural endowment without regard for any difference in physiological detail." -Plutarch, <i>Dialogue on Love 146</i>
Ancient Romans	No conception of "homosexuality" versus "heterosexuality." Homosexual desires were irrelevant; only the acts were regulated.	Similar to Greece under the Republic, but more negative under the Empire, in which male prostitution and pederasty were illegal and passive partners in adult relationships lost many civil rights.	
Buddhism	Varies: Unnatural (Dalai Lama), a karmic punishment (SE Asian countries), an alternative. Not generally condemned in itself.	Unlawful for monks, who must be celibate regardless of orientation. For other Buddhists, "sexual misconduct" is prohibited under the Third Precept, which depends on the circumstances and the results.	"Where there is mutual consent, where adultery is not involved and where the sexual act is an expression of love, respect, loyalty and warmth, it would not be breaking the third Precept." – Buddha Net
Christianity	Not generally considered sinful in itself, though some see it as a purposeful perversion. Some accept it as a natural alternative, while others regard it as a non-chosen disorder akin to alcoholism.	Traditionally considered sinful. Many Christians and denominations continue to uphold this belief, while others have reconsidered it or in the process of doing so.	"Men committed indecent acts with other men, and received in themselves the due penalty for their perversion." -Romans 1:27

Hinduism	Not generally condemned in itself. Some ancient texts and temples depict it as one of many sexual inclinations, while Vedanta discourages homosexual desires as lustful and/or distracting.	Condemned by most Hindu cultures, though not often for religious reasons. The teachings of Vedanta, which emphasize liberation from the material world to the spiritual, allow only heterosexual sex, within marriage and for purposes of procreation.	"...in all things connected with love, everybody should act according to the custom of his country and his own inclination." <i>Kama Sutra IX</i> "O son of Kunti, the pleasures that are born out of sensory contacts are sources of pain. They certainly are transient, having a beginning and an end. The intelligent man is wise enough not to indulge in them." (<i>Bhagavad Gita 5.22</i>)
Islam	Not generally condemned.	Sinful and punishable under Islamic law.	"We also sent Lut: He said to his people: Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds." -Qur'an 7:80-81
Judaism	Orthodox: Condemned as rebellion against God. Conservative: Neither condemned nor affirmed. Reform: Generally accepted as alternative.	Orthodox: Strongly condemned. Conservative: Violation of Jewish law disqualifies from Jewish marriage and religious leadership. Reform: Approved in context of committed relationship; civil marriage supported, but generally not religious marriage.	"A man shall not lie with another man as with a woman; it is an abomination." -Leviticus 18:22
Mormonism	Called "same-gender attraction." Less serious than homosexual acts, but should be resisted.	Considered a serious sin. Heterosexual marriage is required for entry into the most desirable forms of afterlife.	"We all seem to have susceptibilities to one disorder or another, but whatever our susceptibilities, we have the will and the power to control our thoughts and our actions." - Dallin H. Oaks
Sikhism	Generally considered a manifestation of Lust, one of the "Five Thieves" or vices. A minority consider it an acceptable alternative.	Generally condemned in light of its association with Lust and the value of family life. But a minority believe the Sikh value of universal equality supports acceptance of homosexual relations.	"Sikhism is a very tolerant religion and seeks to find the truth rather than adhere rigidly to rules. Homosexuality is not specifically banned in any of the writings of the Gurus, but they do stress that God has intended people to live as man and wife, or to be celibate, with no deviation from this design." –Ethnicity online
New Age	Accepted as alternative.	Accepted within bounds of general ethics.	
Wicca	Accepted as alternative.	Accepted within bounds of general ethics.	"All acts of Love and Pleasure are Her rituals." - <i>The Charge of the Goddess</i>

Legal forbearance

Here’s the list of 83 countries and independent political entities with anti-homosexuality laws:

The total would actually be 84 countries if we were to include Russia, which does not have a law against homosexual acts but is in the midst of an anti-gay crackdown on the basis of its new law against “gay propaganda.”

Africa	24 Nigeria	47 Malaysia	70 St Lucia
1 Algeria	25 Sao Tome	48 Maldives	71 St Vincent & the Grenadines
2 Angola	26 Senegal	49 Myanmar	72 Trinidad & Tobago
3 Benin	27 Seychelles	50 Oman	
4 Botswana	28 Sierra Leone	51 Pakistan	Oceania
5 Burundi	29 Somalia	52 Palestine/Gaza Strip	73 Cook Islands
6 Cameroon	30 South Sudan	53 Qatar	74 Indonesia (Aceh Province and South Sumatra)
7 Comoros	31 Sudan	54 Saudi Arabia	75 Kiribati
8 Egypt	32 Swaziland	55 Singapore	76 Nauru
9 Eritrea	33 Tanzania	56 Sri Lanka	77 Palau
10 Ethiopia	34 Togo	57 Syria	78 Papua New Guinea
11 Gambia	35 Tunisia	58 Turkmenistan	79 Samoa
12 Ghana	36 Uganda	59 United Arab Emirates	80 Solomon Islands
13 Guinea	37 Zambia	60 Uzbekistan	81 Tonga
14 Kenya	38 Zimbabwe	61 Yemen	82 Tuvalu
15 Lesotho	Asia, including the Middle East	Americas	Europe
16 Liberia	39 Afghanistan	62 Antigua & Barbuda	83 Northern Cyprus
17 Libya	40 Bangladesh	63 Barbados	
18 Malawi (enforcement of law suspended)	41 Bhutan	64 Belize	
19 Mauritania	42 Brunei	65 Dominica	
20 Mauritius	43 India	66 Grenada	
21 Morocco	44 Iran	67 Guyana	
22 Mozambique	45 Kuwait	68 Jamaica	
23 Namibia	46 Lebanon	69 St Kitts & Nevis	

Indian Legal Panorama

Homosexuality has been illegal in India since 1861, when British rulers codified a law prohibiting “carnal intercourse against the order of nature with any man, woman or animal.” The law, known as Section 377 of India’s penal code, has long been viewed as an archaic holdover from colonialism by its detractors. It was rooted in the Judeo-Christian religious morality that abhorred non-procreative sex.

Section 377, IPC 1860 reads as:

“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.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

Lacking precise definition, Section 377 became subject to varied judicial interpretation over the years. Initially covering only anal sex, it later included oral sex and still later, read to cover penile penetration of other artificial orifices like between the thighs or folded palms. The law made consent and age of the person irrelevant by imposing a blanket prohibition on all penile-non-vaginal sexual acts under the vague rubric of ‘unnatural offences’. 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 People’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.

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

(i) Liberalization 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 legalization 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.

The Naz Foundation case

The Naz Foundation (India) Trust, a Delhi-based non-governmental organization and working in the field of HIV prevention amongst homosexuals and other men having sex with men (MSM), realized that Section 377, IPC constituted one of the biggest impediments in access to health services for MSM. MSM remained a hidden population due to fear of prosecution under the law. Through its interactions with clients, Naz Foundation became acutely aware of the disproportionate and invidious impact of Section 377 on homosexuals.

In *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 111 DRJ 1, the Court declared that Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts of adults in private, violates Articles 21, 14 and 15 of the Constitution. By saying this, the High Court has proved that it is surely a custodian of fundamental rights of citizens of India. Emotions and pressure must not be considered while deciding a case. Thus giving such a landmark judgment under the pressure of billions is highly encomium. Legislative objective of Section 377 of penalizing "unnatural sexual acts" has no rational nexus to the classification created between procreative and non-procreative sexual acts, and is thus violative of Article 14 of the Constitution of India, 1950.

Hence the Delhi High Court in deciding that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The decision like this was necessary to ensure that the LGBTs should not be made a matter of ridicule or discrimination or abomination. Even if we take the reference of *Ajay Goswami* case, where the hon'ble Supreme Court observed that contemporary social standards determine what is obscene and what is not. Again the High Court Judgment seems to be correct by validating the homosexuality.

Appeal Proceedings in the Supreme Court of India

Suresh Kumar Koushal & Ors. v. Naz Foundation (India) Trust & Ors. [Special Leave Petition (Civil) No. 15436 of 2009] Following the High Court decision, 15 Special Leave Petitions (SLPs) were filed in the Supreme Court appealing against the said decision on behalf of mostly faith-based and religious groups from all parts of India. The Supreme Court overturned that ruling on Dec. 11, 2013, so India is back on the main list of countries with anti-homosexuality laws. This judgment was then overruled by the Supreme Court of India on 11 December 2013, with the Court holding that amending or repealing section 377 is now the responsibility of the Indian Parliament, not the judiciary. The Supreme Court hence dismissed a Review Petition filed by Central Government, NGO Naz Foundation and several others, against its verdict on Section 377.

The Parliament has since then made no special efforts to repeal this draconian section. Section 377 will tragically be in effect and consenting LGBT individuals having sex are thus criminals in India.

CONCLUSION

Upholding section 377 will lead to further alienation of LGBT persons and groups, and cause a severe setback to HIV/AIDS prevention efforts, especially among men who have sex with men (MSM). Gay rights NGO Naz Foundation, which filed the petition to decriminalize gay sex with the Delhi High Court, says this law has been used to blackmail and perpetuate violence against sexual minorities.

With this ruling – after a brief period that was considered a breakthrough in LGBT rights – India once again joins the ranks of countries such as Afghanistan, Iran, and Saudi Arabia, where homosexuality is considered a criminal offence and the penalty is life imprisonment or even death. After the recent laws in Russia that prohibit any kind of propaganda that views homosexuality in a positive light, this ruling is yet another setback in times that are seem to be seeing increasing legislation against homosexuality.

The universal law of Human Rights states that social norms, tradition, custom or culture cannot be used to curb a person from asserting his fundamental and constitutional rights. If we were to accept the justification, given to us by cultural views, public policy and societal values, which are used to restrict a person's right then there would have been no progressive legislation enacted in our Country. Sati, dowry, child marriage and infanticides are practices derived from cultural belief, but the Government still took steps to prevent them.

The United Nations urged India to decriminalize 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 that

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.

Today, homosexuality is recognized across the globe. Different sexual expressions or orientations automatically come within the ambit of expanded right to life and personal liberty as this right also includes provision for future developments. Right to equality as well as right against any discrimination based on sex would also be violated in absence approval of homosexuality. If laws are supposed to represent socially-acceptable dos and don'ts, then a new mindset is the need of the hour. Otherwise, normal human beings will continue to suffer inhuman exploitation just because nature has nourished them with the need to be different.

India needs to come out and address the situation that is knocking at her door. They need to recognize homosexuality and in turn legalize gay unions. The various personal and civil laws enacted for the benefit of spouse or family is not accessible to the gay community since their union is not recognized by the State. India is the largest democracy in the world. We take pride in ourselves and in our Constitution, believing that in India, each and every citizen has equal rights. Part III of our Constitution guarantees us these Fundamental Rights, regardless of caste, creed, sex, class etc. So why then is a particular section of society proscribed from these privileges? Homosexuals or LGBTs await the day when they will finally gain equality in society; when the Fundamental Rights will truly apply to everyone.

REFERENCES:

1. The Indian Penal Code by Ratanlal (Author) & Dhirajlal (Author) 32nd edition 2014
2. Regulating sex: the politics of intimacy and identity, Elizabeth Bernstein, Laurie Schaffner (2005), Routledge,
3. <http://www.apa.org/helpcenter/sexual-orientation.aspx>
4. <http://www.telegraph.co.uk/news/science/11251206/Having-homosexual-thoughts-is-an-essential-part-of-human-evolution-study-suggests.html>
5. <http://www.samesexattraction.org/What-causes-same-sex-attraction.htm>
6. <http://76crimes.com/76-countries-where-homosexuality-is-illegal/>
7. The Practical Lawyer :<http://www.supremecourtcases.com> Eastern Book Company Generated: Wednesday, January 7, 2015
8. http://www.ilga.info/Information/Legal_survey/Asia_Pacific/supporting%20files/situation_of_homosexuals_in_indi.htm
9. <http://www.englishforums.com/English/HomosexualMarriagesAgainstNatures/zrdh/Post.htm>
10. http://www.indialawjournal.com/volume3/issue_4/article_by_amit.html