

## Same Sex Relationship in India: The Constitutionality, Legality and Morality Debates

Partha Pratim Paul\*

### Abstract

*In India, homosexuality is a criminal offence under Section 377, Indian Penal Code. This Act has been passed by British Parliament in 1860. The section states that “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished” which remains in force in India. But the same homosexuality has been decriminalised in U.K, country of the origin of this Act. Indian society is also not static, but very dynamic in nature; so Indian society and what was its position one and half century ago, is not the same society in this century. There have been changes felt everywhere in the social, cultural, economic, political fields of life. People have started looking at things from different perspectives. Though some of the values remain eternal in nature in the society, fact remains that some values change with the change of time. Therefore, one of the tasks of law is to respond to those changes positively. Unless law does it, it will lose its due relevancy in the society. In India, the Constitution through its Part III, guarantees fundamental rights of individuals. It promises through its preamble - justice (political, social, economic), equality (of status and of opportunity etc. In the context of criminalisation of same sex relationship, the questions which are being frequently asked by many, namely, is same sex relationship immoral? Is same sex relationship unnatural? Does the criminalisation of same sex relationship end up with violations of many fundamental rights guaranteed in Part III of Constitution of India i.e. Right to equality, Right to privacy, Right to liberty, Right to dignity etc? Should same sex relationship be allowed in India by recognising the reality of life? In this context, in this article, judgments i.e. NazFoundation v. Govt. of NCT, Delhi, and Suresh Kumar Kaushal v. Naz Foundation (which overruled the former) have been critically analysed from different perspectives, which gives many new insights in understanding the issue of homosexuality. It also discusses Rupa Hurra v. Ashok Hurra case which framed up a guideline for curative petition, as Supreme Court has accepted curative petition regarding homosexuality. Additionally, this article tries to develop a new paradigm of jurisprudence in the context of law and science inter-face, which is the jurisprudence of post modern world.*

**Key words:** Homosexuality, Right to Liberty, Right to Dignity, Right to Privacy, Right to Equality, Freedom of Expression

## **Introduction**

To define morality is a difficult task indeed. However, New Encyclopedia (1993) analyses the concept very nicely:

Philosophers have attempted to determine goodness in conduct according to chief principles and have considered certain types of conduct either good in themselves or good because they conform to a particular moral standard. In the history of ethics there are three principal standards of conduct, each of which has been proposed as the highest good: happiness or pleasure; duty, virtue or obligation; and perfection; the fullest harmonious development of human potential. Depending on the social setting, the authority invoked for good conduct is the will of God, the pattern of nature, or the rule of reason. When the will of God is the authority, obedience to the divine commandments in scriptural texts is the accepted standard of conduct. If the pattern of nature is the authority, conformity to the qualities attributed to human nature is the standard.

Morality is the standard criterion to evaluate the human conduct, whether it is right or good in a given society. It is a bunch of values which is to be imbibed, so that a person can be an ideal human being of a society and a good citizen of the country. Difficulty arises due to the reason that it is a relative concept which

depends on many things like, polity of state, economics, religion, scientific temperament of the people, culture etc. In the same way, to a great extent morality is not static. It also changes according to changes occurring in the society. While some moral conducts have universal application with a common standard, some conducts have only society specific orientation. Some of the conducts always remain moral in any given space and time; some become immoral according to change of time and space. The larger question remains: should morality at all be infused and embodied into law? Natural Law Theory according to Dennis Lloyd (2001) is repository of such approach: "The essence of natural law may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. These principles constitute the natural law. This is valid necessity because the rules governing correct human conduct are logically connected with immanent truths concerning human nature. Natural law is believed to be a rational foundation for moral judgment. "Hence, the role of morality in giving colour and content of law is undeniable. The problem arises because though law accepts some behaviours as immoral, people now are challenging it. The issue is dominating in India because a serious question confronts the society: is homosexuality immoral? Is the prohibition over it unconstitutional? In this context, a PIL, (Article 226, Constitution of India), was filed by

NazFoundation, to challenge the constitutional validity of section 377, IPC which criminally penalizes ‘unnatural offences’. The challenge is founded on the premise that it infringes some peoples’ fundamental rights in Articles 14, 19 and 21 of Constitution of India.

### **Naz Foundation V. NCT of Delhi, Delhi High Court Judgment**

A decision of court is not binding because of its conclusion but in regard to its ratio-decidenti. V.N.Shukla (2004) defines it as “a statement of law applied to the legal problems raised by facts as found, upon which the decision is based”. The following is the ratio-decidenti of Delhi High Court in Naz Foundation v. Govt. of NCT, Delhi (1999) judgment which gave a new paradigm to look at criminality arising out of same sex relationship from fundamental rights discourse:

“Section 377 IPC, insofar it criminalises 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. By ‘adult’ we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to asexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the

recommendation of the Law Commission of India in its 172<sup>nd</sup> Report which we believe removes a great deal of confusion.”

The principles over which the Delhi High Court in Naz Foundation v. NCT, Delhi, built up its ratio-decidenti is narrated in the following:

### **Emergence of Doctrine of Constitutional Morality and Its Application**

The High Court in this case, by focussing that “constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges”, developed a unique concept of constitutional morality as a bunch of higher norms above statute, which each statute must confirm for warranting its own validity:

Constitutional provisions are either directly aimed at furthering the goals of the social revolution. The core of the commitments to the social revolution lies in Parts III and IV, in the Fundamental Rights and Directive Principles of State Policy. These are the conscience of the Constitution. The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free

from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality. While moving the Draft Constitution Dr. Ambedkar quoted Grote, the historian of Greece, who had said: The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves. Moral indignation, howsoever strong, is not a valid

basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.

Though a large section of the society views homosexuality as immoral, but as constitutional morality is supreme, public morality can in no way withstand against constitutional morality of India which are nothing but fundamental rights enshrined in Part III of the Constitution.

#### **Right to Life under Article 21, Constitution of India**

As Delhi High Court declares that the 'Right to Life (Article 21, Constitution of India)' of the homosexuals is violated by section 377, it becomes imperative to understand the meaning of Right to Life. Dignity and Privacy within the broad sweep of 'right to life' are nothing but imperatives of constitutional morality of India. Hence, denial of rights of the homosexuals are the denials of 'right to dignity' and 'right to privacy'; The question remains: how does Dignity and Privacy get the status of fundamental rights, when the Constitution itself is silent? The observation of Supreme Court in *Menaka Gandhi v. Union of India* (1978) is enlightening:

"If a right is not specifically named in Article 19(1), it may still be a fundamental right covered by same clause of that Article, if it is an integral part of a named

fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed, flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible, otherwise to effectively exercise, that fundamental right. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed, is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.”

In the light of this Constitutional Jurisprudential basis, the judiciary found the ambit of the right to life enshrined in Article 21 and sowed the seed for future development of it. Accordingly, unnamed Right to Privacy and Right to Dignity are integral parts of a named fundamental right i.e. Right to Life, because it carries with it same basic nature and characteristics of Right to Life and is in reality and substance nothing but an

instance of the exercise of it. This inclusion in turn paves the ways to treat the rights of homosexuals as matters of dignity and privacy. In the language of High Court:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

### **Right to Dignity**

‘Right to dignity’ has become a facet of ‘right to life’ under Article 21, Constitution of India. The High Court in Naz Foundation judgment states appositely the meaning of it:

26. Dignity as observed by L’Heureux-Dube, J (1995) is a difficult concept to capture in precise terms. At its least, it is clear

that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. The expression "dignity of the individual" finds specific mention in the Preamble to the Constitution of India. V.R. Krishna Iyer, J. observed that the guarantee of human dignity forms part of our constitutional culture in *Prem Shankar Shukla v. Delhi Admn* (1980).

27. In *Francis Coraliev. Union Territory of Delhi* (1981), Justice P.N. Bhagwati explained the concept of right to dignity: "We think that the right to life includes the right to live with human dignity and all that goes along with it. Every act which offends against or impairs human dignity would constitute deprivation pro-tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

It means that when a person is devalued and stigmatised, dignity is damaged. Human dignity is impaired by unfriendly and hostile treatment for someone's personal traits like sexuality. Dignity is harmed because homosexuals are stigmatised, marginalized, looked down and demeaned in the society by non-recognition of their place. It denies a homosexual a right to full personhood which is implicit in notion of 'right to life' and belittles them by treating them as criminals. Hence, they can't live in the society with holding their heads high with honour and prestige.

### **Right to Privacy**

Right to Privacy is indispensable in the life of each and everyone. The right to privacy has been held to protect a 'private space' in which man may become and remain himself for certain purposes or for certain periods in/of his/her life. Sexuality is one core area of privacy where people do not like to be dictated; people like to have absolute freedom of choice. In a nutshell, right to privacy is the right to be left alone. The society should leave a person without any interference or intrusion in any manner-which not only disturbs the private activities but also prevents the person from performing. The sphere of privacy allows persons to develop human relations for fulfilment of sex related expectations including its method and manner. Following is the verbatim transcription of that analysis by High Court in this case:

35. In *Kharak Singh v. State of U.P* (1964), SubbaRao, J. while

concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right of movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right to privacy. In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.

36. *Gobind v. State of M.P* (1975), They (judges) certainly realized as Brandeis, J. said in his dissent in *Olmstead v. United States*, the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government a sphere where he should be left alone.

38. *R. Rajagopal v. State of T.N* (1994), held the right to privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be left alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.

The High Court by referring to Justice R.C. Lahoti (2005): "Privacy centres

around values of repose, sanctuary and intimate decision. Repose refers to freedom from unwanted stimuli; sanctuary to protection against intrusive observation; and intimate decision, to autonomy with respect to the most personal of life choices", views "Section 377 IPC as an Infringement of the Rights to Dignity and Privacy" as:

40. The right to privacy thus has been held to protect a "private space in which man may become and remain himself". The ability to do so is exercised in accordance with individual autonomy. Mathew J. in *Gobind v. State of M.P*: "stressed that privacy - the right to be let alone - was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests. Blackmun, J. (1986), made it clear that the much-quoted "right to be let alone", should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalisation. The privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private

intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.

Delhi High Court referred to Article 12 of UDHR (1948) and Article 17 of ICCPR (1966) to show the significance of Right to Privacy. The High Court tracked its development in India and showed the meaning attributed by judiciary and found sexuality is all about privacy.

### **Right to Equality**

Violation of Right to Equality (Article 14, Constitution of India) occurs in section 377, IPC as it does not pass two-test rule of reasonable classification. Hence according to Delhi High Court it is an example of discrimination (Article 15, Constitution of India) of discrimination based on sex:

Section 377 of IPC makes no distinction between acts engaged in the public sphere and acts engaged in private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to anybody. Thus it is evident that disparate grouping in section 377 does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody etc; hence there is no intelligible differentia. The object of section 377 is to protect

women and children. But it was not enacted keeping in mind the instances of child sexual abuse or to fill the lacuna in a rape law. The legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults of same sex in private. The objective of penalizing 'unnatural sexual acts' has no rational nexus to the classification created between procreative and non-procreative sexual acts. On objective of maintaining public health, NACO's affidavit points out that "enforcement of section 377 adversely contributes to pushing the infliction underground; make risky sexual practices go unnoticed and unaddressed.

Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do.



98. Discrimination caused to MSM and gay community is unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India.

104. Sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15.

The High Court recognised that section 377, IPC is violative of Right to Equality; so equality is an attribute of Constitutional Morality, negated by criminalisation of same sex relationship in India.

### **Homosexuality is not Against Order of Nature**

According to Delhi High Court, homosexuality is not unnatural: "Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders in 1973 after reviewing evidence that homosexuality is not a mental disorder. In 1987, ego-dystonic homosexuality was not included in the revised third edition of the DSM after a similar review. In 1992, the WHO removed homosexuality from its list of mental illnesses in the International Classification of Diseases 10. It reads: disorders of sexual preference are clearly differentiated from disorders of gender identity and homosexuality in itself is no longer included as a category." In the language of High Court in this case: "Thus, homosexuality is not a disease or mental illness that needs to be, or can be

cured or altered, it is just another natural expression of human sexuality." Moreover, homosexuality is viewed as unnatural - Khanu v. Emperor (1925): "If the oral sex is committed, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible. "According to High Court in this case, "section 377 of IPC is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, i.e., for procreation only. Any non-procreative sexual activity including homosexuality was viewed as being against the order of nature". This approach towards sex for procreation is absolutely flawed. People also have sex to get bodily or mental euphoria (without the object of procreation); otherwise they would not have performed it with contraceptives or when women do not menstruate. It is unnatural?

Homosexuality is the general reflection of a person's gene (a form of inner body chemistry) for which the person does not have any choice, has to respond to his/her inner natural instincts. The genes are pre-disposing the sexual orientation of a person. Example(1): 'Science Daily' (2007) reported that "homosexual behaviour was largely shaped by genetics and environmental factors. Writing in the scientific journal Archives of Sexual Behavior, researchers from Queen Mary's School of Biological

and Chemical Sciences, and Karolinska Institutet in Stockholm report that genetics and environmental factors (which are specific to an individual, and may include biological processes such as different hormone exposure in the womb), are important determinants of homosexual behaviour.” Example (2): ‘Science Daily’ (2008) again reported that “genetics has a role in determining sexual orientation in men, further evidence. Canadian scientists have uncovered new evidence which shows genetics has a role to play in determining whether an individual is homosexual or heterosexual. The research was conducted by Dr. Sandra Witelson, a neuroscientist in the Michael G. DeGroot School of Medicine at McMaster University, and colleagues at Sunnybrook Health Sciences Centre in Toronto.”

The preceding analysis focuses growing inter-relationship between science and law. It just conveys the truth that law cannot succeed by ignoring the elements of biological sciences. There are vast areas where law should synergise with scientific principles and knowledge in doing justice.

### **Supreme Court on Same Sex Relationship in Appellate Case**

Suresh Kumar Koushal, under Article 132 of Constitution of India, appealed before Supreme Court against NAZ Foundation v. NCT Delhi judgment. This gave rise to Suresh Kumar Kaushal v. NAZ Foundation judgment where the hon’ble apex Court (Constitution Bench) has overruled the Naz Foundation of Delhi

High Court which read down that part of section 377, IPC which criminalises the same sex relationship between consenting adults, by declaring it void for being unconstitutional. The reasons constructed by Supreme Court while upholding the constitutionality read down part of section 377, IPC as in the following:

### **Presumption of Constitutionality in Favour of Section 377, Indian Penal Code**

The Supreme Court invoked the doctrine of presumption of constitutionality in favour of section 377 of IPC in the following way:

26. Keeping in mind the importance of separation of powers and out of a sense of deference to the value of democracy that parliamentary acts embody, self restraint has been exercised by the judiciary when dealing with challenges to the constitutionality of laws. This form of restraint has manifested itself in the principle of presumption of constitutionality.

28. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. If no amendment is made to a particular law it may represent a decision that the Legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law.

32. The 172nd Law Commission Report specifically recommended deletion of that

section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision.

33. It is, therefore, apposite to say that unless a clear constitutional violation is proved, this Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need.

The apex Court has interpreted Article 13(1) of Constitution of India in a different way by distinguishing violation and clear violation; it states that Constitutional Courts can make it void only in clear violation cases. But, Article 13(1) itself does not differentiate between anything like mere or clear Constitutional violations. Moreover, do the Constitutional Courts have any locus standi to put the degrees on the nature of violation? It is up to the sufferer to decide the matter; it is the level of consciousness of the people which matters most. All violations are equally condemnable and deserve to be remedied appropriately. This interpretation will set a precedent where fundamental rights are set in a potentially dangerous trajectory. Constitutional Courts might ignore some violations by dubbing as mere violation and refuse to enforce it.

The Supreme Court also set a precedent by observing that self restraint must be exercised and it must be guided

by the presumption of constitutionality. If the fundamental right of a person is violated, why should the Constitutional Courts keep self-restraint? Do the Constitutional Courts want to enjoy the suffering of people emanating from the violation of fundamental rights? Keeping self-restraint could be the approach of the judiciary as far as the fate of any statute is concerned if it comes in conflict with Constitution, embodied in other Parts but not Part III of it. Moreover, favouring constitutionality of any enactment, if there are two opposite interpretations, is not applicable in fundamental right violation cases. The Supreme Court has erred in applying a general rule of interpretation of statute which is not at all meant for Part III of Constitution.

### **Homosexuality is Carnal Intercourse against the Order of Nature**

The apex Court sees homosexuality as carnal intercourse against the order of nature. On the basis citing cases, by it, apex Court finds: “from these cases no uniform test can be culled out to classify acts as carnal intercourse against the order of nature. In our opinion the acts which fall within the ambit of section 377, can only be determined with reference to the act itself and the circumstances in which it is executed. We are apprehensive of whether the Court would (not) rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section. Nonetheless in light of the plain meaning

and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent.”

### **Whether Classification Made in Section 377, IPC is Reasonable**

Relying on the broad propositions framed in its earlier decision of *Re: Special Courts Bill (1978)*, about the scope of Article 14, Constitution of India, to determine the question whether a particular classification is unconstitutional, the Supreme Court followed the following guidelines:

5. By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification

must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

Thereby, the Supreme Court in this appellate case found that section 377 of IPC does not have vice of unconstitutionality for being discriminatory in nature:

42. Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.

### **Right to Dignity and Privacy under Article 21, Constitution and Same Sex Relationship**

The apex Court dealt with Right to Dignity and Privacy vis-a-vis homosexuality in the following manner:

47. *Gobind v. State of M. P* (1975): 22. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of that claimed rights as a fundamental privacy right would be of far less significance. 23. Time works changes and brings into existence new conditions. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Privacy interest in autonomy must also be placed in the context of other rights and values. 25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists.”

49. In *Mr. X v. Hospital Z* (1998):27. As already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or

protection of health or morals or protection of rights and freedom of others.

50. The right to live with dignity has been recognized as a part of Article 21 and the matter has been dealt with in *Francis Coralie v. Union Territory of Delhi* (1981) “the right to life includes the right to live with human dignity and all that goes along with it.”

Therefore, Supreme Court conceded both the rights as fundamental right under Article 21, but views same sex relationship not under Right to Privacy and Right to Dignity. It is also of the view that homosexuality is not an Indian value: “We have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level” and there is a compelling state interest to enforce the morality stemming from Indian values. But the fact remains that sexuality of homosexuals, cannot be an issue about Indian values v. western values. The Supreme Court has erred in understanding the reality of biological life of human beings. There are many instances where Supreme Court itself was deeply influenced by western values. The reasoning of Supreme Court also does not hold any substantial ground because, whole Constitution of India itself has been borrowed from foreign countries - U.K, Ireland, U.S.A and Japan. The Supreme Court has erred also because the whole

concept of criminality, arising out of same sex relationship, has been borrowed from U.K as Indian Penal Code itself (passed by its parliament). It implies that homosexuality is a crime as per western value. Moreover, how does the sexuality of homosexuals become western when ancient Hindu temples in its stone engrave (sculptures) demonstrate this type of sexuality of human beings? Finally, what is wrong in it if a western value is infused in Indian legal framework if it is good and does not ante-thesis to Indian value system, when in a globalised scenario, no country cannot just shut its doors to prevent the air flowing in.

#### **Overruling of Naz Foundation Judgment by Supreme Court under Appellate Jurisdiction**

Finally, on the basis all preceding principles, Supreme Court upheld the constitutionality of section 377 of Indian Penal Code, by opining that:

54. Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable.

56. This Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per

the suggestion made by the Attorney General.

#### **Curative Petition and Homosexuality**

After Supreme Court overruled the Naz Foundation v. NCT Delhi, a review petition under Article 137 Constitution of India, had been filed; subsequently that review petition also has been rejected. But ray of hope is still visible, as Supreme Court has accepted a curative petition in this regard. Though at par, the Order XL Rule 5 of the Supreme Court Rules bars further application for review in the same matter, the justification of second review in the name of Curative Petition (second review) is found in Supreme Court judgment of Rupa Hurra v. Ashok Hurra (1999):

Though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in public interest that a final judgment of the final court in the country should not be open to

challenge. Yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice.

While stating that it can take review petition again under Articles 129 and 142 which confer very wide powers on this Court to do complete justice between the parties, Supreme Court has formulated the following guidelines for curative petition which has to be kept in view while taking a final decision on homosexuality:

- This Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power.
- It is common ground that except when very strong reasons exist, the Court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of a review petition. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.
- That a petitioner is entitled to relief *ex debito justitiae* if he establishes (1) violation of principles of natural justice in that he was not a party to the *lis* but the judgment adversely affected his interests or,

if he was a party to the *lis*, he was not served with notice of the proceedings and the matter proceeded as if he had notice and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

- The petitioner, in the curative petition, shall aver specifically that the grounds mentioned therein had been taken in the review petition and that it was dismissed by circulation.

### **Conclusions**

Sexuality - A Facet of Right to Liberty:

Liberty adds one of the inalienable rights of the human beings of democratic world, is another narrative of Constitutional morality. New Encyclopaedia (1993) explains: "right of individuals to act as they choose." or "the right of individuals to act without restraint as long as their actions do not interfere with the equivalent rights of others." Webster Dictionary 1988) sees: "the condition of being free to choose especially as between ways of acting or living"; or "the right to do as one pleases". Criminalisation of homosexuality is also negation of 'right to liberty' simpliciter. It is a matter of choice to enjoy sexual pleasure according to nature of a person's sexuality. Basing on the same analogy of *Menaka Gandhi v. Union of India*, it can

be inferred that LIBERTY for/in sex includes 'right to perform sexual activity in different ways' because it is an integral part of liberty because it partakes with it same basic nature and characteristic of liberty. Personal liberty covers a variety of rights including 'right to sex' which goes to constitute it comprehensively. John Rawl's (2000) first principle of justice echoes: "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons."

Sexuality - Freedom of Expression:

Freedom of Expression is another inalienable right of human beings and constitutional morality under Article 19. It includes the natural and spontaneous expression of the inner bodily and mental feeling of sexual urge and its spontaneous expression through performance. There cannot be only one stereotypical way (penile-vaginal) of expressing sexual pleasure; there are different ways of expressing it like, penile-vaginal, oral, anal etc., which wholly depends on the way persons want to get pleasure and satisfaction out of process.

Curative Petition Should Cure the Legal Ailment:

In the earlier judgment, hon'ble Court had been deeply swayed by its pre-conceived notion in favour of

conventional type of sexuality (as moral and natural), a notion socially constructed by the hetero-sexuals themselves; it shows patent and overt bias against the homosexuals, their sexual orientation and practice of their sexuality. It has resulted in a reasonable apprehension of personal bias (institutional view, not the personal beliefs of the hon'ble judges). Additionally, there is also a reasonable apprehension of legal bias resulting in denial of the Right to Equality, which together adversely affects the homosexual community. Therefore, it is desirable that Supreme Court will respond to the changes which are occurring in the society, to keep the law relevant. It is also expected that as hon'ble Court will become an instrument in initiating social reform by inculcating values to honour not only the Privacy and Dignity of homosexuals, but also their Right to Equality, Liberty and Freedom of Expression, in the minds of Indians; this small step of apex Court, little by little, motivate the society in general to accommodating the homosexuals and will not treat them as criminal elements or unnatural creatures on this planet who have all potentialities to contribute to the development of this country. But this approach should not be misunderstood that it is striving to legalise the same sex marriage in India. The concept of marriage in India as institution of society should remain intact as it is being practiced today - a permanent union of a man and woman to the exclusion of all others, which gives them the status of husband and wife.

Law is Dictate of Science:



What is natural or unnatural, the biological reason of functioning of human body should be a criterion to ascertain, if law seeks to have a say on it. Similarly what is moral or immoral, same approach should be followed to determine that the law should be based on truth. If science i.e. biological science becomes the base

of law, the truth lies there. The object of building the scientific basis of law is to infuse justice, fairness, rationality and reasonableness into it. It gives also the message that in many areas law is the dictate of science i.e. biological science. This approach shows a new paradigm of jurisprudence, where law is also based on scientific truth and its principle.

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- Article 12. Universal Declaration of Human Rights (1948): No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- Article 17. International Covenant of Civil and Political Rights (1966): No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.
- Article 13.(1). Constitution of India: All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- Article 14. Constitution of India: Equality before law-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
- Article 15. Constitution of India: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- Article 19. Constitution of India: Protection of certain regarding freedom of speech etc-(a) to freedom of speech and expression.
- Article 21. Constitution of India: Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to the procedure established by law.
- Article 132. Constitution of India: Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases-An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, where in a civil, criminal or other proceeding, if the High Court certifies (under Article 134-A) that the case involves a substantial question of law as to the interpretation of this Constitution.
- Article 137. Constitution of India: Review of judgments or orders by the Supreme Court-Subject to the provisions of any law made by Parliament or any rules made under

Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Article 226.(1). Constitution of India: Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari*, or any of them (for the enforcement of any of the rights conferred by Part III and for any other purpose).

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