



SECTION 377: EVOLUTION AND RELEVANCE

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INTRODUCTION

The Love that Dares not to Speak its Name

This is one of the lines of Lord Douglas poem *Two Loves* which is purportedly interpreted as Lord Douglas's platonic relationship with Oscar Wilde. When Oscar Wilde was charged with Sodomy and Gross Indecency for his writings, he was asked to explain this line. According to him, this line means "*It is beautiful, fine and noblest form of affection. There is nothing unnatural about it. That it should be so, the world does not understand. The world mocks at it, and sometimes puts one in the pillory for it.*" Though this audacious statement did not stop him from getting punished in 1894, but now it is necessary to observe how much society has accepted this erotic desire.

This article attempts to establish that Section 377 of the IPC is not in consonance with contemporary realities by examining how the notion of homosexuality has evolved through the ages. At first, we look at mythology and literature as also historical evidences to establish that existence of homosexuality has contoured since antiquity. By doing so, we seek to challenge the proposition that it is a Western concept that developed in 19th century Europe and is alien to Indian culture. Next we look at works of sexologists like Kerthbeny, Ulrich to show that attraction towards same-sex is

not unnatural and hence penalizing homosexuality is denial of the natural and inalienable right of freedom of human emotion. Thereafter, we critically examine the changing contours of societal reaction and evolution of Section 377 in Post-Independence Era which leads us to judicial interpretation and legislative inaction in the matter due to lack of acceptance by the larger society.

HISTORY REGARDING THE ORIGIN OF HOMOSEXUALITY

ANCIENT AGE

Ancient texts like Arthashastra and Manusmriti had explicitly mentioned about homo-eroticism though in a negative sense. Verses 369 and 370 of the Manusmriti, which is the earliest source of Hindu Law, says "*If a female virgin has homosexuality to another female virgin, she should be fined 200 pennies, be made to pay double (the girl's) bride-price, and receive ten lashes. But if an adult woman does it to a female virgin, her head should be shaved immediately or two of her fingers should be cut off, and she should be made to ride on a donkey in public.*"¹ One of the reasons for this antagonism towards homosexuality was due to its non-procreativity. However, prevalence of the law against homosexuality itself substantiate that it existed during that period. Ancient Indian mythology also gives ample examples of Male-Male love.² One of

¹ Pariplab Chakraborty, *Marginalization of Homosexuals: Analyzing the Space of Dissension in the realm of Non-Normative Sexuality, Politics of Dissent*, 115

² R. K. Dasgupta, *Queer Sexuality: A Cultural Narrative of India's Historical Archive*, 3 Rupkatha



the most prominent of this is the bromance between Krishna and Arjuna in Mahabharat. Their Krishna explicitly states that Arjuna is more important to him than wives, children or kinsmen- there can be many spouses and sons but there is only one Arjuna, without whom he cannot live' Same sex love has also been justified through the concept of Rebirth.

Eg- In Somadatta's Kathasaritsagara, Somaprabha falls in love with the beautiful princess Kalingasena and attributes this love to her previous birth when he says '*female friends I am sure she and I were in previous birth*'. Another aspect of this homo-eroticism is the concept of sex change. Hindu deities are multidimensional and thus they can appear in any form. Eg- Vishnu, which is one of the primary Gods, can also take the form of a woman called Mohini. Thus despite knowing that Mohini was an incarnation of Vishnu, Shiva, another primary Hindu god, got attracted to her and their 'violent coupling' gave birth to Aiyappa. However the most famous literary text on this homo-eroticism and sexuality is Vatsyana's Kamasutra. Regarding non-normative sexual practices, the text says "*in all things connected with love, everybody should act according to the custom of the country, and his own inclination*". Thus the text talks about Auparishtaka or Mouth Congress which is one of the sexual intercourses between two eunuchs³. Thus the text says

Journal on Interdisciplinary Studies in Humanities 651, 652-655 (2011).

³Vatsayana, *The kama sutra of vatsyayana part 2 of sexual union chapter 11 of the auparishtaka or mouth congress*, 39 (2012), available at <http://fullonlinebook.com/nonfictions/the-kama-sutra-of-vatsyayana-part-2-of-sexual-union-chapter-11-of-the-auparishtaka-or-mouth-congress/fqje.html>, last seen 15/09/2018.

that sexual intercourses do not necessary always lead to procreation, but also give pleasure. Hence these mythological and literal evidences show that a non-procreative sexual practice, which is a deviance from the prescribed sexual practices, was very much present in ancient India.

BHAKTI MOVEMENT & MEDIEVAL AGE

Starting in South India in 8th century and then flourishing in North India in 15th century, the movement brought alternative paths of devotion through music and dance. Negating the orthodox boundaries of caste and creed, now the gods were not worshipped as a Supernatural Power, but as friend, lovers, spouse and child. Poets like Surdas, Mirabai and Tulsidas sang hymns for their Gods which went beyond the confines of marriage and family bonding and inadvertently legitimizing same sex love and desire. E.g., - Surdas writes "*These eyes thirst for a vision of Hari (The god Krishna) Wanting to see the lotus eyed one Grieving for him day and night*". One can easily fathom that it talks about an intimate relationship between Lord Krishna and his disciple Surdas. However the devotees tend to identify themselves with the female who desires union with the male deity.⁴ Thus in Jagganath Charitramitra, Oriya poet Jagganath Das says that Shri Chaitanya (who considered himself an reincarnation of Krishna) called him as Sakhi (female friend). Thus the works in Bhakti Movement show that Homo-eroticism was justified through hymns in praises to God where the

⁴ *Same-Sex Love in India: Readings in Indian Literature*, 62 (R Vanita & S. Kidwai 1st ed., 2001).



God becomes a central character of the devotee's family and also through the changing of sex of the devotee

With the advent of Islamic Rule in India, evidence of same sex love and homo-eroticism became more vivid and explicit. A multiple invasion of Mahmud of Ghazni (971-1030 AD) from 1000-1025 AD marked the inception of Islamic rule in India. Though the ruler was known for his valor and destruction of many temples including Somnath, another aspect of him was his sexual relationship with his slave Ayaz. There are many Ghazals attributed to their platonic relationship which not only show homo-eroticism, but also love which breaches the social and class hierarchy. One such ghazal is:

"Mahmud set a cup beside him and a decanter before him

Full of burgundy wine, as if distilled from his own heart

He filled the cup with wine like his love's ruby lips

Entangled in the curls of Ayaz, Mahmud began to lose control"⁵

However there is difference of opinion regarding their homo-eroticism. While historian Scott Kugle compares it with other types of romantic characters like Heer-Ranjha and Laila-Manju, Indrani Chatterjee is more skeptical about it since she feels that it is not a manifestation of individual sexual choice, but rather sexual exploitation and misuse of their social position. Similarly in his autobiography Babarnama, Babar talks about his intimate relationship with his male slave Baburi. However historians once again opined that Baburi was nothing but a

catamite who was enslaved during wars to fulfill the ruler's homosexual pleasures and there was no space for the slave's sexual preferences. However Mahmud-Ayaz love stories remain one of the most vivid and explicit evidence of homo-eroticism which also got mentioned in Sufi literature. Poets like Abru and Mir Taqi Mir have extensively wrote poems on homo-eroticism called *ShahidBaazi* (Love of boys). These poetries use words like "Maikhana" (tavern), 'sakhi' where the protagonist is seen drinking alcohol in an all- male gatherings and expressing sexual desire for his fellow men and lamenting for the heartbreaks. However poets like Rumi was critical about *Shahid-Baazi* since he felt that Sufism was for seeking ill-burly and not for committing sodomy. Another interesting aspect of Arabic Literature is the introduction of Lesbian poetry called Rekhti. Introduced by Sadaat Yaar Khan Rangin, here the protagonist is a female (Begumati Zabaan) who shows her love for her fellow female character. The language was also used of the courtesans and other ill-reputed women which show that even though male-male love had become a part of the mainstream society since they had greater autonomy, lesbianism was still an anathema to the public at large due to a patriarchal society. However these instances show that homo-erotic desire was quite common in ancient and medieval age and thus it is not at all an 'Occidental Concept'.

EVOLUTION OF THE LAW AND POST INDEPENDENCE DEVELOPMENT: -

The Founding Fathers of Indian State were quite ambiguous regarding homosexuality. In one of his letters, Mahatma Gandhi

⁵ Supra 2, at 657



opined that homosexuality was an ‘unnatural vice’ which has come to us from time immemorial and there is no genuine difference between Homosexual and Heterosexual lust.⁶ Even Nehru, who was quite influenced by Western Ideas, went on to say that ‘Homosexual behavior was an aberration introduced into India by the colonial masters. This is despite the fact that India’s history has had very vivid evidences of homo-eroticism and Macaulay described homosexuality as an ‘ecclesiastical offence’ while introducing Section 377 of the IPC.⁷ This is because the law is a legacy of ‘Victorian Morality’ and ‘Victorian Puritanical Movement’ when sexual restraint was at its peak and citizens had to follow ‘Moral Code of Conduct’. Due to this Puritan Control, many people born in Victorian Age were uninformed and emotionally frigid about their sexual desires. One of the prime reasons for this was the threat of population growth and concomitant scarcity of food. Thus sexual appetite was seen as a disease and men were counselled for avoiding masturbation and extramarital sexual affairs. But as Victorian era was full of contradictions, so even homosexuality was also seen as a serious ‘Mental Disorder’ though it does not indulge in procreation. Though death penalty for buggery was abolished in 1861, but the Criminal Law Amendment Act, 1885 which made Sodomy a punishable offence under ‘gross indecency’⁸. One of the most controversial

part of this act was that it penalized people even when there was no sufficient evidence for sodomy since it had given judges a wide discretion. Thus Oscar Wilde was given the most severe punishment under this act on mere suspicion of his relationship with Lord Douglas which was based on the content of the letters exchanges between the two. Similarly mathematician Allan Turing had to undergo ‘Hormone Therapy’ when he was convicted under this Act on mere presence of a male partner at his home.

For the first time Queer Movement came into the spotlight when Shakuntala Devi published her book *The World of Homosexuals* in 1977. Inspired by her own life experience of marrying a homosexual man, which eventually led to her divorce, she narrates the different approach towards homosexuality through various interviews between homosexual couples in India and Canada.⁹ The next spur took place when journalist Ashok Kavi Row explained the term ‘Gay’ in *Savvy Magazine* in the year 1986 and later started the first Gay Magazine *Bombay Dost* in 1990.¹⁰

If the decade of 1980s saw the rise of Gay Movement in India, the decade of 1990s witnessed the growth of Lesbian Movement. First Deepa Mehta’s film named ‘Fire’ released in 1996. The film narrates the story of two married women named Radha and Sita who failed to get a blissful married life due to very puritanical nature of their

⁶Supra 2, at 658

⁷Supra 1

⁸*LGBT facts about Victorian England which will blow your mind*, Pink News, available at <https://www.pinknews.co.uk/2017/09/18/8-lgbt-facts-about-victorian-england-which-will-blow-your-mind/>, last seen 15/09/2018.

⁹S. Saxena, *How Many Of These 93 Things Do You Know About India’s LGBTQ Movement?*, Youth Ki Awaaz Blog, available at <https://www.youthkiawaaz.com/2017/07/lgbtq-movement-in-india-91-facts/>, last seen 15/09/2018.

¹⁰Naisargi N. Dave, *To Render Real The Imagined*, 35 *The University of Chicago Press Journal*, 34, 35 (2010)



husbands. Devoid of matrimonial love, these two developed an immense love and affection for each other which was also a way for their emancipation from a highly patriarchal and conservative society. One of the first film in this genre, it faced a massive protest by Right-Wing Hindu political parties and groups who called it 'immoral' and 'against India's culture and tradition'. However the movement got a major fillip through GeetiThandani who formed the Sangini help line and support group for Lesbians. Through this helpline Lesbians from various parts of the country can communicate with one another by writing letters which remain confidential to the NGO.

One of the most remarkable inferences which came out through this NGO is that the meaning of the term 'Lesbian' is very different from what it means in the West. Letters reveal that even Married Women who are confined to their household chores are also actively conversing through letters. For most of them it is not a sexual desire for someone of same sex, but a way of emancipation from their restrictive monotonous life. That is why in the initial phase of the movement, they used terms like 'single-woman' or phrase such as 'woman who love woman' instead of calling themselves 'Lesbian' outrightly. It was also due to the fear of social taboo existing in the society against 'Lesbianism' that people were reluctant to call themselves Lesbians. For example, in 1987, two police officers named Urmila Srivastava and LeelaNamdeo decided to marry each other though it was still unlawful in India. However this very idea of marriage had led to their dismissal from their service. A women centric NGO

named Jagori decided to fight for them which was interestingly not in the name of Lesbianism but in the name of Feminism. This was the trend of the decades of 1980 to late 1990s to relate it to the more acceptable Feminist's movement and women's empowerment. This was also because women calling themselves 'Lesbians' had to face a 'double discrimination' since choosing not to marry and being independent was being seen as a bad omen in the society. However this trend was broken in 1999 when women started openly calling themselves as 'Lesbians' and, like men' they also started attending Lesbian Night Parties. The first Pride March was conducted in Kolkata in 1999 when both men and women took part in it.

But despite this developments, the mainstream society has never accepted it and one of the fundamental reasons is because the abysmal notion of 'Privacy' among the Citizenry.¹¹ Indian society gives too little place to one's private life and individual autonomy because We inherit the Shame Culture where one's Public Image matters a lot to exist in the society. That is why in most of the times; a person has to relinquish his/her personal desire if it

¹¹ A Marathi Professor named Prof. Siras was allegedly having consensual sex with a rickshawallah in his own room when some miscreants forcibly entered his room and made video of the entire incident. This was circulated through media which led to his suspension from the University. Though the Allahabad HC ruled in his favor (this incident happened before Suresh Kumar Koushal Case) but AMU, being a very conservative University, would have never accepted him and he later had to commit suicide. It is also alleged that he was actually murdered. However his death is still considered a mystery.



violates the general norms of the society because of the fear of being shamed and ostracized. It is interesting that even UK has abolished Sodomy Law in 2010. Recently USA has abolished it in 2014 through a plebiscite and countries like Ireland, Iceland and Belgium have had Gay leaders as Head of the State. However in India, the lack of social consciousness is evident and that is why the Parliament and the Judiciary have to play a greater role in it.

RELEVANT QUESTIONS RAISED DURING THE EVOLUTION OF LAW

1. HOMOSEXUALITY: WESTERN CONCEPT?

Whenever the debate regarding decriminalization of homosexuality (Section 377 of IPC) starts, Cultural chauvinists argue that it is a 'smuggled' idea and has been imported from the West.¹² They go to an extent to announce that the Indian Constitution is averse to homosexuality. However the fact is neither it is a Western idea nor Indian Constitution is exclusively for the heterosexuals. Homophobia is simply the part of Victorian Morality' legacy which was brought by Thomas Macaulay when he made the Indian Penal Code in 1860. Indian historical evidences show that the society had the idea of homo-eroticism since the age of Dharmashastras which were composed in 1250 BC and it became more explicit during the medieval ages.

¹²Section 377, Bigotry and Why the Constitution Is Neither Heterosexual or Homosexual, THE WIRE,, available at <https://thewire.in/gender/section-377-bigotry-constitution-heterosexual-or-homosexual>, last seen 15/09/2018.

2. HOMOSEXUALITY: WESTERN CONCEPT?

While describing homosexuality, the words 'against the Order of Nature' has been used in Section 377 of Indian Penal Code. However sexologists like Karl Maria Kertbeny and Karl Heinrich Ulrich have proved that homosexuality is not at all 'unnatural'. In his writings, Ulrich emphasized on the existence of a 'Third Sex' whose nature is inborn. He assumed as a rule that human being either born with male or female sexual organs and they get attracted to person having opposite sexual organs. However there can be exception to this rule where the direction of sexual attraction is determined by a person's psyche and he referred to them as 'Third Sex'¹³. Thus he used the term 'Urnig' for a male bodied person with a female psyche who gets attracted to male and not woman (gay) whereas 'Urnigin' for a female bodied person with a male psyche who gets attracted to female.¹⁴ Similarly Kertbeny became the first person to use the word 'Homosexuals' when he wrote a letter to Ulrich. Unlike Ulrich, who considered himself 'Third Sex', Kertbeny was

¹³ H. Kennedy, *Karl Heinrich Ulrichs First Theorist of Homosexuality*, 26, 32-33 in *Science and Homosexualities*, Vernon Rosario, 1st ed., 1997), available at <http://hubertkennedy.angelfire.com/FirstTheorist.pdf>, last seen 15/09/2018.

¹⁴J. Burroway, *Today in History: the Love That Dares Not Speak Its Name Gets a Name*, Box Turtle Bulletin Blog, available at <http://www.boxturtlebulletin.com/tag/karl-maria-kertbeny>, last seen 15/09/2018.



ambiguous about his sexuality and called himself 'Normally Sexed' while also appreciating male-male love. The most significant contribution of Kertbeny was criticizing the 'Medical Model' of homosexuality where it was considered a disease and he tried to prove that it was quite natural. As a gay right activist his arguments against Sodomy laws were remarkable. He said

*"Legislation is not concerned whether this inclination is innate or not, legislation is only interested in the personal and social dangers associated with it ... Therefore we would not win anything by proving innateness beyond a shadow of doubt. Instead we should convince our opponents — with precisely the same legal notions used by them — that they do not have anything at all to do with this inclination, be it innate or intentional, since the state does not have the right to intervene in anything that occurs between two consenting persons, older than fourteen, which does not affect the public sphere, nor the rights of a third party."*¹⁵

Ironically this innate argument of homosexuality was propounded by Richard Von Krafft Ebbing in his highly influential book '*Psychopathia Sexualis*'. Being himself a therapist, Ebbing described various types of sexuality through the case studies of his patients having sexual deviations. In his degeneration theory he said that homoeroticism was an illness since it did not have the ability to procreate, so it was a biological deformity. Since he believed that it was an innate, so he felt that rather than

¹⁵ Kertbeny, *Hormones, Brains and Behaviour*, 152 (3rd ed., 2016).

criminalizing homosexuality, it could be cure through pathology.¹⁶ However he also believed that sexual attraction (libido) was natural and inevitable whose abstinence would indeed lead to serious health hazard. But he also argued that since one's sexual preference also plays a constructive role in social life, thus too much non-procreative sex would be detrimental to the society at large. In his later works, he defined sexuality as 'pleasure' rather than a 'mean of procreation'. Thus he concluded that apart from homosexual and heterosexual, there were bisexuals who get attracted to both and men. Thus at last he concluded that homosexuality was analogous to heterosexuality and thus it was not a disease or innate which had to be treated.¹⁷ This tectonic shift of understanding sexuality with the perspective of psychological perversion and affection rather than an orthodox moral and social view which had to be curbed, has had led to legislative reforms. Thus it led to the 'Secularization of Sexuality' where one no longer confesses his sexual desire to a priest, but to a doctor or psychologist¹⁸.

¹⁶He was one of the first signatories of Hirschfield's Petition for abolition of Section 175 of German Legal Code which criminalized Homosexuality

¹⁷H. oosterhuis, *Sexual Modernity in the Works of Richard von Krafft-Ebing and Albert Moll*, 56 *Cambridge Journals of Medical History*, 133, 143 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3381524/>, last seen 15/09/2018

¹⁸ Gutting, Gary and Oksala, Johanna, "Michel Foucault", *The Stanford Encyclopedia of Philosophy* (summer 2018 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/entries/foucault/#HistModeSexu>, last seen 15/09/2018.



However, it is also widely believed that 'Sexuality' is a 'Social Construct' and heterosexuality is imposed on an individual by a Homophobic society through various legislative and political means.¹⁹ But in his book '*History of Sexuality*', Foucault argues that this 'Repressive Hypothesis' of sexuality since the Victorian Era had led to a new medico-juridical discourse and a new identity for the homosexuals.²⁰ This 'reversal discourse' from ostracism to identification has led to various Gay Liberation Movement and LGBTQ Movement in the 20th century in the West. Thus the West does not see homosexuality as a 'Sexual Perversion' or innate which needs to be treated but more as a sexual preference.

LEGAL ASPECT OF SECTION 377

Section 377 of IPC which criminalizes homosexuality and bestiality runs as follows *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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.* Now if it were to believe that words like 'against the Order of Nature' defines 'Unnatural Sex', then it becomes all the more ambiguous since it has not been defined anywhere on which basis it has been called 'unnatural'. Modern science and biologists have proved that there is

¹⁹ Compulsory Heterosexuality- Introduced by Adrienne Rich it implies that Heterosexuality is not so much the natural form of sexual preference, but it is imposed on individuals by social constraints.

²⁰M. Foucault, *History of Sexuality*, 51 (1st American ed., 1978).

nothing unnatural about homosexuality. However the notion of homosexuality being 'Unnatural' is itself an archaic concept which derives its strength from religion and morality. Earlier sexual intercourses were seen as a 'cycle of reproduction' and that is why heterosexuality was practiced. Based on this same argument, the State derived its power to control sexual intercourses in order to curb population growth. But criminalizing homosexuality becomes all the more absurd since it does not lead to any population growth nor the modern State is governed by religious laws. With the increasing notion of privacy and individual autonomy, the logic to criminalize homosexuality becomes all the more weak since sexual intercourses are no longer seen only as means of reproduction but also a mean for pleasure. The sheer increasing the number of cases and publications on homosexuality also buttress the fact that it is no longer seen as 'Unnatural' by the general society.

VIEWS ON THE DECISION TAKEN BEFORE THE 2018 DECISION

NAZ FOUNDATION VERDICT: INFRINGEMENT OF PRIVACY

In the landmark judgment of **Naz Foundation v State of Delhi**²¹, the DELHI High Court ruled that Section 377 of IPC is Unconstitutional since it violates Article 14 (Right to Equality before Law) 15 (Protection from discrimination on the basis of Religion, Race, judgment says that Right to Sexual- Orientation falls under Protection from discrimination on the basis of Sex and

²¹ Naz Foundation v State of Delhi, 160 Delhi Law Times 277, (Delhi High Court, 02/07/2009)



also Right to Life And Personal Liberty.²² Thus the State has no right to control sexual intercourses between two adults if there is a free consent. It is to be noted that at that time Right to Privacy was not included under Article 21 as Fundamental Right. However after interpreting the previous cases on Right to Privacy like *Kharak Singh vs State of UP*²³ and *District Registrar & Collector, Hyderabad v. Canara Bank*²⁴, the Court ruled that the idea of Right to Privacy is implied in Article 21 since privacy is a sine-qua-non for a person's individual autonomy and thus it needs to be protected²⁵. On the issue of Morality, the Court makes a very interesting distinction between Public Morality and Constitutional Morality where the former derives from the social acceptability; the later derives from Constitutional Values. Then the Court held that while enshrining reasonable restrictions on Fundamental Rights, it needs to be satisfied that the Act violates Constitutional Morality and not any Public or Religious Morality. Since Our Constitution envisages an 'Inclusive Society' and also gives protection from discrimination on the basis of Sex, restrictions on homosexuality is not justified and thus Section 377 is

unconstitutional unless it is coercive and lacks free consent.

SURESH KOUSHAL VERDICT: A REGRESSIVE DECISION

After the landmark verdict, PIL was filed in the Apex Court against the judgment which overruled the judgment and once again held that Section 377 of IPC is Constitutional since it does not violate any fundamental Right since the Section does not discriminate against any particular gender or community. However it failed to recognize the LGBT as a 'Community' who are discriminated by this law for their sexual preferences and orientation. Further negating all the arguments of Right to Privacy and 'inclusive society', the Court held that Section 377 is a pre-constitutional law and had there been any violation of fundamental rights then the Parliament would have amended it.²⁶ The Court showed reluctance in reviewing the Act since it felt that legislating is the task of the Parliament and not the Judiciary which is concerned with interpreting and adjudicating disputes. However this reasoning is quite absurd because India, being a Common Law Country, the Court has greater discretion of Judicial Review and nullifying laws if it violates the Fundamental Rights.. The judges also relied on the *de Minimus Rule* that the issue is a trivial matter since only 200 cases has been reported on the concerned section since the inception of the law and the Court can refuse to adjudicate on it. This reasoning is quite horrifying since

²²Right to Privacy Judgment Makes Section 377 Very Hard to Defend, Says Judge Who Read It Down, THE WIRE, available at <https://thewire.in/gender/ap-shah-377-right-to-privacy>, last seen 15/09/2018

²³ Kharak Singh v State of UP, (1964) 2 SCR 332.

²⁴ District Registrar & Collector, Hyderabad v. Canara Bank, Civil Appeal no. 6350-6374 of 1997 (Supreme Court, 01/11/2004).

²⁵ Naz Foundation Vs. Govt. of NCT of Delhi: A Critical Analysis, linkedin Pulse, available at <https://www.linkedin.com/pulse/naz-foundation-vs-govt-nct-delhi-critical-analysis-tripathi>, last seen 15/09/2018

²⁶ Doctrine of Eclipse: Any Pre-Constitutional Law, which is inconsistent with the Part 3 of the Constitution, becomes inoperative from the date of the commencement of the Constitution.



one's sexual preferences and Right to Sexual Orientation can be anything but 'trivial matter'. At last, it also rejected the Delhi HC'S doctrine of Severability to sever the portion of consensual same-sexual intercourse from the Section and thus penalizing Bestiality and non-consensual homosexuality or sexuality with a minor, holding that there is no part that can be severed without affecting the whole section.

PUTTASWAMY JUDGMENT: A RAY OF HOPE

After years of serious contentions and debates, the Apex Court finally recognized Right To Privacy as one of the Fundamental Rights under Article 21 of the Constitution. Though the case was initiated challenging the validity of Aadhar Project, which aims to build a personal identity database of every citizen based on their biometric information, on the ground that it violates a person's Right to Privacy, the judgment has far reaching consequences for the queer community. In the Section 'Disordant Note', Justice Chandrachud severely criticized the Koushal Judgment and held that one's right to sexual-orientation is within a person's right to life since it is intrinsically related to one's identity and facing discrimination based on this can have 'chilling effect' on the fundamental rights. The Court made the following observation
"Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental

*rights guaranteed by Articles 14, 15 and 21 of the Constitution"*²⁷

It also criticized the approach of the judges calling LGBTQ Rights as 'so-called'rights and held that their rights are genuine rights like any other human rights. Even though, the Court did not nullify Section 377, but it had saked the Parliament to adopt the Yogyakarta Principles where it says that the State shall repeal any law which criminalizes homosexuality between two adult persons. Following this land mark judgment, a Curative Petition has been filed against the Koushal Judgment by a Constitutional Bench.

LATEST AMENDMENT IN THE FIELD OF HOMOSEXUALITY: DECRIMINILIZATION OF SECTION 377

The recent judgement by CJI Dipak Mishra in the case of **Navjet Singh Johar & Ors v Union of India**²⁸ has decimalizes the offence made under section 377 IPC and held that the free consensual sexual activity between the LGBT persons of the same sex in private is against the section 14, 15, 19 and 21 of the Indian Constitution and also said that this judgement will prevail over all the pending cases charged under the same offence. The Court overruled the judgement of the Suresh Kumar Koushal & Ors V Naz

²⁷Justice K. S. Puttaswamy (Retd.) and Anr. v Union Of India And Ors., Writ petition (civil) no. 494 of 2012 (Supreme Court, 24/08/2017).

²⁸ Navjet Singh Johar & Ors v Union of India, W. P. (Cr.) No. 76 of 2016, (Supreme Court, 06/09/2018).



Foundation & Ors²⁹ and held that the choice of an LGBT person to have a consensual sexual activity with another same sex in private is their right of having free choice, a choice of their sexual activity and judicial determination.

CONCLUSION: THE WAY AHEAD

So as we could see that despite having a vivid history of homo-eroticism, it has never been accepted by the mainstream society and homosexuals have always been marginalized. Similarly, we also saw how the sexologists have proved that homosexuality is not an 'Unnatural Sex' and it has been widely accepted by Western societies like UK which eventually brought Section 377 of the IPC. However the acceptance of homosexuality by the 'traditionalist' Indian society lies deep in the notion of privacy. As Shankuntala Devi said *'It is not the individual whose sexual relations depart from the social custom are immoral- but those are immoral who would penalize him for being different,* so we can just hope that this time the legislatures and the judiciary could be a harbinger for a social change by making love and attraction gender-neutral. But the recent Supreme Court Judgement has de-criminalized the act of sexual activity between the same sexes. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.

²⁹ Suresh Kumar Koushal & Ors V Naz Foundation & Ors, Civil Appeal No. 10972 OF 2013, (Supreme Court, 11/12/2013).