

SEXUAL PREFERENCE - A FUNDAMENTAL RIGHT.

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The Time has Come, the Walrus said, to Talk of Many things.....

Should condoms be made available to the inmates of Tihar? The question confronting the Delhi High Court in the recent public interest petition has raised complex issues. Issues concerning AIDS, public health, rights of prisoners, and closetted amidst these, a constitutional challenge to the penal provision on homosexuality. A subject hitherto under wraps and unacknowledged, is being forced into public and legal fora in the shadow of AIDS.

Although homosexuality per se is not a crime in India, the act of sodomy is. By virtue of Section 377 of the Indian Penal Code of 1860, even consensual and private adult homosexual sodomy is a crime; Evidently a serious offence, punishable by a maximum sentence of life imprisonment if the Court so desires. The initial compulsion for including this provision in the Code in 1860 was to enforce the colonial state's interpretation of Christian morality. That objective was made redundant in 1967 (if not earlier in 1947) when adult consensual homosexual acts were de-criminalised in Britain, and gradually in most Commonwealth and Western countries.

The treatment of sodomy cases by the Courts makes this penal provision appear deceptively benign. With less than 10 reported cases of the High Courts and the Supreme Court in the last fifty years, and with sentences varying between seven days to a year, the sodomy law may seem like a dead letter. The impact of the law, however, is far deeper and more serious than what the few reported cases reveal.

By labelling sodomy as a criminal act the law reinforces the social prejudices attached to homosexuality. The fact that homosexuality or desire for a person of the same sex is not a crime is of little significance when the sexual conduct at the heart of same-sex relationships is criminalised. It strengthens the popular negative notion of homosexuality; Social and legal sanctions combine to deny dignity and respect to persons of homosexual orientation.

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The social context in which the law operates is material to the kind of persecution faced by gay people. In Indian society, sexuality is allowed legitimate expression primarily within the parameters of a heterosexual and patriarchally defined institution of marriage. One way of ensuring conformity is to discourage and stigmatise any conduct deviant to the established order. The social hostility and illegitimacy attached to homosexuality is not capable of 'wiping' it out of existence, for that cannot be. Same sex relationships have existed in different cultures at different points in time, at times celebrated or tolerated and at other times stigmatised. Just as its celebration did not convert the population en masse to homosexuality, so also its suppression has not made it disappear. What it has done, however, is forced this minority community underground. Burdening them with having to seek relationships surreptitiously and 'invisibly' in public parks and streets often making short term relationships the only viable option.

A 1991 report on homosexuality in India, titled 'Less Than Gay' documents innumerable personal accounts of harrassment, intimidation and assault that gay people are subjected to by the police in public places. The sodomy law justifies surveillance in areas where gay persons congregate, as well as their persecution - not because the 'offence' of sodomy is committed but because sodomy 'might' result. As a consequence, persons exhibiting homosexual inclination become sitting ducks for the police. In such cases other available laws are legitimately deployed by the police to facilitate control. Therefore public nuisance and vagarancy laws are almost always used alongwith Sec. 377 IPC by the law enforcers. Exercising of this legally sanctioned power against 'suspected sodomists' makes the act of sodomy itself irrelevant.

The social stigma and the legal criminality combine together to stifle any resistance to the humiliation, extortion and sexual assaults inflicted regularly upon gay people. The fear of discovery and the dread of criminal prosecution effectively silences and disempowers them from claiming even basic human rights. This disempowerment is evident in the denial of safe sex education and condoms to persons in situations of captivity, as in Tihar, even in the backdrop of AIDS.

Where does this provision stand in relation to the fundamental rights guaranteed by our Constitution. It is worth exploring the compatibility of a legal provision enacted in the year 1860 with the notions of dignity, liberty and equality given to all citizens under the 1950 Constitution. Inevitably this must begin by translating the debate on homosexuality to the issue of fundamental rights - the right to life and personal liberty guaranteed under Article 21 as well as the right to equality under Article 14 of the Constitution.

The right to life has been interpreted by the Courts time and again to "include all those aspects that make life meaningful, complete and worth living", thereby recognising that life must be more than mere animal existence. Sexuality and sexual preference is integral to human beings, perhaps as integral as the right to breathe, the right to rear a family and to choose friends. The personal expression of intimacy in adult human relationships is essential to human dignity and therefore an integral component of the right to life. Should such a right be deemed axiomatic for persons of heterosexual orientation but be labelled criminal for those with homosexual orientation? Does the Constitution anywhere envisage circumscribing fundamental rights of persons on the ground that they are in minority or that their choices and preference are different from that of the majority population?

Similarly, personal liberty too has been construed by the Courts in its widest possible amplitude. It has been interpreted in the past to include the right to travel abroad, the right to return to India, the right to privacy, to socialise with family and friends, to be given a speedy trial, depending on the circumstances of each case. Assuming that sexuality is an integral part of a human being, then the right to sexual preference should logically be an incidence of personal liberty. State regulation of sexual preference in such a situation would no doubt be an infringement of an individual's privacy. Although consensual heterosexual sodomy is also criminalised by Sec. 377 of the Penal Code, the fact is that the privacy and social legitimacy accorded to different - sex relationships closes the possibility of state interference. The absence of any such prosecution is itself telling.

The Constitutional mandate of equality is clearly denied by the sodomy law to some persons on the basis of their sexual orientation. While heterosexuality is accorded sanctity and recognition in law (within the institution of marriage and outside of it), homosexuality suffers adverse discrimination. Surely, as expressions of sexuality both are linked to individual preference and desire. What then could be the justification for this differential treatment in law. It needs to be examined whether a law affirming intolerance towards a sexual preference different from that of the majority^{can} survive the test of our Constitutional guarantees.

Democratic norms demand an inclusive and participatory society. Law can facilitate participation of marginalised and oppressed groups in public life by extending the protection of rights to them. Instead, the sodomy law has disabled and excluded persons of homosexual orientation from realising their fundamental rights. In this context, the recent challenge to Sec. 377 can only be described as significant. Regardless of its judicial outcome, it will succeed in generating debate and placing the subject 'visibly' onto public agenda.

Dated: June 1994
New Delhi