



Crime and rhetorical abuses against sexual minorities: A dinner table discussion in India

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Abstract: Sexual minorities generally refers to those groups of people whose sexual orientation and gender identity is not within relatively socially acceptable limits. It includes a lesbian, gay, bisexual and transgender who mostly incorporate the kink of same-sex activity. They face horrendous cruelties and often meet refusal, obstinacy from state and law enforcement agencies. The anti-gay discrimination or prejudice by heterosexual people has reduced sexual minorities to second class citizens. Criminalization of Section 377 by Supreme Court gives police more leeway in using law to harass them. Violence, torture, assault, criminal intimidation and other offences by police is pretty endemic. This leads LGBT people to face high levels of depression and reduce their self-esteem. The present topic throws light how violence and rhetorical abuse are inflicted on sexual minorities and how society looks at them with disgust and values them as less than human beings not worthy of same respect as normal individuals.

Key Words: Homophobic, Transphobic, Rhetorical, Obstinacy.

Introduction:

India as a country is deeply conservative and tends to be bound by traditions, so human sexuality has never been a part of public discourse in India. Criminalization of homosexuality in India, repressive legal contexts, pervasive social stigma and police atrocities on LGBT people makes them even more vulnerable. There is no law in India to provide a remedy to sexual minorities. Currently the sexual violence laws in India recognize only women as victims and men as perpetrators there are instances where perpetrators walk scot-free after assaulting transgenders or gay men. The legal discrimination against sexual minority operates through criminal law system. Transgenders in particular are treated as criminal community and deprived of protection and special treatment accorded to other oppressed classes e.g. SC/ST. violence and offences can be two types 1.offence inflicted on sexual minorities under

Indian penal code and 2. Offences inflicted on sexual minorities in criminal major and minor Act and other special statutes.

Offences inflicted on LGBT people under Indian penal Code:

1. Unnatural offences: Section 377

Legal discrimination against sexual minorities takes many forms the most notorious being Section 377 of IPC a British Colonial legislation which criminalizes homosexual behavior and continue to be in statute books. The Section says whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of either description for a term which may extend to ten years and also liable to fine. The explanation appended to the section explains that penetration is sufficient to constitute the carnal intercourse necessary to the offence described under the Section. The section does not distinguish between consensual and



coercive sex. The cases of abuse and voluntary sex between two consenting adults can be prosecuted under the provision.

This Section prohibits certain sexual acts which both homosexual and heterosexual married and unmarried people might engage in, however this Section is almost used to target sexual minority populations as they are erroneously seen as the only ones to perform carnal intercourse against the order of nature. In fact Section 377 exists only to be used by police to victimize gay and bisexual men who they catch in public areas. Cases under this rarely come to courts. Police have no clear policy on sexual minorities and the police constables misuse Section 377 to extort and harass sexual minorities even it is used to intimidate lesbian women who have run away together or if they make their relationship known. So Section 377 the archaic law stands even today though it was read down by Delhi High court Judgment but Supreme Court in Suresh Kumar Koushal's case dismissed it to be irrelevant and it turned the clock back and was being viewed in India globally as a retrograde step opening possibility of police harassment irrespective of age and consent.

2. Extortion Section 383:

Since gay, bisexual men have no acceptance and no social space in society they become victims of extortion, physical, verbal and sexual abuse. Under Section 383 of IPC. In public places they have been blackmailed not only by police but also by goondas and hustlers who take advantage of their vulnerability and stigmatized existence to freely hound and rob them. Police often stop gay and bisexual men in the cruising areas and threaten and take their names and address and extort money from them.

FIR are never been recorded and there is hardly any police records.

3. Theft Section 379:

Kothis and transgenders more often than not become victims of suspicion of theft under Section 379 in hands of police. In this event they are badly beaten up and their money taken up and goods seized and their address taken with threats to inform their families and embarrass them, they are taken to cruising areas with their hands handcuffed and become victims of illegal detention, verbal abuse and police humiliation.

4. Murder Section 302:

Every arm of the state continue to oppress them. Section 302 of IPC is used to target transgender and hijras in the same manner as men having sex with men. There is a long list of transgender being killed unlawfully. It is claimed that around the world one transgender is murdered after every 3 days and in India it happens more frequently. Sonia masi Aka Imran Ajmeri who once emerged as the face of transgender community in Gujarat was shot dead by unidentified assailants..

5. Public nuisance and obscenity: section 268 & 290 IPC

Public nuisance and obscenity continue to drive LGBT people underground impacting their ability to assess HIV related service. Public nuisance under Section 268 is a species of criminal offence and it affects public health, safety, convenience, decency, morals and spread of infection of diseases. LGBT community are accused of creating annoyance, injury and discomfort. Since same-sex activity is not authorized by law their activities amount to public nuisance under Section 290 of IPC and being booked and imprisoned.



6. Obscenity in public spaces: Section 292 & 294

Gaymen and transgenders have been targeted by police for exhibiting obscenity in public. The Indian penal code has not defined the word "obscene" yet, literally it can be said that indecent exposure of a person is an obscene act. Similarly sexual intercourse in public space sale of obscene books doing obscene acts and songs falls within the ambit of Section 292 & 294 respectively. The legal provisions relating to attract and encouraging obscenity in public places helps police to take the side of law to make sure that the public spaces were not misused and make them guilty of illegal detention.

7. Criminal intimidation: Section 503 & 506

Sexual minorities under section 503 have become victims of criminal intimidation and thereby received threats and injury to their reputation property by goonads, family members and police high handedness without being prosecuted for such offence. Police atrocities on sexual minorities have increased alarmingly in recent times. They intimidate them in parks, public space without being penalized under Section 506 of IPC. Due to social stigma hardly a FIR is being registered or a complaint being filed and at times police men are bribed to drop prosecutions which adds another insult to their injury.

8. Assault and criminal force on LGBT community: Section 350, 351 & 358

Sexual assault is a serious concern for members of LGBT/queer community as they are for all people. It is a crime and tort and may result in criminal and civil liability. As report suggests 30% of lesbians have reported of

having experienced sexual assault by another women not necessarily the intimate partner. Over 11% of gay men and lesbian youths report being physically attacked by family members also. LGBT persons face additional challenges in healing from childhood sexual assault due to myths that childhood may have caused them to be a gay. Queer persons may be sexually assaulted as a part of hate crimes – A study of gay, lesbian and bisexual showed that 41% of them have reported being a victim of hate crimes at the age of sixteen.

9. Wrongful restraint: Section 339, 341

In India physical and sexual violence against sexual minorities by police, goondas and families are entrenched and evident in several studies documenting the same. Homosexual persons are subject to criminal law and also become victims of wrongful restraint. There have been documented cases of sexual minorities being wrongfully restrained but perpetrators escape penal liability under Section 341 as FIR are hardly being registered by police and they also keep no documentary evidence. There have been instances where hijras are beaten up by police and false charges under Section 341 are brought against them.

10. Wrongful confinement: Section 340, 342

The stigmatized identity of sexual minorities makes them victims of wrongful confinement. The structure of criminal law in India thus acts along other societal structures to make them destitutes of legal personality. The offence of wrongful confinement under Section 340 is similar to tort of false imprisonment here the victim is not allowed to proceed in any direction



beyond the circumscribing limit. There are many documented cases of sexual minorities being wrongfully confined but the perpetrators escape liability under Section 342 for police inaction and hostile attitude of state agencies towards them.

11. Abatement and commission of suicides by lesbians: Section 306, 309

Lesbian couples feel socially neglected and looked down upon by state and society and commit suicides under Section 309 of IPC for struggling against each other against all odds to marry each other in an inter religious marriage. Sahayatria a lesbian women collective in Kerala has documented 24 cases of lesbian suicides in Kerala during 1996 to 2004. They have been targeted and experience abuses in family life. Lesbians in India could still be described as little more than shadows largely silenced and are not considered to be legitimate part of mainstream society. Even there are many cases of abatement of suicide cases under section 306 which is brushed under the carpet.

12. Sexual minorities had no recourse to rape law: Section 375, 376

The offence of rape is the most hated crimes against basic human rights and it is violative of victims most cherished fundamental rights. The dictionary meaning of rape is a forceful ravishing of a women and as the definition of Section 375 stands it did not recognize males as potential victims. But there are many documented cases of lesbian, gaymen and transgenders being raped, but majority of such cases goes unreported.

As report suggests the majority of male on male rapes were not perpetrated by homosexual men rather heterosexual men. Pervasive homophobia in society

causes many victims of male on male rapes to remain silent on it because of fear and shame associated with being labeled as homosexual. So effeminate boys masculine girls, gays, bisexuals and transgender adults faced disproportionate risks of rape from adult men who were not homosexual rather heterosexuals and bisexuals. In a society that celebrates musculanity it becomes difficult for gay men to report rape cases as they don't have any platform of speakout, lesbians also become victims of patriarchal power and victims are left to battle their terrors alone. Voices of gay victims remained unheard of as it was inflicted just to shame them and insult them for lack of musculanity. Transgenders became victims of rape and faced the fear of humiliation by society and unwarranted adverse publicity.

India's criminal law (Amendment Act 2013 threw LGBT out and was made gender specific to victims and no longer gender neutral)

The new Amendment is a slap to all those who believed that it was made more inclusive for various forms of sexual assault faced by LGBT people specially transgenders and kothis moving beyond the narrow definition of rape. So today rape laws no longer remains gender neutral and only a man can commit the offence of rape on a women which throws gay men and transgenders under the bars.

13. Acid Attacks on transgenders: Section 326 A

There have been documented cases of acid bulb attacks on transgenders and their sexualities also become a ground for being made victims.

14. Legality of Nirvana (Sex-reassignment surgery for transgenders)



The Indian legal system is silent on sex-change operations and is not legal. Nirvana or castration as such is not mentioned in IPC but it is covered under various Sections mentioned in IPC. The closest term mentioned is emasculation under section 320.

Grievous hurt: Section 320, 325

According to Section 320 of IPC emasculating or castrating someone is causing him grievous hurt for which one can be punished under Section 325. Thus technically speaking even if one voluntarily (with consent) chooses to be emasculated then the doctors are made liable for punishment and the person undergoing emasculation could also be punished for abetting such offence under Section 320. So doctors do not prefer such type of operation.

Voluntary castration by quacks violate parameters of Section 320, 322, 326, 87, 88 and 109

In India there is no specific guidelines for sex-reassignment surgery (SRS) only free SRS is performed in select government hospitals. Majority of hijras/transgenders could not afford to pay private plastic surgeons who charge heavily. Thus they resort to unqualified medical practitioners for undergoing emasculation getting emasculated by Thai Amma as it is done in Tamil Nadu which seems to be rare now. So due to bad surgical procedures adopted by unqualified medical practitioners (quacks) many hijras develop post operative complications and urological problems.

So here Section 87 and 88 protects surgeons and their surgical operations but not the quacks as they cannot be said to act in good faith which is a requisite of Section 87 & 88. Also the consent clause which applies to surgeons do not apply to quacks as the purpose of

operation is not to save life. Section 87 of IPC proceeds on the basis of volenti non fit injuria, he who consents cannot complain. This rule is founded on two propositions viz. 1. That every person is the best judge of his own interest and 2. That no man will consent to what he thinks is harmful to him. So it is to be remembered that Section 87 does not permit a man to give his consent to anything likely to cause his own death or grievous hurt. Under Section 88 of IPC an act is not an offence if it is not intended or known to be likely to cause any harm person for whose benefit it is done in good faith (express or implied) consent to suffer it.

As castration is not legal in India qualified surgeons don't perform this surgery unless it is mandated due to medical reasons. Hence eunuchs resort to quacks who act in violation of section 109, 88, 320,, 322 and 326 of IPC and inflict penal liability. All such surgeries are done in a clandestine manner and nobody comes to know it though quacks always remain at the receiving end.

15. Exposure and abandonment of a child under twelve years by parents or person having care of it Section 317

Under Section 317 of IPC the birth of an eunuch child (hijra) cannot be avoided. Their birth is a deprivation of natural reproduction process but they are discarded as undesirable by unfortunate parents who fail to discharge their duties. Such parents need to be properly educated and suitable deterrents must be implemented to prevent them from abandoning an eunuch child. It is an offence to abandon a child under the age of twelve years and punishable with rigorous imprisonment of seven years. However this is never invoked and mere publicity of its existence will cause



several erring parents to mend their ways. In case of regular normal children if this happens it is necessary for someone to lodge a complaint in order to enforce the relevant law but children born with ambiguous genitalia are abandoned by parents without being persecuted.

Offences inflicted on LGBT people in other statutes:

1. Hate crimes on sexual minorities:

Hate crimes are crimes that are targeted at persons because of hostility, prejudice to that person either for disability, race, ethnicity, religious beliefs, sexual orientation and transgender identity. Hate crimes against LGBT persons can take the form of killing on individuals. Gay pride marches, festivals or attacks directed at LGBT bars or in LGBT community premises is rampant. Hate crimes is an offence motivated by homophobia and transphobia. Hate crimes and hate motivated incidents occur against all persons all over the world and India is no exception. It may involve physical assault, verbal abuse, damage to property, insults etc.

2. The Narcotics Drugs and Psychotropic Substances Act 1985 gives wide ranging powers to arrest transgenders:

People such as transgenders who indulge in some form of intoxication and use of drugs face tremendous stigma from legal and health institutions and society as a whole. The NDPS Act amended in 1989 provides most stringent penal framework for activities relating to narcotics drugs and psychotropic substance. The Act bestows special powers to arrest sex workers indulged in drug abuses.

3. Being a gay under Army Act 1950, AIR Force Act 1950 and Navy Act 1957 is a crime

Army act 1950, Air Force Act 1950 and Navy Act 1957 all have their own provisions under which homosexuality is considered illegal. Under Section 45 and 46 (c) of Army Act 1950 homosexuality is considered an unnatural conduct and makes it punishable offence and imposes maximum punishment of seven years imprisonment. Section 45 and 46 (a) of Air Force Act 1950 also imposes same penalty because being a gay is still a crime. The Navy Act 1957 reads somewhat differently but has same effect with different prescribed punishment. Under Section 53 of Naval Act anyone who is guilty of uncleanness or of any indecent act shall be punished for two years punishment. Under Section 54 officers guilty of any conduct unbecoming the character of officer shall be punished for a term which may extend to two years or such person herein mentioned.

4. The Criminal Tribes Act 1871 also treated transgenders as criminals:

The monstrous provision of Criminal Tribes Act 1871 constituted a negation of civil liberty and eunuchs were considered criminal and were marginalized in all discourses and brutal violence were inflicted on them. In 1897 the Act was amended and eunuch was deemed to include all members of male sex who admit themselves or in medical examination clearly appear to be impotent. Even any eunuch who appear to have cross dressed or ornamented like a woman in public street and danced and played music or took part in public exhibition in public street was arrested without warrant and punished with two years imprisonment, fine or even both. They were constantly harassed by police



by threatening to file criminal case under Section 377 IPC. Thus sexual non conformity of eunuch thus earned severe strictures and penalties from colonial administration. So being an eunuch itself was a criminal enterprise and surveillance was an everyday reality.

5. The Immoral Trafficking Prevention Act 1986 was made gender neutral to harass transgenders:

The old Suppression of Immoral Trafficking in Women and Girls Act 1956 in Section 2 (f) define prostitution as a women offering her body for promiscuous sexual intercourse for hire whether for money or kind and targeted only female gender. But in 1986 the title of the Act was changed to Immoral Trafficking Prevention Act with words "girls" and "female" being substituted by "person" throughout the Act to include transgenders and kothis. So the Act now applies to both male and female sex workers and those whose gender identity was indeterminate the hijras. So this provided legal basis for police to arrest and intimidate hijras and transgenders. So with this hijra became subject of the new Act.

Conclusion:

To conclude in India sexual minorities are deemed not to exist at least legally. Legal discrimination against sexual minorities takes many forms the most notorious being section 377 of IPC which conveys a message that homosexuals are of less value than other people and demeans them. Crime, violence, against LGBT person tends to be especially vicious in comparison to other bias motivated crimes. They are continually thwarted when trying to live freely and authentically. Law has been used systematically to arrest, terrorize and blackmail sexual minorities. It has

spawned public intolerance and abuse to millions of LGBT people to live in fear and secrecy at tragic cost to themselves and their families. Homophobic and transphobic violence has been recorded in every region of the country. Violent incidents and acts of discrimination frequently go unreported because victims do not trust police and are also afraid of reprisals or even unwilling to identify themselves as LGBT. India as of now do not have any anti LGBT propaganda law but the governments apathy and negligence towards cases of discrimination and violence faced by LGBT individuals in India do not show India in the making of an emerging global leader.

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