Legal Research Development
An International Refereed e-Journal
ISSN: 2456-3870, Journal home page: http://www.lrdjournal.com
Vol. 09, Issue-II, Dec. 2024

Interplay between Law and Morality and its Role in Restoring Dignity to the Sexual and Gender Minorities in India

Hadiya Khan *[a], **Dr. Pankaj Tyagi** **[b],

[a] *Research Scholar, Department of Law, MMM College, Ghaziabad, Chaudhary Charan Singh University, Meerut, U.P., (India).*

[b] *Professor, Head, Department of Law, MMH College, Ghaziabad, Chaudhary Charan Singh University, Meerut, U.P. (India).*

KEYWORDS

Hart-Devlin Debate on Law and Morality, Homosexuality, Fundamental Rights, Sec 377 of Indian Penal Code, Bhartiya Nyaya Sanhita, 2023.

ABSTRACT

Law has always been an instrument for bringing about changes in society. It regulates and controls the behaviour of individuals. More often than not, the prevalent morality of any given society is reflected in the body of laws that govern it. The laws are based on the collective conscience and moral values. Similarly, the morals and ethical mores that prevail in a society at any given time is deeply entrenched in its religious ethos and have always shaped behaviour and decisions of the country's populace, and this ultimately determines as to what is acceptable or unacceptable in society. One realises that the realms of law, morality and religion are ever intersecting and overlapping each other and at the same time are constantly changing also. The body of laws that exists in society raises and maintain the moral compass of a society. The question which, therefore, arises is whether role of law, as a tool to effect change in society, is restricted to just that, i.e., to enforce public morals? The article deals with the interplay of Law and Morality, delving into the debate of Hart-Devlin on Law and Morality in the light of the concept of homosexuality and the accessibility of basic rights and dignity to the LGBTQ community in India. The article has also dealt with the changing judicial trend as is seen from interpretations given by judiciary, of Section 377 of erstwhile IPC, in their pronouncements that indicate a shift from "persecution" to "protection" of sexual minorities.

"The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available to all."

---*Justice K.S. Hegde*

Introduction

In India, members of LGBTQ Community have long been subjected to unspeakable discrimination and persecution. What is mind-boggling is that not only the society ostracised this sexual minority, but the State too brazenly hounded and harassed them for their non-conforming identity. This centuries-old societal and systemic victimisation, however, was eventually brought to an end when the Supreme Court in the landmark judgement in *Navtej Singh Johar & Ors. v. Union of India & Ors*,[1] declared

Corresponding author
****E-mail:** hadiya.khan12@gmail.com (Hadiya Khan). https://orcid.org/0009-0000-4793-145X
DOI: https://doi.org/10.53724/lrd/v9n2.5
Received 18th Oct. 2024; Accepted 20th Nov. 2024
Available online 30th Dec. 2024
2456-3870/©2024 The Journal. Publisher: Welfare Universe. This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License

section 377 of the Indian Penal Code, 1860, illegal and unconstitutional to the extent that it had criminalised sexual acts "*against the order of nature"* between two consenting adults. In clear and unequivocal terms, the Court had ruled that respect for one's choice is of utmost essence of one's personal liberty under the law, and was an integral part of their privacy and personal autonomy. Thus, to criminalise the sexual relation between two consenting and adult persons of same-sex or gender was indefensible, irrational and manifestly arbitrary.[2] The Apex Court also observed that the archaic law, in force since the colonial era, which criminalised homosexuality, was openly and arbitrarily used by majority as an instrument to exclude, persecute and exploit the LGBTQ community. However, its validity and constitutionality had been upheld so far as it related to acts of bestiality, carnal intercourse against minors (consent being immaterial) and non-consensual sexual acts against an adult.

The social milieu in India was not always conducive for Judiciary to bring about such a watershed moment in the history of human rights for the sexual minorities. India and its society are known by its cultural and traditional beliefs, and as often as not, by very deeply entrenched orthodox values. One may explain it away by saying that, when the Indian Legislatures enact laws, or when Judiciary gives its decisions or for that matter, when the Executive formulates policies, none of these organs is functioning in a complete vacuum. They are, to a great degree, guided by the moral values and ideals recognised and prevalent in society. As is rightly observed by Prof. C.K. Allen, "*Our Judges have always placed their fingers firmly and delicately on the pulse of the accepted morality of the day.*" Constitutional adjudications, especially those that involve restrictions or curtailing of fundamental rights, cut deeply across the realm of the prevailing social and political milieu of a country. And where adjudication concerned the legality and constitutionality of section 377 of erstwhile I.P.C. as, unvaryingly, targeting the sexual minorities and contravening their fundamental rights under Articles 14, 15, 19 and 21, of the Constitution of India, these would invariably be controversial too. The debate over homosexuality has always been one which, at worst, may be adjudged as a conflict between law and morality and at best may be summed up as a co-relative interplay between them.

Law as a Tool for Enforcement of Morality

The realms of law, religion and morality, in a society, remain constantly changing or overlapping each other; these are always in a state of flux. Morals and ethics prevalent in a society have always influenced the decisions and behaviours of individuals in the society. These include such principles as determine what is acceptable or unacceptable in society. Law plays a similar role- viz. - regulating and controlling behaviour of persons. And many a times, the prevalent morality of society is seen being reflected in the body of laws governing that society. Law is, more often than not, based upon shared morality and values. It consists of such rules that enhance and maintain the morality compass of a society. So, one would wonder if that alone is the role that law plays in society, i.e., to enforce the public morals.

Additionally, one has to contend with the fact that public morals do not remain static, they can and do change and when they do, the law should move along with them, so as to remain relevant and in consonance with changing times. Values are such social-ideals, which form the matrix, out of which the judges and/or the legislators derive all legal principles. When moral ethics in the society undergo change, the law tends to life.[3]

As a consequence, one is faced with the question – 'Does the law have to be moral to count as law? Is an inherent morality a requisite for its validity?' Now law, more or less, has been defined as set of such principles and rules as the State creates and is enforced through the courts. These regulate external behaviour or conduct of an individual. Whenever a person breaks any of these legal rules, then the State through mechanism of Court, either punishes such person in case of criminal law or requires him to provide compensation if pertaining to civil law. Morality, however, is about such ethics or standards in society as describe and define the good or the bad in human conduct. This more or less operates in a restricted and private sphere, governing individual's internal behaviour. It is also clear that something which is immoral may not be illegal. For e.g., rudeness in itself is not illegal but may seem immoral to some. So, what, therefore, can be the relation between morality and law? In almost all well-established societies, law appears to be the tool for enforcement and policing of the most essential moral principles. And thus, where law is based on morals, one would definitely expect the society to consider violation of such laws as wrong, or in other words, we would expect majority of persons to regard such a breach as immoral. Well, the difficulty that arises with Morality is that, in a society, there may be many and diverse moralities co-existing simultaneously. Thus, it may not be easy to find out as to which morality amongst others be enforced. More often than not, there are contradictory views as to what are the true and actual principles of morality. After all, it was not long ago that the system of Apartheid prevalent in South-Africa, permitting racial segregation in society, was enforced through laws. Again, one comes across contrary views regarding morality of some rules like the ones governing abortion, especially in some western, liberal-democratic countries like the USA and the UK. Substantial part of population here regards abortion as always immoral and wrong, while others consider it as a part of women's reproductive autonomy and fundamental rights. So contrary moral views do co-exist in society and may with time lose relevance, requiring laws to reflect the changed new morality. The corpus or body of laws, in every modern legal system, mirrors the impact of both, the accepted social morality as well as diverse moral ideals. In every modern legal system, the influence of different moral values and the accepted social-morality of its society are reflected in its corpus or body of law. These influences may become part of law either, abruptly, through a piece of legislation; or it may be silently, by way of judicial process. In fact, a statute may just be a legal outward shell which the moral principles may help filling out. Thus, law and morality may overlap and coexist, being complementary and supplementary to each other. This is how the liability for civil or criminal

wrongs is brought in tune with and adjusted to the prevalent views of morality.

Homosexuality or gender fluidity is one such issue that finds resonance here. The majoritarian view contends that issues related to homosexuality are concerned with public morality and if society is to exist, then public morality must be preserved. However, the other view that holds sway is that there must be maximum respect for individual liberty in matters that are private affairs of individual, consistent with the integrity of society.[4] A question therefore arises as to what constitutes the basis of the decision-making process in the matters where one's moral freedom is in conflict with social control, i.e. to what extent should law be used as an instrument to enforce morality and social values beyond the basic need of establishing a public order. In response to it, the interplay between law and morality took centre stage in 1957, in light of the Wolfenden Committee's Report,[5] which sought to legalise sexual acts between consenting men in private in United Kingdom. The committee argued that the role of criminal law was preservation of the "public order and decency, protection of the citizens from what is offensive and injurious, and providing enough safeguards against any exploitations or corruption of others… [it was] not to interfere in peoples' private lives or to seek enforcement of any particular pattern of behaviour, further than was necessary for carrying out the purposes already outlined."[6] The primary reasons for legalising homosexuality, therefore, were one's *Freedom of Choice* and one's *Privacy of Morality.* The Report, relying upon J.S. Mill's *'Harm Principle'* concluded that private space should be free from state interference. This Report sparked a ground-breaking Hart-Devlin debate on the relationship between law and morality, which remains relevant even decades later.

Hart-Devlin Debate

The seminal debate on Law and Morality between H.L.A. Hart and Patrick Devlin was at the backdrop of the recommendations made by the Wolfenden Committee in its report upon the issue of legalization of homosexuality and regulating of prostitution in the English society. They both held contradictory views, while trying to establish as to what role the criminal law should play with respect to morality.

In *Enforcement of Morals* (1965),[7] Devlin held that purpose of criminal law was not just the protection of individuals, but it was for the society as a whole, its institutions, its morals and ideals. A law devoid of morality destroys freedom of conscience. His concept of legal moralism took a very idealistic and collectivistic approach towards the role played by law in society. Society needs a common moral allegiance, it is essential that a society has certain established morality, absence of which may lead to the disintegration of society itself, threaten its very existence and its social and moral fabric.

Any species of behaviour which may pose threat to this social cohesion may, therefore, justifiably be controlled and thus governed by moral legislations. He argues that the collective judgment of a society (which is a result of its shared common morality and conscience) should guide and protect against both, the private as well as public behaviour, that the society deems immoral.[8] Devlin opines that when certain behaviour in society reaches the

extremes of "indignation, intolerance, and disgust," legislation against it became imperative for preserving the society. Such moral legislation was justified, in as much as, it protected the society from the disintegrating effects of such acts and conduct as tended to undermine society's morality. However, it must be kept in mind that Devlin, at any rate, did not assert that the reason why any society or government, was held justified in enforcing a particular morality was *not that that particular morality or a moral view was correct or right;* but instead, the argument which he put forth was based on self-preservation of society. It is in the interest of political governance that it preserves society and one way to do it is by preserving the common morality, the social cementing, i.e. by enforcing certain moral legislations amongst the citizens, prohibiting and preventing certain kinds of egregious violations and behaviour that could be damaging to the society.[9] So if one violates this common shared morality, he is liable for punishment as his immoral behaviour might adversely influence the other members of society as well as himself too. Immoral conduct and acts, therefore, must be forbidden by law.[10] According to Devlin, for purposes of law, *Immorality is that which every right-minded person may be expected to regard being as immoral;* therefore, immoral acts would be those as would be unacceptable to an ordinary person, the man in jury-box or the reasonable man.

Integration of society, its preservation and social cohesion appears to be central idea flowing through Devlin's philosophy. He made following recommendation-

- Privacy of individual must be respected.
- Law ought to interfere only whence society will not tolerate a particular conduct.
- Law should reflect a minimum moral standard and not the maximum moral standard.

Thus, Devlin had based his philosophy on concept of Legal Moralism. It reflects the belief that certain acts may be proscribed and criminalised on grounds of their being inherently immoral. Apart from anti-sodomy laws, illustrations of legal moralism may also be found in anti-gambling, anti-prostitution, and anti-abortion laws.

Devlin's propositions found validation in theory of utilitarianism, according to which an action is either right or wrong on basis of its outcome. According to utilitarianism, the interests of the majority are given more importance than interest of the minority and therefore the latter may be sacrificed. Similarly, Bentham's principle of utility extrapolated upon the role of pain and pleasure in the lives of people. The criterion to determine whether an act was right or wrong was the degree of pain or pleasure it brought to majority of masses. Anything which brought maximum pleasure to people was good, so upheld.

Hart, following John Stuart Mill's *Harm Principle*, argued that unless and until something was injurious or harmful to society, the government has no business to intervene or interfere in the lives of its citizens. He disagreed with Devlin's argument and felt that Devlin had completely blown out of proportion the idea of disintegration of society, over-stretching it. Hart asserted that there was no such thing as total and complete social disintegration in cases where morality differed

among members of society. Instead, what otherwise happens, is a sort of re-interpretation and re-alignment of their mutual and inter-relational connection to each other. He pointed out that, in society, there are many personal moralities in society. The critical- morality (minority view) can quite easily co-exist, side by side, with the mainstream-morality (majoritarian view) so that it does not affect the ability of society to remain a stable order and to continue to function. Hart's views were based upon an individualistic and a pragmatic approach.

He asserted that, other harms being absent, laws should not be founded upon only the prevalent moral consensus, as majority may not always be right. He argued that if morality is enforced by law, it would interfere with individual liberty and curtail development. He advocated that limits or penalties should be imposed upon individual actions only if they caused harm. Hart, however, accepted that for existence of any society, there should be common morality, but he advocated the idea of law as a '*minimum of morality,'* which includes only fundamental rules of human behaviour and moral principles. Hart's views about positivism, thus, contain within it, a *'minimum content of natural law'*.[11] Morality is inherently couched in Hart's concept of law. There are certain areas in Hart's concept of law, where law and morality juxtapose, overlap and coexist with each other. He viewed morality as *private morality and public morality.* Private morality includes and implies all such acts which are subject to one's moral judgment and don't harm others, e.g., consensual homosexual acts between adults done in private. It is this sphere of morality, which, the State has no business to interfere with and should, thus, be out of bounds of law. It is public morality, to preserve which, the society may use law.

Hart has so formulated the natural - law concept very clearly with his positivism, calling it a *'simpler version of natural law'*. The moral aspect of law, however, is immaterial for its recognised validity.

Hart's idea of law as "*a minimum of morality"* was also developed by Ronald Dworkin, who wrote about 'political morality' or 'constitutional morality'. He had written of political morality that in the law-making process, a legislator cannot afford to side-line or ignore public outcry, which must per-force be taken into consideration. This would then demarcate the limits of what was politically achievable and would help decide his strategies of persuasion and enforcement within these limits. He had emphasised that one must, however, not mix-up justice with these strategies, nor confuse the principles of political morality with facts of political life.

Devlin had argued that society can pass morals legislation and enforce them to protect itself, so as to ensure its stability. HLA Hart put forth that no social disintegration will take place if diverse critical moralities are allowed to develop in society. Robert George, another thinker in recent times, had critically argued that for legal soundness of moral legislation, the morality, on which the said Legislation is aimed at, must necessarily be a correct and true morality and not just one which tends to destabilise the society. Thus, we may conclude by saying that both Lord Patrick Devlin and Professor HLA Hart, believe in the value of

morality protected by law, although each of them interprets this value in different way, i.e., one in conservative way and other in liberal.

Law and Morality Vis-A-Vis the Indian Scenario

It seems that legal discussion that constituted the late 1950's Hart-Devlin debate holds relevance till date; and not only the liberal aspects (freedoms and rights) but also the conservative aspects (traditions and integration of society) of understanding law are significant factors to be considered by the legislators as well as judges. Moral and legal rules may be analogous and overlapping in matters of similar conduct, for example truthfulness and honesty is an obligation under a legal rule as well as moral rule. Thus, it is apparent that under certain circumstances, these legal and moral rules may intersect and overlap, because obligation required to be discharged under these rules may be analogous in nature under such situations. However, equally undeniable is the fact that in other circumstances, rules governing conduct may be dissimilar, as the moral or legal obligation required to be performed thereunder may not be alike.[12]

The battle fought and ultimately won in the *Naz Foundation case*[13] and the subsequent overturning of this decision in *Suresh Kumar Koushal case*[14] perfectly illustrates this interplay between law and morality. The contentions, deliberations made and the reasoning behind both the judgments pose question in relation to issues of homosexuality under section 377 of IPC; whether they were founded upon the "*Legal Moralism"* which James Fitzjames Stephen and Lord Patrick Devlin advocated or on the "*Harm Principle,"* which J.S. Mill put forth and H.L.A. Hart endorsed[15]. While it is clear that the policy and approach of the Executive, as manifested in recommendations made by the Law Commission of India in its Reports No.42nd[16] and 156th[17] as well as the decision of Judiciary in *Suresh Kumar Koushal case*[18] were clearly compelled by Lord's Devlin's legal moralist approach and affirmed that immorality, per se, is a sufficient enough reason justifying the State's interference in private spaces of individual's life and thus, didn't favour decriminalisation of homosexuality. On the other hand, the decision delivered in the Naz Foundation case relied upon the assertions made in the Wolfenden Committee Report and the arguments of Prof. Hart stating that the State has no business to interfere in the matters pertaining to private morality (i.e. an individual's private sexual life) unless it poses harm to others and thereby justifying the judicial intervention in recognising an individual's sexual autonomy and the right to privacy of the two consenting homosexual in private.[19]

Tracing the Historical Evolution of the Anti-Homosexuality Law in India

The epicentre of controversy surrounding the issue of homosexuality in India had been the penal provision sec. 377 of erstwhile IPC, which finds its basis in the Buggery Act, 1533 of England. The said Act penalised Sodomy with hanging. However, the earliest documentation of sodomy as criminal offence at the English Common law goes as far back as 1290 AD, in the Reign of King Edward I, as reported in the Fleta (treatise in Latin Language on the Common Law of England) and later in the Britton, (Summary of English Law in French Language) in the 1300. Both of which provided

that sodomites be burnt alive as punishment. It was almost a century later in the year 1861, that capital punishment prescribed for buggery was abrogated in England and in the Wales. In India itself, the history of the anti-homosexual laws or more specifically the unnatural offences laws and enforcement thereof, all through the Mughal period, the Britain's Raj and the Post-Independence era, unquestionably indicates that the conception was originally ushered in by the British and that prior to this, there was not any law or statute in India that criminalised such acts. Colonialism, with its Judaeo-Christian Morality, had brought to the Indian sub-continent such deep-seated homophobia, that we became so convinced that homosexuality was a *"western"* concept, so as to distance ourselves from our historical traditions.[20] Literary works bear witness that our traditions have always allowed gender-fluidity and that homosexuality was prevalent in the Indian sub-continent through-out history.[21] Historical evidence indicates that until about 18th century, during the British Raj, the transgender and homosexual persons were not necessarily, in any way, considered inferior to the binary gender. However, floggings or stoning were carried out for Muslims under the Islamic Law during the Mughal period for sodomy.[22] In the Indian legal system, which followed in footsteps of the English Law, Section 377 of IPC, thus, became the symbol of *homophobia* and *transphobia*. It penalised any person who voluntarily had sexual intercourse "against the order of nature with a man, woman or animal with life imprisonment or punishment for a term extending up to ten years and also with fine."[23] Post-independence, this draconian section somehow, remained on our statute books and was, till recent times, seen as a part of Indian morals and values.

Judicial Interpretation of Section 377 of the Repealed IPC and its Changing Purview Across History

The diverse interpretations rendered by Judiciary, of this legal provision, extending scope of offence in many criminal cases, right from the colonial times till date, are a reflection of competing legal theories about the role of law in society as well as a reflection of various stages of moral compass that the society goes through. Add to this, the policy preferences of a judge, his moral convictions, his psychological inclinations and judicial approach while adjudicating; all of these will hold sway over as to how the Judgment is reached.

Presence of Sec 377, in the Penal Code, was more or less a remnant of the Judaeo-Christian morality that prevailed in England during the Victorian age. The moral and ethical standards prevalent in the then English society could look at sex only through a lens of functionality, that is, only for procreational purposes. Sexual relationship was never contemplated of nor seen as a form of self-expression, expression of love or an act of intimacy. This section was put under the chapter titled *"Of Offence Affecting Human Body"*[24] below the subtitle *"Unnatural Offences"*, which, however, found no mention in the text of the section. Further, the Code nowhere defines the terms *unnatural offence* or *carnal intercourse against the order of nature*, leaving its connotation unsettled and open to judicial interpretation. Initially, the judiciary read it to include *coitus per anum* (anal intercourse)

only,[25] but subsequently it interpreted it to include *coitus per os* (oral sex)[26] also. Later on, offences of bestiality,[27] buggery, sexual acts between lesbians, gays[28], mutual masturbation between persons of same sex or different sex, *coitus per os*, i.e., oral sex, *coitus per anum, i.e., anal sex*, penetrative acts into other openings/ orifices, etc. were all read as falling within the ambit of *'carnal intercourse against the order of nature'.* Interestingly, the section is gender-neutral and includes under its ambit, unnatural sexual conduct of heterosexuals too; but an analysis of judgments has shown that rigors of this penal provision have fallen on the non-conforming sexual minorities.

It, again, is worth-noting that the oral - genital sexual acts, (in contrast to sodomy) were taken out of the definition of *buggery* in 1817 in England,[29] however, in Indian Criminal law it continued to find approval and acceptance with judiciary. Indian judges had held it unnecessary to refer to the English text books or Statutory Laws on homosexuality as their interpretations of the impugned acts proceeds upon the definitions of sodomy, buggery and bestiality. Indian judges had interpreted the words of Sec 377 as being rather simple and extensive enough to be inclusive of all sexual acts / any carnal intercourse against the order of nature within its ambit. It is quite clear that, neither had the idea of a progressively tolerant society, nor the fact that homosexuality had no longer been a crime for some decades now in some nations, had influenced the judges' thinking in India.

In the year 1968, Supreme Court, while deciding upon the question if oral sex was included U/Sec 377 of IPC, had held that *"the orifice of the mouth was not, according to nature, meant for sexual or carnal intercourse."*[30] Thereafter, in Calvin Francis v State of Orissa,[31] paying reliance to the Lohana judgment, the Apex Court stated that oral sex (coitus per os) fell within and therefore, punishable under section 377 of IPC; and having reference to the Corpus Juris Secundum,[32] elaborated that "*sexual perversity* and *abnormal sexual satisfaction"*[33] were the guiding factors to decide the issue. Further, in matter of Fazal Rab Choudhary v State of Bihar,[34] Supreme Court had observed that section 377 of IPC (erstwhile) implied "*sexual perversity"*[35] and thus the test for attracting penalty under the provision underwent a change, requiring the act from being one of non-procreation to an act of sexual perversity.

In all the previously mentioned cases the Indian Courts have more or less toed the line, and interpreted the anti-sodomy laws even more stringently/restrictively than their English counterpart. What is notable here is that these decisions reflected and propagated only the majoritarian views vis-a-vis homosexuality seen in context of the traditional societal morality. It never made allowances for situations where the acts, complained of, were consensual and between adults. In such scenarios, the judgments never considered the accused persons as victim of systemic persecution, let alone, ever discerning or contemplating of such persons as having been robbed of their dignity and human rights.

There, therefore, is always felt a need for judicial interpretation in every legal system, in consonance with the changing times; more so, with regards to

constitutional adjudication. Initially the judges, in their conscious efforts, zealously avoided any judicial over-reach and thus stuck to the rule of literal interpretation; as a consequence of which, a slew of absurd and inequitable results followed. Later on, however, in matters pertaining to Constitution, judge's function enlarged from that of mere literal interpretation of laws to intent-based interpretation and ultimately to declaration in cases of vacant spaces.[36] But what really tilted the scale (in favour) was the principle of *Judicial Review* that makes the Court the custodian and sentinel of fundamental rights. It is this feature which empowers the court to hold any law, or any actions by the Executive or other public official based on that law, as constitutionally illegal and thus, unenforceable, if it deemed it in contravention of the basic law, i.e., the Constitution. The Strict Scrutiny test, which the Delhi High court applied in the *Naz Foundation case*, is the demonstration of the utmost and the strictest standards of the judicial review and is part of the grades of judicial examination which the court adopts in determining whether any constitutional /fundamental right or principle should accede to government's interest.[37] In other words, it is a standard of judicial review of an impugned law or policy (found contravening fundamental right), in which the court will presume invalidity and unconstitutionality of the said policy or law, until the government can show an otherwise persuasive or justifiable interest to uphold the need for such policy or justification in having the continued existence of the said law.

Changing Judicial Interpretations with the Changing Times and Attitudes.

It has been pointed out that the provision under section 377 of the replaced IPC, based on the traditional Judaeo-Christian morality and ethics, had been used to legitimise discrimination against sexual minorities.[38] It will not be amiss to emphasise that this section's moral underpinning did not find resonance with the historically-held values in ancient Indian society respecting sexuality and sexual relationships. Furthermore, even in modern times, the Indian Law Commission had recommended the deletion of section 377 of IPC in its 172nd Report[39] as far back as in the year 2000. However, the legislature failed to give effect to the said recommendation. It appears that the judiciary had been pro-active in restoring dignity and self-respect to the sexual minorities where legislature has been found reticent or reluctant.

The Apex Court, through its ground-breaking judgment in the *Navtej Singh Johar Case*[40], discarded the misplaced notions and societal concerns surrounding homosexuality; that decriminalisation of homosexual acts between consenting adults will result in unfettered spread of homosexual-activities in Indian society and will erode at the traditional and moral values of Indian Family System. The Court found that section 377 of IPC grossly discriminates against an individual on basis of their gender identity or/and sexual orientation, thus, violating Art 14 and 15 of Constitution. Further, it held that the section was in contravention of person's right to life, his/her dignity, right of choice and personal autonomy as laid down in Constitution's Article 21, also that it inhibited non-binary gendered person's capacity in full attainment of their identity, infringing on their

right of freedom of expression under Article 19(1)(a).

The purview of section 377 of IPC had been interpreted variously by Judges to either restrict or widen its application.[41] The understanding of the acts, which the penal provision seeks to prohibit, have undergone a change from "*non-procreative"* (anal intercourse)[42] to "*imitating sexual-intercourse"*– Committing penile-mouth intercourse[43] to "*sexual perversity"* – committing intercourse between thighs.[44]

Further, the Supreme Court has gone so far as to hold the matters where there's a clash between the fundamental rights of two persons, the pronouncement is to be given based upon morals. A case in point is the landmark case, ***Mr. X v. Hospital Z[45],*** wherein the Apex Court stated that when two fundamental rights are at variance, namely, one's privacy rights, read under the one's right to life U/Art 21 of Constitution and another person's right of leading a healthful life, which again is an extension of right to life under article 21, then the right which "*advances the public morality or public interest*" would only be given effect to by judiciary. The Court reasoned that judges cannot keep moral concerns at bay and be expected to merely sit as mute spectators. *"They must keep their fingers firmly upon the pulse of accepted morality of the day*."[46]

However, it doesn't imply that all the legal rules have moral considerations as their basis. Moral and legal obligation of individuals may not be analogous and quite easily be different in some situations. There may be legal rules that are not centred around moral values while others may even, diametrically oppose moral considerations too. The historical evolution of homosexual acts as crime, are an indication as to how the criminal justice system became involved in consensual, private sexual activities of its population.[47] A significant judgment of the Apex Court which set the wheels rolling for bringing about positive changes to the anti-homo-sexuality laws and the consequent upholding of rights and dignity to the LGBTQ community is the momentous *Retd. Justice Puttaswamy case;*[48] wherein Article 21[49] was widely interpreted to include Right of Privacy as a fundamental right of a person. The Court put the right of privacy at par with other fundamental rights recognised into Article 21 and as such was constitutionally protected and was as well an incident to other freedoms assured by our Constitution. Additionally, the Apex Court had called for equal treatment of gender and sexual minorities, and denounced, in quite stringent terms, the discrimination faced by them. It further, stated that *"the protection of sexual orientation lies at the core of fundamental rights and that the rights of this marginalised community are real and founded on constitutional doctrine"*. The nine-judge bench held that rationale behind Suresh Koushal case[50] was incorrect and that right of privacy cannot be denied, even if it was a minuscule fraction of population that was affected. It was further held that the "majoritarian concept" does not apply to Constitutional rights and that courts are often called upon to adopt what may be termed as non-majoritarian view.[51] The implication that this judgement raised was that section 377 of IPC fell afoul of fundamental rights and thus,

unconstitutional.

Prior to this landmark verdict, which had smoothened the path for pronouncing the judgment in Navtej Singh Johar case, was another notable judgment pronounced by the Apex Court in 2006 in *Lata Singh Case*,[52] wherein the Court had expanded the ambit of the Article 21 of Indian Constitution to include right to marry a partner of one's own choice. The Court had held that India being a democratic and free nation, upon becoming a major a person is free to marry whoever he or she wants, with the direction to administration and police to ensure that the couple is not persecuted or put under any threat of violence or harmed by any person and to take strict action against anyone who does so.

In *Suresh Kumar Koushal case*,[53] filed in challenge to the judicial pronouncement on given by the Delhi High Court in Naz Foundation case, decriminalising homosexual acts between adults, the Supreme Court again went along with the majoritarian view surrounding the issue of homosexuality, stating that the LGBT persons constituted a very small portion of the Indian population, out of which only a negligible fraction of them has been prosecuted under the impugned legal provision. It also held that sec 377 of I.P.C. criminalises certain acts and not any particular class of persons. Further, the Court stated, that the decision to amend or repeal this challenged provision, should be left to the Parliament, and that judicial intervention was not required.[54]

No doubt, that in 2000 itself, the Law Commission of India had taken progressive steps when it proposed amendments to rape laws, including deletion of erstwhile section 377 of IPC, hoping to curb sexual violence against all genders. These recommendations were a welcome reflection of the shift in attitudes, (although too late in coming) that the executive was finally ready to shed its ill-founded majoritarian moralistic view surrounding homosexuality in favour of the LGBTQ community's right to individual autonomy and dignity. These, however, didn't find consonance with the representatives of the masses sitting in the legislature, and fell victim to the lassitude of the Parliament, which failed to implement any of the said recommendations, with the ill-fated result that Supreme Court's interpretation in Suresh Kumar Koushal's case[55] pushed back and derailed all the efforts that had gone into building up a favourable narrative for the rights of the LGBTQ community. The Commission had taken into account the laws in force in certain western countries on the subject, consequently acknowledging and accepting this paradigmatic shift in the attitudes and approaches.

Bhartiya Nyaya Sanhita, 2023 (BNS)

It is worth mentioning here that the new Criminal Laws have unfortunately omitted the provision similar to the one contained under sec 377 of IPC. This may appear to be a step back in the movement of ensuring justice and civil rights to the LGBTQ community. The absence of this provision from BNS indicates that while any non-consenting sexual conduct against female victims has been made punishable, but on the same analogy, such non-consenting acts against a man, a transgender person or an animal will go unpunished. What the Apex Court did in the *Navtej Singh Case* was merely a reading down of the law to the extent that it infringed the rights of consenting adults indulging in homosexual acts privately or even the heterosexual

acts against the accepted norms. Doing away altogether with the impugned section 377 of IPC in the new criminal law has pushed them further into the quagmire of indignity, harassment, sexual abuse and discrimination. One may argue that the community has recourse to the Transgender Persons (Protection of Rights) Act, 2019, but the punishment prescribed therein for sexual offences against the transgender community ranges from 6 months to a maximum of merely 2 years, while rape of a woman under section 375 of erstwhile IPC drew a minimum of 7 years of punishment or life-imprisonment, which is now 10 years to life imprisonment under the new BNS or even death sentence in case of gang-rape of a minor girl. Prescribing grossly unequal punishments for same crimes tantamount to flagrant violation of a transgender person's Right to Equality as the Act treats the same crime against the transgender (who already are susceptible to sexual abuse) as less severe. This omission has left them quite vulnerable to discrimination and acute harassment and deprivation of their civil rights.

Conclusion

In the end, one may sum up that the atrocities and discrimination that the LGBTQ community has borne since long will not vanish just by bringing in new laws, when they do not effectively address their issues. The society too needs to change its attitude towards the hardships faced by them. There is no justification in treating members of LGBTQ community any less than a human by denying them equal treatment, dignity or opportunity. The morality gauge of a society (reflected in its laws) may undergo change with time, but it must remain sensitive and true to the basic notions that makes one a human.

Endnotes

[1] WRIT PETITION (CRIMINAL) NO. 76 OF 2016.
[2] *Ibid*
[3] Paul Tillich, Morality and Beyond, 22 (1963), As quoted by Lon N Fuller in The Morality of Law at 6
[4] R.M. Dworkin, ed., *The Philosophy of Law* at p 79(Oxford University Press, New York, 1977)
[5] Report of the Committee on Homosexual Offences and Prostitution, 1957, CMD 247. (October, 1957)
[6] Home Office, Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution, 1957*, CMD 247. (October, 1957)
[7] Patrick Baron Devlin, *The Enforcement of Law*, (Oxford University Press, London, New York, 1968)
[8] Ketki Jaltare, "Law and Morals! Mills, Hart-Devlin Debate," Available at: http://www.vidhikarya.com/legal-blog/LAW-AND-MORALS-MILLS-HART-DEVLINDEBATE (Last Visited on September 18, 2024)
[9] J.S. Neill, "A Short Guide to Hart-Devlin Debate," Available at: <https://youtu.be/6X7yFQlWrC8> (Last Visited on October 7, 2024).
[10] Dawid Bunikowski, "Legal Protection of the Value of Morality: The Hart-Devlin Debate," (January 31, 2015). Available at: <SSRN: https://ssrn.com/abstract=27255388 >, (Last Visited on October 7, 2024).
[11] Ravindra Kumar Singh, "Hart's Concept of Law and Justice", Available at < https://www.bhu.ac.in > (Last Visited on September 20, 2024)
[12] Ravindra Kumar Singh, "Hart's Concept of Law and Justice", Available at < https://www.bhu.ac.in > (Last Visited on November 1, 2024)
[13] Naz Foundation v. Government of NCT of Delhi and Others WP(C) No.7455/2001
[14] Suresh Kumar Koushal v. Naz Foundation and Ors. Civil Appeal No. 10972 of 2013
[15] K..I. Vibhute "Consensual Homosexuality and the Indian Penal Code: Some reflections on the Interplay On Law and Morality," 51 (1) *Journal of Indian Law Institute*, 3-31 (2009). DOI: https://www.jstor.org/stable/43953422
[16] Law Commission of India, *42nd Report on The Indian Penal Code, 1860* (June, 1971).
[17] Law Commission of India, *156th Report on The Indian Penal Code, 1860* (August, 1997).
[18] Suresh Kumar Koushal v. Naz Foundation and Ors. Civil Appeal No. 10972 of 2013
[19] K..I. Vibhute "Consensual Homosexuality and the Indian Penal Code: Some reflections on the Interplay On Law and Morality," 51 (1) *Journal of Indian Law Institute*, 3-31 (2009). DOI: https://www.jstor.org/stable/43953422
[20] Chelsea Peer, "Homosexuality and Gender Expression in India," 1(1) *The Alpha Chi Journal of Undergraduate Scholarship*, (2016). DOI: 10.21081/ax0021
[21] Saleem Kidwai and Ruth Vanita (eds.), *Same Sex Love in India: Readings from Literature and History* (St Martin Press Palgrave Macmillan, 2001)
[22] *Id*
[23] Section 377, Indian Penal Code, Act No. 25 of 1860
[24] Indian Penal Code, Act No.25 0f 1860
[25] Government v. Bapoji Bhatt, (1884) 7 Mysore LR 280.

[26] In *Re* Govindrajulu 1886 1 Weir 382; Khanu v. Emperor AIR 1925 Sind 286.

[27] Khanu v. Emperor, AIR 1934 Lah 261

[28] Brother John Anthony v. State, 1992 Cri.LJ 1352, 1359 (Mad)

[29] Rex v Samuel Jacobs (1817) Russ and Rly 381 CCE (which laid down that penetration of penis through the mouth doesn't amount to sodomy).

[30] Lohana Vasantlal Devchand & Ors v The State, AIR 1968 Guj 252

[31] 1992 I OLR 316

[32] C.J.S., Volume 81, pp 368-370 (Thompson West Publishing Company)

[33] 1992 I OLR 316

[34] AIR 1963 SC 323

[35] *Ibid* AIR 1963 SC 323

[36] Abhishek Pandey, "Strict Scrutiny Test in Constitutional Adjudication", Available at: <http://www.legalservicesindia.com/article/1511/Strict-Scrutiny-test-in-Constitutional-Adjudication:-Indian-Experience.html> (Last Visited on October 22, 2024)

[37] Abhishek Pandey, "Strict Scrutiny Test in Constitutional adjudication: Indian Experience," Available At: <https://www.legalservicesindia.com/article/1511/Strict-Scrutiny-Testin-Constitutional-Adjudication:-Indian-Experience.html> (Last Visited on September 17, 2024)

[38] Geetanjali Mishra, "Decriminalising Homosexuality in India," 17(34) *Reproductive Health Matters*, 20-28 (2009). DOI: https://doi.org/10.1016/So968-8080(09)34478-X

[39] Law Commission of India, *172nd Report on Review of Rape Laws, 2000* (March, 2000).

[40] *Supra* at note 1

[41] Newly Paul, "When Love Wins: Framing Analysis of the Indian Media's Coverage of Section 377, Decriminalization of Same-Sex Relationships," 43(1), *Newspaper Research Journal* 7-28 (2022). DOI: https://doi.org/10.1177/07395329221076595

[42] Khanu vs Emperor, AIR 1925 Sind. 286

[43] Lohana Vasantlal v. State, AIR 1968 Guj. 352

[44] Fazal Rab Choudhary v. State of Bihar, AIR 1963 SC 323

[45] 1998 8 SCC 296.

[46] Mr. X v. Hospital Z, 1998 8 SCC 296.

[47] Henry F. Fradella, "Legal Moral and Social Reasons for Decriminalising Sodomy," 18(3) *Journal of Contemporary Criminal Justice,* 279-301 (2002). DOI: https://doi.org/10.1177/1043986202018003005

[48] Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., AIR 2017 SC 1461

[49] The Constitution of India, 1950.

[50] Suresh Kumar Koushal v. Naz Foundation and Ors. Civil Appeal No. 10972 of 2013

[51] Suresh Kumar Koushal v. Naz Foundation and Ors. Civil Appeal No. 10972 of 2013

[52] Lata Singh vs State of UP and Anr. (2006) 5 SCC 475.

[53] Suresh Kumar Koushal v. Naz Foundation and Ors. Civil Appeal No. 10972 of 2013.

[54] J. Vankatesan, "Supreme, Court Sets Aside the High Court Judgement Decriminalising Gay Sex," *The Hindu*, December 11, 2013.

[55] See Dhananjay Mahapatra, "Law Commission had Recommended Section 377's Deletion 13 Years Ago," The Times of India, 13 December, 2013, Available at: <http://timesofindia.indiatimes.com/india/Law-Commission-had-recommended-section-377s-deletion-13-yrs-ago/articleshow/27264963.cms> (Last Visited on October 18, 2024).

****