

## **THE DICHOTOMY OF FREE CONSENT AND SEXUAL ORIENTATION IN INDIA: A CRITICAL APPRAISAL**

**Dr. Rajesh Bahuguna\* & Abha Vijayan\*\***

\*Dean/Principal, Law College Dehradun, Uttaranchal University, Arcadia Grant,  
Chandanwari, Premnagar, Dehradun, Uttarakhand-248007.

\*\*Student, Master of Laws,, Law College Dehradun, Uttaranchal University.

Received: May 10, 2018

Accepted: June 26, 2018

### **ABSTRACT**

*The researchers have tried to understand and critically evaluate the dichotomy of free consent and sexual orientation in India. The arguments flow from the lack of relevance of 'consent' in sexual matters, a subject privy to the individual. How the popular morality shaped the laws and affected the rights of millions in its way of being popular and majoritarian. Sexual Orientation which is basic and fundamental to any individual and the questioning thereof that has continued so far in democracies, with impunity, is a further matter of discussion. Further light is thrown on the legislative inaction and the judicial hesitation in putting an end to the draconian misconceptions and inadequacies in law. The relevance of recognising the importance of free consent in its interplay with sexual orientation is necessary for a welfare state aiming for upliftment of all.*

**Keywords:** sexual orientation; free consent; 377; LGBT

### **Introduction: India as a democracy aiming to be a 'welfare state'**

The independent India dreamt of being wedded to freedom, a freedom from oppression, humiliation, injustice, inequality (social & economic), and essentially a freedom for self determination. Along with the flailing economy, the British colonists left India in flailing morale too. A society that was accepting and experimental in its attitudes was reduced to a bundle of ignorance bred into the fabric of the nation projecting itself through the disparities that became the identity of the nation. And in the rush to be the 'welfare state' (a dictum based on the principles of Gandhian Socialism which speaks not on the utilitarian ideals advocated by Bentham and Mill but on the ideal of 'Sarvodaya – Welfare of all'), the factor of 'all' got lost. Despite there being constitutional mandates to the effect of ensuring that equality and rule of law will not only permeate the entire Constitutional fabric, but will also be the part of national conscience, the democracy in India has to a great extent failed to address many concerns, including several basic rights of the people vis-à-vis self determination. The prime concern of this Article is to analyse the colossal dance between 'free consent' and 'sexual orientation' in the developing democracy i.e. India. The interesting analogy being drawn between the relevance of 'consent' in the Indian criminal legal system with special reference to sexual offences, where, for instance, at one hand the 'consent of an adult married woman in her marriage is irrelevant as far as her sexual relationship with her husband is concerned' and in the same body, consensual adult sexual acts vis-à-vis alternative sexual orientations (including heterosexual orientation 'against the order of nature') is punishable under IPC<sup>69</sup>. The IPC drafted in the later part of the 19<sup>th</sup> century was purported to have been drafted looking at the social and historical background of the country, but the Judeo-Christian influence<sup>70</sup> on the same cannot be ignored considering it is a masterpiece of British colonialists. The offence under Section 377 IPC is one of those provisions where law and morality interject and the moral tandems of majority are superimposed over the basic identities and orientations of millions

<sup>69</sup> Section 377 of The Indian Penal Code 1860 speaks of Unnatural Offences being Carnal intercourse against the order of nature, whereby, irrespective of consent, any person involved in non-procreative sex with a man, woman or animal is liable for punishment.

<sup>70</sup> Michael Foucault had pointed out that the 'notions, that sex is at the heart of all pleasure and that its nature requires that it should be restricted and devoted to procreation, are not of Christian but of Stoic origin; and Christianity was obliged to incorporate them when it sought to integrate itself in the State structure of the Roman Empire in which Stoicism was virtually the universal philosophy'. For details, refer Michael Foucault, *Power/Knowledge*, (Colin Gordon (ed and tr) and L. Marshall (tr) Pantheon Books, New York) 190-191

belonging to the LGBTQIA<sup>71</sup> community in the country. This article need not delve into the bracket of LGBTQIA<sup>72</sup> specifically, as the same will absorb (and deserves) a lot of space, but the interplay of free consent and sexual orientation affects all human beings at their very core. The intrusion of law treading into the private spheres of persons to their detriment thereof is worth examining.

### The Anomaly of 'Free Consent' in India

Free Consent or the consent perceived as *consensus ad idem* is an agreement to do or to abstain from doing something, between persons eligible to make such a choice. 'Consent is a clear and unambiguous agreement, expressed outwardly through mutually understandable words or actions, to engage in a particular activity. Consent must be voluntarily given and cannot be obtained through coercion or force.'<sup>73</sup> In matters of personal life vis-à-vis sexual preferences, the choice is to be necessarily made by persons eligible to make such a choice<sup>74</sup>. In India, the age of consent has been a matter of great political and judicial debate. With the prevalence of child marriage in India, especially with respect to Section 375 IPC which enunciates or justifies sexual acts of a man with his wife under the age of 18 and not below 15<sup>75</sup>, it was as late as 2017 that the Supreme Court held that sexual relations with one's own wife below 18 years of age is rape<sup>76</sup>. But this brings us to the anomaly that sexual relations of a man with his wife of 18 years or above, cannot be brought under the window of rape if the woman does not consent to the sexual act. The consent of a woman in her marriage is irrelevant as regards her sexual life, especially after she attains the age of majority, and becomes an 'adult'. The only exception being sexual relations between a man and his wife during separation, without her consent, has been made punishable.<sup>77</sup>

Ironically, for more than 150 years, the Indian society has tried to make peace with the draconian provision of Section 377 which negates adult consensual sex which is anything other than penile-vaginal. Here, the dichotomy is that irrespective of the sexual orientation, carnal intercourse 'against the order of nature' between persons even if it is consensual is liable to be punished. There is a draconian presumption here in favour of the argument that the purpose of human beings engaging in sexual intercourse is for procreation. And as such, consenting adults committing the sins of Sodom and Gomorrah are violating the rules of nature. In short, sexual acts like oral-penile, penile-anal, etc which can in no way be presumed to be procreative in nature, are unnatural. As such, consenting adults with alternative sexual orientations are shunned by law along with their heterosexual counterparts, except that heterosexuals are protected under the garb of heterosexuality. The so called purpose attached to sex and sexuality is in the light of the medieval interpretation of human relations where the factum of concupiscence is seen in the negative light.

The derivative by the above two analogies is to the effect that at one hand, an adult woman's lack of consent means nothing and marriage becomes a *de facto* license for a man to subject his wife to his whims and fancies. And on the other, consenting adults, in the confines of their private space are under the constant fear of persecution if they engage in 'unnatural offences' where the 'unnatural' is defined as per the perceived morality of the majoritarian views.

In a democracy, where people have the right to vote since the day they turn 18, it is still a pitiable state of affairs that people have largely no right for a consensual sexual relationship safe from the prying eyes of the law. The rigid dichotomy between consent and sexual orientation is irrelevant and uncalled for in today's day and age.

<sup>71</sup> As pointed out by A P Shah J, the conservative number of LGBTQ persons is about 2% of the population, accounting to more than the number of Sikhs, Buddhists, Jains and Parsis in India and merely 0.3% less than the Christians in India.

<sup>72</sup> LGBTQIA is an acronym for Lesbian Gay Bisexual Transgender Queer Intersex Asexual. Although, this in itself does not cover the wide array of sexual and gender identities including cis-men and women, pansexuals, bi-gender etc.

<sup>73</sup> The University of Michigan, 'The University of Michigan Policy and Procedures on Student Sexual and Gender Based Misconduct and Other Forms of Interpersonal Violence' (July 2016) <<https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-FINAL-062916.pdf>> accessed 6 June 2018.

<sup>74</sup> In general, persons above the age of 18 years.

<sup>75</sup> Exception 2 to Section 375 IPC states: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

<sup>76</sup> Independent Thought v. Union of India MANU/SC/1298/2017

<sup>77</sup> Section 376B IPC as inserted by Section 9 of The Criminal Law (Amendment) Act 2013.

**Sexual Orientation- Fundamental facet of rational existence**

Yogyakarta Principles<sup>78</sup> define sexual orientation as ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender’<sup>79</sup>. Sexual orientation is different from gender identity. Gender identity is about how a person identifies oneself and sexual orientation is about the facet of attraction that the person may feel for another. For instance, person’s gender identity could be male, female, transgender<sup>80</sup>, transsexual<sup>81</sup>, FTM Transsexual<sup>82</sup>, MTF Transsexual<sup>83</sup> etc., but the sexual orientation could be heterosexual<sup>84</sup>, homosexual<sup>85</sup>, bisexual<sup>86</sup>, asexual<sup>87</sup>, etc.

‘The conservative view is that the Scriptures and enlightened reason concur: God created humanity as sexually dimorphic and heterosexually procreative; ontologically distinct as male and female.’<sup>88</sup> And any argument in negation of this conservative view is thwarted. Michael Foucault observed that ‘for millennia the tendency has been to give us to believe that in sex, secretly at least there was to be found the law of all pleasure, and that this is what justifies the need to regulate sex and makes its control possible’<sup>89</sup>. As such, the regulation of the sexual lives of people became as easy mode of control by law and alternative sexualities became easy targets. Any sexual orientation, for that matter, is basic to the fundamental human existence. Be it heterosexual, homosexual or bisexual orientation, it forms part of the argument for sexual freedom. This in-turn is part of the larger argument for the right to privacy. There are essentially spheres in the life of a person where the law or any third person should not be allowed to intrude and sexuality and sexual orientation deserve that recognition of essentiality.

But the law in the country based on the draconian notions of morality render the status of alternative sexuality and orientation that of crime. It is a pity that under the penal code a person’s alternative sexual orientation, which is basic and natural for that person, is deemed to be one at par with that of rape, bestiality etc. Consent as a factor is irrelevant between consenting adults engaging in sexual acts which are technically not procreative in nature<sup>90</sup>. The law does not distinguish between heterosexuals or homosexuals but it is mainly targeted to persecute the LGBTQIA community and sometimes used by estranged wives to persecute their husbands in courts of law<sup>91</sup>.

The 33<sup>rd</sup> Yogyakarta Principle adopted in November 2017 at Geneva makes it incumbent on the states to ‘ensure that legal provisions, including in customary, religious and indigenous laws, whether explicit provisions, or the application of general punitive provisions such as **acts against nature**, morality, public decency, vagrancy, sodomy and propaganda laws, do not criminalise sexual orientation, gender identity and

<sup>78</sup> In 2006 at Yogyakarta, Indonesia a group of Human Rights Activists met to outline a set of international principles relating to sexual orientation and gender identity. In November 2017, Yogyakarta Principles plus 10 (YP+10) were further adopted on the same lines. <<https://yogyakartaprinciples.org/>> accessed 06 June 2018

<sup>79</sup> Yogyakarta Principles as adopted at Yogyakarta, Indonesia in 2006 <[http://data.unaids.org/pub/manual/2007/070517\\_yogyakarta\\_principles\\_en.pdf](http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf)> accessed 6 June 2018.

<sup>80</sup> The gender identity does not fit the normative gender norms of male or female. In India the *Hijra* population is identified as transgender.

<sup>81</sup> A person who biologically may have the traits of one gender but in reality prefers to live as another gender.

<sup>82</sup> Female to Male Transsexual- A person biologically born as a female but identifies oneself as male.

<sup>83</sup> Male to Female Transsexual - A person biologically born as a male but identifies oneself as female

<sup>84</sup> Men and women attracted to opposite gender.

<sup>85</sup> Men attracted to men, women attracted to women. Men are usually referred as ‘Gay’ and women as ‘Lesbian(s)’

<sup>86</sup> Persons attracted to both men and women.

<sup>87</sup> Someone who is not attracted sexually towards anyone at a given time.

For more details refer ‘Our Bodies, Ourselves – The Boston Women’s Health Book Collective’ (Women Unlimited, 2008 Ed.) 143,147

<sup>88</sup> Jens M Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Intersentia Ltd, UK 2015) 50

<sup>89</sup> Foucault, *Power/Knowledge*, Gordon (ed. and tr.) and L Marshall (tr.) (Pantheon Books, New York)

<sup>90</sup> Another random argument on the score of ‘order of nature- for procreation’ is in case of use of contraceptives. By contraceptive usage does even the penile-vaginal sexual act become unnatural, as the same curtails procreation?

<sup>91</sup> The use of the law by estranged wives against their husbands in the courts of law increased with the sanctions being imposed on the misuse of Section 498A IPC which dealt with provisions as to Husband or relative of husband of a woman subjecting her to cruelty.

expression, or establish any form of sanction relating to them'<sup>92</sup>. India is a signatory to the same, yet, the draconian discriminatory law still prevails in India.

### Legislative Embargo

The law in the sphere of consent and sexual orientation is in a sad state in India. Consent, as enumerated in the foregoing paragraphs, is immaterial and more of a negative tool for persecution. In this globalizing world where many democracies have come to accept the rights of sexual orientations at par with the basic right to privacy, and essential part of self-determination, India lags behind. Even in UK, post the Wolfenden Committee Report of 1957, after a decade, UK decriminalised sodomy laws<sup>93</sup>. It must be kept in mind that it was the British Colonialist rule that brought intolerance into the legal fabric in India, formally, regarding alternative sexual orientations. In favour of alternative sexualities the Wolfenden Report had submitted that 'moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind'<sup>94</sup>. Further the Report stated:

*'...the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude term, not the law's business'*<sup>95</sup>.

In India, it was recently in 2017 that a Private Member's Bill was introduced in the Parliament by Dr. Shashi Tharoor (Member of Parliament) by the name of Anti-Discrimination and Equality Bill, 2016 with a view to 'protect everyone who are subject to all forms of unfair discrimination under a single comprehensive legislation which should be neutral and free from bias'<sup>96</sup>. This comprehensive piece of proposed legislation made provisions for the protection of disadvantaged groups<sup>97</sup> in the society including LGBTQ(I)<sup>98</sup> and or all the sections of the society that are subjected to unruly accounts of discrimination. Unfortunately though, the proposed legislation did not receive the majority consensus in the House of People and as such the same was voted out.

The current situation vis-à-vis legislation is that the sexuality of individuals is still within the penumbra of draconian laws.

### Judicial Approach

The judicial approach in the area is quite obscured but better in comparison to the legislative approach in India. The judiciary has moved on from its restrictive interpretation in *Khanu*<sup>99</sup>, *Fazal Rab Choudhry*<sup>100</sup> etc to a somewhat humanistic approach in *K. S. Puttaswamy*<sup>101</sup> (*Puttaswamy*). From a perspective where the courts had categorically emphasised on the purposive nature of sexuality vis-à-vis procreation, the courts have reached a place where they do recognise the need to understand the same in a broader sense. The start of the debate positively catering to the need of freedom in sexual orientation happened with the acclaimed judgment of the Hon'ble Delhi High Court in *Naz Foundation v Govt. of NCT of Delhi*<sup>102</sup> (*Naz*) whereby a Division Bench comprising of A P Shah (CJ) and Dr. S. Murlidhar, JJ held the penalisation of sexual acts between consenting adults to be unconstitutional. Soon thereafter, in *Suresh Kumar Koushal & Anr. v Naz Foundation*<sup>103</sup> (*Suresh Kumar Koushal*), a Division Bench of the Hon'ble Supreme Court comprising of G.S.

<sup>92</sup>Yogyakarta Principles plus 10, 2017 <[http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)> accessed 06 June 2018.

<sup>93</sup> Sexual Offences Act 1967, decriminalised homosexuality and sodomy between consenting adults above the age of 21 (UK).

<sup>94</sup>Departmental Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, September 1957 (UK).

<sup>95</sup> Wolfenden Committee Report.

<sup>96</sup>Bill No. 289 of 2016, 'Anti-Discrimination and Equality Bill 2016' <<https://drive.google.com/file/d/0BzXilfcxe7yuQVdjOFIUNGUydFE/view>> accessed 05 June 2018.

<sup>97</sup> Anti-Discrimination and Equality Bill 2016 s.5.

<sup>98</sup> Anti-Discrimination and Equality Bill, 2016, s 5(iv) and 5(vi).

<sup>99</sup> *Khanu v Emperor* AIR 1925 Sind 286

<sup>100</sup> *Fazal Rab Choudhary v State of Bihar* AIR 1983 SC 323 (Homosexuality was interpreted as sexual perversity)

<sup>101</sup> *Justice K S Puttaswamy (Retd.) & Anr. v Union of India & Ors.* WP(C) No 494 of 2012, 24 August 2017 (SC)

<sup>102</sup> 2010 Cr LJ 94 (SC)

<sup>103</sup> 2014 Cr LJ 785 (SC)

Singhvi and Sudhanshu Jyoti Mukhopadhyaya, JJ, overturned the judgment of Delhi High Court in *Naz* and held Section 377 to be valid. Again, in *National Legal Services Authority v Union of India*<sup>104</sup> the Division Bench of Hon'ble Supreme Court held the right of transgender persons for gender identity of their choice. And most importantly the court declared that no one could discriminate on the grounds of 'sexual orientation'. The famous privacy judgment<sup>105</sup> of *Puttaswamy* is another golden feather in a line of positive interpretation of human rights when the right to privacy was held to be a fundamental right and the view in *Suresh Kumar Koushal* was heavily criticised and it was observed that, 'sexual orientation is an essential attribute of privacy... 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'<sup>106</sup>.

The issue as regards sexual orientation is sub-judice before the Hon'ble apex court the hearing for which has already started before a 5 judge Constitution Bench.<sup>107</sup> The judicial attitude points towards a more balanced view of the law to be taken, where individual right and morality intersects in a constructive and harmonious manner. As observed in *Naz* one has to point out that 'if there is any type of "morality" that can pass the test of compelling state interest it must be "constitutional" morality and not public morality'<sup>108</sup>.

### Conclusion

In the welfare state, consent of a person, and sexual orientation of a person (as regards adult persons), need not be subject matters of debate anymore, as far as sexuality of the individual is concerned, especially when . The law needs to adapt to the changing dimensions of society. India, was tolerant, considering the instances with regard to *Kamasutra*<sup>109</sup>, the respectable position in the society for transgenders (*Hijras*) in terms of *Tritiya Prakriti*<sup>110</sup>, the sculptures in Khajuraho, so on and so forth. The gradual homophobia that seeped into the cultural fabric got an impetus with the British visceral legislation categorising consensual sexual acts 'against the order of nature' with those of non-consensual barbaric acts of mankind. Such a draconian, undignified and humiliating provision has suppressed and oppressed a great number of people and starved them of their basic fundamental rights to self-determination and privacy and has kept them locked in the 'closet'. The judiciary today, perhaps, is gearing up to give a monumental decision as regards the rights of LGBTQIA community. It is high time for the legislature to gear up and acknowledge and protect the basic fundamental right of sexual orientation and give heed to the 'consent' anomaly. For with the aim of 'welfare of all', it is incumbent upon the state to move ahead with everyone in tandem and not leave some behind on perceived morals of the majority. Each and every individual irrespective of gender identity and sexual orientation and social or economic status has the right to be different and to be heard and counted for. The cries and wails of victims of marital rape are no less than any other victim of rape and neither is consensual sexual act (not in consonance with popular heterosexual procreative sex) between adults a matter for the prying and unnecessarily intrusive eyes of the law. The interplay of free consent and sexual orientation needs to be revisited by the legislature.

### Acknowledgment

Sincerest of gratitude is expressed to the faculty members and the staff of the Library of Law College Dehradun, Uttaranchal University who have cooperated in the work with their kind support.

### REFERENCES

#### Books

1. Foucault, Michael, *Power/Knowledge*, (Colin Gordon (ed and tr) and L. Marshall (tr) Pantheon Books, New York)
2. 'Our Bodies, Ourselves – The Boston Women's Health Book Collective' (Women Unlimited, 2008 Ed.)
3. Scherpe, Jens M (ed.), *The Legal Status of Transsexual and Transgender Persons* (Intersentia Ltd, UK 2015)
4. Thatcher, Adrian (ed), *The Oxford Handbook of Theology, Sexuality and Gender* (Oxford University Press, 2014)

<sup>104</sup> (2014) 5 SCC 438

<sup>105</sup> Puttaswamy n 33.

<sup>106</sup> Ibid.

<sup>107</sup> *Nav Tej Singh Johar & Ors v Union of India* W.P.(Crl) No. 76 of 2016 [sub-judice]

<sup>108</sup> *Naz* n 34.

<sup>109</sup> Treatise by Vatsyayan considered as a standard work on human sexual behaviour.

<sup>110</sup> Third sex

Websites

5. Burton, Richard (tr), *The Vatsyayana Kamasutra (Classic Translation of 1833)* <<http://burtoniana.org/books/1883-Kama%20Sutra/1883-KamaSutra.pdf>> retrieved on 02 June 2018.
6. <[www.manupatrafast.com](http://www.manupatrafast.com)>
7. <[www.supremecourtfindia.nic.in](http://www.supremecourtfindia.nic.in)>
8. The University of Michigan, 'The University of Michigan Policy and Procedures on Student Sexual and Gender Based Misconduct and Other Forms of Interpersonal Violence' (July 2016) <<https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-FINAL-062916.pdf>> accessed 6 June 2018.
9. Yogyakarta Principles, accessed from <<https://yogyakartaprinciples.org/>> and retrieved from <[http://data.unaids.org/pub/manual/2007/070517\\_yogyakarta\\_principles\\_en.pdf](http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf)> on 6 June 2018.
10. Yogyakarta Principles plus 10, 2017 <[http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)> retrieved on 06 June 2018

REPORT

11. Departmental Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, September 1957 (UK)

LEGISLATIONS

12. Bill No. 289 of 2016, 'Anti-Discrimination and Equality Bill 2016' <<https://drive.google.com/file/d/0BzXilfcxe7yuQVdjOFIUNGUydFE/view>> accessed 05 June 2018.
13. Indian Penal Code, 1860
14. Sexual Offences Act, 1967 (UK)