Discriminatory or Ethical: An Unnatural Dilemma

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ABSTRACT

“Right to life under section 21 of Indian constitution has came to mean the right to enjoy life- the right to be let alone” -Samuel Warren. With this paper we carried out arguments to examine the ethical viewpoint or “a taboo” ideology in case of IPC section 377, which talked of carnal intercourse against the order of nature by inspecting it with various section of society. The paper’s prime focus is to review the rationale behind the severity of punishment and criminalization of identical sex private affairs as an important privacy issue for the country along with the concern for human rights. We have also tried to identified the sources of such legislative act that finds it origin in Christian religious law and reason for its existence in the present world. A special focus is also kept towards of the rights of LGBT (Lesbian Gay Bisexual Transgender) community and an analysis and survey of their rights is looked upon to examine it with right to privacy judgment and that of “reading down” concept in the case law of Naz Foundation and further subsequent case laws ad recent development that has been dealt separately. Further, to conclude, we had also tried to convey and put forwards the solutions for the elimination of such discrimination against the LGBT community, and at the same time, backed up the importance of religious sentiments and pure order of nature. To provide the readers with the understanding of reasonableness of section 377 of IPC is the key highlight of the paper.

I. INTRODUCTION

“Respect for the individual choice is the essence of liberty; LGBT community possess equalrights under the Constitution.”

– Former CJI Dipak Misra

After sixty-eight years of the Republic of India, the Supreme Court has upheld the right of every human being to be free, regardless of sexual orientation or identity by decriminalizing Section 377 of the Indian Penal Code, 1860.\textsuperscript{3} The present paper is an attempt to understand the source of the evolution of particular section of IPC and the reasons of it’s existence for so long. Basically, Section 377 was always backed up by the religious sentiments of the society and by the ideological concept of the pure order of nature. It’s an end of an era and

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\textsuperscript{3} Section 377: Impact will be felt beyond India, Times of India, Sept. 7, 2018.
now this law won’t apply to consensual sexual relations among adults in private.

This judgement has not only impacted India, but undoubtedly have immense transnational value in other common law countries that still have equivalent provisions in their statute books, to consider the legality of their provisions again. The judgement also affected to the prior policies and rights of LGBT Communities because now the purpose is to frame such human resource policies in workplace which are LGBT-friendly so that they can work and live with dignity.

II. EVOLUTION AND THE HISTORY OF SECTION 377 OF IPC, 1860

In order to better understand the legal perspective of Section 377 it is important to trace it’s historical background. At present, Chapter XVI of the Indian Penal Code, 1860 deals with Section 377 of Unnatural Offences. It states that –

“377. Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The offence under this section is classified as cognizable, non-bailable, non-compoundable and triable by Magistrate of the first class. This Section was draft by Thomas Macaulay in 1838 but it came into existence in 1860. This law was modelled on the Buggery Act, 1533 by the British India. This law defined the term ‘buggery’ as an unnatural sexual act against the will of God and man. It means that this criminalised the anal penetration, bestiality and in a broader sense homosexuality of individuals. Later in 1828, the Act has been repealed and replaced by the Offences against the Person Act,1828. The definition of unnatural sexual acts has been broadened in this act, this definition.

Justice AP Shah, architect of the landmark Delhi HC Judgement, July, 2009. became inspiration for the current Section 377 of IPC. This led to the evolution and existence of the concept in Section 377 of IPC, 1860 as Unnatural Offences. The 1828 Act was further repealed by the British and it got replaced by the Offences against the Persons Act, 1861. Finally, by the Sexual Offences Act, 1967 homosexuality was decriminalized in the UK. And the British Government made same sex marriage legal.

III. DECRIMINALISATION OF SECTION 377

The landmark judgement given by five judge bench of the Supreme Court on 6th September,2018, which struck down a part of Section 377 of the IPC, 1860 and decriminalized homosexuality in India. In India, the journey to
decriminalize section 377 has been initiated with Naz Foundation, a non-governmental organization (NGO) which instituted a lawsuit in Delhi High Court in 2001. They were fighting for gay rights and sought to decriminalize homosexuality. But in 2013 the Supreme Court by reversing the decision of Delhi High Court has re-criminalized the particular section.

Recently, in 2017, the landmark judgement was given in the case of ‘Justice Puttaswamy V. Union of India’⁵, a constitutional bench of the Supreme Court of India held that Right to Privacy is a fundamental right. Wherein Justice Chandrachud called out that the decision for Section 377 as being “unsustainable”, he noted that 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”. On 6th September 2018 was the day when the Supreme Court has ruled some portion of Section 377 as unconstitutional, “irrational, indefensible and manifestly arbitrary” with regards to consensual homosexual sex between adults. But the section is enforceable with the matters relating to sex with minors, non-consensual sexual acts, and bestiality.

IV. THE IMPACT ON LGBTQ COMMUNITY

The Apex Court said that – “The Constitution nurtures dissent as safety valve of society, we can’t change history but can pass way for better future.” The population of LGBTQ(lesbian, gay, bisexual, transgender and queer) people in India were estimated by the Government in 2012 that around 2.5 million people are homosexual. The figures are obtained from the data of the ministry of health. The actual data might be vastly different since many like those feared so far of discrimination and social stigma. The Supreme Court also said that – “The sexual orientation of an individual is natural and discrimination on the basis of sexual orientation is a violation of freedom of expression. The lives of the LGBTQ Community might be impacted AMD affected in the following ways:

1. Right to Privacy – “In conceptualising the right to sexual privacy, it is important to consider how the delineation of ‘public’ and ‘private’ spaces affects the lives of the LGBTQ community,” – Justice Chandrachud. The choice of sexuality is considered to be the core of right to privacy. All these values are integral and important part of right to life under Article 21 of the Indian Constitution. As per the latest verdict, the right to sexual privacy, founded and identified on the right to autonomy of a free individual.

2. Right to Health – “Individuals belonging to sexual and gender minorities experience stigma, discrimination and in some cases denial of care on account of their sexual orientation and gender identity,” – the SC said. The right to life also includes the right to health because the Article 21 ensures the dignified life of an individual.

⁶Shruti Kedia, Decoding Section 377: What it means for the LGBT community, Social Story (Sept 6, 2018),https://www.google.com/search?q=decoding+section+377+what+it+means+for+the+lgbt&oq=decoding+section+377+what+it+means+for+the+lgbt&aqs=chrome..69i57.20669j0j7&sourceid=chrome&ie=UTF-8#.
The Apex court also said that the right to health of an individual is understood to be indispensable to a life of dignity and well being. Also it is observed by the court that the laws which are criminalizing same sex intercourse are also creating a kind of social barriers to accessing health-care and curb effective prevention and treatment of the disease like HIV/AIDS.

3. **Strengthen Transgender Persons Bill** – The transgender activist Lakshmi Narayan Tripathi said that – The ambiguity in the definition of the “x” gave way to misinterpretation. Section 377 included transgender in it’s purview, since it prohibited ‘unnatural’ or non peno-vaginal intercourse. It means the decriminalisation of section 377 helps in strengthening the Rights of Transgender Persons Bill, 2014. For Example – The right to vote, to own property, the right to marry, the right to education, employment, health and so on.

4. **Mental Health** – Many people treat the homosexuality of individual as a disorder which lead to harm the mental health of LGBT persons, increase the level of depression, anxiety, self harm and suicide. Justice Chandrachud said – “Mental health professionals can take this change in the law as an opportunity to re-examine their own views of homosexuality.”

5. **From denial to freedom** – Justice Chandrachud said – “Does the Constitution allow aquiver of fear to become the quilt around the bodies of the citizens, in the intimacies which define their identities? If there is only one answer to this question, as I believe there is, the tragedy and anguish which Section 377 inflicts must be remedied.” The decision cannot change the wrong done in history but it certainly improves the future. The lesbians, gays bisexuals and transgender have equal citizenship as it is their constitutional right in all manifestations.

V. UPLIFTMENT OF LGBT RIGHTS AND POLICY

The new rules and norms made by the court by emphasizing on the fundamental rights of homosexual persons to live with dignity, and should equally enjoy their rights provided under the Indian Constitution, without the stigma which is attached to their sexual orientation. The aim is also to establish a friendly workplace for LGBT Community where they get equal respect and be treated with dignity. The companies and various organizational workplace should implement non-discrimination policy and LGBT community should not be treated differently from the rest.

For Example – There can be a department within the company which is hosted by the person belonging to LGBT community to resolve any issues and grievances of such persons. Like there women’s concerns at workplace were better addressed by a head woman. As now there is a legal responsibility on part of the employers of companies to establish just and fair policies for LGBT community at workplace as it will make India more inclusive, safe place to work and harassment-free. Such kind of change will benefit the
organization’s also because there will be increase in the workforce participation of diverse communities which eventually contribute to inject new ideas and perspectives into businesses. It also help in the removal of unnatural barriers which are creating resistance in innovation, leadership and initiative.

VI. LINKWITH RIGHT TO PRIVACY

Not the so called right but the real right guaranteed under constitution. what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called. It is understood that the name may be a convenient concept for identification but the essence behind the same is the core of identity.

The term ‘privacy’ owes its presence to the word ‘private’. Private is something that is not public and is not guaranteed to be observed by the presiding authority constantly. Privacy is thus the state of being free from the any of the public attention. The actions finished by a person that he requires no implication in by any other person or any specialist are categorized as private happenings. Such happenings may include conducting a medical checkup; activities within your home; using a restaurant bathroom; incoming the office of a reproductive health provider; and generally, any action meant for which you have the reasonable expectancy of privacy.A definite legal definition of ‘privacy’ is not available. Some legal experts tend to define privacy as a human right enjoyed by every human being by virtue of his or her existence. It depends on no instrument or charter. Privacy can also extend to other aspects, including bodily integrity, personal autonomy, informational self-determination, protection from state surveillance, dignity, confidentiality, compelled speech and freedom to dissent or move or think. In short, the right to privacy has to be determined on a case-by-case basis.

“Privacy” is a “State of mind”. A person may be within a crowd and still touch his privacy is not occupied. On the other hand he may be inactive in a shut room but occupied with anxiety that his privacy is being invaded. The right to privacy generally covers physical privacy, informational concealment and decisional self-sufficiency. The relationship of scientific fees and the right to privacy in the numerical age requirements to be thoroughly scrutinized. The nine-judge bench has precisely emphasised the necessity for data fortification laws — a task now trusted, at a preliminary stage, to the Justice Srikrishna Committee .But, notwithstanding of any technological variations, the respect of the right of individuals to make a choice of how and where they want to live, work and chase their individual dreams must be endangered. Nine judges of the Supreme Court have endangered, for decades to come, the most important right emphasised by Justice Brandeis: The right to be left alone.

VII. SUPREME COURT RULING

The distinction of identity has been flocculently stated in National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438, popularly known as NALSA case, where the Court was abode upon the status of identity of the transgenders. Radhakrishnan, J., after referring to catena of judgments and certain International Treaties, lectured that gender identity is one of the most vital parts of life which refers to a person’s intrinsic sense of being male, female or transgender or transsexual person. A person’s sex is usually assigned at birth, nonetheless moderately small assembly of persons may be born with bodies which combine both or certain aspects of both male and female composition.

Gender identity refers to each person’s intensely felt interior and individual involvement of gender, which may or may not correspond with the gender assigned at birth, including the personal sense of the body which may include a easily chosen, alteration of bodily arrival or functions by medical, clinical or other means and other terminologies of gender, including dress, speech and movements. Gender identity, therefore, refers to an individual ‘s self-identification as a man, woman, transgender or other recognized category.

Gender identification is vital section which is required for appreciating civil rights by the public. It is solitary with this recognition that many privileges devoted to the carnal recognition as third gender. would be accessible to the said public more expressively viz. the right to vote, the right to own possessions, the right to marry, the right to entitlement of a formal uniqueness through a passport and a ration card, the right to education, employment, health and so on. Emphasizing on the aspect of human rights, he observed:-there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination.

The Constitution has pleased its duty of providing rights to transgenders. Here and now it is time for us to distinguish this and to range and interpret the Constitution in such away to safeguard a distinguished life for transgender persons. All this can be accomplished if the commencement is made with the gratitude of transgender as third gender.

VIII. CONSTITUTIONALITY OF SECTION 377

There are numerous grounds which tests the validity of Section 377 of Indian Penal Code but the destruction of fundamental rights of LGBT communal is a matter of worry. The rule on the private lives of an individual is a destruction on basic human rights and fundamental rights. India is one of the members of United Nations, which makes India liable to follow the obligations placed on it. Homosexuals are a marginal in our nation but it does not mean that they can be overlooked. As the citizens of India homosexuals are guaranteed all the
fundamental rights. Article 14 of the Constitution talks about equality before law and equal protection of the laws which means that every person must be equal in the eyes of law. Equal protection of the law means that the like should be treated alike and not that unlike should be treated alike.\textsuperscript{20} India also follows the concept of Rule of Law which as propounded by A.V. Dicey includes supremacy of the law and equality before the law. According to this homosexual must be treated in the same manner as others are treated but instead of that they are punished of their natural acts. In National Legal Services Authority v. Union of India,\textsuperscript{8} the Supreme Court has held that “Article 14 does not restrict the word ‘person’ and its application only to male or female and Hijras/transgender persons who are neither male nor female fall within the expression ‘person’. They are entitled to legal protection of laws in all spheres of state activity including employment, healthcare, education as well as equal civil citizenship rights, as enjoyed by any other citizen of this country.

The expression ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the grounds of gender identity.\textsuperscript{9} Further, Article 15\textsuperscript{10} of the Constitution prohibits discrimination on the grounds of only religion, race, caste, sex or place of birth or any of them but the opposite of it is being done by penalising the acts of homosexual people.

Article 19(1)(a)\textsuperscript{24} provides the freedom of speech and expression but what is the use of such freedom if the consent expressed by homosexuals does not have any value before law. Article 21\textsuperscript{6} of the Constitution provides right to life and personal liberty which also includes right to privacy which is not explicitly stated in the article but has been underlined by courts as a part of fundamental rights on various occasions.

The Supreme Court’s judgement read “Sexual orientation is an essential attribute of privacy. Discernment against an individual on the basis of sexual orientation is violent to dignity of the individual. Equality stresses that the sexual orientation of every person must be protected on an even platform.”\textsuperscript{11} But the turn of disciplining the sexual intercourse between homosexuals is incursion of their privacy and violates their right to life. Section 377\textsuperscript{12} is unacceptable on a number of counts, It does not differentiate between consensual and forcible sex. Thus cases of abuse and voluntary sex between two consenting adults can be impeached under this establishment. This would disrupt the constitutionally protected right to privacy under the prolonged definition of right to life (Art 21) (“Kharak Singh vs. The State U.P. &Ors.”).\textsuperscript{13}

The definition of “unnatural offences” is superseded. It invites questions such as what is “the instruction of nature”? As considered by whom? Before, it was measured that the instruction of nature was that the carnal act

\textsuperscript{8}National Legal Services Authority v. Union of India, AIR 2014 SC 1863 (India).
\textsuperscript{9}Dr. J.N. Pandey, Constitutional Law of India, Pg. 87 (54th ed., 2017).
\textsuperscript{10}Indian Constitution, 1950, Article 15, cl. 1.
\textsuperscript{12}Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).
\textsuperscript{13}Kharak Singh vs. The State U.P. &Ors, 1963 AIR SC 1295, 1962 (India).
be done only for the sake of reproduction. But today it would not be considered “against the order of nature” if people have sex mainly for wish. Moreover, observed evidence shows that homosexuality and bisexuality is widespread in the Indian society covering a large section of people belonging to different regional, linguistic, and religious backgrounds and social strata. Section 377 denies these people a right to their sexuality. It attends to constitute into being a new morality, a morality that convicts many forms of sex between two consenting adults including oral sex and anal sex and other kinds of sex, which the judges might decide, fall within the definition of “carnal intercourse against the order of nature”. In history of the statute from 1860 to 1992, there have been few reported cases under 377 in court. Currently, Section 377 to be used by the police mostly to victimize gay and bisexual men whom they catch in public areas to extort money and blackmail, despite the fact that blackmail and extortion are criminal offences. Section 377 has also been used to intimidate lesbian women, particularly in the cases of women who have run away together, or if they make their relationship known. (Bina Fernandez, Humjinsi, 1999)\(^\)\(^{14}\)

The constitutional validity of Section 377 was also tested in High Court of Delhi in Naz Foundation v Government of NCT of Delhi\(^\)\(^{15}\), where High Court held Section 377 of IPC unconstitutional in so far as it criminalises consensual sexual acts in private between grown-ups who have achieved 18 years of age being violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 of I.P.C. will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. This classification will grip upright till the laws made by the Assembly to impose the reference of 172nd report of the Law Commission. The privacy allows person to advance human relations without interference from outside the community or the state. Section 377 repudiates a person’s dignity and forbids his or her identity on account of his or her sexuality and is violative of Article 21. It denies a gay person a right of occupied person. The popular morality or public morality of convinced acts is not a valid defense for restriction of fundamental rights under Article 21. Popular morality is based on subjecting ideas of right and wrong. If there is any type of morality that can license the test of convincing state interest, it must be constitutional morality and not public morality. To criminalize homosexuals on justification of their sexual orientation is against the Lawful morality. Article 15(2) incorporates, the rights which even prohibits discernment in the matter of entree to public places. Discrimination on the grounds of sexual orientation is unbearable even on the horizontal application of the right preserved in Article 15. If there is one constitutional theory it can be said to be underlying theme of Indian Constitution, is that of completeness. In every aspect of life, there is obvious in identifying a role for everyone

\(^{14}\)Human rights violations against sexuality minorities in India, A PUCL-K fact-finding report about Bangalore, Pg. 11-12 (Feb, 24, 2018, 2:42 PM),

in the society. Those apparent as ‘deviants’ or ‘different’ by the popular are not on that score excepted.\textsuperscript{16} But this judgement was overruled by Supreme Court in the case of Suresh Kumar Koushal and another v. Naz Foundation\textsuperscript{17} where court held that the substance must be allocated by the government.

**IX. CONCLUSION**

It is needed to be taken in reflection by the citizens as well as government. To be understood by the people that discernment on the ground of sexual orientation is unjust. To accept LGBT people as a part of the society and to assurance them their rights. They are dissimilar but at the end they are also human beings and must be entitled with their rights whether human or fundamental. The criminalization of their sexual acts under Section 377 invades their privacy. The 172\textsuperscript{nd} Law Commission report has suggested for obliteration of Section 377 of I.P.C. The Wolfenden Committee Report also suggested that sexual acts between two agreeable adults should not be preserved as an offence. Apart from the step of legislature and judiciary the efforts to give equal treatment by the majority to the minority must be taken into consideration.

\textsuperscript{16} Dr. J.N. Pandey, Constitutional Law of India, Pg. 328 (54th ed., 2017).

\textsuperscript{17} Suresh Kumar Koushal and another v. Naz Foundation, AIR 2014 SC 563 (India).