

Just Gender: An Approach to S. 377 IPC

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ABSTRACT: This paper explores the perspectives of s. 377 of Indian Penal Code. Various elements have been contrasted out which has been the matter of debate is context to the rights of third gender. The idea is to bring out the historical perspectives of determining the social perspectives of s.377 and its effect in the present times. We live in diversified society wherein people of different cultures, religion live in together. Judicial orders bring out the betterment of society and different colors of reforms which are required for the development of society.

Keywords: *Just Gender, Cultural Group in India, Social Behavior*

Introduction

Laws in India are given by britishers. One of the most debatable issue today has been the rights of third genders and its relevancy in Criminal Justice administration under S. 377 of IPC which is treated as gift by the British rule. It is based on the act of 1533 by the Parliament of England during the reign of King Henry VIII used to criminalize the sexual activities “against the order of nature”. S. 377 of Indian Penal Code criminalizes homosexual relations which has no jurisprudential justification as it makes consensual voluntary sexual act. The state cannot use its power to punish a particular practice on grounds of immorality only because of majority believes in it but this law also defines a criminal class not by virtue of its social behavior but also by sexual orientation.

Gender Justice

There is an increasing evidence that much greater bias operates at the unconsciousness. The distinction between male, female and third gender have always been a matter of discussion in the society. The term gender and sex have been used interchangeably. However, there is distinction between the two. In 1969, Robert Stoller used the terms ‘sex’ to pick biological traits and ‘gender’ to pick out the amount of femininity and masculinity in a person exhibited. An Implicit bias focus puts people at a net disadvantage due to gender. They invite discrimination towards gender. Hence sex is an assigned status, but gender is an achieved status. The struggle for rights, freedom and justice has been a considerable mainstream.

Apart from this, the third gender or the transgender, which on including them the term 'gender' is not only determined by the sex, but also therefore determined by the tasks, roles and functions given by the society in their private and public life. These inequalities among or differences among genders are not only in resources but also in opportunities and power. These can also be classified as the discrimination among the spheres of political, social, or economic rights. Therefore, we only understand that it encompasses a wider scope of addressing the fair and equal justice to men and transgender and not specially to women only.

Gender Justice and Third gender

Transgenders usually live in full or part time in the gender. In the broad sense, transgenders have been recognized as the term 'hijras' in Indian society are treated by society as unnatural and generally as objects of ridicule and even account as superstitious activity. Transgender also face many issues in the society besides from being look suspiciously all the time. This community have been perceived and has been excluded from participating in social and cultural life and moreover could be contrasted out as decision making process. In today's perspective it can also be referred as gender justice also highlights the rights of transgender in fulfilling rights of transgender in fulfilling their fundamental rights and acceptance.

An Interpretation of S. 377

S. 377 reads as "Whoever voluntarily has carnal intercourse against the order of nature with any man, or 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.

S. 377 IPC uses the words "Carnal Intercourse against the order of nature". The words order of nature here means from where conception is possible, and conception is possible only when there is sexual intercourse between male and female (penile vaginal). If it is between male and female but penile anal then it is within the ambit of S. 377 IPC. This section is intended to punish the carnal intercourse and it corresponds to the offence of sodomy and bestiality under English law. Sodomy means anal intercourse and bestiality means intercourse with animal. Under this section, consent is wholly irrelevant i.e the consent with whom the intercourse was performed is immaterial means to say the person will also be liable as an accused. If the person is consenting party, then he/ she will be liable as abettor and if the person is nonconsenting party, then he/she will be treated as victim.

Historical Perspective

The Buggery Act of 1533 was drafted by Thomas Macaulay around 1838 but brought into effect in 1860. This law in British India was modeled on the Buggery Act, 1533 which was enacted under the reign of king Henry VIII. This law defined buggery as an unnatural offence against the will of God and Man.

Religious perspective on Homosexuality

Homosexuality has been prohibited almost in all the religious beliefs and traditional law codes. In ancient India, the acts of homosexuality were considered as question of morality than a law problem.

India was having no codified law in context to homosexual practices, and it was within the ambit of IPC when it was drafted and enforced. Religious texts and codes were only possible guides for deciding the homosexuals acts and these acts were considered the prism of morality.

What is included in unnatural sexual intercourse?

According to the explanation attached to s. 377, penetration is sufficient to constitute carnal intercourse necessary to the offence described in this section. The definition of s. 377 is not proper i.e. why s. 377 became subject to various judicial interpretations over the year. Initially it covered only sodomy and bestiality and later with the passage of time it also included oral sex.

Present settled position

On September 6, 2018, the Supreme Court of India in constitution bench of five judges decided to announce the application of s. 377 to consensual homosexual between two adults is unconstitutional, irrational, indefensible and arbitrary. But s. 377 continues to remain in force relating to such sexual intercourse with minors, nonconsensual sexual acts and bestiality. So, s. 377 is partly unconstitutional.

- (a) Male having consensual sexual intercourse with male is not an offence.
- (b) Female having consensual sexual intercourse with female is not an offence.
- (c) Minor Male or female having consensual or nonconsensual sexual intercourse is an offence.

Judicial Interpretations

Naz foundation v. NCT Delhi : The Naz foundation trust, a Delhi based NGO working in the field of HIV prevention amongst homosexuals. This NGO realizes that Section 377 is one of the biggest impediments in access to health services for MSM (men having sex with men). Naz foundation filed a writ petition before the Delhi High Court seeking declaration that s. 377 to the extent that it penalizes sexual acts in private between consenting adults is violative of several provisions of Constitution. In the writ petition, Naz foundation claimed that:

- (a) It is violative of Article 21 of constitution which provides right to life and personal liberty as the right to life also includes right to privacy and dignity.
- (b) It is also violative of article 14 of the Indian Constitution i.e., equality before law.
- (c) It is also violative of article 15 (because it discriminates based on sex) as it prohibits homosexuality based on mere sexual orientation.
- (d) It is violative of article 19 (1)(a), (b), (c) as individual's ability to make personal statement about his sexual preference, right to associate and assemble and right to move freely.

The government replied on the following grounds:

The government was represented by ministry of Home Affairs and ministry of health and family welfare, but these two ministries took contradictory stand.

- (a) Ministry of health affairs justifies the retention of s. 377 while ministry of health and family welfare supports the claim of petitioner and justified the existence of s. 377 to some extent.

- (b) Where ministry of health affairs justified the existence of s. 377 on the grounds of public health, morality, and social disgust.
- (c) It further says no right including the fundamental rights can be absolute
- (d) The Constitution permits reasonable restrictions on Fundamental rights on the ground of decency, morality, and public health. So, the restrictions of homosexual acts through s.377 is justified.

Suresh Kumar Kaushal v. Naz Foundation

The Supreme Court has set aside the decision given in Naz foundation and upheld the constitutionality of s.377. It rules that s.377 does not suffer from the voice of unconstitutionality and does not offend either of the provisions of article 14, 15 and 21. The SC didn't find enough reasons for declaring any portion of s.377 to be unconstitutional. Moreover, SC held that there is presumption of constitutionality in favor of all laws including pre-constitutional laws (IPC, 1860) as Parliament is deemed to act for the benefit of people. So, in the case in 2014, SC directed that s.377 is constitutional.

Analysis Of the Impact of Judicial Decisions

Analyzing the orders of the court, there tends to be some positive and negative impact of S.377 Indian Penal Code. Contrasting out the same the decision of court can be positive in nature for one but negative on the other side of coin for others.

Ensuring fundamental rights under article 14, 15 and 21 guaranteed in the Indian Constitution the LGBT community would enjoy their right to choose, right to equality, right to life and liberty, right to live with dignity and non – discrimination based on sex. Justice Deepak Misra, former Chief Justice of India contrasted out that a section of people that falls under the LGBT community could not live-in fear of law which hinders away their rights.

Positive Impact

Following the judgment of Navtej Singh Johar v. Union of India, the portion of it has been held to be criminalized and applicable to non-consensual, penile, non vaginal sex, sexual acts and force relating acts by adults with minors. A portion of it is still held to be criminalized and due to this it plays a vital role in the Indian Society. Moreover, the cardinal principle of autonomy states under this states that under the scheme of constitution, the individual has sovereignty over person's own body. A person can willfully surrender his/her autonomy willfully to another individual and their intimacy in private is matter of their choice.

Negative Impact

Opposition of this, this verdict stands immoral and unethical on the grounds of society. It is of the opinion of some that this verdict is against the cultural beliefs. This is also against the principle of natural intercourse i.e., men and women. They believed that unnatural sexual intercourse welcomes the unethical perspectives i.e., an intercourse between men and men or women and women. It is the general rule of interpretation that when any law is interpreted, the intention of the legislature must be taken into consideration because it helps judiciary to identify the exact meaning of a statute for which a law is enacted.

Conclusion

The 2018 verdict based on constitutional morality could easily repeal S.377 declaring it irrational and manifestly arbitrary. This judgment cannot transform the overnight perceptions of society related to the third gender as it needs to be accepted by the society on various norms. Not only on ethical or cultural perceptions but also on emotional well-being of society including the Third Gender Community. Creatures of God or it may be said as Third Gender are also the part of society and it should be further an accepted principle that rights are for everybody and they should be given the rights for their security and upbringing. The Third Gender community at large has still to fight for their rights and it's just a watershed moment in a long war which has not seen its conclusion.

CONFLICTS OF INTEREST

There are no conflicts to declare.

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