

DELHI HIGH COURT'S RULING ON SECTION 377 OF IPC 1860 WHICH DEALS WITH UNNATURAL OFFENCES (HOMOSEXCUALITY). [July 2009]

In a Landmark Judgment, delivered by **Delhi High Court on 2nd of July, 2009** a bench of **Chief Justice Hon'ble Shri A.P. Shah** and **Hon'ble Shri S. Murlidharan** declared **Section 377 of IPC "Violative of Constitution of India in so far as it criminalizes consensual sexual Acts of Adults in Private."**

A lot of hue and cry is being raised by a section of our society with some socio - political leaders going to the extent of criticizing judiciary in a non charitable manner. However, without opposing their right to oppose the order and air their views, I would like to point out that the manner in which they are criticizing judiciary requires a restraint. Judiciary is merely doing its duty of interpreting the law and parliament is always in its right to make or amend an existing law. Who can forget Shah bano case and subsequent amendment of law by the congress led parliament under the leadership of late Rajiv Gandhi. We should never forget that we are a democracy and there are very fine thinly regulated system of checks and balances and which need to be respected for vibrant and successful democracy.

However, let us now consider the judgment of the Delhi high Court which has been in news for its path breaking judgment.

The Writ Petition on which Delhi High Court delivered its landmark Judgment was filed by an NGO (Naz foundation) as Public Interest Litigation to challenge the constitutional validity of section 377 of IPC to extent that the said provision criminalizes sexual acts between adult in private. The Writ Petition was earlier dismissed by the Delhi High Court in 2004 on the ground that there is no cause of action in favor of the Petitioner and that such a Petition cannot be entertained to explain the academic challenge to the constitutionality of the legislation. The Supreme Court with a order dated 3rd February, 2006 set aside the said order of Delhi High Court observing that the matter does require the consideration and is not of a nature which could be dismiss on the aforesaid ground.

HISTORY OF THE LEGISLATION:

Section 377 of IPC criminalizes sex other than heterosexual penile - vaginal. The Legislation History of the subject indicates that the 1st record of sodomy as a crime at common law in England were chronicled in Flata in the year 1920 and later in the Britton in the year

1300. Both texts prescribe that sodomites should be burnt alive. Acts of sodomy later became penalized by hanging under the Buggery Act of 1533 and which was re-enacted in 1563 by Queen Elizabeth – 1.

In 1861 the death penalty for Buggery was abolished in England and Wales. However, sodomy/Buggery remained as a crime “Not to be mentioned by the Christians”.

The said Section drafted by Lord Macaulay in 1860 prescribes imprisonment up to 10 years for unnatural sex and outlaws non-vigilance sex (oral or anal) and any kind of sex with animals. The English law was reformed in Britain by the sexual offence act 1967. Section 377 of IPC is contained in Chap 16 of IPC under the Title “of offences affecting the Human body” within this chapter Section 377 of IPC is categorized under the subject “unnatural offences”. The concerned section read as below:

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”

The Judgment delivered by the Delhi high Court has very nicely analyzed as to how the unnatural offences as perused under section 377 of IPC has undergone change from non-procreative to imitative to sexual perversities. Thus we find that in *Khanu v. Emperor*, AIR 1925 Sind 286, Kennedy A.J.C. held that “section 377 IPC punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings.... [if the oral sex committed in this case is carnal intercourse], it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible.” Thus here we find that purpose of sex is procreation and any sex which does not lead to procreation is illegal. Moving further In *Lohana Vasantlal Devchand v. State*, AIR 1968 Guj 252, the issue was whether oral sex amounted to an offence under Section 377 IPC. It was held that the “orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse.” Moving further in the case of *Fazal Rab Choudhary v. State of Bihar*, AIR 1983 SC 323; it was observed that Section 377 IPC implied “sexual perversity”. However, it is noteworthy that courts had earlier held in R.

V. Jacobs (1817) Russ & Ry 331 C.C.R., and Govindarajula In re., (1886) 1 Weir 382, that inserting the penis in the mouth would not amount to an offence under Section 377 IPC.

CASE OF THOSE WHO ARE OPPOSING THE SECTION 377 AS IT IS:

1. According to Petitioner NGO and those who supported the petition Homosexual and such other people represents population segment that is extremely vulnerable to HIV/AIDS infections. According to them the HIV/AIDS preventive efforts were severely impaired by the discriminatory attitudes of the State Agency towards homo – sexuality as the same is covered under section 377 of IPC, as a result of which basic fundamental Human right of such groups (in minority) stood denied and they were subject to abuse, harassment, and assault from public and public authorities.

2. Further the concerned Section 377 of IPC is based upon traditional Christen moral Standard which conceives sex in purely functional terms i.e. for the purpose procreation only. Any non-procreation sex activity is thus viewed as being against the order of nature.

3. Recent past History of section 377 of IPC shows that it has generally been employed in cases of child sexual assault and abuse and not on private consensual same sex conduct and thus criminalizing consensual oral and anal sex is outdated and served as the weapons for money and perpetuate negative and discriminative beliefs towards homo sexual.

4. The submission of NACO and consequently ministry of Health confirm the case set out by those demanding changes that Homo sexual community is particularly susceptible to attracting to HIV/AIDS. According to NACO those in the high risk of HIV/AIDS category like Homo Sexual have been found to be mostly reluctant to reveal same sex behavior due to the fear of law enforcement Agencies and thus keeping a large section invisible and unreachable and thus thereby pushing the cases of infection underground making it very difficult for the public worker to even assess them.

5. Voices against section 377 of IPC is coalition of 12 organization representing child rights, women rights, Human rights, Health concerns as well as rights of same sex desiring people including those identified as Lesbian, gay, by sexual, transgender, Hizra, kothi persons. This group supports the cause of the Petitioner and realized

upon its report, title "Rights for all, ending discrimination under section 377 of IPC", published in the year 2004 to create awareness about negative impact of this law of society in general and Lesbian, gay, by sexual, transgender, Hizra and Kothi persons in particulars.

6. The Petitioner had further stated that the said section to the extent of their application violates the section 14, 15, 19 (1) (a) (b) (c) and (d) and Article 21 of the Constitutional of India and thus consensual sexual intercourse between two willing adult in private is required to be saved and excepted from the panel provision contained in **section 377 of IPC.**

CASE OF THOSE WHO ARE SUPPORTING THE RETENTION OF SECTION 377 AS IT IS:

As for the Union of India WAS concerned in this particular case the Ministry of Home affairs and Ministry of Health and family welfare had taken contradictory stands as is clear from the affidavit filed by two wings of Union of India. The Ministry of Home affairs sought to justify the retention of section 377 of IPC, whereas ministry of Health and Family insistent that continuance of section 377 of IPC has hampered the HIV/AIDS prevention efforts. Stand of Ministry of Home affairs and supporters seeks to justify the section 377 of IPC on the reason that: -

- a) It has be generally invoked in cases of child sexually abuse and for complementary lacunae in rape laws and not mere home sexuality;
- b) This clause has been used in cases of assault where bodily harm is caused or feared;
- c) Delusion would open the flood gate of delinquent behavior;
- d) Interference by Public authority in the interest of public safety and public health and morality;
- e) 42nd report of law commission of India in its report have justified that Indian society still considers that homo-sexuality is criminal offence.
- f) The subject is relating to policy of law rather than the legality;
- g) In Parliamentary secular democracy the legal conception of crime depends upon political as well as moral consideration, notwithstanding overlap existing between legal and moral factors;

h) Public tolerance to such acts by other country and society cannot be the ground for its legality as the same is not approved or tolerated by Indian Society.

i) Anything which is illegal can not be legalized by the consent of the party who is party to such illegality.

HIGH COURT VIEW:

The Hon'ble High Court held that Section 377 of IPC infringes Articles 14, 15 and 21 of the Constitution of India to the extent it criminalizes consensual sexual Acts of Adults in Private. The Hon'ble High court did not deal with violation of Article 19(1) (a) to (d) and that issue has been left open.

The Hon'ble High Court has held that the criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lacs. The number of lesbians and trans genders is said to be several lacs as well. This vast majority is denied "moral full citizenship". Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalizes consensual sexual acts between adults in private.

The Hon'ble court has further held that if the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health vis-a-vis said section of society. The provision, from this perspective, should fail the "reasonableness" test.

The Hon'ble High Court held that right to life & protection of a person's dignity, autonomy and privacy is covered by Article 21 of the Constitution of India. S -377 of IPC is an infringement of the right to dignity and privacy.

The Hon'ble High Court held that Section 377 is an impediment to successful public health and the submission of ASG that Section 377 IPC helps in putting a brake in the spread of AIDS and if consensual same-sex acts between adults were to be de-criminalized, it would erode the effect of public health services by fostering the spread of AIDS is completely unfounded since it is based on incorrect and wrong

notions. It held that Sexual transmission is only one of the several factors for the spread of HIV and the disease spreads through both homosexual as well as heterosexual conduct. There is no scientific study or research work by any recognized scientific or medical body, or for that matter any other material, to show any causal connection existing between decriminalization of homosexuality and the spread of HIV/AIDS. The argument, in fact, runs counter to the policy followed by the Ministry of Health and Family Welfare in combating the spread of this disease.

MORALITY AS A GROUND OF A RESTRICTION TO FUNDAMENTAL RIGHTS:

Hon'ble High Court held that if a court finds that a claimed right is entitled to protection as a fundamental privacy right, the law infringing it must satisfy the "compelling state interest test".

While it could be "a compelling state interest" to regulate by law, the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a "compelling state interest" to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.

Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. 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. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.

In the 172nd report, the Law Commission has recommended deletion of Section 377 IPC, though in its earlier reports it had recommended the retention of the provision. In the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and inter alia, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC

WHETHER SECTION 377 IPC VIOLATES CONSTITUTIONAL GUARANTEE OF EQUALITY UNDER ARTICLE 14 OF THE

CONSTITUTION:

The scope, content and meaning of Article 14 of the Constitution has been the subject matter of intensive examination by the Supreme Court in a catena of decisions. The decisions lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objective sought to be achieved by the statute in question. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e., causal connection between the basis of classification and object of the statute under consideration. Hon'ble High Court held that the classification under S-377 bears no rational nexus to objective sought to be achieved.

THE CLASSIFICATION BEARS NO RATIONAL NEXUS TO THE OBJECTIVE SOUGHT TO BE ACHIEVED:

Section 377 IPC makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to anybody. Thus it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14.

INFRINGEMENT OF ARTICLE 15 – WHETHER 'SEXUAL ORIENTATION' IS A GROUND ANALOGOUS TO 'SEX':

Article 15 is an instance and particular application of the right of equality which is generally stated in Article 14. Article 14 is genus while Article 15 along with Article 16 are species although all of them occupy same field and the doctrine of "equality" embodied in these Articles has many facets. Article 15 prohibits discrimination on several enumerated grounds, which include 'sex'. The argument of the petitioners was that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex discrimination cannot be read as applying to gender simpliciter. The Hon'ble High Court held

that the sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. According to Hon'ble Court, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.

TEST OF REASONABLENESS:

The Hon'ble High Court held that the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society. If a law discriminates on any of the prohibited grounds, it needs to be tested not merely against "reasonableness" under Article 14 but be subject to "strict scrutiny". The impugned provision in Section 377 IPC criminalizes the acts of sexual minorities particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution. Section 377 IPC in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.

SCOPE OF THE COURT'S POWER TO DECLARE A STATUTORY PROVISION INVALID:

The Hon'ble High Court also dealt with the subject of Court's power to declare statutory provision invalid especially since Union of India filed written submissions in which it claimed that the courts have only to interpret the law as it is and have no power to declare the law invalid. According to ASG (Additional Solicitor General), therefore, if Hon'ble Court were to agree with the petitioner, they could only make recommendation to Parliament and it is for Parliament to amend the law. However, the Hon'ble court did not agree to the views of ASG and observed that the submission of learned ASG reflects rather poorly on his understanding of the constitutional scheme. It held that it is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution derives its power or

authority under the Constitution and has to act within the limits of powers. The judiciary is constituted as the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. The role of the judiciary is to protect the fundamental rights. A modern democracy while based on the principle of majority rule implicitly recognizes the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view. It is the job of the judiciary to balance the principles ensuring that the government on the basis of number does not override fundamental rights. After the enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme.

DOCTRINE OF SEVERABILITY:

The prayer of the petitioners was to declare Section 377 IPC as unconstitutional not completely but to the extent the said provision affects private sexual acts between consenting adults in private. The relief has been sought in this manner to ensure the continuance of applicability of Section 377 IPC to cases involving non-consensual sex. Based on the doctrine of Severability the hon'ble High Court declared that S-377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The Hon'ble Court further held that the provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' the Hon'ble Court meant everyone who is 18 years of age and above.

CONCLUSION

The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, "Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion..... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future." [Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, pages 57-65]. If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. Indian Constitution

reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as "deviants" or 'different' are not on that score excluded or ostracized. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and nondiscrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual. We are a democratic country where we "agree to disagree". This right of others to disagree requires to be protected for sustenance of democracy. After all, we all Indians want Qasab (seen killing our countrymen on video live), Accused of Mumbai attack, to be hanged but we still provide him with a lawyer and hold trial for the same. Why do we do that? Because it is the fundamental right to have a Lawyer and defend our case. No one can be punished without a trial. It is the rule of law that has to prevail. If, that is the case then why can not we allow adult people to decide on their sexual orientation and preference? By saying this I am not trying to justify or the Hon'ble Court tried to justify Homosexuality, but what the court held was that because we are a democratic society and there is enough scope for disagreement within the society and thus we might not agree with each other words and deeds but we certainly protect the right of others to disagree and do things which we do not like as long as it is not unlawful legally. We are a multi cultural and multi ethical country where differences in acts and deeds are bound to be there but that does not make the words and deeds of minority unlawful simply because it does not toe the line of majority or it is in opposite to the views of the majority.

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