



CONSTITUTIONALITY OF UNNATURAL OFFENCES IN INDIA: PRESENT SCENARIO

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ABSTRACT- Section 377 of the IPC talks about unnatural offence. Unnatural offence means sexual intercourse with any person which is against the order of nature. Now here question arise that does homosexual gives good message to the society? This paper also talks about natural offences and the LGBT Community and the various aspects of homosexuality and is it really fair to discriminate the homosexual or LGBT community? It also contains the reason behind homosexuality. Whether any special legislation should be enacted to protect the fundamental rights of the LGBT community? It focuses on the law of India and fundamental rights of every citizen of India. The first chapter in this paper introduces the unnatural offence which is provided in section 377 of IPC with its punishment. Second chapter talks about the history of the legislation i.e from where unnatural offence came. Third chapter talks about arguments in favor of section 377 and also contain defense statement. The forth chapter talks about constitutional validity of section 377 and some important case laws like Naz foundation where they are appealing to repeal this section because it is violating fundamental rights of the citizen. It also discussed about the homosexuality as a disease. It also contains various people opinion on homosexuality. Our legal system will not enforce homosexual activities in India, if it does it leads to unconstitutional. This paper mainly aims that as we all know that homosexual in India are not treated well. They were discriminated on every ground. So if any special law enacted for the homosexual community, it will just like new hope for the survival of LGBT Community. Everyone has right to choose their partners and they have rights to be treated as heterosexual couples.

Key Words: Unnatural Offence, LGBT, Homosexual, Punishments, Discrimination

I. INTRODUCTION

It is common inclination that people of one sex are attracted towards another sex or inversely attracted to other gender. For instance female are attracted towards male and male are attracted towards female. But now a day it is likely to see that people are not inversely attracted but they are similarly attracted. They are considered as unnatural offences. The whole community is considered as LGBT. The same sex fascinating is known as homosexuality and people are known as homosexual. In simple words homosexuality is a sexual attraction between samesex. Now here question arises that what causes homosexuality? Is it genes, upbringing or personal choice. So according to my point of view it is just because biological factor and it is not a choice. The provision regarding this is given under section 377 of Indian Penal Code which is considered as unnatural offence. The punishment for this offence is either life imprisonment or description for a term which may extend to 10 years. This offence is considered as against the nature. Consent in unnatural offence is regarded as immaterial because it is done against the order of nature. And the party consenting is treated as abettor.

If as a women fell in love with other women, it is considered as a sin and she have to confront with the society. In 21st century, we all have right to choose our partners then why it is recognized as disgraceful in society. LGBT are discriminated in every field even their family feels shame to accept them. They were forced to marry opposite gender to maintain their dignity in society. LGBT are still struggling to express their gender choice. LGBT are fighting for equal right and acceptance but they are ignored by the society. Section 377 of Indian Penal Code prohibits unnatural offence. According to this section:

Unnatural Offences- Whoever voluntarily has carnal intercourse against the order of nature with any man, women, 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 be liable to fine.

This section is very unclear as what is against the order of nature and it is impossible to define objectively.

HISTORY OF THE LEGISLATION

The Indian Penal Code was drafted by the Lord Macaulay and was introduced in 1861. It was influenced by the British law. At that time the crime of Britain was considered as crime under IPC, 1860. Act of

Sodomy was punished by hanging under the Buggery Act, 1533. The term 'Buggery' means unnatural sexual act which is against the will of god and man. Section 377 of IPC was also acquired from this Act. This law has never been amended since it's enacted. According to our ethical standard, sex is only done for the procreation of children and on this principle our law is also based. So on the basis of this, homosexuality is unnatural offence and it is against the order of the nature. So Section 377 is very important to determine what is natural and what is unnatural.

INTERNATIONAL PERSPECTIVE ON LGBT RIGHTS

When we talk about Tanzanian Constitution (1977), it also guarantees the right to equality and can forbid the discrimination based on gender. But LGBT people still facing problem in that country and they were discriminated, harassed by the society. LGBT people are still not coming out to declare themselves as LGBT. Section 154 of the Penal Code of Tanzania talks about the unnatural offence with punishment of maximum 20 years to life imprisonment. As consequences of the existence of these laws criminalizing homosexual act, LGBT community in Tanzania suffering from stress and they have fear of sue and its punishments.

Now when we talk about Uganda, the parliament of Uganda passed a bill on prohibition of promotion of unnatural sexual practices which was violating the international law. So the constitutional court of Uganda struck down the bill because it was violating the rights of the LGBT people and also discriminating them for their sexual orientation.

ARGUMENTS IN FAVOUR

Rights to dignity and life- According to Article 19(d) and Article 21 every citizen have right to live with dignity but due to Article 377 their rights to privacy infringes and they don't feel their self worth. LGBT are forced to hide their identity to the society. They are discriminated on every ground. Public disapproval is not only the reason to restraint one's freedom. As every individual have rights to choose their partners even if they were homosexual. Constitution of India respects all the citizen and do not discriminate people on the basis of sexual orientation. Constitution follows constitutional morality not public morality.

Right to Privacy- Constitution of India provides privacy to all citizen of India either in matter of marriage, education or procreation. Homosexual is not a big matter, it just only express their sexuality without harming anyone. The right to privacy provides happiness to the human life. Restraining this right needs a strong reason because it may lead to infringement of one's right. Homosexuality is not a big ground to restrain this right.

Discriminated by Society- Homosexual are facing discrimination in society. They are denied by basic rights and considered as victim. Their basic fundamental rights are acquired by the society and they were treated as victim. People used to look homosexual with dirty eyes. They were also harassed, blackmailed by the society. And this torture was the result of section 377 of IPC, 1860.

Freedom to Choose- Every individual has right to choose their partners even if they are LGBT. Law and Society are not bound to interfere in the matter of individual. Making one's decision oneself enables an individual to build their confidence or to complete their goals. According to this right even Girl have right to choose her girl partner, boy can choose their boy partner and society have to accept their relationship without interfering in it.

Using Mill's Harm Principle- According to this Principle, if any homosexual act done privately and without harming other or society, it cannot be prohibited. If any harm caused to the homosexual it cannot be considered as harm because it is done on consent and it is considered as self regarding act. The act of homosexuality is not prohibited until it causes harm to the people or society. According to this principle, being offended by an act is not counted as being harmed.

THE DEFENCE

Some arguments that favor Section 377 of IPC:

Sexual intercourse is only to conceive- Law is based on principle of Judeo Christian moral and ethical standard and according to this sexual intercourse is only done for procreation of children. It is considered

as only duty for procreation. When we look at the Vedas, even it is provided that sexual activities are only done for procreation. When we see the LGBT, they only did sexual activities for the pleasure. They cannot give birth to the baby. So it is restricted by the society. Sexual intercourse also transmits disease from one person to another. So it is safe when it is done for procreation. So Section 377 indirectly talks about safety of person, that's why this section should not be taken down.

Importance of Public opinion- Law is a concept of both moral and political structure and society is absolutely based on it. In India, people have opinion that homosexuality is against the tradition and custom of our society and if anyone try to go beyond this is not considered as good. Law cannot run separately from the society. The act which hurts the feelings of public at large extent are prohibited. Their rights of freedom can be infringed if it is hurting the sentiment of public. India is following the older tradition according to which homosexuality is one of the unethical activity. Hence it would be silly to uplift the protest against this section unless the public opinion regarding it changes.

It is against Morality- It is obviously true that every citizen have right to choose their partners or freedom of expression but it doesn't include the freedom to be immoral. When we talks about homosexuality, it is immoral act whether is done privately or publically and the laws prohibit these kinds of act. It is against the order of nature or against the will of god. So it is recognized as immoral Act.

CONSTITUTIONAL VALIDITY OF UNNATURAL OFFENCES UNDER SECTION 377 OF INDIAN PENAL CODE, 1860

The constitutional validity of section 377 was challenged in case Naz Foundation v. Government of Delhi & Ors. In this case it was argued that section 377 was violating the fundamental rights of Articles 14, 15, 19 and 21. It was also stated that Article 21 can be diminished only if the interest of the state is gripped which is missing in this case. It was also argued that the word "sex" used in Article 15 is not only indicate gender but it includes "sexual orientation" and Article 15 states that no discrimination on the grounds of sex. Consequently, the section 377 was declared unlawful by the High court of Delhi.

Later High Court judgments were reversed by Supreme Court of India on 2013. Reason given by Supreme Court that revoking section 377 falls under the scope of parliament, and cannot be chosen by the legal. Besides, on 28 January 2014 Supreme Court rejected all the survey petitions against its decision on section 377 of IPC.

In case of Navtej Singh Johar v. Union of India, the following aspects were delivered:

The court highlighted that a person indulging any kind of sexual activities with animals are considered as criminal offence under section 377 of IPC.

The LGBT Community will not be discriminated on any ground and will be equally treated as other persons and their rights will not be violated.

Section 377 of IPC are illogical and random so it must be partially prohibited to the extent to which it criminalizes consensual sex between two adults.

Section 377 of IPC used as equipment to harras the LGBT Community and also creates discrimination among citizens.

LAW COMMISSION REPORT

In 172nd report which is submitted by chairman B P Jeevan Reddy in 2000 to the law minister (Ram Jethmalani) the commission recommended that section 377 deserves to be deleted in the light of section 375 which is already effected. The purpose behind the recommendation is if section 375 is deleted, then only thing which is left in section 377 is sexual intercourse with animals, and we may leave such persons to their just deserts.

But government had not taken any step to modify or delete this section. When IPC adopted many amendments were introduced related to sexual offences but still legislature not choose to amend this section.

VIEWPOINT OF VARIOUS PEOPLE IN MATTER OF HOMOSEXUALITY

1) HOMOSEXUALITY IS A DISEASE, IT CAN BE CURABLE: BABA RAMDEV

According to yoga guru, Baba Ramdev had stated that homosexuality is a disease and it can be curable by practicing yoga. He also invited to the LGBT Community claiming that their bad addiction can be cured if they do yoga on daily basis.

Further, he also stated the scientific view that homosexuality is not a genetic but it is unnatural. No one would have been born homosexual if there ancestor were homosexual.

2) SUBRAMANIAN SWAMY

He is a BJP leader. According to him, it is against the practice of Hindutva. He also stated that it is an English practice. The minister also quoted after the verdict of supreme court that it is nothing to celebrate nor it is a normal thing but government should invest in medical research to make it curable.

IS HOMOSEXUALITY A DISEASE?

Earlier homosexuality is regarded as socially and mentally unwell. Even Ramdev- Tijrawala case argued on the basis of false research that it is a curable disease which is caused due to environmental factors. Such researches not only misleading the people but also have potential to incite the people.

But according to recent study, it has been found that homosexuality is not a disease but it is a part of one's identity. And now it has been removed from the list of mental illness by the WHO. It is a part of person personality which they can carry with themselves. It doesn't need to be cure nor it is curable. So section 377 is remains invalid.

SECTION 377 ALSO VIOLATES THE BASIC FEATURES OF THE CONSTITUTION OF INDIA

Preamble of the Constitution of India cherished the word namely: Liberty, Equality and Justice to all citizen of India either they are straight or homosexual. It constitutes basic features of the constitution but section 377 denies these objectives. Further it also denies equality and equal protection. Hence it is clearly violating the basic features of the constitution.

ARGUMENTS AGAINST REPEALING OF SECTION 377

If this section shall not repealed then sexual transmitted disease like HIV and AIDS would spread and harm the people.

It would degrade the moral value of the society and may also cause big health hazard.

According to Apostolic Churches Alliance homosexuality was a disgrace in the bible.

ARGUMENTS IN FAVOUR OF REPEALING SECTION 377

It was violating the fundamental rights of the citizen whether it is heterosexual or homosexual.

It was infringing Article 14,15,19 and 21 of the constitution of India.

By criminalizing it, many health care are not provided to the homosexuals.

It was also asked that Right to sexuality and freedom were necessary to human dignity.

CURRENT LEGAL STATUS OF HOMOSEXUALITY IN INDIA

On 24 August 2017, Supreme Court of India gave the freedom to express sexual orientation to the LGBT community. Therefore, it is protected under right to privacy. On the date of 6 September 2018, Supreme Court again legalized the consensual gay sex.

Any sexual activities which is against the order of nature or against the will of god is punishable by law. The law replaced the variety of punishments for unlawful intercourse mandated in the mughal empire. Many political leaders like Arun Jaitley and Shaina NC also favoured the decriminalization of homosexuality.

Section 377 of IPC was considered partially valid because when the unnatural sex done with minor and animals are punishable by law for a term which may extend to 10 years or life imprisonment or fine.

SOME LANDMARK JUGEMENTS

Suresh Kumar Koushal Case (2013)

Supreme Court overturned the judgement of Delhi High Court which was held in 2009 that homosexuality was decriminalized act and criminalized the homosexuality once again.

NAVTEJ SINGH JOHAR v. UNION OF INDIA

In this case Court held that section 377 of IPC,1860, as much as it applied to consensual sexual conduct between adults in private, was unconstitutional.

IMPACT OF DECRIMINALISING HOMOSEXUALITY

Homosexual people are able to live with dignity and use their fundamental rights in their own ways.

Harassment faced by them either by the society or the police will be ceased.

LGBT Community able to open their sexual preferences in front of society and they don't feel shame to talk about their choices.

II. SUGGESTIONS

- 1) The most initial step is sex education. Sex education is provided in school. A child must not feel shameful in talking about these terms. They were also good at talking about their sexual orientation to their guardians or teachers. Everyone have right to choose their partners and do not feel shame if they are homosexual.
- 2) Parents also completely valued their wards circumstances and guide them. Parents are not required to misbehave to their child if they were homosexual nor they force to marry opposite gender. Parents should completely understand their child, accept them and stand with them.
- 3) Decriminalize section 377 of IPC. So homosexuals also live like others and enjoy their fundamental rights without any provocation. Law must be improved. Equal protection is provided to all citizens of India either they were homosexual or straight person.
- 4) In 21st century, we have super power to deal with every aspects of life, then why we are not using it in right way. Now it's time to talk about alleged forbidden issues or public have capacity to openly acknowledge the issues like homosexuality.
- 5) Media and films can also play an important role. They are the best medium to reach the public. They have to show that LGBT are not burden to the society but they are also human and do not cause harm to anyone. Media have to show all the positive sides of homosexuality. They have to make film on them and make aware to the society or guardian of the homosexual that they are also human and they should be accepted.

III. CONCLUSIONS

Here I concluded that Yes there is a violation of fundamental rights which is given under Article 14, 15, 19, 21 of the constitution. IPC was introduced in 1860 and it was influenced by the british law under

which section 377 are stated. According to this section if any same gender marry with each other it is considered as crime and punishable with life imprisonment or 10 years imprisonment. But In outside India when any person marry with the same gender, it is not said to be offence. As we can see the Naz foundation Case, they are appealing to abolish section 377 of IPC which are violating the fundamental rights of citizens. In constitution of India it is not given that fundamental rights are not applied to homosexual but here Article 14 talks about equality to the all citizens either they are homosexual or heterosexual. When we talks about section 15, it says that there is no discrimination on the basis of sex, caste or religion.

According to my opinion, there must be a special law for the homosexual people that they can choose their partners and marry with them like heterosexual people. Still hearing is going on but decision is yet to come. If decision is passed in favor of homosexual then they get a new hope for their survival.

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