

SECTION 377 OF INDIAN PENAL CODE VIS-A-VIS HOMOSEXUALITY

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INTRODUCTION

The section 377 of IPC is intended to punish certain unnatural offences like sodomy, buggery and bestiality. The offence consists in having carnal knowledge against the order of nature by person with a man or in the same unnatural manner with a woman or by man or woman in any manner with an animal.

Section 377 IPC says,

“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 extent to ten years, and shall be liable to fine”.

It has been given in the explanation of the section envisaged in Code that penetration is sufficient to constitute the carnal intercourse necessary to offence defined in the said section.

According to the referred section, homosexual intercourse amongst individuals is punishable.

Homosexuality is generally considered a taboo subject by both Indian civil society and the government. Public discussion of the same in India has been inhibited by the fact that sexuality in any form is rarely discussed openly, but however in recent years attitude towards homosexuality have shifted slightly.

Religion has played a significant role in shaping Indian customs and traditions. Religious texts condemn homosexuality.

Scholars have different views on homosexuality. Some of them stress that homosexuality was prevalent and accepted in ancient Hindu society.

Indian law does not recognize same-sex marriages, nor does it provide for civil unions. Until July 2009, homosexual intercourse was a criminal offence under Section 377 of the Indian Penal Code, 1860, which made it an offence for a person to voluntarily have

“Carnal intercourse against the order of nature”.

Whilst convictions under this Section were extremely rare, with no convictions at all for homosexual intercourse in the twenty years to 2009, Human Rights Watch have said that the law has been used to harass HIV/AIDS prevention activists, as well as sex workers, men who have sex with men, and other Lesbian, gay, bisexual and transgender(LGBT) groups. The group documents arrests in Lucknow of 4 men in 2006 and another 4 in 2001. The People’s Union for Civil Liberties has published two reports of the rights violations faced by sexual minorities and, in particular, transsexuals (hijras and kothis) in India.

In recent years, the continued existence of this section had become controversial. The Law Commission of India had historically favoured that the retention of this section, but in its 172nd report, delivered in 2000 it recommended its repeal, as did the then Health minister, Anbumani Ramadoss, in 2008.

Judiciary was not in favour of repealing the aforesaid section but on 2nd July 2009, in a landmark judgment, the Delhi High Court, on PIL plea by Delhi based NGO-Naz Foundation which works among sex workers in Delhi struck down the provision of section 377 of Indian Penal Code which criminalized consensual sexual acts of adults in private, holding that it violated

“the fundamental right of life and liberty and right to equality as guaranteed by Article 21 and Article 14 of the Constitution of India respectively”.

The Bench said:

“We declare that Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts of adults in private, is violative of Article 21 [Right to protection of Life and Personal Liberty], Article 14 [Right to Equality before Law] and Article 15 [Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth] of the Constitution.”

Sexual orientation is a ground analogous to sex, and that discrimination on sexual orientation is not permitted under Article 15.

Meanwhile, the Supreme Court on July 2009 declined to pass an interim order to say the Delhi High Court verdict legalizing gay sex among consenting adults. The Apex

Court said it would wait for the government to come out with a definite stand on the issue.

However, the court clarified that

“The provision of Section 377 will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.”

The Bench further said that,

“this clarification will hold till Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which, we believe, removes a great deal of confusion.”

There were contradictions within the Government as the Home Ministry had opposed scrapping of section 377 while Ministry of Health came out openly in support of the gay rights activists.

The Government later sidelined the stand of the then Health Minister Ambumani Ramadoss and opposed the PIL by describing homosexuality as “the most indecent behaviour” in society.

The Centre had submitted that gay sex is immoral and reflection of a perverse mind and its decriminalization would lead to moral degradation of society.

Law Minister, Veerapa Moily, announced that the Centre would call for a parliamentary debate to reach a ‘wider consensus’ on a basic issue of human rights and equal justice.

CONCLUSION

It is an obnoxious colonial-era provision that has absolutely no place in the statute book of a modern democratic and secular state.

Section 377, which punishes

“Carnal intercourse against the order of nature”

with imprisonment up to 10 years, is not specifically targeted at homosexuality. But by criminalizing any penetrative sex that does not lead to reproduction, it has become a weapon in the hands of law enforcement officers to harass those who have alternative sexual orientations.

In an age where there is growing acceptance of the idea that LGBTs must be allowed to live in dignity and respect, it is shame that India cannot bring itself to legalise gay behaviour.

The government must not give in to pressure of religious fundamentalists, moral obscurantist, and others who argue that Indian society is not ready to accept such change.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination.

A provision of law branding one section of people as criminal based wholly on state's moral disapproval of that class goes counter to equality guaranteed in the Constitution.

Section 377 in its application to sexual act of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited grounds of sex. Any discrimination on the grounds of sexual orientation is against Article 15 of the Constitution of India which prohibits any discrimination on grounds of sex, religion, caste or place of birth.