

Right to Love Vis-à-vis Right to Live With Dignity



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The Indian Penal Code was an important experiment in the larger colonial project along with exercises in codification like the Civil Procedure Code and Criminal Procedure Code to apply the collective principles of common law in British India. Thomas Babbington Macaulay, the president of the Indian Law Commission in 1835, was charged with the testing task of drafting the Indian Penal Code also as a unifying effort to consolidate and rationalize the "splintered systems prevailing in the Indian Subcontinent."^[1]

Section 377's predecessor in Macaulay's first draft of the Penal Code was clause 361, which defined a severe punishment for touching another for the purpose of unnatural lust.^[2] Macaulay abhorred the idea of any debate or discussion on this "heinous crime", and in the Introductory Report to the proposed draft Bill (dated 1837) stated that: Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said

".....we are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision".^[3]

The lack of any debate or discussion, suggesting the creation of this definition purely out of the discretion of Macaulay, also explains the sheer vagueness and ineffectiveness of the language of the proposed anti-sodomy section. Narrain notes that the concept of an unnatural touch was too vague to be an effective penal stature, and the final draft was a substantial improvement on the initial draft.^[4]

Homosexuality and Indian Penal Code

Section 377 in its final draft is still shrouded with euphemisms. The final outcome to prevent this "revolting" and injurious activity evolved in the form of the following text:

Section 377:

Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprison-

ment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine.

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

The Naz Foundation, a non-Governmental Organization working in the field of human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) and sexual health, challenged the constitutional validity of Section 377 because it violated the rights to privacy, to dignity and health, to equality and non-discrimination and to freedom of expression. It also argued that the law prevented public health efforts at reducing the risk of transmission of HIV/AIDS as the fear of prosecution prevented people from discussing their sexuality and life style. The Delhi High Court on 2nd July 2009, in a landmark judgment, held Section 377 to be violative of Articles 21, 14 and 15 of the Constitution, as it criminalized consensual sexual acts of adults in private.^[5]

Individuals and faith-based group appealed the High Court verdict. The Supreme Court of India, on 11th December 2013, upheld Section 377 and overturned the judgment of the Delhi High Court that had decriminalized adult consensual same-sex conduct. National and International Human rights groups condemned the Supreme Court decision.^[6]

The Naz Foundation and the Government of India have since filed a petition seeking review of the judgment.^[7] They argue that there are a number of grave errors of law that need to be corrected.

The judgment goes against the grain of the Supreme Court's own jurisprudence on advancement of fundamental rights and freedoms of all people, especially those who face marginalization in society. The Court's reliance on the principle of judicial restraint and Parliament's prerogative to change laws is misplaced, particularly when the law has been challenged for violation of fundamental rights of citizens.^[9]

The judgment raises significant constitutional issues with far reaching public importance. There is a need to seek an interim stay on the operation of the judgment, as the judgment has caused immense prejudice to all

adult persons who engage in consensual sex. This is particularly true for those from the Lesbian, Gay, Bisexual and Transgender (LGBT) community who had become open about their sexual identity since the High Court judgment and are now at risk of prosecution under criminal law.^[10]

Many countries have decriminalized same-sex orientation and behavior. Several liberal and progressive nations recognize LGBT rights to include human, civil and political rights. Many countries have also legally recognized same-sex civil partnerships, whereas some have even legalized same-sex marriages (e.g., Brazil, Canada, England, France, South Africa, Spain, Sweden and in some states in USA). LGBT rights laws include government recognition of same-sex relationships, civil unions and marriage, adoption and parenting. They also include anti-bullying legislation, anti-discrimination student, employment and housing laws, immigration equality, equal age of consent law and hate crime laws providing enhanced criminal penalties for prejudice-motivated violence against LGBT people. The United Nations Human Rights Council recognizes LGBT rights.^[11]

Approval of Right to Love

In a historic verdict, the Supreme Court of India on September 6, 2018, decriminalised the Section 377 of the IPC and allowed gay sex among consenting adults in private and finally granted "Right to Love." The SC ruled that consensual adult gay sex is not a crime saying sexual orientation is natural and people have no control over it.^[12] Bench clearly said in their judgment that Social exclusion, identity seclusion and isolation

from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves a truly free society. It is injustice for the "Less than Equals" sections of the society. Actually the writ petition was filed for declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be the part of life under Article 21 of Indian Constitution.^[13]

Conclusion:

"One defines Oneself. That is the glorious form of individuality. Therefore the identity is pivotal to one's being, said Justice Indu Malhotra while imparting the judgment. She further added "I am what I am, so take me as I am" & No one can escape from their individuality. The emphasis on the unique being of an individual is the salt of his/her life. Denial of self expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realization is one's signature and self determined design. What nature gives is natural. This is called nature within. During giving a transient change to the Criminal Law bench in their landmark judgment said "It is order of nature". The constitution would become stale and dead testament without dynamic, vibrant and pragmatic interpretation, constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of society. Hats off to Indian Judiciary for welcoming a vibrating change in the socio-legal field.

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