

Research Paper

Analytical Study of Section 377 of Indian Penal Code and Judicial pronouncements / activism

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ABSTRACT

Our constitution is above three branches of our system viz. the Legislature, the executive and judiciary. The independence of every pillar is specifically demarcated in our constitution. The constitution does not fix any straight jacket formula for the limits of each branch. On the contrary, the every pillar is supportive to each other and the mandates are issued to have the cross checks over the jurisdictions.

Introduction

This paper is based on the analytical study of Section 377 of Indian Penal Code and the judgment of the Hon'ble Delhi High Court given in Naz Foundation v. Government of NCT of Delhi & Ors. So, to have the overlook, we have to consider the other material available. Learned Author K.S. Rathore has stated in his Article " Role of Judicial Activism towards protection and permission of constitutional rights " reported in AIR 2010 Journal Section page 140 to 144. On page 140 he has observed that -

"In India, the doctrine of separation of power is adopted illustratively, but the 'essence' of that doctrine with the doctrine of constitutional limitation implicit in the scheme was duly recognized long back In re Delhi Laws case. Separation of judiciary from the executive is mandated in Article 50 of the Constitution with the independence of judiciary as a corollary. Later, the doctrine of separation of powers was elevated to the status of a basic feature of the Constitution in the case of Indira Nehru Gandhi v. Raj Narayan'. Wherein it was observed ; " Thus the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context of even our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances. "

On page 143 he observed that -
"The concept of Public Interest Litigation was elaborated in India in 1976 and after that the rule of locus standi was got gradually expanded. Some of the most significant areas where Public Interest Litigation has proved a boon and made an ever lasting impact can be noticed, i.e., right to a healthy environment right to speedy trial and free legal aid, right to privacy, right to free education up to 14 years of age, right of arrestees and detenues, protection of bonded, contract, child labourers, political corruption and crime etc. Recently , the landmark judgment of Delhi High Court relating to the disclosure of Judges Assets, matter is an example of far reaching,

effect of judicial activism."

In his view, the various case laws developed by the Apex Court has given new meanings and dimensions to the various constitutional rights available to the common Indian citizen and utilized them to regulate the social, economic , civil and cultural existence of the common masses. The judicial activism as a tool frequently resorted to against executive has also invited allegations of its excess use not only from other quarters but from the Apex Court itself. According to Author, without judicial activism executive and legislature shall become unbridled horse.

2 Dr. Urusa Mohsin in her Article Homosexuality under Personal Laws reported in 2009 Cri. L. J. Journal page 187 to 194 stated that under many religions the sex out of the wedlock and between same genders is prohibited. According to her, previously there was strict ban on such sexual relationship in Christian Religion. But recently some Christians have come to believe that homo sexuality is not inherently sinful (Page 190). The Jewish law strongly condemns the homosexual unions and considers it as rebellion against God. (Page 190). She further observes that Islam is not an ethnicity but it is a religion which regulates the life of mankind. Any sexual relations out of wedlock is strongly forbidden in islam. (Page 191). According to her, in Hindu religious text the homosexuality is not explicitly mentioned that is why the view of Hindus are varying and diverse. Vedas which are the foundation of Hinduism dealt the heterosexual matters. Pre-material and extra material sex is condemned. The teachings of Vedanta which emphasize to pursuit of ' moksha ' allow only heterosexual sex between the married couple for the procreation. (Page 191)

3 " The purpose of Section 377 of IPC is to provide healthy6 environment in the society by criminalizing unnatural sexual offences. In P. Rathinam v. Union of India the Apex Court said that the life means, "The right to live with human dignity and the same does not connote continued drudgery. It takes with in its fold some of the fine graces of civilization which makes life worth living and that the expanded concept of life would mean the tradition, culture and heritage of the person concerned. (Page 193) (AIR 1964 SC 1844).

4 In conclusion, the Author states that Homosexuality has haunted mankind from the beginning of society through it is considered deviant behaviour through out the human history. As homosexuality is utterly contrary to every natural law of human and animal life and hamper at the morals purposes and institutions of the proactive society. It is a radical change in the basic institution of marriage. Society needs value and they should not be contingent on convenience, laws and individual preferences. Culture is a shared system. Modernization has certainly not taken place to the extent of permitting individuals freedom to interfere with the social norms nurtured by culture. (Page 193 – 194). At last it can be said that “ when a man mounts another man the throne of the God shaken ” .

5 If we peruse the observations made by both these Authors then it becomes clear that their view is to protect the cultural protection given to the society and also to protect the basic relationship between the man and woman. It is true that in some countries this basic concept is changed and they have validated the relationship between man and man and woman and woman.

6 Distinction between Section 375 and 377 of IPC . Section 375 of IPC is a definition of Rape. A man is said to commit rape when he has sexual intercourse with a woman under the circumstances following in the 6th descriptions. Therefore, there are two essential ingredients of Section 375 of IPC.
i - Sexual intercourse by a man with a woman and
ii - Sexual intercourse must be under circumstances following under any of the 6 Clauses of Section 375 of IPC.

7 Section 376 IPC provides punishment for the rape. Section 377 IPC is titled as ' Unnatural Offences ' . It runs as under -
Sec. 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 described in this section.

As per explanation the penetration is sufficient to constitute the carnal intercourse. As per Section 375 also the penetration is sufficient to constitute the sexual intercourse. The exception provided under Section 375 is that the sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. The age given in the exception varies as per the various State Amendments. As per the various judgments of the Apex Court and High Courts the rape is heinous crime. The punishment provided for the offence u/s. 377 is imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also liable to fine. The nomenclature u/s. 375 and 377 shows that the act has considered both these offences as of serious, grave and heinous nature.

8 Judgment of Hon'ble Delhi High Court in Naz Foundation v. Government of NCT of Delhi & Ors. The Hon'ble Delhi High Court comprising the Bench of Hon'ble Justice A.P. Shaha, Chief Justice and Dr. S. Muralidhar, J. has considered the constitutionality of Section 377 of IPC. Said writ petition was preferred by Naz Foundation a non Government

organization as public litigation to challenge the constitutional validity of Section 377 of the IPC . They have challenged Section 377 of IPC to the extent that said provision criminalises consensual sexual acts between adults in private. The challenge founded on the plea that it covers sexual acts between consenting adults in private and violated the fundamental rights guarantee under Articles 14, 15, 19 and 21 of the Constitution of India. According to petitioner, Section 377 of IPC should apply only to non consensual penile non vaginal sex and penile non vaginal sex involving minors. The Court observed in said case reported in 2010 Cri. L. J. 94 in para 4 that the expression carnal intercourse is used in Section 377 IPC as distinct from the expression “ sexual intercourse ”, which appears in Sections 375 and 497 IPC. The consent is no defence to an offence u/s. 377 IPC and no distinction regarding age is made in the section.

9 The petitioner challenged the validity of Section 377 of IPC in order to protect the homosexuals or gay persons who are having sex in private with their consent. According to them, Section 377 of IPC serves as a weapon for police abuse, detaining and questioning extortion harassment , forced sex, payment of hush money and perpetuates negative and discriminatory beliefs towards same sex relations and sexuality minorities. (Page 7).

10 In para 11, the Court has briefly stated the reply filed by the Union of India. Contradictory stands are taken by Ministry of Home Affairs and Ministry of Health and Family Welfare . The Ministry of Home Affairs sought to justify the retention of Section 377 of IPC while, the Ministry of Health and Family Welfare insisted that continuance of Section 377 IPC has hampered the HIV / Aids prevention efforts. National Aids Control Organization has also submitted the response in the shape of reply filed by the Ministry of Health and Family Welfare. The Court has considered various aspects raised by these departments. The other respondents including respondent no. 8 has supported the cause espoused by the petitioner regarding Section 377 of IPC . According to it, it criminalizes carnal intercourse against the order of nature is an unconstitutional and arbitrary law based on archaic moral and religious notions of sex only for procreation.

11 After considering the affidavits filed by the parties and their arguments the Court after considering various case laws held in para 66, 67 and 68 that -

Para 66 -

The “ Delhi Declaration of Collaboration, 2006 ” issued pursuant to International Consultation of Male Sexual Health and HIV, co-hosted by the Government of India, UNAIDS and Civil Society Organizations, recognised that :

“ . . . the stigma, discrimination and criminalisation faced by men who have sex with men, gay men and transgender people are major barriers to universal access to HIV prevention and treatment ” (Delhi Declaration of Collaboration : 26th September , 2006). On June 30, 2008, the Prime Minister Mr. Manmohan Singh in a speech delivered at the release of the Report of the Commission on AIDS in Asia stated “ the fact that many of the vulnerable social groups, be they sex workers or homosexuals or drug users, face great social prejudice has made the task of identifying AIDS victims and treating them very difficult ” (Prime

Minister's address on the release of the Report of the Commission on AIDS in Asia: June 30, 2006). On August 08, 2008, the Union Minister of Health and Family Welfare, Dr. Ambumani Ramadoss speaking at the 17th International Conference on Aids in Mexico City is reported to have stated "... structural discrimination against those who are vulnerable to HIV such as sex workers and MSM must be removed if our prevention, care and treatment programmes are to succeed". He said, "Section 377 of the Indian Penal Code, which criminalises men who have sex with men, must go" (Reported in Indian Express : August 9, 2006 <http://www.indianexpress.com/story/346649.html>). Union Minister of Health is also reported to have stated at the International HIV/AIDS Conference in Toronto, 2006 that Section 377, IPC was to be amended as part of the Government's measures to prevent HIV/AIDS. (The Hindu : August 16, 2006)."

Para 67 -

There is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973 after reviewing evidence that homosexuality is not a mental disorder.

Para 68 -

Thus, homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality.

It is further observed in para 80 that the Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality. As per para 79, the 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 subjecting notions of right and wrong. The Court further held in para 87 that -

"For the above reasons we are unable to accept the stand of the Union of India that there is a need for retention of Section 377, IPC to cover consensual sexual acts between adults in private on the ground of public morality."

According to Court the Supreme Court has given widest amplitude to personal liberty as enumerated in Article 21 of the Constitution and observed that it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and give additional protection under Article 19. (Para 25) (Maneka Gandhi v. Union of India AIR 1978 SC 597). In Indian Constitution the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus, violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full person-hood which is implicit in notion of life under Article 21 of the Constitution. (Para 48). So, considering the right to equality, equal treatment, right to privacy, right to freedom and right to privacy, the Court

observed in para 118 and finally in para 132 that -

Para 118 -

It is true that the courts should ordinarily defer to the wisdom of the legislature while exercising the power of judicial review of legislation. But it is equally well settled that the degree of deference to be given to the legislature is dependent on the subject matter under consideration. When matters of "high constitutional importance" such as constitutionally entrenched human rights are under consideration, the courts are obliged in discharging their own sovereign jurisdiction, to give considerably less deference to the legislature than would otherwise be the case. In State of Madras v. V.G. Row (Supra), while impliedly explicating the scope of power under Article 13 it was held that if the legislation in question violated a fundamental right, it would have to be struck down "in discharge of a duty plainly laid upon the courts by the Constitution".

Para 132 -

We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. 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' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, 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. Secondly, we clarify that our judgment will not result in the reopening of criminal cases involving Section 377 IPC that have already attained finality. So, according to Court, Section 377 of IPC is violative of Articles Section 14, 15 and 21 of the Constitution. The Article 21 deals with personal liberty, Article 14 with right to equality and Article 15 with the rights against discrimination on the grounds of sex. It is violative only in respect of the consensual sexual acts of adult in private. The Court has clarified that Section 377 of IPC will continue to govern non consensual penile, non vaginal sex and penile non vaginal sex involving minors.

12 Marital jurisprudence recognizes sexual intercourse between married couple i.e., man and woman. It recognizes that it is good for both man or woman and spouse and it is in accordance with the order of nature. It helps for the procreation while the sodome jurisprudence is against the principles of marital jurisprudence. Some countries have accepted gay relationship or lesbian relationship and also the marriages between them. But some countries have not accepted the same. In such circumstances, the global notions of different religions can be fully accepted in Indian culture which strongly prohibits such relationship.

13 Learned Author Mohd. Abdul Khadeer in his Article "A Cursory view on the judgment of Delhi High Court on Homosexuality reported in 2009 Cri. L. J. Journal Section page 261 to 262 observed on page 262 that -

"The instant case now before the Supreme Court is not to decide the right of individuals or group of some persons but it is a question of law to be settled by the whole nation. We believe that a larger bench of Supreme Court may call for expert opinions from psychiatrics, medical doctors, social scientists to ascertain the effect of homosexuality on body, mind and behavioural trait of homosexuals. It is a case of cross cultural conflict between

India and western countries.

So, according to Author, the society and cultural values and canons of morality cannot be ignored by academic discussion on law. Hon'ble Shri. V.R. Krishna Ayyar former Judge of the Apex Court observed in his Article Politics and Performance of our Courts reported in AIR 2010, Journal Section page 175 and 176 that (Page 175) -

“So high is the higher Court from where justice is delivered that is why the courts are considered next only to divinity and royalty. In this sense, the robed brethren are a wonder in themselves as a class.”

He further observed (Page 176) -

“A Judge should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him to make some forecast of the consequences of his action is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of the imagination. It requires poetic sensibilities with which Judges are rarely endowed and which their education does not normally develop. These Judges must have something of the creative artist in them, they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.”

14 Here, I would like to point out the observations made by our Hon'ble Apex Court in *S. Khushboo v. Kanniammal & Anr.* reported in AIR 2010 S.C. 3196. It has been observed in head note 'F' that -

“Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as 'decency and morality' among others, there is need to tolerate unpopular views in the socio cultural space. The framers of our Constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes. The appellant's remarks did provoke a controversy since the acceptance of pre marital sex and live in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, but there are certain individuals or groups who do not hold the same view. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in pre marital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co extensive. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'.

In this case the appellant was a well known actress who had approached the Apex Court for quashing of criminal proceedings pending against her. Various proceedings were instituted against her regarding some remarks expressed by her. According to Apex Court, offence means an act or

instance of offending, commit an illegal act and illegal means, contrary to or forbidden by law. Offence has to be read and understood in the context as it has been prescribed under the provisions of Ss. 40, 41 and 42, IPC which cover the offences punishable under IPC or under special or local law (Para 20).

15 The Court also observed in *M.S. Jayaraj V. Commissioner of Excise, Kerala & Ors.* (2000) 7 SCC 552 (AIR 2000 SC 3266) that -

“The 'person aggrieved' means a person who is wrongfully deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. 'Person aggrieved' means a person who is injured or one who is adversely affected in a legal sense.”

In para 32, it is further observed that -

“It is, therefore, not only desirable but imperative that electronic and news media should also play positive role in presenting to general public as to what actually transpires during the course of the hearing and it should not be published in such a manner so as to get unnecessary publicity for its own paper or news channel. Such a tendency, which is indeed growing fast, should be stopped.

We are saying so as without knowing the reference in context of which the questions were put forth by us, were completely ignored and the same were misquoted which raised unnecessary hue and cry.”

In the last, the Court quashed impugned criminal proceeding against the appellant. While considering such situation the Court has to understand the matter as observed by the Hon'ble Apex Court in para 17, it is as under

“This position was later clarified in *Samaresh Bose v. Amal Mitra*, AIR 1986 SC 967, where the Court held that in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author, the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have on the minds of the reader.”

16 Learned Author Dr. Raj Kumar Upadhyay, observed in his Article *Western and Indian Concept of Human Rights: An overview* reported in AIR 2010 Journal Section page 123 to 128 that - (Page 127) -

“What does Dharma mean? The word is clearly derived from the root “Dhri”, which denotes “upholding”, “supporting”, “nourishing” that which upholds in Dharma. Thus, Dharma supports the stability of society, the maintaining social order and general well being and progress of man kind. The purpose of Dharma has been expressed as, “That all persons may be happy, may express each others happiness, that there may be welfare of all, all being free from fear and disease, cherish good feelings and sense of brotherhood, unity and friendship”. Thus, in the Indian perception Dharma means rules of righteous conduct which would help humans to attain happiness. To be happy is considered a natural right, the most

important and comprehensive human right.”

The Author mentioned that Gandhiji dreamt a total revolution, social, economic, political and spiritual. He wanted to “wipe every tear from every eye”. (Page 128)

17 So, from the various views and the observations of the Hon'ble High Court and the Apex Court it becomes clear that the personal liberty of a person is of highest value and any act which is contravening such personal liberty is not in consonance with the principles of the Constitutional Law. The Authors have also expressed their view that interpretation of law should not be such that it should harm the society at large. The basic principle laid down by the catena of authorities is that the personal values have no more importance than the values of the society.

Conclusion

Every person has his own world and he interprets every fact in his own fashion. A person may see that glass is half filled while other may see it as half empty glass. So, though the homosexuality is now recognized by some countries can not be said that it is now globally accepted by all the persons or countries. We are human beings. But we are bound by some religion & country. We are identified by our religion and country. In such circumstances, when the morality of society is at stake and though some persons are doing such sexual acts in private then the question of the benefit of society at large is a question which is in the mind of many persons. While considering the articles of some learned authors we have seen that they have also upheld the morality of the society. The society is known by its moral values. It is held in catena of authorities that public interest must prevail over personal interest. Similarly, the minority interest

is required to be protected still when the public interest is of larger value then it must prevail. Everybody has his own ideas about pleasure and displeasure. Now, the Hon'ble Apex Court has to settle this question of law.