

Liberty of Sexual Orientation under Indian Law and Societal Aspects

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Introduction

The world has been an unfair place for people with non-traditional sexual orientations. Though regional and international declaration on human rights and treaties exist to ensure equal treatment, formal and informal discrimination exists in all rungs of society including workplace. Reactions towards people expressing non-conventional sexual orientation and gender identity vary from being tolerant to condemnation and criminalization but never complete acceptance. The inclinations of a character with admire to heterosexual, gay, and bisexual behaviour is named as sexual orientation.

The first step on the long path to acceptance of the diversity and variegated hues that nature has created has to be taken now by vanquishing the enemies of prejudice and injustice and undoing the wrongs done so as to make way for a progressive and inclusive realisation of social and economic rights embracing all and to begin a dialogue for ensuring equal rights and opportunities for the —less than equal sections of the society. The English regulation was reformed in Britain by means of the Sexual Offences Act, 1967, which de-criminalized homosexuality and acts of sodomy between consenting adults (above the age of 21) pursuant to the record of Wolfenden Committee. The Committee advising the Parliament had recommended in 1957 repeal of laws punishing gay conduct. Before this even in England, homosexuality became a crime; however, they reformed their law according to need and want in their society. Lord Macaulay drafted Indian Penal Code, 1860 and delivered it in 1861. But we are nevertheless bearing the odds of Section 377 of the IPC, a code which becomes drafted approx one hundred fifty years in the past. Ironically, at the same time as the British drafted Section 377 of the IPC, while changing a tolerant Indian attitude in the direction of sexuality with a notably oppressive one, this law changed into repealed within the UK.

Freedom of Sexual Orientation vis-à-vis Preamble of the Constitution of India, 1950

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The right of equality earlier than law and equal protection of the law is guaranteed underneath Article 14 and 21 of the Constitution. Right to choose his/her partner is a fundamental right and a component to steer a life with dignity which once more falls beneath the ambit of Article 21. It is the criminal offense below phase 377 of the Indian penal code, 1860. This made an offence for a person to have "carnal intercourse towards the order of nature." However, the Delhi High Court decision in Naz Foundation vs. Government of NCT of Delhi found Section 377 and other felony prohibitions towards private, adult, consensual, and non-commercial identical-intercourse conduct to be in direct violation of fundamental rights furnished via the Indian charter. Such discrimination in opposition to the homosexual, lesbian community on grounds of an aberrant sexual orientation had an effect too. It is also the violation of the essential rights underneath Article 15(1), which removes 'intercourse' as a floor of kingdom discrimination. The petitioners additionally contended that there has been a violation of fundamental rights underneath Article 19 due to the fact, the sufferers have been now not being given the proper to freely express their sexual choices and additionally flow at their very own unfastened will to get involved in any kind homosexual conduct.

Section 377 vis-a-vis Article 21 of the Indian Constitution

The right of equality before the law and equal protection of the law is guaranteed under Article 14 and 21 of the Constitution. Section 377 of IPC violates their constitutional protection. It is unreasonably classify the way of homosexuals' community and infringing their right under the articles of 14 and 21 of the constitution of India. Thus different sexual expressions or orientations automatically come within the ambit of expanded right to life and personal liberty. Under the dignity is the autonomy of the private will and it is the right of the person's freedom of choice and action. Section 377 also conveys the thought that homosexuals are of much less value than different human beings, it demeans them and unconstitutionally infringes upon their right to stay with dignity. Section 377 IPC additionally creates structural impediments to the workout of freedom of speech and expression and different freedoms below Article 19 by way of homosexuals and isn't blanketed via any of the regulations contained therein. The society must be given them as a part and parcel of it and S. 377 of IPC need to have been repealed much in advance as it changed into developing hurdles for homosexuals to live a dignified existence. After the Naz Foundation Case definitely the homosexuals would be able to stay a dignified life. Furthermore, morality by way of itself cannot be a valid ground for restricting the proper below Articles 14 and 21. Public disapproval or disgust for a certain magnificence of

individuals can in no manner serve to uphold the constitutionality of a statute. In *Unni Krishnan v. State of Andhra Pradesh*², the Hon'ble Supreme Court of India took a bigger step and interpreted the expression Personal Liberty in its widest amplitude and gave a list of rights that may fall under the Constitution of India, 1950, Article 21. Thereby Personal Liberty was held to include Right to Privacy. In *Mr. X v. Hospital Z*³ wherein, the scope of the right to privacy was re-examined and it was declared that the right to privacy is an essential component of the right to life.

Religious Beliefs and Social Stigma regarding alternate Sexual Orientation

Sexual orientation at the workplace was by no means before a subject of open discussion in company India due to the reality till recently underneath section 377 of Indian Penal Code, gay acts were unlawful in India. This phase 377 of IPC become overturned in a landmark judgment by means of a Delhi High Court judgement legalizing and decriminalizing private consensual intercourse among adults of the same gender. This judgment is sizable because addressing the problem of sexual orientation opened a brand new chapter inside the realm of inclusivity. Unto the point of this judgment, maximum of the Indian agencies who've global operations mention sexual orientation of their diversity announcement best to conform with the global requirements and host nations laws. But apart from assembly the involved legal necessities sexual orientation turned into not openly discussed and by no means featured the various range topics in Indian corporate global together with Indian IT- ITES sector. Human Resource managers usually veered out of the topic mentioning the detail of illegality regarding the issue. But after the 2009 judgement that the difficulty is out in open, criminalization aspect lifted and with the courtroom identifying it as an extension of a person expressing his/her sexuality a few corporations in Indian It and ITES sector start addressing this variety size (IBM - India, Infosys, Google -India). This consists of, expanding the corporation's diversity assertion and aid structures via adding sexual orientation as a variety measurement and establishing rules and prompting projects on this regard. In *Naz Foundation*⁴ case it was held that consensual sexual activities between two adults of the same sex should not be regulated by law as it violates their Fundamental Rights and a person's choice of a sexual accomplice is no business of the State to regulate on. Section 377

² Unni Krishnan v. State of Andhra Pradesh ,1993 AIR 217

³ Mr. X v. Hospital Z,1998 Supp(1) SCR 723

⁴ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1

is abused to brutalize the persons belonging to the gay community. Popular morality, as distinct from constitutional morality as derived from constitutional values, is based on shifting notions of right and wrong and as of today, a large chunk of elite population is in favour of the LGBT rights and hence, this shows that the State is not even going by the popular morality but by its own morality and if there is any type of morality that can pass the test of compelling state interest, it should be constitutional morality.

Conclusion

Hence it can be concluded that the society must have rationale, open, thoughtful, judicial & unbiased approach towards minority's community in general & homosexuality in particular. It is observed during research work that, most of the people in society, especially middle-aged and elderly people have a firm belief that if homosexuality is legalized, it will open flood gates for many homosexuals to come out and the overall moral standards of the society will deteriorate. LGBT people need to be counselled, educated, uplifted & motivated so that they can also live a life of dignity. It is the responsibility of the stakeholders of society to bring such people in the mainstream. It is the responsibility of the Psychologist to counsel the homosexuals that it is a natural though a deviant sexual orientation. It is also their utmost duty to counsel the parents as well; who desperately approach them to have their 'gay' child cure of such orientation.⁵

⁵ National Coalition for Gay and Lesbian Equality v. Minister of Justice, [1998] 121 PCLR 1517 at para 81