

The Contemporary Route To Justice: Section 377 of Indian Penal Code, 1860

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HISTORY

The history of the Indian Penal Code (IPC) started from Lord Macaulay who drafted the Indian Penal Code and the heated discussion which began between Lord H.L.A Hart and Lord Patrick Devlin; renowned philosophers of the ancient times.

The departmental committee on homosexual offences and prostitution released its report known as the Wolfenden report which recommended decriminalizing homosexual behavior between consenting adults.²

Section 377 of Indian Penal Code, 1860 is defined as unnatural offences that 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 term which may extend to ten years, and shall also be liable with fine.

Enforcing Morality through Laws: The Hart-Devlin Debate

The HART- DEVLIN debate was basically on an argument over the philosophical wisdom rather than on the validity of constitutional law and also on morality as a basis for enacting criminal law. It is obvious to state that the issue of morality in the Indian society can't be addressed without changing certain provisions of the statutes and it can only be done by changing the mindset of the people and reforming them, turning the Indian society into a very broad minded one. From the point of view of Jurisprudence, Hart and Devlin both argued on this concept of law.³ Professor H.⁴L.A. Hart and Patrick Devlin added to the verbal confrontation. Hart's essential concern was focused only to the individual, but Devlin's distraction was only for the society. Their speculations were not that far

separated; Hart managed the restriction amongst law and ethical quality, while Devlin examined the exchange of law and morality.⁵

The Hart – Devlin Morality Debate has been in three altogether different settings, the courts dismissed the public morality rationale for homosexuality laws prevailing in India. National Coalition for Gay and Lesbian Equality vs. Priest of Justice⁶, Lawrence vs. Texas⁷, and NAZ Foundation vs. Government of N.C.T Delhi⁸, were basically some important decisions challenging the constitutional validity criminalizing sexual conduct. Providing equality and privacy to the homosexuals were noteworthy in each of the three cases.⁹

Professor H.L.A. Hart proposed two working meanings of morality: “positive morality” or the morality really acknowledged and shared by a given social gathering, and “critical morality”, which might be characterized as “the morally accepted principles utilized”.¹⁰ The issue of legitimizing homosexuality and prostitution was examined by the Wolfenden Committee headed by Sir John Wolfenden. The Report guaranteed that it is not the obligation of the law to fret about immorality. As to homosexuality, it suggested, “practices between consenting adults in private should never again be a crime”. As to prostitution, it prescribed that “however it must not be in itself be made unlawful, a law ought to be passed, to drive it off the streets” on the ground that open requesting was a hostile disturbance to customary subjects.¹¹

Homosexuality as stated in Jurisprudence is not a disease or mental illness which has to be cured whereas it is just another feeling of loving one owns kind and are the same as normal people are. Though homosexuals having sex with each other is against the order of nature but it is now

widely accepted throughout the globe. The Manu Smriti, one of the Hindu law codes also punished for certain incidents of homosexuality whether female or male like a female's head would be shaved or made to ride a donkey if she was found to have intimate relations with another girl.¹²

It is presently been thirty-five years since H.L.A. Hart published one of its books on "Law, Liberty and Morality", which denoted the start of the Hart-Devlin face off regarding concerning the implementation of morality in the criminal law.¹³

It is a long time since James Stephen published a book "Liberty, Equality and Fraternity", which started a comparative level headed discussion with John Stuart Mill. Both of these discussions concerned the real part of the utilization of criminal authorizations to punish indecent conduct.¹⁴ Morality infers a fundamental reference to the refinement of what is ideal from what isn't right.

Different moralities vary with regards to the degree of what is correct and what isn't right, or great and awful, and subsequently, every group, country or society may have its own morality and ethics, as indicated by the nearby convictions, regardless of whether social, political, religious or any other. Moreover, the articulations "ethics" and "morality", are however expansive in significance, have time and again been comprehended to have a nearby association with sexual conduct.¹⁵

The thinking supporting the two discoveries was the committee's conviction that the capacity functioning of criminal law was, to preserve public order and decency, to shield the nation from what is hostile or harmful, and to give adequate protections against misuse and debasement of others, especially the individuals who are particularly defenseless on the grounds that they are youthful, vulnerable in body or mind, unpracticed, or in a condition of special physical, official or financial reliance.¹⁶ The

law is the guardian of the general population, and has no function "to intercede in the private existences of subjects, or to try to implement a specific example of conduct, more remote than is important to do the reasons" of safeguarding open order.¹⁷ This general idea of the law has driven the Committee to additionally recognize "public morality" and "private morality" or unethical behavior that is the private existence of people. There stays one extra counter-contention which we accept to be unequivocal, to be specific, the significance which society and the law should provide for individual freedom of decision and activity in issues of private morality.

As an outcome, the Wolfenden Committee prescribed, inter alia, "that homosexual conduct between consenting grown-ups in private should never again be a criminal offense", in view of the supposed range of private ethical morality.

Morality in Constitutional Law

The underlying issue in the most common Hart-Devlin debate to which laws should have enforced morality when we inquire into the issue of judicial adjudication on the constitutional validity of a particular statute.

At that time Britain had also legalized homosexuality in its state.

The main challenge to the legal system was brought by NAZ India¹⁸, an NGO working on health related issues of men having sex with men (MSM). The All India Muslim Personal Law Board also moved to the Supreme Court challenging a Delhi High Court judgment¹⁹ on legalizing homosexuality between consenting adults by filing a petition on 2nd February, 2010.

The main issue of the famous case of Naz foundation was the presumption of constitutionality which stated that it violated Article 21 of the Constitution of India.²⁰

The next violation of the right to privacy which is also a part of Right to life as there is always a private space for a person to decide

his preference in the context of private intimacy without the interference of the society but section 377 haven't given these rights to a person. It is also a fact in the context of private intimacy. If a person being an adult has consented to have sex with another man, it shouldn't be the duty of law to prohibit him from doing that act as it is his private right to do what he wishes to.

The final judgment given by the Delhi High Court was that section²¹violated Article, 14, 15 and 21.²² But its provisions will continue to govern penile-non vaginal sex among minors. But as on August, 2017, a new judgment giving a right to privacy as a status of a fundamental right in India,also recognized protection of sexual orientation and it was further quoted by the judges that it lies at the core of the fundamental rights protected under article 14, 15 and 21.²³

Supreme Court of India recently, passed a judgment against human rights by reestablishing a law that banned gay sex.²⁴ The Court re-established Section 377 of the Indian Penal Code, a nineteenth century law, but barring "bodily intercourse against the order of nature". The judgment had caused huge anger amongst the masses and also among liberal and among activists, which used legal intervention to redress grievances against minorities of all types in India. It has additionally been censured from lawful and human rights viewpoints.

As per a Deccan Herald report, no less than 750 cases were enrolled and 600 individuals arrested under Section 377²⁵, after the Supreme Court struck down the Delhi High court's decision²⁶, which decriminalized homosexuality.

Yet, gay activists have frequently alleged that the law gives a chance to individuals to use and abuse the criminal justice system. Since, this decision was made just before the 2014 General Elections; no party was willing to introduce or pass the bill because it was a controversial topic. But the judgment given by the High court was

reversed by the Supreme Court as it argued that India is not in a condition to accept this kind of behavior in the society. Also the 172nd report of the law commission recommended deletion of this section. Supreme Court also justified itself by stating certain examples. It is high time to speak publicly about these issues in the flawed verdict of the Supreme Court. The Indian government should succeed in its progress and act immediately to not fully repeal Section 377²⁷ but at least give certain rights to the homosexuals while prohibiting bestiality; sex with animals.

CONCLUSION

Therefore, the jurisprudential point of view was dismissed by the Supreme Court from around the globe which has given free rights to homosexuals and certain privacy and dignitary rights as well. The Supreme Court has also rejected international law on sexual orientation and gender identity. As the Indian Penal Code, 1860 which was drafted in the pre-constitutional area in the 19th century has become obsolete now and should be altered with the advancing needs of the society but India is still bearing the old traditions of being repugnant to the emerging trends. It is the correct age and time to accept the idea of LGBT giving due respect to their rights and they must be allowed to live with dignity and recognition. The customs still prevail over legislations in certain regions of India where the customs of Hindu, Buddhist, and Muslim prevail over the thinking of everyone.²⁸ The need of the hour is to socially adopt the new norms which are recommended for the amendment in the Indian statutory laws. As the Delhi High Court judgment²⁹ in this scenario is very favorable and thus decriminalizes homosexuality favoring to lakhs of benevolent homosexuals in India but was eventually overruled by the Supreme Court judgment³⁰. To conclude, nothing much has been changed in the recent case and has absolutely caused zero transition in the Indian legal scenario. So, in the fight for gay's rights, we've probably

lost and the government makes no other initiative to amend it in the near future. The only hopeful thing which could be said that more number of judges shall be constituted to look into this matter and reform the nation. Unless a deliberate endeavor is made by the society, acting through the organization of the law, to equal the crime with that of sin, there must remain a domain of private morality and corruption and no social development of the society would be seen in the near future.

(Endnotes)

- 1 * 4th year UNIVERSITY OF PETROLEUM AND ENERGY STUDIES, DEHRADUN
- 2 Wolfenden Report, 1957
- 3 Russell Hardin, *The Morality of Law and Economics*, 160-200 (1966).
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- 5 Yves Caron, *The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy* 50-56 (1970).
- 6 1998 (12) BCLR 1517 (CC)
- 7 539 U.S. 558 (2003)
- 8 2010 CriLJ 94
- 9 Allison Jernow, *Morality Tales In Comparative Jurisprudence: What The Law Says about Sex*, Amsterdam Law Forum at pg.11, Amsterdam (2011)
- 10 Ronald M. Dworkin, *Lord Devlin and the Enforcement of Morals* 67-90 (2017), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4612&context=fss_papers (last seen on 03/08/ 2017).
- 11 Wolfenden Report, 1957.
- 12 Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process And Criminal Law*, Berkeley Journal of Criminal Law , 5 (2004).
- 13 Yves Caron, *The Legal Enforcement of Morals and the So – Called Hart – Devlin Controversy*, 15 McGill Law Journal.
- 14 Gerald Dworkin, *Devlin Was Right: Law andThe Enforcement Of Morality*, 40 William And Mary Law Review at pg. 927 (1999).
- 15 Yves Caron, supra 11.
- 16 Wolfenden Report, 1957
- 17 Yves Caron Report, supra 13.
- 18 *NAZ Foundation vs. Government of N.C.T Delhi*, 2010 CriLJ 94
- 19 Ibid
- 20 Indiankanoon.org.(2017).Nazfoundation.Availableat: <https://indiankanoon.org/search/?formInput=naz%20foundation>. (Last seen on 15/08/2017).
- 21 S.377, *The Indian Penal Code*, 1860
- 22 *The Constitution of India*,1950.
- 23 Supra 20.
- 24 Suresh Koushal and another vs. NAZ Foundation and others. CIVIL APPEAL NO.10972 OF 2013 (Arising out of SLP (C) No.15436 of 2009)
- 25 *Indian Penal Code*, 1860
- 26 *NAZ Foundation vs. Government of N.C.T Delhi*, 2010 CriLJ 94
- 27 Anon, (2017). Available at: <https://www.outrightinternational.org/sites/default/files/15-1.pdf> (last seen on 30/10/ 2017).
- 28 Hart-Devlin Debate, Sixthformlaw.info (2017), https://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm. (Lastseen on12/11/2017).
- 29 *NAZ Foundation v. Government of N.C.T Delhi*, (2010)CriLJ 94.
- 30 Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.