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DECRIMINALISING HOMOSEXUALITY: A COMPARATIVE STUDY OF SINGAPORE AND INDIA

NETHRA MOHANRAM

INTRODUCTION

Consensual sex among adult homosexuals or heterosexuals in private space is not a crime, the Supreme Court unanimously held to struck down part of a British-era law that criminalized it on the grounds that it violated the constitutional right to equality and dignity. Till 2007, Section 377 of the Indian Penal Code, 1860, which criminalized sexual intercourse against the order of nature, was *para materia* with Section 377 of Singapore's Penal Code 1936, when the latter was repealed. However, Section 377A of Singapore's Penal Code, which essentially criminalizes consensual sex between men and men, remained a part of the law

In 2018, in the landmark case of ***Navtej Singh Johar v. Union of India***[1], the five-judge constitutional bench of the Indian Supreme Court struck down the criminalization of homosexuality under Section 377 of the IPC. Shortly after the judgment, three Originating Summons were filed by three homosexual men before the High Court of the Republic of Singapore, which were heard together on the consent of the parties in ***Ong Ming Johnson v. Attorney General***[2], challenging the constitutionality of Section 377A of the Penal Code of Singapore on Article 9 (***Right to Life and Personal Liberty***), Article 12 (***Equality before the Law***) and/or Article 14 (***Freedom of Expression***) of the Constitution of the Republic of Singapore.

Section 377A, which was personified in the Singapore law in 1938 while Singapore was under the British administration, criminalizes "Outrages on Decency" and reads as follows: "377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."

Nevertheless, in the present Article, the author will decisively analyse only the issues on violation of Article 12 and Article 14, where the reference was made and the Singapore court showed dissent to the Indian jurisprudence.

[1] W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

[2] [2020] SGHC 63 Originating Summons Nos 1114 of 2018; 1436 of 2018 and 1176 of 2019

COMPARATIVE ANALYSIS BETWEEN ARTICLE 12 OF THE CONSTITUTION OF THE REPUBLIC OF SINGAPORE AND ARTICLE 14 OF THE INDIAN CONSTITUTION

As one of the grounds for challenging the constitutionality, the plaintiff relies on Article 12 which provides for the equality clause and is *para materia* with Article 14 of the Indian Constitution. The plaintiff questions the provision as being under-inclusive and over-inclusive for not criminalizing female and male homosexual conduct and on the issue of criminalizing private conduct which however does not harm public morality, respectively. As far as these issues meeting the reasonable classification test under Article 12(1) is concerned, the dilemma lies in the inclusion of the broader test of "*proportionality*" in the reasonable classification test.

In contemplation of, the plaintiff places reliance on the jurisprudence of different nations which share a similar history, legal system, heritage or society to that of Singapore to highlight on the limitations and denigrations of the reasonable classification test insofar as it operates solely as a threshold inquiry, adopted by the Singapore courts overtime to not include "proportionality" as a yardstick for testing reasonable classification.

On comparison with the Indian decisions, the plaintiff relies on ***Om Kumar v Union of India***[3] wherein the Supreme Court observed that on considering whether a specific provision or statute conforms to the reasonable classification test, "the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality." On further emphasis on the proportionality approach, the court observed that any regulation on the Fundamental Rights by a statute or an order, to meet the objective of such statute or order, should be the least restrictive one. This judgment is evidence of the enthusiasm of the Indian judiciary which, though occasionally fervid, does not entirely crawl upon the functions of the legislature.

In hastening this dynamism, the Indian judiciary has, in ***Anuj Garg v. Hotel Association of India***[4] and further affirmed in the *Navtej* judgment, acknowledged the need to espouse and give precedence to the inferences and effects of legislation rather than assessing an enactment on its objects and purposes which would hold redundant after decades of the statute coming into force. The relevancy

[3] Special Leave Petition (civil) 21000 of 1993

[4] 6 December, 2007; Appeal (civil) 5657 of 2007

and efficiency of law lie in it evolving with the changing socio-economic or political conditions of the society that it is bound to serve.

However, the Singapore High Court considers the judgment delivered by the Indian judiciary to be incongruous to the traditional principles of judicial review subscribed to by the Singapore law and deems improper to adopt "proportionality" as a yardstick under the reasonable classification test for the reason that the proportionality approach would consequently lead in reviewing the legitimacy of the objects of a statute which would result in the judiciary acting like a "mini- legislature". In disregarding the preference afforded to the effects and implications of a statute in adjudging its validity contrary to sticking to the purpose for which the statute was enacted, the court goes to the extent of upholding that it will not consider any "extra-legal arguments, regardless of how valid or plausible they may seem to be". Overlooking such arguments irrespective of their validity as specifically observed by the Hon'ble Court is a sign of plain defiance.

As it appears to be, the role of the judiciary in Singapore is, to a great extent, truncated to the classical role of interpretation of the statute only and anything more would entail in it usurp the functions of the other organs of the government.

The plaintiff further relies on the right to freedom of expression guaranteed under Article 14(1)(a), *para materia* with Article 19(1)(a) of the Indian Constitution, to encompass the freedom of sexual orientation and sexual preferences, subject to such acts being consensual and in private as a challenge to the disputed constitutionality. It is entrenched that the freedom of expression is not an absolute right but the court in the instant case does not dwell into the restrictions under Article 14(2)(a).

The court, on applying varied internal and external tools of interpreting a statute, opined that the freedom of expression cannot be divorced from the freedom of speech and therefore is restrictive to include only verbal communication. The same was observed despite the umpteen, repetitive contentions from the plaintiff's end that such an interpretation would "render the term 'expression' otiose".

In furtherance, the plaintiff also produced foreign authorities in support of his proposition. However, it is saddening that the High Court dissented with the ratio in the *Navtej* judgment, which entailed within the freedom of expression, the right to homosexual conduct. The author is unable to agree with the reasoning of the Indian Supreme Court given that the court appeared to have accepted a wider meaning of what constitutes 'expression', extending beyond verbal communication of ideas, opinions or beliefs.

The court in concurrence with the defendant's argument also edged forward to observe that endowing an expansive interpretation would include any human conduct and any form of sexual expression, precisely -bestiality, incest, necrophilia or paedophilia within the sphere of "expression" which, do not embrace the morals of the Singapore legal system and the intention of the constitutional makers in bestowing such freedom.

The views of the Hon'ble Singapore Court do not appease the author's conscience. The comparison of consensual sexual acts between same-sex couples with a psychological disorder like paedophilia or an absurd fixation like in necrophilia or the cold-hearted act of bestiality through carnal intercourse with animals, without each adhering to the prerequisite consent is utterly irrational. Such unreasonable criminalization obstructs the realization of the rights of the male homosexuals because their expression of autonomy and self- determination through their sexuality is not permitted to be pronounced. Despite being a minuscule of the population, every individual or community is vested with certain inalienable human rights and as has been established globally, the human right to the freedom of expression is all-embracing than the freedom of speech to include more than any natural, oral or written expression.

Therefore, to efficiently discharge its functions and in the interest of upholding complete justice, the author believes that the need of the hour is an overarching legislation that guarantees equality to all persons on the basis of sexual orientation, gender identity and expression, sex, caste, religion, age, disability, marital status, pregnancy, nationality and other grounds. The law should impose obligations of equality and non-discrimination on all persons, public and private, and in the areas of education, employment, healthcare, land and housing and access to public places. It should provide for civil remedies including injunctions to stop discriminatory behaviour, costs and damages, and positive action to make reparations. Most importantly we need an equality law to define what equality would encompass. In the current situation, particularly in Jammu and Kashmir where people are arrested and communication channels have been blocked, an equality law may seem to be a luxury when basic freedoms of people are taken away. Here the Supreme Court comes to our rescue because it held in its privacy judgment in ***K.S. Puttuswamy v. Union of India (2017)***[5] that equality and liberty cannot be separated, and equality encompasses the inclusion of dignity and basic freedoms. Situations like what we see in J&K also show us that we need an equality law that not only addresses discrimination against individuals but also addresses structural forms of discrimination and exclusion. On the first

[5] WRIT PETITION (CIVIL) NO 494 OF 2012

anniversary of *Navtej*, the time is right for these reforms, so that we are able to see these battles being won in the next 25 years.