
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

“Sustenance of identity is the pyramid of life & that's why the majoritarian views and popular morality cannot dictate constitutional rights of any individual guaranteed by the Constitution.”

- Hon'ble Indian Supreme Court

Review of Ong Ming Johnson v. Attorney General [2020] SGHC 63 in light of Progressive Constitutionalism (NavtejJohar v. Union of India).

- Archit Mishra¹

Indian Constitution is certainly one of the bulkiest and largest constitutions in the world. It encompasses the rights of all the citizens and non-citizens as well. Part III of our Constitution which is often known as the heart and soul of this entire document is one of the most dynamic parts and from time to time through various judicial pronouncements the courts have realized and enlarged the interpretation of these rights mentioned under Part III to give a real meaning to the constitution.

Progressive Constitutionalism: NavtejJohar v. Union of India, AIR 2018 SC 4321:-

The Hon'ble Apex Court of India in 2018 in this case pronounced an unanimous judgement and held that Section 377 acts as an anathema to our constitutional scheme so far its application to consensual conduct related to sex between adults done in private is concerned and held it to be an unconstitutional provision. However, the judgement didn't touch upon the other limb of Section 377 which relates to sex with minors, non consensual sexual acts and bestiality.

¹ Student of Symbiosis Law School, Pune

It is important to note that while striking down this section, the Hon'ble Judges formed their opinion from the roots of the constitution i.e., Article 14 & Article 21 and laid down the formation as to how these articles should be interpreted to uphold the constitutional values and why this provision is draconian and how it strikes at the root of Indian Constitution.

Ong Ming Johnson v. Attorney General, [2020] SGHC 63:-

Recently, the Singapore Supreme Court (hereinafter referred as SSC) in the case of Ong Ming Johnson v. Attorney General while adjudicating the issue of constitutionality of the provision related to homosexuality in Singapore Penal Code, upheld the provision of criminalizing the homosexuality and did not agree with the ruling mentioned above pronounced by the Indian Supreme Court. In addition to this, the Singaporean Supreme Court held that this provision is not in contravention of their constitutional ideas as mentioned under Article 9,12 & 14 of the Singaporean Constitution (hereinafter referred as SC).

Analysis of Article 12 & 14 of the SC:-

In this section an attempt has been made by the author to review & analyse the implication of Article 12 of the SC which deals with the right to equality and it is similar to Article 14 of the Indian Constitution and Article 14 of the SC which deals with the freedom of speech & expression and it is similar to Article 19 of the Indian Constitution and with due respect to Your Lordship of Singaporean Supreme Court how in my humble opinion these sections could have been interpreted so that the irrational, absurd & incomprehensible discrimination related to homosexuality can be declared as an unconstitutional provision.

I would be dealing with **Right to Equality (Article 12 SC)** first and while stating this I would like to state that when we talk about such provision, it is very important to understand that the equal protection mentioned under Article 12 is protection under “law” and the “law” should be applicable to all unless exceptions are carved out. The premise on which the Hon'ble SSC proceeded that the word “law” as used in Article 12 does not include Section 377A is a fallacious conclusion in terms of law and fact both. In addition to this, making a blind demarcation between

the remedy sought by the Appellant i.e., the appellant were not seeking equal protection under Section 377A but rather, protection from prosecution under Section 377A lacks logic.

Section 377A is restricted to its application only for male and the wordings which has been used is itself highly subjective and confers unbridled powers to the state because of the term “gross indecency” which has been used in the section criminalizing Homosexuality.² The term “gross indecency” has not been defined in the entire penal code and in addition to the wordings does not put any explanation or illustration to guide the citizens as to what amounts to gross indecency and it is highly exposed to be misused by the authorities. Moreover, the application of this section has been restricted to male and this classification is also unfounded since no intelligible differentia or reasonable classification based on sound application of mind has been done in this case.

If we will read this section more carefully, we will understand that the section is a mixture of patent illegality and unreasonableness and it cannot stand by with the contours of Article 12 of SC. The element of manifest arbitrariness has been involved in the section especially, when we talk about the latter part of the section. Any fundamental fact and identity which is congenital in nature and is existing within an individual by birth cannot be a ground for discriminating him/her and thus making them liable for punishment. These are rights which are so intrinsically related to the identity of any individual that they becomes inviolable and law of the land which makes them a criminal cannot be said to be a part of a civilised country. The constitutional interpretation of any provision should be in such manner that the holistic development of a sound society with liberalized ideas and thoughts prevail and inherent attribute which any individual gets when he takes birth should not be considered as a taboo and should be granted all the rights as an ordinary citizen enjoys in any country.

Now, I would be dealing with **Right to Free Speech & Expression (Article 14 SC)**. The most important aspect to understand in this right is related to the application of term “expression.” The basic mistake which the SSC has committed while adjudicating this matter is that the Hon’ble

² Section 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.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

judges restricted the meaning of word “expression” by putting all its varied interpretations within the ambit of either “utterance, declaration or representation.” In addition to this, another major mistake which has been done while pronouncing this judgement was by paying unnecessary heed to the marginal notes and concluding that this right has been granted in relation to freedom granted to speech i.e., verbal speech and open form of communication.

The idea of the word “expression” as has been defined under Indian Constitution encompasses within itself all the possible form of expression and also includes sexual orientation as a form of expression which is inviolable and cannot be any ground to make a valid classification. Though, the SSC has relied on the Indian judgement *Nand Kishore v. State of Punjab*,³ and held that “*there is a presumption always in favour of constitutionality of the law*” but eventually lost sight of the fact that the connotation of any word cannot be restricted to only certain areas and one cannot put it into any strait jacket formula.

The undefined “indecenty” based on any individual’s sexual orientation which has been classified as an offence is beyond the understanding of a civilized society and it can be easily said that it is a hollow classification which lacks any logic. In addition to this, when the legislature has itself prescribed certain limitations of the application of this right under Article 14 then it is needless for the judiciary to determine any other restriction on this right and this interference was certainly uncalled for since the “indecenty” which has been mentioned under Section 377A can be a natural decency and morality for many and thus any legislation which impinges such basic rights of its citizens should be struck down straight away.

The analysis of this Section in unequivocal terms makes it very clear that the wordings of this Section cannot stand with the rights granted to citizens under Section 14 of the SC. The restriction related to consensual sexual activities between two adults cannot be considered as an offence just because of the majority opinion believing it as an anathema for their society rather the broad amplifications of the progressive interpretation of the constitution should be adopted. Such restriction can never become a sound and a reasonable ground for curbing the rights granted to an individual under the Constitution.

³*Nand Kishore v. State of Punjab* (1995) 6 SCC 614.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

Another important aspect which we all should realize is that any sexual activity or carnal intercourse done between two adults in private cannot by any means harm the public decency, morality or not even an ounce of such acts done in private amounts to “gross indecency.”

CONCLUSION:-

The respected person and draftsmen of any constitution never envisaged a society filled with social stigmas and ignoble viles to prevail in any civilised society. The constitution and its interpretation should be in such a harmonious manner that it deletes the history or social discrimination and lays down the law of the land in such a manner that all social vices are discouraged. Thus, crafting an exception on the basis of sexual orientation and the sexual activities done by some of them in private is clearly opposite to the fundamental idea of the Constitution. In lieu of this judgement, without prejudice to what has been held by the Hon’ble Judges of the Hon’ble SSC in this case and affording my due respect to all the judges, in my humble opinion I don’t think that the law laid down in this judgement gets along with the idea of progressive constitutionalism and it abhors the purpose for which constitution is enacted and implemented because the law laid down in this judgements strikes at the root of certain limbs of the constitution. The constitution is a document which enlarges various beliefs, ideas and their acceptability but this judgement is a classical example of denudation of the basic constitutional values.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>