

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

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Section 377 of the Indian Penal Code and Fundamental Rights: A Study

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ABSTRACT

Section 377 of the Indian Penal Code is a section of the Indian Penal Code introduced in 1861 during the British rule of India. Modelled on the Buggery Act of 1533, it makes sexual activities "against the order of nature" illegal. On 6 September 2018, the Supreme Court of India ruled that the application of Section 377 to consensual homosexual sex between adults was unconstitutional, "irrational, indefensible and manifestly arbitrary", but that Section 377 remains in force relating to sex with minors, non-consensual sexual acts, and bestiality. This paper will explain the decriminalization of homosexuality in India.

Keywords: *Homosexuality, LGBT, Section 377, Criminalization, Fundamental Rights*

I. INTRODUCTION

In the Indian Penal Code, 1860 **Section 377** of the British colonial penal code criminalized all sexual acts "against the order of nature". The law was used to prosecute people engaging in oral and anal sex along with the homosexual activity. The penal code remains in many former colonies and has been used to criminalize third-gender people, such as the *point* in Myanmar.²

Is the criminal proscription under Section 377 of the Indian Penal Code, 1860 confined to certain sexual acts or homosexuality in general? This question is inspired by the dismissal of a recent petition challenging the constitutionality of this the anti-sodomy provision of the Indian Penal Code, 1860 (hereafter S.377). The year 2018 changed the way we look at gender, sex and sexuality. The judgment of the Supreme Court in *Navtej Johar v. Union of India*.³ holding that consensual same sex under Section 377 of the Indian Penal Code was no longer criminalized was revolutionary in the manner in which it protected the rights of lesbian, gay, transgender persons, and sexual minorities. In protecting their rights, the Supreme Court also gave broader and more expansive meaning to "sex" within the Constitution to include gender identity and sexual orientation. *Navtej* is a beginning from which will emerge a whole new era not only for transgender equality but gender equality in India.

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² Chua, Lynette J.; Gilbert, David (2016). "State violence, human-rights violations and the case of apwint of Myanmar". *Gender, Violence and the State in Asia*. Taylor & Francis. ISBN 9781317325949.

³ (2018) 10 SCC 1.

Portions of the section were first struck down as unconstitutional concerning gay sex by the Delhi High Court in July 2009.⁴ That judgement was overturned by the Supreme Court of India (SC) on 11 December 2013 in *Suresh Kumar Koushal vs. Naz Foundation*. The Court held that amending or repealing section 377 should be a matter left to Parliament, not the judiciary.⁵

Accordingly, section 377 criminalizes the homosexual movement and makes it culpable with as high discipline as life detainment. This arrangement of IPC has turned into a noteworthy dubious point and theme of civil argument as of late. Individuals of the LGBT people group are attempting in some cases to persuade and pressurize our legislators to decriminalize Section 377. At the end of the day, LGBT social activity bunches are demanding that if two consenting grown-ups of the same sex are associated with homosexual exercises, it ought not to be a criminal offence.

The Indian Penal Code was an important experiment in the larger colonial project along with exercises in codification like the Civil Procedure Code and Criminal Procedure Code to apply the collective principles of common law in British India. Thomas Babbington Macaulay, the president of the Indian Law Commission in 1835, was charged with the testing task of drafting the Indian Penal Code also as a unifying effort to consolidate and rationalise the “splintered systems prevailing in the Indian Subcontinent”.⁶ S 377 in its final draft is still shrouded with euphemisms. The outcome to prevent this “revolting” and injurious activity evolved in the form of the following text:

“Section 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 10 years, and shall be liable to fine.”

S 377 is both very similar to sodomy statutes around the world in that it re-instates and codifies the common law offence of sodomy, and at the same time, it is very different from a lot of the sodomy statutes:

(a) The statute, unlike many other similar laws, does not define a specific offence of sodomy. As a piece of legislation, S 377 applies a vague offence without defining what “carnal intercourse” or “order of nature” are to the general public at large, the only criteria being “penetration”. It is a separate issue that the Indian courts over the decades have interpreted and

⁴ "Delhi high court decriminalizes homosexuality". *www.livemint.com*. 2 July 2009. Retrieved 10 July 2022.

⁵ Venkatesan, J. (11 December 2013). "Supreme Court sets aside Delhi HC verdict decriminalising gay sex". *The Hindu*. ISSN 0971-751X. Retrieved 10 July 2022.

⁶ The different prevailing systems were in the Bombay, Madras and Bengal Presidencies.

constantly re-defined “carnal intercourse” read conjunctively with the “order of nature” to include other non-procreative sexual acts.

(b) It applies to both heterosexuals and homosexuals. Over the years, the general offence of sodomy became a specific offence of homosexual sodomy, a significant distinction although never reflected in Indian law has subsequently been read through in certain later cases by the Indian courts.

II. HISTORY AND LEGAL FRAMEWORK

Homosexuality originated all over the world in the ancient period. It was observed that same-sex relationship has been practised by many kings. Homosexuality does not consider to be a crime in the ancient period. Under Manusmriti homosexuality has been punished but it does not consider a heinous crime.⁷ In Ahmadabad at Shiva temple which was constructed in 1060 CE depicts the interest between two women together for sexual activities.⁸

Homosexuality refers to attraction or sexual behaviour between people of the same sex, and/or to sexual orientation. As an orientation, homosexuality refers to "an enduring pattern of or disposition to experience sexual, affection, or romantic attractions primarily to" people of the same sex; "it also refers to an individual's sense of personal and social identity based on those attractions, behaviours expressing them, and membership in a community of others who share them." Homosexuality, bisexuality, and heterosexuality together make up the three main categories of sexual orientation and are part of the heterosexual homosexual continuum.⁹

The history of the legal campaign for the rights of LGBTI persons in India largely started with the legal challenge to Section 377 of the Indian Penal Code. Section 377 is an anti-sodomy provision derived from the Indian Penal Code of 1860. While Section 377 impacted gay, lesbian, queer and transgender persons, there were many other colonial legislations and legal provisions that specifically criminalized transgender and intersex persons in India. Transgender persons are persons whose gender identity or gender expression does not conform to their biological sex. This includes persons who intend to or have undergone Sex Reassignment Surgery (SRS) to align their biological sex with their gender identity to become male or female, transsexual persons, cross-dressers and all other identities. Intersex persons are born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition

⁷ Das, R. (1982). *Crime and Punishment in Ancient India*. Kanchan Publication. pp 89- 100. Retrieved Jan 04, 2020 from books.google.co.in

⁸ Mathew, B. (2013). *Pilgrimage to Temple Heritage*. Published in Prashant Kumar V.T on behalf of info. Kerela communication ltd. pp 478 à 489. ISBN: 8192128443. Retrieved on Feb 03, 2020 from books.google.co.in

⁹ Darr, Orna Alyagon. 2016. —Narratives of ‘Sodomy’ and ‘Unnatural Offenses’ in the Courts of Mandate Palestine (1918 48).*Law and History Review* 35 (01): 235–60.

of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither. In India, “Transgender” is often used as an umbrella term to include intersex persons and also several identities including Hijras, Kothis, Aravanis, Jogappas, ShivShakthis etc.¹⁰

Despite all these legislations that criminalized transgender persons, there was no mass transgender rights movement in the country that challenged these laws or fought against them. Although from the nineties, transgender activists were very vocal on the streets and had been the backbone of street protests around LGBTI issues in cities like Bangalore,¹¹ they were not at that time organized into a strong transgender rights movement nor were they too actively thinking of legally challenging any of these legislations including Section 377.

The real legal battle for LGBTI rights started in 2001 with a petition filed by Lawyers Collective on behalf of *Naz Foundation* challenging the constitutionality of Section 377 in the Delhi High Court. This was not the first time that Section 377 was being challenged. It was first challenged in 1994 by a group called AIDS Bhedbhav Virodhi Andolan, which was working on HIV/AIDS, but their petition however was not actively pursued. Thereafter, in 2001 a public interest litigation (PIL) was filed by the *Naz Foundation*,¹² which was working actively with the gay community. This was prompted after a police raid in Lucknow where the police arrested many persons on the grounds of suspected homosexuality while they were distributing condoms and other materials, as part of their HIV health rights work.¹³

Section 377 of the Indian Penal Code, 1860 makes certain acts illegal. It is an archaic colonial law that was brought in by the British. The section seems neutral in that it criminalizes certain sexual acts and not people and their identities. However, it has never been used against consenting heterosexual persons and has been misused against homosexual persons. The primary problem with the provision of law is that it does not take into consideration age or consent. Therefore, it criminalizes adult consensual same-sex acts.

The Delhi High court gave its judgment in *Naz Foundation v NCT of Delhi*¹⁴ wherein section 377 of the IPC was read down to not apply to consenting adult consensual acts in private. The Delhi High Court held that section 377 is against constitutional values embedded in Article 14

¹⁰ *NALSA v. Union of India* (2014) 5 SCC 438.

¹¹ Narrain, Siddharth (2009). “Crystallizing Queer Politics: The NAZ Foundation Case and its Implications for India’s Transgender Communities” *NUJS Law Review* 2(3): 455.

¹² *Naz foundation v. Government of NCT of Delhi* 2010 Cr.LJ 94 (Del.)

¹³ Krishnan, Vidya (2018). “How the LGBTQ Rights Movement in India Gained Momentum”, *The Hindu*, 14 July. Available at: <https://www.thehindu.com/society/its-been-a-long-long-time-forthelgbtq-rights-movement-in-india/article24408262.ece>

¹⁴ *Naz foundation v. Government of NCT of Delhi* 2010 Cr.LJ 94 (Del.)

(Right to Equality), Article 15 (Non-Discrimination) and Article 21 (Right to Life).

The Supreme Court reversed the judgment of the Delhi High Court and held that section 377 does not violate the constitution and is therefore valid. The Supreme Court reasoned its judgment on several grounds. First, it held that all laws enacted by Parliament are presumed to be valid under the Constitution. This means that to hold the law to be invalid, it must be shown, through evidence, that the law is violating the Constitution. The Supreme Court held that there is not enough evidence to show that S.377 IPC is invalid under the Constitution. The Court held that there is very little evidence to show that the provision is being misused by the police. Also, just because the police may be misusing a law, does not automatically mean that the law is invalid. There must be something like the law itself that is unconstitutional.

According to the Supreme Court, the law can be implemented without misuse. It was also argued before the Supreme Court that because S.377 applies to certain sexual conduct, it essentially means that all forms of sexual expression by LGBT people would be unnatural. This would mean that any sexual conduct by such people would be illegal. Therefore, S.377 prohibits all sexual expression of LGBT persons. The Supreme Court disagreed with this argument and held that S.377 speaks only of sexual acts and does not speak about sexual orientation or gender identity. This would mean that even heterosexuals indulging in acts covered under S.377 would be punished. Therefore, the section does not target LGBT persons as a class.

History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognize that homosexuality is a completely natural condition, part of a range of human sexuality.¹⁵

Having canvassed with a vehemence that sexual orientation is an important facet of the right to privacy which has been raised to the pedestal of a cherished right, the learned counsel for the petitioners have vigorously propounded that sexual autonomy and the right to choose a partner of one's choice is an inherent aspect of the right to life and right to autonomy. In furtherance of the said view, they have relied upon the authorities in *Shakti Vahini v. Union of India and others*¹⁶ and *Shafin Jahan v. Asokan K.M.*¹⁷ wherein it has been recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected

¹⁵ Justice Malhotra

¹⁶ (2018) 7 SCC 192

¹⁷ AIR 2018 SC 1933 : 2018 (5) SCALE 422

under Articles 19 and 21 of the Constitution.

III. CONSTITUTIONALITY AND JUDICIARY ON IPC 377

The SC's judgment may go down in history as one of India's landmark rulings. Section 377 of the Indian Penal Code, 1861 was partially struck down by the SC as it was seen to violate the fundamental rights of equality, prohibition of discrimination, freedom of speech and expression, and more importantly, the right to life. As a result, being gay is no longer illegal...or to be afraid of. Although this ruling may soon become a matter of 'pride' for India, in a conventional society like India, considerable efforts will be needed to change mindsets.

The Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* (2009)¹⁸ held that criminalising sexual activities with consent in private not only impairs the dignity of those persons but is also discriminatory and impacts the health of those people. The Delhi High Court decriminalized homosexuality because Section 377 is a violation of Articles 14, 15 and 21.

The Supreme Court, in *Suresh Kumar Koushal v. Naz Foundation* (2013)¹⁹ case, set aside the Delhi High Court judgment and said that homosexuality under Section 377 of IPC is illegal and will continue to be an offence. The court said that Section 377 did not suffer from any "constitutional infirmity". The court also added the responsibility of amending or removing Section 377 lay with the Parliament.

In the *Puttuswamy vs. Union of India*²⁰ case, the Supreme Court held the right to privacy as a fundamental right. The court stated that privacy included the preservation of personal intimacies and that sexual orientation was an essential attribute of privacy. The Court argued that the right to privacy and the protection of sexual orientation lay at the core of fundamental rights guaranteed under Articles 14, 15 and 21. The constitutional morality makes it mandatory for the state to provide equality to all. The 2017 Supreme Court verdict on right to privacy highlights that the choice of one's sexual orientation is an important part of his/her privacy.

The ideals of individual autonomy and liberty, equality for all, and recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our Constitution. Right to Privacy enshrined under Article 21 upholds that if a person cannot enjoy his privacy then it hampers his right to a dignified life. It violates the provision of equality before the law (Article 14). Article 15 provides for a prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth. Decriminalizing Section 377 does not ensure a halt in

¹⁸ Naz foundation v. Government of NCT of Delhi 2010 Cr.LJ 94 (Del.)

¹⁹ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. 2016 7 SCC 485

²⁰ Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

discrimination against the LGBT community. The other challenge for LGBT members will be concerning acceptance in jobs and family gatherings.

IV. CONCLUSION

The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature. The argument does not lie in the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminate the concepts underlying the said rights. In this regard, the observations in *Video Electronics Pvt. Ltd. and another v. State of Punjab and another*²¹ are quite instructive:- "Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour in evolving dynamic situations."

Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. This guarantee of recognition of individuality runs through the entire length and breadth of this dynamic instrument. The Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable. The courts must realize the constitutional vision of equal rights in consonance with the current demands and situations and not read and interpret the same as per the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing harmony, that is unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.

The Supreme Court decriminalised homosexuality saying that the "LGBT community has the same rights as that of any ordinary citizen. Respect for each other's rights and others is supreme humanity. Criminalising gay sex is irrational and indefensible." However, while India may have scrapped the controversial Section 377(A), there's still a lot more that needs to be done for true equality to be implemented on the ground level. Homosexuality in India has been a subject of

²¹ (1990) 3 SCC 87

discussion from ancient times to modern times. In striking down the colonial-era law that made gay sex punishable by up to 10 years in prison, one judge said the landmark decision would "pave the way for a better future."

In 2018, at a time when the LGBTI and therefore the transgender movement had gained great social acceptance and therefore the community was waiting with bated breath for a choice from the Supreme Court, on 6th September 2018, the Supreme Court during a 5-judge Bench, led by the judge unanimously held in *Navtej Johar*²² that Section 377 was unconstitutional to the extent that it criminalizes consensual relationships of any kind between adults and overruled *Koushal*.²³ The Supreme Court in holding Section 377 to be unconstitutional recognizes the elemental rights of sexual and gender minorities and Chief Justice categorically declares that the proper life and dignity include the dual aspects of one's identity and sexual orientation.

International human rights treaties and jurisprudence impose obligations upon States to protect all individuals from violations of their human rights, including based on their sexual orientation.²⁴ Nevertheless, laws criminalizing same-sex relations between consenting adults remain on the statute books in more than seventy countries. Many of them, including so-called "sodomy laws", are vestiges of colonial-era legislation that prohibits either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex.²⁵

The arguments for relationship recognition and non-discrimination represent a replacement challenge to the rights movement; therein they shift from a paradigm of tolerance thereto of staking a positive political claim. The third issue I'd wish to highlight moves between the 2 claims: the status of the transgender community in India. Unlike the gay, lesbian, and bisexual community, the transgender community's status of criminalization hasn't been completely erased since the Delhi High Court's judgment.

It might not be too far away from the reality to state that transgender battles for equality are leading and have succeeded in transforming the women's rights movement in India as well because it's changed our notions of gender and opened our minds to a gender expression that's non-conforming with mainstream gender stereotypes. A future for India with full equality is going to be one in which we recognize that each gender is equal. The transgender

²² AIR 2016 SC 76

²³ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. 2016 7 SCC 485

²⁴ Dominic McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law", Human Rights Law Review, Vol. 16 (2016).

²⁵ UN Human Rights Council, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (2011).

movement is taking us towards such a goal. Given the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. It is, however, clarified that such consent must be free consent, which is completely voluntary, and devoid of any duress or coercion. India is also required to protect the right to privacy, which includes within its ambit the right to engage in consensual same-sex sexual relations.²⁶

The LGBT persons deserve to live a life unshackled from the shadow of being ‘unapprehended felons.

²⁶ Committee on Economic, Social and Cultural Rights, “General Comment 20: Non-discrimination in economic, social and cultural rights” (2009), at para 32.