

# HOMOSEXUALITY: DEBATING ISSUES IN THE LIGHT OF INDIAN LEGAL AND SOCIAL SYSTEM: AN ANALYTICAL RESEARCH

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## ABSTRACT

To introduce homosexuality is romantic or sexual attraction or behavior among the people of the same sex. As a sexual orientation, homosexuality refers to an enduring pattern 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, behavior expressing them, and membership in a community of others who share them. The common term used for homosexuals are 'gays', 'lesbians', 'bisexuals', or 'transgender' and collectively known as LGBT people. Homosexuality which is believed to be of western origin and culture has swept in India past a decade, with a striking force on our Indian society and culture. The legal battle concerning decriminalization of homosexuality has begun. Today it is the most sensitive, controversial and debatable issue of high concern as the onus to do justice lies on apex court which involves issues of fundamental rights of LGBT people in our socio-legal system. Homosexuality is considered as a taboo subject, by both Indian civil society as well as our legal system. Public discussion of homosexuality has been inhibited by the fact that sexuality in any form is rarely discussed openly in our country. Attitude towards homosexuality is overwhelmingly negative, however it is a shocking reality that homosexual behaviour has always existed in India, sometimes in the form which is culturally sanctioned such as, the Hijras, and other times in invisibility and silence. Section 377 of Indian penal code, 1860 penalizes homosexual acts (both consensual and non-consensual). The Delhi High Court in its landmark judgment of Naz Foundation (India) Trust, 2009 decriminalized consensual homosexual acts of adults in private, and held that bare interpretation of section 377 IPC is violative of fundamental rights enshrined in article 14, 15 and 21 of Indian constitution. Prior to this landmark judgment, LGBT people were struggling underground for their existence and identity. The Delhi high court judgment went in their favour because of which they gathered courage and confidence to come out of the closet. Since 2009 till 2013, a lot of LGBT activism was seen in newspapers, media, social networking sites etc. Many celebrities, both national and international, have also stood by the side of homosexuals when it came to supporting them for their basic and fundamental rights. During these four years in India, people from all walks of life have come forward advocating for decriminalization of homosexuality. Also the society is aware about the fact that defaming anyone with

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content related to homosexuality is an offensive act, and our legal system is too much concerned with the same.

**Keywords:** homosexuality, disposition, LGBT, decriminalization, activism.

## Section 377 of the Indian Penal Code and Queer Women in India

**Ponni Arasu and Priya Thangarajah**

“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 ten years, and shall also be liable to fine.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

According to this law, any kind of sexual activity that is not penilevaginal intercourse ('intercourse' as used in the explanation usually means penile- vaginal intercourse in Indian law) is punishable. This law then criminalizes sexual activity between two consenting adults. A discussion of the interpretation and implications of the law is outside the scope of this specific paper. Section 377 is also the only law in the Indian Penal Code that addresses child sexual abuse. We can clearly see, however, that a law that only includes penile-vaginal intercourse cannot be a comprehensive code to address child sexual abuse thus asserting the need for another law on the same This law instituted in 1860 in British India, at the same time as in Britain itself, is common to many former colonies of Britain and thus is common to most countries in South Asia. It has historically been the anti-sodomy provision in the British imperial legal system. Ironically, enough the section was removed from the British code but still remains in its former colonies.<sup>1</sup>

This provision has been used mostly against gay men, men who have sex with men (MSM), hijras<sup>2</sup> and male sex workers in the public sphere. It has also been used against organizations<sup>3</sup> and ground level activists working on issues of sexual rights, LGBT issues and HIV/AIDS. It is significant to note here that from 1860 onwards there have been very few cases of arrest and prosecution under sec.377<sup>4</sup>. The section however, we

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<sup>1</sup> The law was removed from the British code in 1967

<sup>2</sup> Hijras can be called, for lack of a better term, transgender people. In India they are also a social, political and cultural community.

<sup>3</sup> Bharosa Trust, an organisation in Lucknow working on issues of HIV/AIDS was raided and accused of having in their possession 'pornographic' material. The material in question was that relating to sexual health. Employees were arrested under 120 (B) for criminal conspiracy and under sec. 377 of the Indian Penal Code

<sup>4</sup> Forty six cases in the high courts in British and Independent India from 1860 onwards, which is a modest number, compared to the instance of harassment of gay men and Hijras with or without direct mention of sec. 377

know from testimonial evidence, has been used for harassment of gay, MSM and hijras in the public sphere by police officials and in the private by families and friends.

This section also serves as a threat against lesbian and bisexual women within families, friends, educational institutions, workplaces and so on. But as the law is patently silent on 'carnal intercourse' and it has in its execution excluded sexual acts by women, the threat that queer women face under this archaic law is different from the experience of queer men. As we know from history, women are more often than not, denied access to the public space as well as the right to articulate their being as including their body and sexuality.

The freedom to leave one's paternal home and pursue one's own, relatively independent life, in the name of a job is in most cases allowed for men and denied to women. Further, women are conditioned to not think, speak or act based on any notions of themselves with sexual interests, preferences or choice. Given these factors, queer women share a common ground with all other women while challenging even that common ground by their identification and life as queer persons. How do queer women then claim rights provided by the constitution and international conventions when their identity per se is not included in the legal regime and if such an inclusion might be counterproductive would be questions that we hope to raise in this paper. An analysis of this context based on empirical evidence is an almost impossible task in a situation where very few women are openly queer within their families/friends or at workplaces. The only source we can use to base and analyze our contentions, are testimonials of the cases of lesbian couples who have run away from home and of those who have committed suicide. This paper will be based on interviews with activists from some cities in India- Delhi, Bangalore, Trivandrum and Bombay. We hope to interview activists and lawyers who might have been involved in these cases to ascertain whether sec.377 was within the parlance of the families, police and lawyers that they have interacted with. We also hope to speak to the women involved to have discussions on the perception about the law as well as what they see as the repercussions of change in the same. A discussion on questions of legal change as part of the larger struggle for non-discrimination based on sexual orientation/preference will be woven through the paper.

## **NAVTEJ SINGH JOHAR v. UNION OF INDIA: A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT PERSONS**

The 6th of September 2018 marked a historic victory for a vibrant and vociferous LGBT<sup>5</sup> movement, which for over seventeen years had been demanding the repeal of Section 377 of the Indian Penal Code (see Appendix A for full text). The Supreme Court in its decision in Navtej Singh Johar v. Union of India, struck down the 1860 law criminalizing the lives of LGBT persons.

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<sup>5</sup> Short-hand for Lesbian, Gay, Bisexual and Transgender. We have used the terminology adopted by the judges in the operative part of the judgment, while cognizant that there are a range of identities in the Indian context including Intersex, Queer, Hijra and many more.

The decision itself built upon a history of struggle carried out relentlessly across the country which involved pride marches, protests, demonstrations as well as courageous individual acts of LGBT persons coming out in their workplaces, families as well as in the media. It is also important to remember those who contributed so much to the LGBT movement but are no more with us. Our collective efforts have opened up in ways small and big, a space in Indian society for tolerance and acceptance of sexual and gender diversity. The struggle of the last quarter century waged by thousands of people across the country has succeeded in creating a space of visibility and acceptance in Indian society around the loves and lives of the LGBT community.

To recapitulate briefly on some of the legal high points in the struggle against a law of colonial vintage. In 1950, the Indian Constitution came into force with the recognition that all persons had the right to equality, non-discrimination, life and personal liberty (see Appendix A for relevant provisions of the Indian Constitution). The significance of the Constitutional framework was that it gave the community the language of universal human rights, which would apply to all persons without discrimination.

However the Courts never saw fit to apply the constitutional framework to LGBT persons till the ground breaking decision in 2009 by the Delhi High Court in Naz Foundation v. NCT Delhi. For the first time, in Indian judicial history, Section 377 was judged against the parameters of the Constitution to find that the provision violated the right to equality, non-discrimination, dignity and privacy of LGBT persons and found Section 377 unconstitutional. In 2013, in Suresh Kumar Koushal v. Naz Foundation, in a widely criticized judgment, appositely captured by Vikram Seth as a “bad day for law and love”, a two-judge bench of the Supreme Court recriminalized LGBT lives.

In 2014, the Supreme Court in NALSA v. Union of India found that transgender persons were entitled to full rights under the Indian Constitution. In 2017, in Puttaswamy v. Union of India, a nine-judge bench’s decision of the Supreme Court found that that the right to privacy was a part of the fundamental rights chapter and that Suresh Kumar Koushal was one of the “discordant notes” in the rights jurisprudence of the Supreme Court.

Thus, both legal developments and social developments had made Suresh Kumar Koushal increasingly unviable. There was a sea change in the social and public perception of LGBT lives which was perhaps best captured in the contrast between the empathy that the judges who heard Navtej Singh Johar showed towards LGBT persons compared to the cruel indifference of the Koushal Court. In Suresh Kumar Koushal, the judges were adamant that the law criminalized sexual acts and not identities. The judges had contemptuously observed that LBGT persons were anyway a “minuscule minority” whose rights they referred to dismissively as “so-called rights”. The judges who heard Navtej Singh Johar were clear that Section 377 affected not only sexual acts but LGBT persons, that the right to privacy and dignity were real rights which applied to LGBT persons and that constitutional morality 10 mandated that the rights of every minuscule minority were deserving of constitutional protection (see Appendix C for the parties who appeared before the Court,

Appendix D for Summary of Arguments made during the proceedings, and Appendix E for transcript of the proceedings before the Supreme Court).

After four days of hearing, the judgment was delivered on the 6th September 2018. This short booklet aims to provide a roadmap to this judgment so that its implications can be better understood by LGBT persons as well as all those who are interested in the future of human rights.

The judgment itself is an acknowledgment of the breadth and depth of the LGBT movement and references fact-finding reports, narratives of persecution, academic writing, poetry, literature, philosophy, law, and jurisprudence, weaving these diverse sources together to make an argument that Section 377 is violative of the promise of the Indian Constitution.

### **KEY ASPECTS OF THE JUDGEMENT**

The judgment in Navtej Singh Johar, delivered on 6th September 2018, spanned 493 pages and had four concurring judgments authored by Misra C.J.<sup>6</sup> speaking for himself and Khanwilkar J. with concurring judgments by Justices Nariman, Chandrachud and Malhotra . The Court traversed the fundamental rights protections of the Constitution to find that Section 377 of the Indian Penal Code (IPC) violated LGBT person's rights to dignity, equality, privacy and expression. The judgment itself was widely welcomed both by the LGBT community as well as other social movements not just for the result, which was a decriminalization of the intimate lives of LGBT persons, but also for the way the judges reached their conclusion. This section will highlight some of the key aspects of the judgment.

### **TONALITY OF THE JUDGMENT**

What is most remarkable about the judgment is its tonality. It is not written in the register of cold logic, but with the emotional force of someone who is very moved by witnessing the unconscionable suffering inflicted on LGBT communities. The judges refer to the suffering of Oscar Wilde, Alan Turing, Khairati (the first reported decision on Section 377 which is of the arrest and torture of a transgender person singing in the streets), Nowshirwan (a Parsi shopkeeper arrested under Section 377), the poetry of Vikram Seth and the agony of his mother Leila Seth. Chandrachud J. characterizes Section 377 as a “colonial legislation” which has made it criminal for “consenting adults for the same gender to find fulfillment in love”. Chandrachud J. notes that, “the offence under Section 377 of the Penal Code – has continued to exist for nearly sixty eight years after we gave ourselves a liberal constitution. Gays and Lesbians, Transgender and Bisexuals continue

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<sup>6</sup> C.J. : Chief Justice; J. : Justice

to be denied a truly equal citizenship seven decades after independence”. The effect of legislations such as Section 377 on LGBT lives led him to observe that “civilization has been brutal”

## CONSTITUTIONAL MORALITY

The constitutional guarantee of the right to develop one’s personhood and the right to equal citizenship is firmly anchored in the notion of constitutional morality as referenced by Justices Misra, Nariman and Chandrachud. The denial of the right to dignity of LGBT persons is incompatible with the morality of the Constitution. As Chandrachud J. put it, “there is an unbridgeable divide between the moral values on which it [Section 377] is based and the values of the Constitution”. The idea of “constitutional morality”, the judges derive from Ambedkar. In the Constituent Assembly, Ambedkar famously said that, “Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it”. The fact that “our people” have yet to imbibe constitutional morality leads 18 Ambedkar to the conclusion that, “Democracy in India is only a topdressing on an Indian soil, which is essentially undemocratic”. Constitutional morality is thus an ideal, rooted in the Constitution and Indian society must transform to bring social morality into conformity with the constitutional ideals of respect for the dignity and autonomy of all its citizens. The judiciary, the executive, the legislature, and the citizens must all work towards achieving this ideal of “constitutional morality”. The judgment in Navtej Singh Johar is one step in this journey of ensuring that social morality conforms to constitutional morality. The idea that the majority opinion should prevail over the right to dignity and liberty of the minority is explicitly rejected. As Nariman J. put it, “It is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality”. By explicitly setting out the Court as a guarantor of minority rights, regardless of the opinion of “popular or legislative majorities”, the Court signals its determination to defend the Constitution. In a time when lynchings have become the order of the day and the government remains a mute spectator, the role that the Courts have to play in safeguarding the right to life of minorities of all stripes and hues cannot be overstated. It should be noted that citizens too have a role to play in achieving a society based on constitutional morality. As Chandrachud J. put it, “Constitutional morality requires that all the citizens need to understand and imbibe the broad values of the Constitution”. The role of the Constitution is to produce “a social catharsis” and that “the ability of a society to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time”.

## CONCLUSION

On 6th of September 2018, when the Supreme Court of India read down Section 377 of the Indian Penal Code, it marked a historic victory for a vibrant LGBT movement in India. This short booklet looks at key themes, opinion-wise summaries of the judgment as well as ways the judgment can be used going forward. It aims to provide a roadmap to this judgment so that its implications can be better understood by LGBT persons as well

as all those who are interested in human rights and its futures. A special concern is being given to the fundamental rights, which is ‘right to privacy’, that is a glacier part for every citizen of our country. Too much concern of our Indian legal system is the biggest support to cure such critical offences.

