

Transformative Constitutionalism and the Rights of LGBT Community

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Abstract

The Constitution of India is revolutionary in its aim to transform the society. It is a sad reality that, our society at large, treats LGBT community as outcastes and untouchables. In India they face legal and social difficulties which aren't experienced by the non- LGBTs. In India the harassment and discrimination of the gay and transgender community is resulting from the continues existence of Section 377, affects their rights guaranteed under the Constitution of India including the right to equality, the right to non-discrimination, the right to privacy, the right to life and liberty. Section 377 of the Indian Penal Code, 1860 refers to 'unnatural offences' and punishes the one who voluntarily has carnal intercourse as against the order of nature with any man, woman or animal. The issue on Section 377 was first raised by a NGO, Naaz Foundation, which had in 2001 approached the Delhi High Court for decriminalising sex between consenting adults of the same gender by holding the penal provision as "illegal". The five bench judge of the Honourable Supreme Court on September 06, 2018, has ruled that an adult gay sex between the parties in private is no longer a criminal offence under Section 377 of the IPC¹. Application of the provision ie section 377 to consensual homosexual sex between adults is unconstitutional, irrational, and manifestly arbitrary. Thus an analysis of the Supreme Court verdict in Navtej Singh Johar & Ors vs. Union of India is inevitable to understand the crumbs of Law in detail and its impact in the modern scenario. It is through this judgement that the apex court opens a window of acceptance and achievement for the LGBT community. This paper emphasises on a critical analysis of the judicial pronouncement on section 377, transformative constitutionalism and the rights of LGBT community, the litmus test for survival of Section 377 IPC, and its impact in the revolutionary democracy.

Keywords: *Transformative Constitutionalism, Sexual Orientation, manifestly arbitrary, consensual homosexual sex, Non-discrimination, Unnatural offences.*

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¹ Indian Penal Code, 1860

Introduction

India has been a country which since the dawn of the vedic period has acknowledged and harmonized with the philosophies of gender fluidity and queerness centuries compared to the western world had even it had attempted to reconcile with these terms². Ayoni of all types are punishable in the Arthashastra. Manusmriti prescribes light punishments for such acts.³ The important point at issue of the gender disparity crisis is the denial of civil liberties and cultural imperialism has arisen mainly due to the fact that the predominant majoritarian group seeks to enforce their will another being or collective group. Human sexuality is a complex phenomenon⁴. The approval of the distinction between desire, behavior and identity acknowledges the multi-dimensional nature of sexuality. Homosexuality, bi-sexuality and other sexual orientations are equally natural and reflective of expression of choice relying on the consent of two persons who are eligible in law to express such consent. It cannot be treated as physical or mental illness, it is a natural variation of expression and free thinking process, hence criminalising the same is a great discomfort to gender identity. Such sexual orientations are to be considered as an 'order of nature'.

In the year 1992, about 18 men were arrested from a park of New Delhi on the suspicion that they were homosexuals. After a huge protest and demonstration by gays, lesbians and by various groups of human rights, were released from the custody of the police after filing a petty case against them. In fact they were not indicated under Sec. 377 but under the provision of public nuisance under the Delhi Police Act.⁵ Authorities often show unwillingness to participate in discussion regarding LGBT rights, regularly expressing their reservations on the issue, and neither of the two main political parties place LGBT issues high on their agenda during the 2008 electoral campaign.⁶

According to the American Psychological Association, that the sexual orientation is a natural phenomenon and attraction towards the same or opposite sex both are naturally equal, the only distinction is that the same sex attraction arises in very lesser numbers. The rights of the lesbian, gay, bi-sexual and transgender community, is comprised of 7-8% of the total

² Jeffrey s.sikar, *Homosexuality and Religion* 127(2006)

³ Vanita, *Introduction*, Ruth 2005

⁴ Drescher J, Byne WM, *Homosexuality, Gay and Lesbian Identities and Homosexual Behaviour*

⁵ Available at www.altlawforum.org visited on 12th June, 2021

⁶ National commission for the promotion of Equality, (NCPE)

population of India, need to be recognized and protected, sexual orientation is an integral facet of every individual's identity⁷. Therefore, the focus of this paper is to critically analyse of the judicial pronouncement on section 377, transformative constitutionalism and the rights of LGBT community, the litmus test for survival of Section 377 IPC, and its impact in the revolutionary democracy.

Homosexuality and Indian Society

There is no such progressive changes have taken place as regards to the social and legal recognition and so far homosexuals are concerned, they remain victims of violence in different forms supported by the state and society. In India from a scattered group of a few hundred, homosexuals are at present ten crore strong and growing community evolving its own hip and happenings. The number is with gradual increase with more and more such people impending out of the closet. Compared to Delhi and Mumbai (with five lakh gays each) to a lesser extent, Bangalore and Calcutta are considered to be the hub of the gay movement in India, people from smaller towns like Gujarat, Maharashtra and Bihar are also coming out⁸. These gays in India are talking live in chat rooms and looking for their soul mates, falling in love with them, having sex on the net and crossing the cities to be with each other in real world, which shows that homo-sexual relationships are not ignored of in India, but they commonly exist in the country's larger cities where people can be more open about their sexuality.⁹

Sexual Assault and LGBT Community

According centres for disease control and prevention lesbian, gay, bi-sexual and transgender experience sexual violence at similar rates or higher rates than straight people. As a community, LGBTQ people face higher rates of poverty, stigma and marginalization, which put us at greater risk for sexual assault. Within the LGBTQ community, transgender people and bisexual women face the most alarming rates of sexual violence. Among both of these populations, sexual violence begins early, often during childhood.

Transformative Constitutionalism and the Indian Constitution

⁷*Navtej Singh Johar & ors vs. Union of India*, The Secretary Ministry of Law and Justice, Writ Petition(criminal) no. 76 of 2016

⁸ According to Shaleen Rakesh, Coordinator, Milan project, Naz Foundation, New Delhi.

⁹ BBC news article dated, 29 May 2001



In declaring Section 377 to be unconstitutional, the Court, was deeply reflective about the fact that State action alone will not be sufficient unless Constitutional rights acquires a meaningful purpose for the marginalised communities . Therefore, the Court did not crumble the words when it stated that it is both, criminality of the law and the ‘*silence and stigmatization*’ of the society towards the LGBT community that orchestrates the marginalization and the exclusion of the former. Implicit in that claim was the understanding that inequality, hierarchy and prejudice transpires as much from State action as it does from societal sanctions, community conventions and private relationships.¹⁰

Similarly, Section 292 of Indian Penal Code, 1860 refers to obscenity and there is ample scope to include homosexuality under this section. Also Section 294 of Indian Penal Code, 1860, which penalizes any kind of "*obscene behaviour in public*", is also used against gay men. Giving effect to that vision, the Court, held that a substantive understanding of Article 14¹¹ mirrors ‘*the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence*’. Substantive equality enables LGBT people to equal protection of the laws and to participate in both public and private affairs as equal citizens of the country. Likewise, by acknowledging that Section 377 violates Article 15¹² as it ‘*perpetuates stereotypes*’ against the LGBT community that is rooted in traditional gender roles, the Court essentially uncovered the relationship between ‘heterosexual expectations of society’ and State criminalization of homosexuality. It is this unwholesome nexus between State laws and ‘*public morality*’, that transformative constitutionalism purports to break and imagine instead, ‘a transformation in the order of relations’ among individuals, society and the State.

Judicial Dictum on Rights of LGBT Community

¹⁰ Abishek Jebaraj, *why the section 377 case raises questions beyond LGBTQ Rights*, July 16th 2018

¹¹ Equality before Law and Equal protection of Law

¹² Secures the citizens from every sort of discrimination by the state, on the grounds of religion, race, caste, sex, or place of birth or any of them in ensuring equality before law and equal protection of law

*National Legal Services Authority vs. Union of India*¹³, it was held that, the Indian transgender community has been the worst sufferer of exploitation amongst the entire LGBT community because of their dishonoured social, educational and economical status. They have never been considered as a part of society and have always been subjected to exploitation, violence and humiliation either in the hands of society or by the authorities in power. The continuous rejection and not having access to resources, these people often resort to beggary or prostitution, making them more vulnerable to discrimination and crimes such as human trafficking. In 2009, the Delhi High Court decriminalised the consensual sex between people of same gender. But this landmark judgment in the history of LGBT which granted equal rights to them was overturned by the Supreme Court of India in 2013.¹⁴

But in 2014 the Supreme Court through its judgment brought in a new ray of hope for the first time in the history for these transgender people, they were recognised as the third gender. In *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others*, the Constitutional Court of South Africa opined “*The achievement of equality is one of the fundamental goals, that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races*”¹⁵.

In *K.S. Puttaswamy and another v. Union of India and others*¹⁶ wherein the majority, speaking through Chandrachud J, has opined that, “*sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour*”. Radhakrishnan. J, after referring to judgments and International Covenants, opined that “*gender identity is one of the most fundamental aspects of life which refers to a person’s intrinsic sense of being male, female or transgender person. A person’s sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology*”¹⁷.

Biologically speaking, the difference between a gay man and a straight man is something like how “*a left-handed person and a right-handed person*” differs in their nature. Some are left handed by birth, the same way there are some who are destined to be born as

¹³ Writ Petition (Civil) No.604 Of 2013, AIR 2014 SC 1863

¹⁴ *Naz foundation v. Govt. of NCT of Delhi*, 160 (2009) DLT 227 (129)

¹⁵ 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

¹⁶ 4 (2017) 10 SCC 1

¹⁷ 1 (2014) 5 SCC 438



gay or one amongst that community. Thus that which is not consensual and unnatural is made punishable after this judgement which shows that the judiciary has taken right step in transforming the society.

Litmus Test for the Survival of Section 377 Indian Penal Code, 1860

As per the Constitution, which is the law of the land, guarantees to its citizens to live his or her life in their own terms and the same “*cannot be taken away except according to the procedure established by Law*”¹⁸. Article 21 is broader in its scope including within its ambit a variety of such other rights. The sexual autonomy of an individual in terms to choose his or her sexual partner is an important pillar and an in-Segregable facet of individual liberty. When the a person’s liberty in the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his or her liberty notwithstanding the fact that, the exercise of such liberty is within the limits of his or her private sphere, then the signature of life melts and living becomes a bare subsistence and consequently, the fundamental right of liberty of such an individual is abridged.¹⁹

Section 377 Abridging Article 19 and Article 21 of the Indian Constitution

Article 19 of the Constitution guarantees the citizens the freedom of choice. Section 377 Indian Penal Code, 1860 amounts to unreasonable restriction as it makes carnal intercourse a criminal offence and it also has a chilling- effect on an individual’s freedom of choice as under Article 19. In lieu of the test laid down in the aforesaid authorities, Section 377 Indian Penal Code, 1860 does not meet the proportionality criteria and is violative of the fundamental right of *freedom of expression* including the right to choose a sexual partner. Section 377, has a chilling effect on Article 19(1) (a) of the Indian Constitution which guarantees the fundamental right of *freedom of expression* including that of LGBT persons to express their sexual identity and orientation acknowledgment of relationships or any other means²⁰. Likewise, such persons are hesitant to register companies to provide benefits to sexual minorities due to the fear of state action and social stigma. Further, a conviction under

¹⁸ Article 21 of the Indian Constitution

¹⁹ Supra Note 2

²⁰ Ibid

Section 377 Indian Penal Code, 1860 renders such persons ineligible for appointment as a director of a company²¹.

Section 377 IPC is also unreasonable as it becomes a weapon in the hands of the majority or the same said heterosexuals to seclude and harass the LGBT community which generates a fear in them that mars their joy of life and threat to their life. They constantly face social prejudice and are subjected to the shame of being their very natural selves. Hence section 377 that criminalises any consensual activity between two adults whether homosexuals, heterosexuals, and lesbians is unreasonable and unconstitutional²².

Moreover the said section also violates Article 15 of the Constitution since there is inherent discrimination in it grounded on the sex of a person's sexual partner²³, a person can be prosecuted for acts done with an opposite-sex partner without her consent, whereas the same acts if done with a same-sex partner are outlawed even if the partner consents. Reference was made to the *Justice J.S Verma Committee on Amendments to Criminal Law*, where it was observed that, 'sex' occurring in Article 15 includes sexual orientation and, thus, taking this stand, Section 377 of IPC is also violative of Article 15 of the Constitution.

Further, Section 377 IPC, deprives the LGBT persons of their right to reputation which is one of the facet of the right to life and liberty of a citizen under Article 21 of the Constitution. This right is being denied to the LGBT persons because of Section 377 IPC as it makes them, apprehensive to speak openly about their sexual orientation and makes them susceptible to extortion, blackmail, and denial of State machinery for protection and enjoyment of other rights on certain occasions, the other concomitant rights are affected.

Effects of Recent Judgement

The *Navtej Singh Johar judgment* emphasizes on the transformative potential of Constitution of India. The court has considered lesbian, gay, bisexual and transgender Indians as individuals, and recognised their humanity, individuality, and autonomy. For the first time, LGBT community directly demanded their rights to be fully recognised as equal

²¹Supra Notes 2

²² Ibid

²³Section 376(c) to (e)



citizens in the court. This is the power of India's "*transformative Constitution*" as the and its heart lies Article 32 of the Constitution²⁴.

The judgment by Chief Justice Misra and Justice Khanwilkar declared that, "*Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right to the freedom of expression.*" Justice Chandra chud remarked, "*The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation.*"

The situation before this judgement was that the LGBT persons were deprived of their rights due to the presence of Section 377 as they fear prosecution and prosecution upon revealing their sexual identities and, therefore, this class of persons never approached the Supreme Court as petitioners, rather they have always relied upon their teachers, parents, mental health professionals and other organizations such as NGOs to speak on their behalf. Section 377 prohibits 'unnatural sex' or carnal intercourse against the order of nature. It is a colonial-era law that prohibits non-penovaginal intercourse and makes it a punishable offence that can earn the accused up to ten years of imprisonment.²⁵ This judgment has far-reaching consequences, ensuring that LGBT people will enjoy the full extent of rights and liberties guaranteed by the Constitution. Though this judgment is a big relief, yet the Indian society is yet so poor that it cannot tolerate this massive change. They mock upon the judiciary for giving rights to do something that is unnatural and immoral according to their views.

Though the decriminalization of section 377 will give LGBT community a separate and dignified status but at the same time it will have cascading effect on existing laws. The problem is with respect to the interpretation of the terms husband and wife which includes both male and female especially in the matters of divorce and as to who should pay the maintenance which is difficult to be ascertained in case of same gender. Hence the decriminalization of Section 377 of IPC will have a great impact on Indian family laws.

This judgement has become a great foundation for the future transforming the lives of LGBT people by recognising their rights. This judgement also serves to attain the objective of

²⁴ Abishek Jebaraj, *Why the Section 377 case raises questions beyond LGBTQ Rights*, on July 16th 2018

²⁵ Supra Note 24.

the Constitution in bringing radical social transformation. The Supreme Court has also reiterated its anti-majoritarian role and the Constitution's commitment to the individual. This is a new dawn, not for LGBT rights alone, but for individual rights and liberties in India.²⁶

Suggestions

- Every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites, and hijras. They should also have the right to freely express their gender identity. This includes the demand for hijras to be considered female as well as a third sex.
- There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.
- The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against kothis and hijras in public areas and police stations, and the guilty policeman be immediately punished.
- The police administration should adopt transparency in their dealings with hijras and kothis make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.
- Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse and rape.
- The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord hijras and kothis the same courteous and humane treatment as they should towards the general public.

Other Measures

²⁶ Supra Note 1.



- A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behaviour of all sexualities. Vocational training centres should be established for giving the transgender new occupational opportunities.
- The Press Council of India and other watchdog institutions of various popular media (including film, video and TV) should issue guidelines to ensure sensitive and respectful treatment of these issues.

Conclusion

Decriminalization of section 377 was a major milestone for the LGBTQ community as it gave them the right to reveal their emotions and live a dignified life. The constitutional courts has brought in a transformative judgement on section 377 treating the LGBTQ as natural victims and sensitized the society towards their plight and laid stress on such victimisation. The children would become prey, and protection of the children in all spheres has to be guarded and protected²⁷.

Every community and every human being should be treated equally whether they are homosexuals or heterosexuals because we all are god's creation so there should be no discrimination on the basis of sexual characters. Our Indian Constitution provides fundamental rights to all the people including LGBT community²⁸. It provides Right to Equality, Right against discrimination on the basis of sex, Right to life, Right to Freedom of Speech and Expression, Right to Privacy and other religious and cultural rights. These rights are not direct rights provided to LGBT but can be interpreted as they are citizens of India. LGBT community in India and in all over the world deserves to be treated equally with dignity and respect. The consent between two adults has to be the primary pre-condition. After 377 we can now work to target the vulnerable queer people and provide them with a safe space, hope and the will to live a happy life²⁹.

²⁷ Edited by Aarush Kumar, Will the marriages of the LGBT recognised by the government, September 9th, 2018

²⁸ Supra note 13

²⁹ Ibid