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**Homosexuality and the Legality of it [Road to Legal recognition of the  
LGBTQ Community and its equality in India]**

**Ratula Datta**

## ABSTRACT

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*Throughout time, homosexuality has been considered a taboo, especially in Indian society. There has been a consistency in the social stigma, marginalization, discrimination, harassment and hate speeches surrounding homosexuality. Over the last several decades, homosexuals have been deprived of basic human rights from a socio-cultural, ethical and legal perspective. Homosexuality was stated to be illegal under Section 377 of the Indian Penal Code, and an issue regarding the same had been raised by the NAZ Foundation to the Supreme Court in the year 2001. However, on 6th September, 2018, the Supreme Court ruled that Section 377 was 'unconstitutional' and decriminalized the section, thus decriminalizing carnal intercourse, and homosexuality as a whole. This paper focuses on the vicious cycle of torture that anyone had to face if they were a part of the LGBT community, and how the existence of a single provision made their existence more 'alien' to society. Human sexuality is not a choice, and it is a feeling that can occur in multifarious ways. For any authority to deem a choice that someone makes to love another or be with another, as illegal, should be considered as outright illegal. The landmark judgment laid out the foundation for the LGBT community to be considered as human; especially in a country where personal affairs are held equal to 'crimes' that offend society as a whole.*

*Keywords: LGBT, Homosexuality, Section 377, Decriminalize, illegal.*

## INTRODUCTION

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On the 6<sup>th</sup> of September, history was made for the LGBT community with a vociferous judgment which marked the end of a seventeen-year long war that was being fought by the community. The demand regarding the repealing of section 377 was done through the Supreme Court's decision in *Navtej Singh Johar v. Union of India*, which finally struck down the 1860 law, which criminalized the lives and lifestyle of the LGBT community.

The decision had completely been built upon the years of struggle through protests, marches and demonstrations that had been carried out by the LGBT community, merely asking for the right to 'love' each other in whatever way they wished. The collective efforts of the LGBT community, many among them who lost their lives in the process, contributed in small and big ways that opened up a space for tolerance towards 'love'; sexual and gender diversity for everyone in the Indian society. The struggle over years finally paid off through the judgment, which ultimately succeeded in creating a space for visibility and acceptance for the LGBT community in a society that chooses to uplift morality before reasoning towards affection, that two people have for each other.

The struggle against this colonial law had ideally started almost a century back. In 1950, the Indian Constitution had taken its shape with the recognition that every person had the right to equality, non-discrimination on any grounds. However, even though the Constitution recognized universal human rights, it did not deem fit to recognize rights and the Constitutional framework for the LGBT until the groundbreaking decision of the Delhi High Court in 2009, with the case of *NAZ Foundation v. NCT Delhi*. This was the first time that the constitutional validity of Section 377 had been questioned on the grounds that the provision was violating right to equality, non-discrimination, and privacy of persons belonging to the LGBT community. However, in 2013 again, through the case of *Suresh Kumar Koushal v. Naz Foundation*, acts under Section 377 had been recriminalized; and as Vikram Seth rightly quoted, it was indeed a 'bad day for love'.

Again in the year of 2014, the Supreme Court in *NALSA v. Union of India* found that transgender persons were ideally entitled to all rights under the Indian Constitution. Again 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* had been proved as one of the "discordant notes" in the notes surrounding jurisprudence of the Supreme Court.<sup>1</sup>

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<sup>1</sup> *To Live and Love Freely: Repeal of Section 377*, India Today; (Dec. 29, 2019: 12:35 PM); <https://www.indiatoday.in/magazine/news-makers/story/20190107-to-live-and-love-freely-repeal-of-section-377-1419353-2018-12-29>



In Suresh Kumar Koushal, the judges had been convinced that the provision ‘merely’ criminalized sexual acts and not any identity, however not realizing that they were criminalizing the identity of an entire orientation. In the case of Navtej Singh Johar, the empathy of the judges were captured, as the decision surrounded Suresh Kumar Koushal was deemed cruel and unjust towards the LGBT community, who were nothing but people, and deserved the basic and similar rights as that of everyone else in the nation. The judges very cruelly, in Suresh Kumar Koushal had held that the LGBT community was a ‘miniscule minority’, their basic rights were repeatedly referred to as ‘so-called rights’. Navtej Singh Johar came across as a historical judgment wherein it was showcased that the basic constitutional rights, dignity, non-discrimination and privacy were being snatched from the LGBT community.

The historical judgment has become an ideal representation of the Court acknowledging every protest, march, demonstration, art, literature, factual statistics, and philosophy, all that had weaved themselves together to earn the LGBT community the rights it needed and deserved, instead of patronizing the existence of section 377, that violates the entire narrative of the Constitution.<sup>2</sup>

## **RIGHT TO LOVE: AN EMOTIONAL OR LOGICAL DECISION?**

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The most remarkable aspect of the judgment was the tonality of it, which was not through mere logic and a cold understanding, but through the usage of emotions and empathy. The judiciary had been essentially moved by the constant suffering of the LGBT community and the vicious cycle of violence that the community had become trapped in. The judges had referred to the suffering of Oscar Wilde, Khairati- which is one of the first cases of torture on a transgender person for singing on the streets, and Noshirwan, who was a Parsi shopkeeper arrested under the advent of the Section 377.

Justice Chandrachud noted 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, Transgenders and Bisexuals continue to be denied a truly equal citizenship seven decades after independence’*. The constant violence inflicted upon the LGBT community led him to believe that the civilizations have been brutal about understanding the rights of a community that did go at par with that of the majority and came across as different than the others. Justice Chandrachud had also characterized Section 377 as a ‘colonial legislation’ that made it a criminal offence for ‘two consenting adults to find fulfillment in love’, which

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<sup>2</sup> ARVIND NARRAIN, *Right to Love*, ALT LAW FORUM, (Nov. 10, 2019, 10:10 am) [http://altlawforum.org/wp-content/uploads/2018/09/RightToLove\\_PDFVersion-1.pdf](http://altlawforum.org/wp-content/uploads/2018/09/RightToLove_PDFVersion-1.pdf)

shows the emotional proximity the judges reached towards to criminalize the existence of the provision.<sup>3</sup>

The criminalization of Section 377 ideally served as an apology to the LGBT community for the years of tortures that had been inflicted upon them. An apology always has come into existence with two dimensions, which is the acknowledgment of having done a wrong and the expression of a willingness to pay or atone for the same. Navtej Singh Johar had taken responsibility for having inflicted wrongs and sought to atone for it.

This sentiment and apology had been best captured in what Justice Malhotra has said, “*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*”.

Every time there has been an outrage surrounding the unconscionable torture and suffering imposed upon the LGBT community, there has either been a silence of indifference or of pity, or a social media outrage that lasted for a few months, only to die down and have the atrocities continue. However, the judicial response towards the atrocities not came across as an apology, but also as an apology. In Navtej Singh Johar v. Union of India, the Supreme Court acknowledged its own cruelty and ignorance of repeated plights of the LGBT community for a mere existence and allowance for their rights.

The apology provided in Navtej Singh Johar had drawn and unfolded its strength and force from the other important apologies that had been made for causing historic injustice; whether it was by the German nation to the Jews, or by the Canadian government to their indigenous inhabitants, or by South African apartheid enforcers to everyone who had suffered under their rule, and by the apology and regret that had been expressed by Britain for the spread of anti-sodomy laws among the Commonwealth nations. As Justice Chandrachud puts forth, “*It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and trans-genders have a constitutional right to equal citizenship in all its manifestations*”.

However, as seen in every historical and human relationship, an apology will only have a proper meaning if one wants to repay for the wrongs done in the past. An apology will not only be about the past but should really provide a pathway to the future. Navtej Singh Johar v. Union of India is ideally rooted in a deep sense of responsibility for having contributed completely in the act of violation and then seek to redress the wrong.

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<sup>3</sup> MARIA THOMAS, *Timeline: The Struggle against section 377 began two decades ago*, Quartz India, (Nov. 10, 2019, 12:34 PM); <https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights/>

## **VIOLATION OF HUMAN RIGHTS OF THE LGBT COMMUNITY (A NATIONAL AND INTERNATIONAL PERSPECTIVE)**

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The idea surrounding human rights ideally nestles on the central premise that all human beings will be considered equal. It follows the basic rule that all humans have a dignity and that dignity should be respected and all humans should be treated equally. Anything that undermines this dignity, will be nonetheless violating the human rights of that particular person, as it violates the principle of equality and paves a way for discrimination.

The human rights of lesbian, gay, bisexual, transgender and queer people have come into a sharper focus around the world, with significant advances being made in many countries in recent years, including the adoption of new principles. The Constitution of India mandates justice; social, economic and political to everyone. The judgments which have been discussed in this paper earlier mark a significant and landmark moment for LGBT rights since the judgments not only reversed a relic of the British imperial rule but it also ordered that LGBT Indians should be accorded all the protections of their constitution. This was obviously viewed as a welcome victory, but it does not necessarily mean that LGBT people in India are fully free or have been perceived as equal among their fellow citizens. It underestimates the amount of work which remains to be done in India and the rest of the world to overturn antiquated and repressive anti-gay laws.

India is a vast and diverse country and the attitudes of various citizens towards this subject and experiences of LGBTI individuals vary vastly. The disparity between urban and rural India, language, caste, class and gender add several further complexities to understanding this topic in a better manner which gives an explanation in-depth. But with the advent of decriminalization of 377, we do have an idea of the fact that India's LGBT citizens are not a "minuscule minority". The LGBTQ community has an extremely strong voice that is loud and refuses to be silent any longer in their efforts to reclaim equality.<sup>4</sup>

Human rights of the LGBTQ community has been affected time and again despite the legal principles framed or decapitated, for the revival of human rights of the LGBTQ community. One of the most recent and controversial topics surrounding violation of human rights of the community can be viewed

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<sup>4</sup> ZAINAB PATEL, *The Long Road to LGBT Equality in India*, UNDP India; (Dec. 29, 2019; 9:46 PM); <https://www.in.undp.org/content/india/en/home/blog/lgbtequalityindia.html>

with the existence of the Transgender Persons (Protection of Rights) Bill, 2019, which was given an assent to by the Upper House after 74 members had voted against an Opposition Motion to send the document for a better scrutiny after only 55 MPs voted in the favour of the same. Even though the bill appears to be a progressive document for the LGBT community, as it provides rights against discrimination under educational institutions, government offices, during rental or purchasing of properties and during the usage of other public services. However, all of these protections can only be availed by a transgender person after providing a 'proof of recognition of their identity' before a magistrate who shall be providing an identity certificate to the person. This comes as contradiction and complicity as the bill itself states that transgender people can have a 'self-perceived' identity. All the rights provided to these persons immediately become subject to debate when the granting of the rights depend upon a bureaucratic nod. How can a bill claim to bring forth positive change for transgender persons when access to basic fundamental rights shall depend upon a bureaucratic nod? Despite some of the obvious discrepancies surrounding the need for upholding human rights of the LGBT community, there are repeated assaults on such persons, whether it comes in the form of mental harassment or physical abuse. Persons belonging to this community get repeated attacks on them wherein they are mocked for their choice of sexuality and often seen as an anomaly of nature, and hence not given the acceptance that other human beings get.

Sexual assault is one of the most heinous yet unrecognized forms of violation of human rights of the transgender people and the LGBT community as a whole. Sexual assault is excruciatingly damaging to the health and well-being of all victims who identify as LGBT. Sexual violence against every individual who identifies as LGBTQ has been perceived as a violent attempt to oppress any social norm surrounding gender and sexual preferences.

because of transphobic bias reported higher rates of HIV infection (10%).<sup>5</sup>

In a study of 6,436 individuals who identified as transgender and gender non-conforming, there were significant percentages of respondents who reported of having experienced discrimination and violence. Transgender and gender non-conforming people have repeatedly reported high rates of harassment, physical assault, and sexual assault in a variety of settings including, but not limited to, schools, workplaces, prisons, and homeless shelters. Sexual victimization was correlated with higher rates of HIV infection and attempted suicide among respondents.

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<sup>5</sup> S. GENTLEWARRIOR & K. FOUNTAIN, *Sexual Violence and Individuals who identify as LGBTQ*, NSVRC Organisation; (Jan. 01, 2020; 8:05 am); [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Research-Brief\\_Sexual-Violence-LGBTQ.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf)

In a review of 75 studies surrounding sexual victimization of individuals gay, lesbian or bisexual or is merely a part of the LGBT community, researchers had found that there are significant rates of lifetime sexual assault, childhood sexual abuse, adult sexual assault, intimate partner sexual assault and hate-crime related sexual assault among people who recognized themselves as a part of the LGBT community. Several researches have examined and indicated that sexual violence is an important concern for individuals who identify themselves as a part of the LGBT community. It is the truth that persons who are a part of the same community, are at a higher risk of being subjected to sexual violences as they may encounter barriers to services because of homophobia and transphobia. Intersections between several forms of oppression may exterminate these challenges, making it significant to LGBTQ sexual victimization alongside sexism, racism, ableism and any other challenge that may exist.

With the draconian Section 377 now revoked , what is the ideal way forward? Today we celebrate the International Day Against Homophobia and Transphobia. May 17 was specifically chosen to commemorate the World Health Organization's decision in 1990 to declassify homosexuality as a mental disorder, and give recognition to transgender, lesbians, gay and bisexual and queer people and their identities. This day has received official recognition from several states, international institutions as the European Parliament, and by countless local authorities. Most United Nations agencies also mark the occasion with specific events.

## CONCLUSION

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### **Homosexuality: A natural phenomena and not a choice**

Johann Wolfgang von Goethe had said that ‘I am what I am, so take me as I am’; to stress on the acceptance of one’s individuality over societal norms.

When understood from an emotional perspective, a person who falls in love with another may be questioned, but is ideally never made to rethink their choices. The choice of a partner is an intimate choice and a natural phenomenon, and not something that a person will willfully do in order to harm the pride or morality of another.

*‘The choice of partner, the desire for personal intimacy and the yearning to and love and fulfillment in human relationships have a universal appeal’ and “the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation’*, noted Justice Chandrachud.

Section 377 was a provision that served no purpose, other than glorifying homophobia, and was completely unconstitutional on the ground that it did not allow two consenting adults to have sex, thus preventing their basic right to privacy. History owes the biggest apology for the atrocities against the LGBT community, and a legal provision that upheld the same had to be discontinued under every circumstance to allow a community to merely ‘feel’ human. A judicial disposition can never serve as an apology to all the lives that have been lost in the process, and all the people who have had to let go of their partners; but it can ensure that in the future, everyone is allowed to choose their partners, and that sexual orientation is considered a normal part of human behavior, thus giving everyone the ‘right to love’ and the ‘right to choose partners’.

Apart from a legal recognition of the identities of the LGBT community, the mindset of people is what will provide the proper protection to the people who belong to this community. It is never someone’s choice to engage in a sexual orientation but a natural way in which a person is able to recognize themselves and their identity as a whole. The revocation of Section 377 truly provided a new horizon for the LGBT community to protect their rights.

Fundamental rights do not come with a list of who can avail the same and who cannot, and no one should have to prove their identity in order to have ‘access’ to the same.