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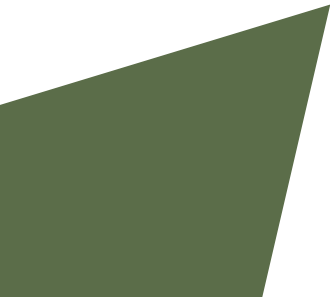
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**Application of Section 377 IPC- Things to be unacceptable in the
society: A socio-legal study**

Neeharika Chauhan

INTRODUCTION

Laws of any society are based on the many customs, traditions and practices of that society, and what is generally considered to be right and wrong. In the modern societies as well, it seems to be the case by and large. But sometimes the legal system may surpass or diverge from the expectations of the society. In the recent judgements of the Supreme Court regarding section 377 of Indian Penal Code, the above has most certainly been the case.

The judgements given by the Supreme Court in the cases of *Navtej Singh Johar vs Union of India*¹ and *Suresh Kumar Kaushal v. Naz Foundation*² represents the perspective of our legal system when it concerns the LGBT issues, human rights issue or the existing debates around the constitutionality of the sodomy laws in India. Judgements or decisions like these may vastly differ from the ideologies of our nation and the social perspective regarding the above-mentioned issues of LGBT rights, Human rights or Constitutional rights. But at the same time, there exist many other judgements given by our legal system which may not differ from the social values, and are furthered to uphold the importance of our social values.

This paper will specifically deal with the ever-evolving debates legal and social in nature which are dealt with under the purview of section 377 of Indian Penal Code, 1882. The LGBT debates regarding, allowing only natural sex to be legal, further what is defined as natural sex, whether someone being Gay, Lesbian or Transgender somehow makes them medically ill or is all of this natural, is one big umbrella term which encompasses various issues. Further, emerging out of LGBT debates, come the Human Rights debate of right to privacy, right to sexuality, etc, is the next spectrum of debates which have been discussed in various Supreme Court Cases, thus will be discussed in this paper as well. Lastly, come the issue of Constitutionality of Sodomy Laws in India, which have also been dealt with in a few Supreme Court cases.

RESEARCHER'S INTEREST

In this paper the author has tried to study the various cases of Supreme Court addressing the issue of LGBT rights, Human Rights or Constitutional rights, all of which come under the purview of section 377 of Indian penal code. Subsequent to contemplating the cases, the author has examined the legal impression of the previously mentioned issues and afterward further contrasted it with the general social point of view. Most of the social perspective has

¹ Navtej Singh Johar vs. Union of India, W. P. (Cr.) No. 76 of 2016

² Suresh Kumar Koushal vs. Naz Foundation, Civil Appeal No. 10972 OF 2013

been derived from the arguments posed by the opposite counsel and the social perspective held by the honourable judges of the court.

The researcher here holds interest in analysing why the gap between LGBT interests and the general interest of the society exist. Why in this age of globalisation of not only material but also cultures, where same-sex marriages have been made legal in many other countries, but is still considered taboo in India as per its social norms and because of which has not yet been made legal. The researcher further holds interest in analysing how and why the Sodomy laws, such as section 377 of Indian Penal Code exist to begin with, and what, if any, purpose do they serve. Ultimately, researcher's interest lies in the legal contribution of LGBT rights and further how the social perspective can be changed.

DOMAIN OF SECTION 377 OF INDIAN PENAL CODE

“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 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.”*

Above is given section 377 of the Indian Penal Code, 1882, which is titled as “Unnatural Offences”. The law was drafted in 1880, drafted by Thomas Babington Macaulay, the president of the Indian Law Commission which had the responsibility to draft the Indian Penal Code. This law was made to criminalise everything it as ‘touching of unnatural lust’.⁴

Unnatural offences here refer to any form of unnatural sexual activity, other than penetrative penile-vaginal sex. The domain of the above law includes the offences relating to the act of Sodomy. Punishment is to be given to any man or woman who indulges themselves in any activity of Unnatural sex. To be able to properly understand this law, we need to understand the criterion of “unnatural sex”. Macaulay, who was responsible for the final draft of clause

³ Indian Penal Code, 1882, S.377

⁴ Akansha Madaan, "Decision of Honourable Supreme Court on Section 377 of Indian Penal Code is it just and fair?"

361 which was further made into section 377 of Indian Penal Code, was not very keen on holding debates revolving around heinous offences as it would lead into being a public discussion and further corrupt the public morality. Sodomy is one of the crimes he considered to be heinous nature, and therefore this draft was passed without any proper debates.

Thus, the definition of Unnatural Lust or Unnatural sex still remained vague, and further the object of the law. This definition was defined over the years on various cases and for a long-time consent of the people indulging in the activity was not considered.⁵

The scope of section 377 widened as it applied to both heterosexual and homosexual couples which needs the consent for sex between married couples.

In 2018 Supreme Court of India gave the judgement of the case *Navtej Singh Johar vs Union of India*, under which it decriminalised any *consensual act* of unnatural sex between two adults. Therefore, allowing the law to punish the act of a person, which happened without the consent of the other party.

HYPOTHESIS

After understanding the history and scope of section 377 of the Indian penal code, a lot of questions regarding the motive, scope and validity of the law arise.

Here, in this paper the author had tried to resolve these issues by analysing the debates and arguments revolving these issues from a legal as well as social perspective. We shall try to understand why this law seems to still be relevant and if any changes need attention.

⁵ Navtej Singh Johar vs. Union of India, W. P. (Cr.) No. 76 of 2016

CHAPTER 1

SOCIAL PERSPECTIVE OF INDIAN SOCIETY TOWARDS LGBTQ+ COMMUNITY AND RELEVANCE OF 377

In this paper we are trying to analyse, if the existence of a law like Section 377 is even relevant to the Indian society today. Was it ever relevant?

Back at the time of British India biblical standards of ethics and morals were made inclusive into our law. Given that the current Indian society is a secular society, biblical ideologies of the 19th century should not hold importance. Even in many Christianity dominant countries, the regressive and discriminatory laws against the LGBT have now been abolished.

In ancient Hindu Indian mythology, we have observed various instances of people, in real life or through the way of scriptures, indulging in homosexual relationships. Whether it be a God taking a form of another gender, or ancient temples with statues depicting homosexual relationships, LGBT community has been a part of our culture for a long time.⁶

In the modern Indian society discrimination against the LGBT community, owing to the existing stigma around same sex relationships is very much prevalent. Even though the actual number of recorded cases in which consenting adults have been punished under 377, but because of this section authorities have been able to exploit lives of many LGBTQ+ people in the name of law. Transgenders have to face discrimination at almost all platforms, if it for finding jobs or a place to live. It was only after the Supreme Court judgement in the case of *National Legal Services Authority Vs Union of India* in 2014, that the third gender was given a legal recognition. And it was only after the judgement of the Supreme Court on the case of *Nanjot Singh Johar vs Union of India*, that we started to see a significant representation of the LGBTQ+ in the mainstream entertainment media, which was portrayed in a good light and not to demean their identity.⁷

Arguments most commonly used in order to further/support the case of section 377 or criminalising homosexuality:

⁶ Akansha Madaan, "Decision of Honourable Supreme Court on Section 377 of Indian PenalCode is it just and fair?"

⁷ Kaustav Bakshi, Parjanya Sen "India's queer expressions on-screen: The aftermath of the reading down of Section 377 of the Indian Penal Code"

1.1. AIDS IN LGBTQ+

One major argument which was presented in the case of *Suresh Kumar Kaushal vs Union of India*⁸ was of the existing higher rates of HIV/AIDS amongst the LGBT community that the non-LGBT i.e., 8% vs 1% respectively, and that section 377 effectively helps in curbing the spread of HIV/AIDS. Moreover, it was seen that men who had sex with men were contracting HIV at a much higher rate.

This could have been a problem when the spread of HIV had anything to do with people's sexuality. Actually, this problem can be curbed simply by using protection or condoms while having sex and this applies to everyone.

In fact, because of this existing law, there have been instances where social workers of ABVA tried to distribute condoms to prisoners of Tihar Jail in Delhi but were stopped by the jail authorities because distributing condoms would be promotion of a criminal activity and they could not support that.

1.2 RELIGIOUS BELIEFS AND PUBLIC MORALITY

Many religions around the world are often seen to criticise homosexuality and state how it is against the order of nature and thus against God. India being society extremely dominated with religion and traditions seems to not be very keen on the idea of homosexuality, despite the existence of many ancient and religious clues promoting homosexuality.

The issue of public morality has been taken an excuse ever since the drafting of the law. To such extent that Macaulay believed that somehow even having a public discussion on the issue would result in tainting the public morality and ethics. The result was a very vague and ambiguous law which has trampled over people's rights more than it protected public morality.

In the case of *Navej Singh Johar vs Union of India* one argument put forth was that decriminalization of section 377 would result into restriction of a wife's right to file a petition for a divorce. It was as follows:

“Further, it is the contention of the applicant that decriminalization of Section 377 IPC will have cascading effect on existing laws such as Section 32(d) of the Parsi Marriage and Divorce Act, 1936; Section 27(7)(1A) A of the Special Marriage Act, 1954 which permits a wife to present a petition for divorce to the

district court on the ground, (i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; Section 10(2) of the Indian Divorce Act, 1869 and Section 13(2) of the Hindu Marriage Act, 1955.”¹⁰

The above statement was taken from the judgement. More than just a wife’s right to divorce it is often contested that section 377 is what aids in keeping heinous acts of bestiality or child sexual abuse or to help men who get sexually abused to get justice and find relief.

1.3 NATURAL SEX OR AGAINST THE ORDER OF NATURE

Another major argument used against homosexuality is that it is unnatural or against the order of nature. As mentioned in the section itself, that any voluntary carnal intercourse against the order of nature is to be made punishable. But even in this section or even in the draft proposed by Macaulay, the definition of unnatural sex is missing. How do we identify what kind of sex is against the order of nature and what is not? Because it does not aid in the process of procreating, does it become unnatural? Then should any kind of sexual activity without the intention of procreating should be made illegal? In various cases all over South Asia, section 377 has been interpreted to include anal sex, oral sex, penetration between the thighs and mutual masturbation.¹⁰

1.4 NON-VIOLATIVE OF ARTICLE 15 OF THE INDIAN CONSTITUTION

Article 15 of the Indian Constitution, a Fundamental Right, states that

“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”

Often times when people contest that section 377 of the IPC is discriminatory in nature and is against the provisions of article 15 of the Indian Constitution, as it allows unwarranted arrests of people by the authorities and discrimination in the society, the usual counter-argument that follows is that as per article 15 of the Indian Constitution it is not discriminatory, as it does not discriminate based on religion, race, caste, sex or place of birth.

One argument that was mentioned in the case of *Suresh Kumar Koushal vs Union of India* was that the number of people which have been punished for having consensual carnal intercourse against the order of nature are extremely few in numbers, so to declare a law unconstitutional, it is not enough.

"that a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in the last more than 150 years less than 200 persons have been prosecuted ... under section 377 IPC." (at [43]). This, therefore, "cannot be made sound basis for declaring that section ultra vires the provisions of the Constitution"

CHAPTER 2

LEGAL PERSPECTIVE OF INDIAN JUDICIARY TOWARDS LGBTQ+ COMMUNITY AND RELEVANCE OF 377

2.1 DISCRIMINATION AGAINST LGBT COMMUNITY

Daily harassment, bullying, violence, at schools or work places are some form of the most common discrimination LGBTQ people of our country have to face. Withdrawal of job opportunities, educational opportunities, etc are some ways the stigmatisation of LGBTQ people is propelled. Finally, police brutality, corruption, blackmail, extortion, etc are some instances which scar LGBT people for life. The legal outlook on the matter of issues relating to section 377 has been in a way evolving over the years. Ever since the drafting of Indian Penal Code and its enactment in 1862, it has ever since been interpreted in various ways. From punishments given for dressing up as a woman by a man⁸ to decriminalization of consensual sexual acts under 377, the legal system has gone a long way.

It took quite some time for our legal system to recognise the problems that the LGBT community has to face due to some of laws of the country, but in the recent few years some major judgements given by the Supreme Court have tackled some fundamental issues of for the LGBT population. The judgement given by the Supreme Court in the case of *National Legal Services Authority vs Union of India*⁹ in 2014 finally recognised transgendered people as the “third gender” and also left the category of identification of third gender be open to the discretion of the individual, in order to protect their right to privacy.

Similarly, in the case of *Navej Singh Johar vs Union of India*¹⁰ the Supreme Court decriminalised homosexuality by permitting any two consenting adults to have sex legally.

⁸ Queen Empress vs. Khairati, (1884) ILR 6 All 204

⁹ National Legal Services Authority vs Union of India, WP (Civil) No 400 of 2012

¹⁰ Supra at 1

Discrimination in various forms have been a part of life for these people. And for our legal system instead of protecting them makes them even vulnerable by enabling laws like section 377.

In Suresh Koushal case the court overlooked the discrimination on the basis that it was happening to a miniscule section of the Indian population thus was held violative to article 15.

“The applicant has also advanced the argument that Section 377 IPC in its present form does not violate Article 14 of the Constitution as it merely defines a particular offence and its punishment and it is well within the power of the State to determine who should be regarded as a class for the purpose of a legislation and this, as per the applicant, is reasonable classification in the context of Section 377 IPC.”

In this judgement the arguments put forward by the respondents were mostly the ones which are mentioned in the previous section of this paper, but the Supreme Court had given this judgement after analysing the effects of any of those arguments against homosexuality on 377.

But in the Navtej Singh Case the Supreme Court overruled the judgment given in Suresh Koushal case and acknowledged the fact that even if it is a miniscule part of the population, cannot be identified as a minority, or even if it doesn't violates article 14,15,19 or 21 of the Indian Constitution, still overlooking discrimination and not giving rightful justice is not what our constitution aims for.

Supreme Court further included that section 377, as far as it prohibits consensual sexual activity between two capable adults, it is violative of sections 14, 15 and 21 of the Indian constitution and discriminatory against the LGBT community. As far as it prohibits non-consensual activity and bestiality, the section holds its standing.

2.2 375 VS 377

Section 375 of the Indian penal code defines Rape.

“375. Rape. —A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation. — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT

(Manipur) — (a) in clause sixthly, for the word “sixteen” substitute the word “fourteen”; and

(b) in the Exception, for the word “fifteen” substitute the word “thirteen”. [Vide Act 30 of 1950, sec. 3 (w.e.f. 16-4-1950) (made earlier than Act 43 of 1983)]. COMMENTS Absence of injury on male organ of accused Where a prosecutrix is a minor girl suffering from pain due to ruptured hymen and bleeding vagina depicts same, minor contradictions in her statements they are not of much value, also absence of any injury on male organ of accused is no valid ground for innocence of accused, conviction under section 375 I.P.C. proper; Mohd. Zuber Noor Mohammed Changwadia v. State of Gujarat, 1999 Cr LJ 3419 (Guj). Penetration Mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case; Prithi Chand v. State of Himachal Pradesh, (1989) Cr LJ 841: AIR 1989 SC 702.” ¹¹

¹¹ Indian Penal Code, 1882, s.375

The above section while defining rape primarily focuses on two major conditions, which are, for rape to be committed by a man against a woman and secondly for it to be without her consent.

Therefore, rape, as punishable by the Indian penal code, can happen only in a heterosexual activity and that which should be committed without the consent of the women. Hence, the same basis was used in the Navtej singh case while determining that consensual activities shall not be made punishable under Indian penal code.

2.3 RIGHT TO PRIVACY

The discrimination that the community has had to face over the years because of existence of section 377 has been immense.

The Supreme Court held, in the case of *NALSA vs Union of India*, that gender identity did not refer to biological characteristics but rather referred to it as “an innate perception of one’s gender”. The Apex court had used same analogy as of a gender identity of a person, to identify as something used to express one’s personality and is for the individual to determine themselves. Thus, right to sexuality is now a part of right to one’s privacy as well as right to human dignity.

2.4 WHAT IS “AGAINST THE ORDER OF NATURE”?

As per *Homer Clarke*, the most significant function of marriage today is to furnish emotional satisfactions to be found in no other relationships. Procreation does not seem to be the fundamental purpose in contemporary society.

In the judgement of the Navtej singh case, it was observed that since procreation does not seem to be the basic function of marriage in today’s society, then it would not seem fair to deem homosexual sex as “against the order of nature”.

It was further observed that sexual identity of a gay, a lesbian or a bisexual person is just like one’s gender identity, an expression of one’s personality. That is a natural and biological phenomenon and not by one’s choice.

As per American Psychological Association “*it is just as much ingrained, inherent and innate as heterosexuality*”.¹²

¹² “Answers to Your Questions for a Better Understanding of Sexual Orientation & Homosexuality” 2008, American Psychological Association

2.5 DECRIMINALIZATION IN MANY PARTS OF THE WORLD

Criminalising homosexuality has been abolished from so many countries all over the world. Even the United Kingdom, which gave us our legal system, has now decriminalised any kind of sexual activity between two consenting adults. Even a royal pardon was issued for Alan Turing, a renowned mathematician and code breaker who had helped the UK immensely during World War II, was chemically castrated for “gross indecency”.

The UDHR and the *Yogyakarta* principles have clearly mentioned the right to one's sexuality and no discrimination against the LGBT Community.¹³

Same-sex, marriage was legalised in Australia in 2017, along with that Brazil, New Zealand, Luxembourg, Ireland, the USA, Columbia and Finland have legalised same-sex marriage after 2013.¹⁴

¹³ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <https://www.refworld.org/docid/48244e602.html> [accessed 17 May 2020]

¹⁴ Dr Poonam Kakoti Borah, “Engaging with the Law: Decriminalisation of Homosexuality and the Johar Judgement, 2018”

CHAPTER 3

ANALYTIC COMPARISON BETWEEN SOCIAL VS LEGAL

After studying the legal and social perspectives on the relevance of section 377 as well as the LGBT community, we will attempt to find various parallels and cross overs between the two.

After analysing the legal perspective of our country, it is safe to say that the judiciary has come a long way to granting the LGBT community its long due justice. But after analysis of the social perspective our it would seem that our society is still fairly homophobic in nature.

Upon a comparison between the reasons stated whether section 377 is deemed to be fit for our society, the answer seems to be, obviously, yes. Almost all the arguments generally given to protect the “sodomy law” of our country have been tackled with in the Johar judgement.

Starting with the drafting of this law based prudish Victorian morality put into our legal system which has harmed generations of LGBT Community to the very recent Johar case judgement in 2018, our legal system may have seemed to evolved, but our society does not seem to.

3.1 WHY 377 HAS NOT BEEN REMOVED OR ALTERED

In the Johar judgment the consensual homosexual acts between two capable adults was made legal, but the act was not removed or remodelled, as that is not something which comes under the jurisdiction of the courts.

Upon further analysis of the arguments given to protect section 377, we have observed two things:

- 1) The aspect of criminalising bestiality is still very much legal since animals are not capable of giving consent.

- 2) The men and children who have suffered various kinds of sexual abuse have found refuge under this section. Since section 375 of Indian penal code specifically defines rape as a criminal act which can only be done against women, thus it leaves the sexually abused men at a huge disadvantage. Thus, for as long as we don't have any existing law which protects men from sexual abuse, 377 is the one which heeds to their sufferings.

CONCLUSION

“The UDHR declare that everyone is entitled to the right and freedom to live. Article 2 states that everyone is entitled to all the freedoms listed in the UDHR, “without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁵

The analysis done on the social and legal perspectives on section 377 tells us that there still exists a very apparent gap between the two opinions. Indeed, with the decriminalisation, visible changes can be seen in the society, whether it is with increase in LGBT representation in the Indian cinema or with the visible evident social activism, but when it comes to LGBT issues our society still has a long way to go.

The judiciary might have done its job in decriminalising homosexuality, but when it comes to the homosexual laws in India, certain necessary changes are still required. 377 may be tackling the loopholes in the rape laws of IPC, but it is not enough, as the purpose of the section is different. There is an urgent need for different sexual abuse laws for men and further separate laws which deal with issue of child sexual abuse and bestiality. Also, need for new homosexuality laws is necessary, whether it is about discrimination against LGBT community or issue of same-sex marriage. Since, previously mentioned marriage today is not about procreation but more as an emotional bond between two people, it would not be a stretch to initiate large scale discussions on same-sex marriage in India.

¹⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 17 May 2020]

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