

THE STRUGGLE AGAINST SECTION 377 AND ITS IMPACT

Abstract

The essence of liberty and equality sewed in the Constitution had long been forgotten for a minority of the population that had faced persecution at the hands of a discriminatory colonial law. A much-needed and awaited change was brought forth by the Hon. Supreme Court of India on 6th Sep 2018. This article traces the legal background that ultimately led to the Navtej Johar verdict through various cases relating to section 377. The impact of the judgments has also been briefly mentioned stressing the need to recognize and accept the LGBTQ members for who they are. The final verdict was the result of years of LGBTQ activism of various NGOs and Organizations like the ABVA, Naz Foundation, and Lawyers Collective. The sixth of September 2018 will always be celebrated as a day of pride in India. The iconic wordings of the section 377 verdict are unforgettable and have laid the foundation for an inclusive society. Traveling back to the notion of this article, I have tried to retain the spirit of the struggle against section 377 and its impact on society and community.

Keywords: Homosexuality, LGBTQ Community, Constitution, Section 377, IPC, Rights.

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1. INTRODUCTION

In light of Supreme Court Collegium's latest approval to the proposal of elevating Senior Advocate Saurabh Kirpal as a judge in the Delhi High Court¹ – this article is inspired by his valuable contribution in the decriminalization of section 377 and his book on the same – Sex and the Supreme Court that came out amidst the pandemic in August 2020. Mr. Kirpal's name was recommended by the Delhi High Court in 2017 but it was later deferred by the Apex Court Collegium. At a time when the Delhi High Court is all set to hear petitions seeking recognition of same-sex marriages in India, it was about time that the bench is represented by a member of the LGBTQ community.²

The year 2018 was a year of landmark judgments – from scrapping section 487 of IPC that deprived women of their autonomy and consent to upholding the privacy and dignity of the citizens of India in the Aadhar verdict.³ One such leading and historical judgment was delivered by the honorable Supreme Court of India on 9th September 2018 in the Navtej Singh Johar case.⁴ This case upheld the fundamental rights of equality, freedom and to live with dignity of millions of Indian citizens who had to be closeted fearing the penal action under section 377 of IPC. The Judgment read down section 377 to decriminalize consensual homosexual acts between two individuals which could otherwise be punishable by a penalty as harsh as life imprisonment for violations. The 150-year-old law had been challenged by public interest litigations for almost a decade. After the initial taste of victory in the Naz Foundation case⁵ and its subsequent overturn in the Suresh Kumar Koushal case,⁶ the LGBT community had long waited for its rights to be recognized and upheld. In the 2013 Suresh Kumar Koushal case, the petitioners had challenged the decision of the Delhi High Court in the Naz

¹ The Hindu, *SC nod for elevation of Saurabh Kirpal as Delhi HC judge*, November 15, 2021, available at: <https://www.thehindu.com/news/national/sc-nod-for-elevation-of-saurabh-kirpal-as-delhi-hc-judge/article37510152.ece> (last visited on January 10, 2022).

² The Hindustan Times, *Delhi HC to hear petitions seeking recognition of same-sex marriages on Nov 30*, October 25, 2021, available at: <https://www.hindustantimes.com/india-news/delhi-hc-to-hear-petitions-seeking-recognition-of-same-sex-marriages-on-nov-30-101635161247524.html> (last visited on January 10, 2022).

³ Swagata Banerjee, *Top 12 Landmark Judgments of 2018 delivered by Supreme Court* *Top 12 Landmark Judgements of 2018 delivered by the Supreme Court*, Legal Desire Media and Insights, December 17, 2018, available at: <https://legaldesire.com/top-12-landmark-judgments-of-2018-delivered-by-supreme-court/> (last visited on January 11, 2022).

⁴ Navtej Singh Johar and Ors. vs. Union of India (UOI) and Ors. (06.09.2018 - SC): MANU/SC/0947/2018.

⁵ Naz Foundation vs. Government of NCT and Ors. (02.07.2009 - DELHC): MANU/DE/0869/2009.

⁶ Suresh Kumar Koushal and Ors. vs. NAZ Foundation and Ors. (11.12.2013 - SC): MANU/SC/1278/2013.

Foundation case asserting that it would adversely affect the social structure and the institution of marriage in the Indian society.

The need of decriminalizing homosexuality had been advocated by NGOs since as early as 1994 such as by the AIDS Bhedbhav Virodhi Andolan (ABVA) working on HIV/AIDS prevention and care that even went ahead and filed a petition before the Delhi High Court, calling for the repeal of Section 377 on the ground that it violated not only their right to privacy but also their right to health as the criminalization of homosexual acts made members of the LGBTQ community hesitant in seeking medical help/ advice thus making them more susceptible to sexually transmitted diseases.⁷ Another such NGO was the Naz Foundation that was set up in 1994 by Anjali Gopalan and a few others working on tackling the spread of HIV/ AIDS that was hindered because of this discrimination with the LGBTQ community. This NGO challenged section 377 too in the light that by prohibiting homosexual sexual acts, the very identity and sense of self-worth of an individual were stripped away.⁸

In reading down section 377, the Supreme Court not only restored the dignity of the individual but also held that the state had no right to impose its version of morality through coercive penal provisions in the most intimate aspects of a person's life. It was through the Navtej Singh Johar case finally that the consensual acts of homosexual sex were no longer held to be a crime. Dutee Chand, the fastest Indian sprinter who came out of the closet in 2019 in one of her interviews said that the judgment of September 2018 helped her overcome her fears and come out gay and proud.⁹ This is the impact that the 2018 judgment has had on the lives of people.

2. I AM WHAT I AM SO TAKE ME AS I AM

Chief Justice Dipak Misra started his and Justice Khanwilkar's judgment by quoting the famous German poet and philosopher Arthur Schopenhauer, who said: 'I am what I am, so take me as I am.' With this, the Judges confirmed that the individual's right to sexuality, right to sexual autonomy, and the right to choose one's sexual partner were held to be part of the right to privacy and had

⁷ Mentioned by Geetanjali Misra in her paper: 'Decriminalizing Homosexuality in India', Reproductive Health Matters 17(34), 2009, p.22.

⁸ Manisha Kumari Gupta, *Navtej Singh Johar & Ors. v. Union of India: Interpreting Section 377 of IPC 1860*, available at: <https://www.ijlmh.com/paper/navtej-singh-johar-ors-v-union-of-india-interpreting-section-377-of-ipc-1860/> (last visited on December 25, 2021).

⁹ Abhishek Shukla, *The SC verdict on Section 377 gave me the confidence to come out in the open: Dutee Chand*, September 6, 2019, available at: <https://timesofindia.indiatimes.com/sports/off-the-field/the-sc-verdict-on-section-377-gave-me-the-confidence-to-come-out-in-the-open-dutee-chand/articleshow/70995132.cms> (last visited on December 26, 2021).

its constitutional basis in Article 21 of the Constitution.¹⁰ The Constitution of India in the form of fundamental and constitutional rights guaranteed to every citizen - Justice, Equality, Liberty, and Dignity as envisioned in the preamble to the Constitution however it is meaningless to say that one has a dignified life when it is stripped of all freedom, individuality, and choice. All these notions envisioned in the preamble seemed unfounded and false in the presence of section 377 that made human dignity unachievable in the apprehension of an archaic law. It was for this reason that the judges emphasized human dignity, what it truly meant, and why it was essential for the overall existence of a being. The Judgement pointed out the friction between section 377 and various constitutional provisions – Article 14 to begin with. The discrimination against gay people was unfair and unreasonable and therefore in complete violation of the fundamental right to equality. As per article 15 of the constitution that prohibited discrimination on the grounds of religion, race, caste, sex, or place of birth only and sexual orientation being analogous to sex under the said article, discrimination only on the ground of sexual orientation would defeat the very purpose of Article 15 of the Constitution. Article 19 of the COI enumerates various facets of the right to freedom such as that of free speech and expression, to reside in any part of the country, and to practice any trade, profession, or business as one desires. The right to freedom of speech and expression also includes within its ambit the right to express one's sexual orientation and to be able to exercise it freely without fearing any social stigma or victimization. Last but not least is the right to personal life and liberty as guaranteed under article 21 of the COI. It has been very well interpreted by the Courts that the right of existence is more than merely an animal existence and covers within its sweep a physical existence with human dignity. This concept was further strengthened by the hon. Supreme Court in the Justice Puttaswamy case aka the privacy case.¹¹ The Court in the Puttaswamy judgment concluded that dignity and privacy are intrinsic and inseparable parts of the human element. Therefore, the concept of dignity has to be understood in terms of human dignity that is if the dignity is not protected then the foundational basis of privacy would collapse. No doubt arises now that sexual orientations and sexual activities are dimensions of human privacy that the state is bound to protect for a dignified existence because a threat to the former would dilute the dignified existence.

¹⁰ Erika C. Collins and Stefan Schaaf, “*I am what I am, so take me as I am*” – Historic decision of India's highest Court decides gay sex no longer criminal, *International Labour and Employment Law*, September 7, 2018, available at: <https://www.internationallaborlaw.com/2018/09/07/i-am-what-i-am-so-take-me-as-i-am-historic-decision-of-indias-highest-court-decides-gay-sex-no-longer-criminal/> (last visited on January 2, 2022).

¹¹ Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., MANU/SC/1044/2017.

3. THE LEGAL BATTLE: FROM THE NAZ FOUNDATION CASE TO THE SURESH KUMAR KOUSHAL CASE

It is of great significance to trace the legal background that ultimately led to the reading down of section 377 as the legal backdrop is a testament to the evolving LGBTQ jurisprudence in the Indian Judicial System. In 1994, a group of physicians recommended that condoms be distributed in the Tihar Jail due to high reportage of homosexuality. The prison authorities refused to allow condoms to be distributed because they felt that this act would amount to an acceptance and even condonation of homosexual sexual acts which was otherwise penalized under the Indian Penal Code. This led an NGO called the AIDS Bhedbhav Virodhi Andolan to file a PIL before the Delhi Court, calling for the repeal of section 377 on the ground that it violated the right to privacy. The petition came up for hearing in 2001 but by then, the movement had lost its momentum. When the matter came up for hearing, the NGO failed to make a legal representation and the case was therefore dismissed.¹²

Then came the Naz foundation – an NGO that worked towards HIV/AIDS prevention and care began working closely with the gay community in the 90s and witnessed many incidents of brutalities that the homosexuals had to go through. One such incident was where a young man was made to undergo electro-shock therapy to cure his homosexuality. This led the NGO to file a complaint with the NHRC (National Human Rights Commission) but was disappointed when the NHRC paid no heed to the complaint pointing out that homosexual acts amounted to a criminal offense under section 377. Many such incidents of assault, harassment, and abuse by public authorities brought to light the inhuman life that the LGBTQ members were subjected to deprived of any fundamental rights. This led the NGO to file a petition under the Delhi High Court challenging the same. The petition was initially dismissed by the Delhi Court stating that the NGO had no locus standi in the case but the High Court's decision was reversed by the Supreme Court, which directed the High court to hear the matter.¹³

The case was finally heard by the Delhi High Court in 2009 by a bench comprising Chief Justice Ajit Prakash Shah and Justice Muralidhar and history was created for the first time by reading down section 377 and declaring that consensual homosexual conduct in private was not a crime. It is interesting to note here that the petition by the NGO although opposed by the Ministry of Home Affairs for having the potential of affecting the morals of Indian society, was supported by the Ministry of Health and Family Welfare stating that section

¹² Abhiudaya Verma, *Legal Journey of Section 377 – A Relentless Battle of Expression and Recognition*, LexQuest Foundation, April 18, 2020, available at: <https://www.lexquest.in/legal-journey-of-section-377-a-relentless-battle-of-expression-and-recognition/> (last visited on January 9, 2022).

¹³ Supra note 5.

377 mired in the prevention of HIV/ AIDS. After the 2009 judgment, the mood of the society started changing – the LGBTQ activism gained momentum, pride marches began to be conducted and other sensitization efforts were being undertaken at Universities and amongst workgroups.

However, this victory was transient as one part-time astrologer sought permission from the Supreme Court to challenge the Delhi Court verdict, and the same was granted by the Supreme Court. The twist in the tale came when in the Suresh Kumar Koushal case, the Supreme Court reversed the decision of the Delhi High Court and made millions of Indian criminals again.¹⁴ The Supreme Court was of the view that the Delhi High Court had severely erred in its earlier decision in the Naz Foundation case that was based on insufficient and fraudulent statistics. It was also argued that it was for the parliament to determine the legislation and out of the domain of the judiciary.

4. THE PRIDE MOMENT (NAVTEJ SINGH VERDICT)

Things changed by 2015. A writ petition was filed in the Supreme Court in 2015 by five courageous individuals who got together to challenge section 377 and the previous Supreme Court verdict in the Suresh Kumar Koushal case.¹⁵ These were ordinary people who proudly identified themselves as members of the LGBTQ community and their allies – Navtej Singh, a renowned classical dancer; Sunil Mehra, a journalist; Aman Nath, a hotelier; Ritu Dalmia, a chef, and Ayesha Kapur, a businesswoman. The Navtej Johar petition was listed in the Chief Justice's court in January 2018 and it was listed to be heard after the summer vacation in 2018. The hearing of the case was completed on 17 July 2018. On 6 September 2018, the judgment was finally delivered in a packed courtroom. There were four concurring judgments. As each of the judges read the judgments, the exhilaration in and outside the courtroom knew no bounds. The judgment had not merely read down section 377 but had proved to be a ray of hope for the LGBTQ community. For the first time in a long while, they felt heard, seen, and involved in a case that was about to change their lives for the better and it was long due.

The second judgment that came from Justice Rohinton Nariman is worth mentioning here - throwing light on public morality and constitutional morality and stating that in a conflict between the two, the latter would always prevail. The constitutional provisions were revived in this judgment by Justice Nariman. The judgment was forward-looking directing the Union Government to

¹⁴ Supra note 6.

¹⁵ Supra note 4.

publicize it through media and conduct sensitization programs to eliminate the social stigma associated with such persons.

The next judgment came from Justice D.Y. Chandrachud emphasizing individuality and inclusivity.¹⁶ The judgment pointed out the persecution faced by homosexuals at the hands of state machinery in the name of section 377. It was said that it will be unjust for the gender-based and sexual minorities to be deprived of the equality and equal protection of Law guaranteed to every citizen under the COI. The choice of partner is a personal matter and the state has no business to interfere with a person's consensual intimacies. Justice Chandrachud used a song by Leonard Cohen to make it clear that democracy is not something that is imposed by a powerful state or organization but lies in the ability of every individual to be able to live his/her/their life with dignity and under the protection of fundamental rights.

The empathetic attitude of the court was apparent in the judgment of Justice Indu Malhotra who recognized that homosexuality was not an alien concept but was a part of the human condition and a variation of sexuality, that had since long been unrecognized. Once sexuality is seen as an integral and inseparable part of human identity and existence, to criminalize it is to dehumanize a person and render them unequal. As rightly said in the judgment, history does owe an apology for the ostracism faced by the LGBTQ community.

5. IMPACT: PRE AND POST-NAVTEJ JOHAR VERDICT

Over the years, the changing legal status of individuals through various judgments on section 377 had affected the physical, emotional, mental, and professional well-being of millions. From having the guts to come out of their closets to going back in them after the Suresh Kumar judgment, the rights and sense of identity of homosexuals and others from the LGBTQ community had been swinging back and forth like that of a pendulum. Many people chose marriage for the sake of cover-ups and to avoid a social boycott. While some coming from orthodox families also faced life threats for being who they are. Before the Navtej Judgment, there were multiple cases and stories of harassment of the LGBTQ community, in some cases even by homophobic police officers. Same-sex couples were separated under section 377 and treated for their deformities by extreme means. In 1987, two policewomen from Madhya Pradesh – Urmila and Leela were suspended from their positions for

¹⁶ Scroll.in, *State has no business in personal matters; Justice DY Chandrachud's conclusion in section 377*, September 6, 2018, available at: <https://scroll.in/article/893434/state-has-no-business-in-personal-matters-justice-dy-chandrachuds-conclusion-in-377-case> (last visited on December 30, 2021).

getting married to each other.¹⁷ The community members persistently feared arrests because of their open attitude towards sexual orientation and sexual preferences.

The Navtej Judgment reassured the faith of the LGBTQ community, however minuscule it may be that every person has the right to love the person that they love and be loved by them in the same capacity and to deny them of this would be to deny them of the most basic fundamental rights that directly stands in violation of the COI. The judgment made us realize that social acceptance of the LGBTQ community would help in breaking the gender stereotypes and predetermined gender structures. It will also help the community members from falling prey to social and economic seclusion. What also changed from the Naz Judgment to the Navtej Johar judgment was the perception of the Indian Courts and their understanding of section 377 and the LGBTQ community. Since its pronouncement, there has been a breathing space for the community. However, there is a long way to go as there is only so much that the judiciary can do. The legislature needs to step in and formulate laws or improve the existing ones to create a haven for the members of the LGBTQ community.

The Supreme Court's Judgment in the Navtej Singh case has impacted the LGBTQ community deeply – empowering and enabling them to fight for themselves and their rights against arbitrary law enforcement and state authorities. There seems to be also societal acceptance to some extent in the form of movies being made on the issue. Decriminalization has led to destigmatization associated with homosexuality in society and has instilled psychological as well as emotional security among homosexuals and other sexual minority groups.

6. CONCLUSION

Education and awareness have a key role to play in the acceptance or denial of homosexuality and LGBTQ rights. In most countries surveyed on the same, those who had greater levels of education are most likely to say that homosexuality should be accepted in society than those who have less education. In a country like India, which has a poor literacy rate - sensitization programs and sex education are the need of the hour to develop an understanding and acceptance towards the Community.¹⁸ Strangely, a country

¹⁷ Alok Hisarwala, *Why Indian Opponents of the same-sex verdict are so horrified at the US Verdict*, June 27, 2015, available at: <https://scroll.in/article/737216/why-indian-opponents-of-same-sex-marriage-are-so-horrified-at-the-us-verdict> (last visited on January 4, 2021).

¹⁸ Jacob Pouster and Nicholas Kent, *The Global Divide on Homosexuality Persists*, June 25, 2020, available at: <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/> (last visited on January 8, 2021).

that is home to the Kama Sutra took so long to grant LGBTQ people their basic civil liberties. Today, India has come a long way in striking down section 377 that treated LGBTQ members as criminals for loving whom they did but there is still a long way to go until each and everyone from the community feels safe and equal to all. The Navtej Johar Judgment only decriminalized consensual homosexual sexual acts. Further, a lot needs to change when it comes to recognizing same-sex marriage and its registration, health care, family care, adoption rights, inheritance rights, property rights for LGBTQ people, and most importantly the right to enjoy marital privileges such as taking decisions under partner's health crisis, etc. That is where change is needed next.