



SEXUALITY AND IDENTITY

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INTRODUCTION

Sexuality of a person plays an important role in his/her identity and sense of self. Sexuality often refers to a person's sexual orientation or sexual preference and it tells whom you emotionally, mentally, physically get attracted to, this may be same-sex (homosexual), opposite-sex (heterosexual) or bisexual orientation (most genders). People around the world have been facing violence and inequality, and sometimes torture or execution the reason being on whom they love, how they look, or who they are. Sexual Orientation and Gender Identity are an integral aspects of oneself and no one should be discriminated or abused on it. The issue of criminalization of section 377 and homosexuality has been debated all over the country from ages.

SEXUAL ORIENTATION / SEXUALITY

Sexual preference of a person (male or female) termed as Sexual Orientation¹ or it can be said as to in which gender a person (HE/SHE) is sexually attracted. The act of person or his feeling are used in order to say about the sexual orientation of the person as either heterosexual or homosexual or bisexual.

Sexual Orientation, understood as to refer to each person's capacity for profound

emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.²

Sexual orientation refers to a person's sense of personal and social identity based on those attractions, behavior expressing them, and membership in a community of others who share them.³

Sexual orientation is refer to the erotic attraction of a person. As in the case of

1. Heterosexuals, to members of the opposite sex;
2. Homosexuals (gays and lesbians), to members of the same sex;
3. Bisexuals, to member of both (opposite and same) sex;

Supreme Court of India in case of National Legal Services Authority v Union of India and other⁴ held that:

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc.

GENDER IDENTIFICATION

On a common note, Gender of a person is identified on his/her birth, but it is on the person one's own conception as to identify oneself as Male or Female or Both or Neither.

sometimes also extends to include transgender and intersex persons

² <https://yogyakartaprinciples.org/preamble/>

³ APA, 2015a, p. 862

⁴ WP (Civil) No 400 of 2012

¹ Under conventional classification, in reference to sexual orientation, a person may be heterosexual (people whose sexual attraction is primarily towards people of opposite gender), bisexual (primary sexual attraction to both men and women) or homosexual (refers attraction to the same gender). This term



Gender Identity: A person's deeply-felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person's sex assigned at birth or to a person's primary or secondary sex characteristics. Since gender identity is internal, a person's gender identity is not necessarily visible to others.⁵

There are some aspects of identity that cannot be taken for granted, including sexual identity and gender identity. While most people are born prepared to feel comfortable with their body's gender, and to desire sexual contact with members of the opposite sex upon sexual maturity, there have always been a minority of people who do not fit this mold.

Supreme Court of India founded that the right to self-identify one's gender (Male or Female or third gender), was an important part of the constitutional right to live with dignity.⁶

SECTION 377 OF THE INDIAN PENAL CODE

Section 377 of the IPC deals with 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 be liable to fine fixed by the law.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.⁷

⁵ American Psychological Association. (2015). Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. *American Psychologist*, 70(9), 832-864. doi.org/10.1037/a0039906

In simple terms, it refers to sexual intercourse done by a man, a woman against the order set by the nature with either any man, or woman or animal shall held liable and will be punished with imprisonment for life or for a period that may extend for ten years, and will be held liable to fine.

The SC of India since 1860 has tried to interpret the section 377 as to what exactly the word carnal stands for as the scope of the section has kept on widening.

The major issues that the courts in India started facing when dealing with section 377 was whether the section violates the fundamental right guaranteed by the Indian Constitution through Article 14, 15, 19 and 21 :

1. Does it violets the fundamental right guaranteed under Article 14 :

The Supreme Court held that where an act is arbitrary in nature then it is violating Article 14 of the Indian constitution.

The section's main objective is of penalizing the unnatural sexual activities, which has no rational nexus to the classification made in sexual acts and thus it is violative of Article 14 of the constitution.

2. Does it violets the fundamental right guaranteed under Article 15 :

The Indian Constitution clearly states that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them" and, Therefore section 377 of IPC is violative of Article 15 of the Indian Constitution as it discriminates a person on his sexual orientation.

⁶ WP (Civil) No 400 of 2012

⁷ K.D. Gaur, "The Indian Penal Code 1860", 6th Edition, 2017



3. Does it violate the fundamental right guaranteed under Article 19 :

Every person of the India has the right to freely express himself and The CJJ held that Section 377 in its present form violated Article 19(1)(a) of the Constitution that deals with freedom of speech and expression⁸

4. Does it violate the fundamental right guaranteed under Article 21

Supreme Court finally in the case of Navtej Singh Johar ruled that Section 377 of the IPC violates the rights to Life, Liberty, Dignity and Autonomy of personal choice under Article 21 of the Indian Constitution.⁹

LGBTQ RIGHTS

When we talk about the rights of people belonging to LGBT community, The Supreme Court of United States explained in *Romer v. Evans*¹⁰, “there is nothing “special” about laws which prevent Laws which prohibit discrimination simply give LGBT people that basic right to be equal participants in the communities in which they live.”

The landmark judgements in case of *NALSA v UOI*¹¹ gave the right

Equality: apex Court ruled that non-recognition of their gender denying transgender persons equal protection of the law. There was a constitutional obligation upon which the State was bound with the duty to ensure such equal protection proactively.

Non-Discrimination: according to the constitution of India, Discrimination is prohibited in the country on a number of

specified grounds, which includes “sex of a person” . The Court mentioned the term “sex” to include “gender identity”.

Dignity: The Court found that since gender constituted the core of one’s sense of being, as well as an integral part of a person’s identity, recognition of one’s gender identity lies at the heart of one’s fundamental right to dignity.¹²

Right given in other jurisdictions around the world are :

1. The Criminal Justice (Scotland) Act 1980 states that :

A gay or bisexual man over 21 years having sex with a man or woman was made legal and they will not be charged as charged for committing a criminal offence.¹³

2. The Employment Equality Sexual Orientation Regulation Act 2003 :

This law makes discrimination and harassment on grounds of sexual orientation in employment, vocational training and colleges and universities illegal.¹⁴

The civil partnership act 2007 :

This law extended the privileges to marriage to same sex couples in all but home.¹⁵

Rights to same sex marriages:

1. Only seven countries allow marriage of gay couples: South Africa (2006), Belgium (2003), Netherlands (2001), Norway (1-jan-2009), Spain (2005), Sweden (1-may-2009), Canada (2005), and the following U.S. States: Connecticut (2008), Iowa (27-apr-2009), Maine (14-sep-2009), Massachusetts (2004) and Vermont (1-sep-2009).

⁸ Navtej Singh Johar v. Union of India W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

⁹ Navtej Singh Johar v. Union of India W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

¹⁰ *Romer v. Evans*, 517 U.S. 620 (1996)

¹¹ National Legal Services Authority v. Union of India, (2014) 5 SCC 438

¹² Writ Petition (Criminal) No. 76 Of 2016

¹³ <http://www.legislation.gov.uk/ukpga/2003/42/contents>

¹⁴ <http://www.legislation.gov.uk/uksi/2003/1661/contents/made>

¹⁵ <https://www.legislation.gov.uk/ssi/civil%20partnership>



2. Eight countries give same-sex couples most or all rights of marriage, including Denmark (1989), Finland (2002), Germany (2001), Iceland (1996), Switzerland (2007), United Kingdom (2005), and New Zealand (2005). Another 12 countries give some, but not all of the rights of marriage.¹⁶

Yogyakarta principles: Yogyakarta principles totally intends to human rights in relation to gender identity and sexual orientation and identifies the states obligations to respect and fulfill them. Some important recognitions were:

- People of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination based on sexual orientation and gender identity.¹⁷

OBSTACLES TO JUSTICE IN INDIA BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

In India, since 1860 when the clause of 377 was added in the Indian Penal Code, the concept of sexual offences against the nature's order was added and was made illegal. The fact that institutions like the family, schools and hospitals often perpetuate discrimination and are frequently the sites of abuse increases the risk that queer

people will be subjected to human rights abuse.

From the very beginning, Gender identity and sexuality have been important areas in defining the cultural and national identity of India, A country where culture is imbued with morality, religiosity, normative values, customs and ages old traditions, acceptance of homosexuality was a struggle and seemed to impossible for the LGBT Community.

The legal system in India has been inconsistent with the obligations under the international human rights law to prevent discrimination and violence based on sexual orientation and gender identity.

A society where the homosexuality being considered as abnormal and, abuse is considered as a daily routine for people who identify themselves as Gay or Lesbian and harassment tolerance can take place any time due to their sexual orientation. Such abuse in form of ragging and torture, mental harassment etc. when are faced by the young children and adolescent in schools and colleges and university leads to depression, homeless and school/college dropouts, making them vulnerable and develops stress and reduces their self-confidence and affects their morals.

CASES

Various cases have evolved in India and the final judgement of The Indian Supreme Court regarding the matters of sexual orientation and gender identity, which are

- Naz Foundation v. Govt. of NCT of Delhi¹⁸

In this case, the Delhi high court on 2nd, July 2009 by giving the landmark judgement stating that Section 377 of the Indian penal

¹⁶https://shodhganga.inflibnet.ac.in/bitstream/10603/45127/16/16_chapter%209.pdf

¹⁷ http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

¹⁸ Writ Petition (Civil) No. 4755 of 2001



Code is violative of the basic fundamental rights guaranteed under the Indian Constitution in Article 14, 15 and 21. As section 377 is arbitrary in nature, criminalizes the sexual acts of people in private and discriminate people based on sex, and harms their dignity.

- Suresh Kumar Koushal & ORS. V. Naz Foundation & ORS¹⁹

In this case, Supreme Court overruled the judgement given by the Delhi High Court in 2009 in the case **Naz Foundation (India) Trust v. Government of NCT of Delhi and Ors**²⁰, and once again criminalizes unnatural sexual acts; Supreme Court also stated that section 377 does not suffer from the vice of the unconstitutionality.

- National Legal Services Authority v. UOI²¹

In this case, Supreme Court of India looking forward to the violence and challenges faced by the transgender people (Kinnar Community) while accessing Justice gave the right to self-recognition of their gender identity to transgender people based in India by upholding the fundamental rights given/guaranteed by the Indian Constitution via Article 14, 15, 19 and 21 (i.e. Right of Equality, non-Discrimination, Rights of Expression and Dignity).²²

Supreme Court in this case observed that Sexual Orientation of a person to the attraction (emotional or physical) to other person.

Court observed that Gender Identity in one of the most important fundamental aspect of life. Gender identity refers to each person's

individual experience as to his/her gender, which may or may not correspond with the sex assigned to him/her on birth. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other.

“Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.”²³

Justice K.S. Puttaswamy & Anr. V. UOI²⁴

In this case, the nine judge bench of Supreme Court went to the extent of making this judgement as landmark judgement on 24, August 2017, held that by upholding article 21 under part III of the Indian Constitution (i.e. one of the Fundamental Right guaranteed to the citizen under the Constitution of India), that it is duty of state to carefully balance the privacy of an individual and legitimate aim, at any cost, the Fundamental Right cannot be given to or taken away by state/law and all act should be in accordance and should abide by the constitution of India.

SUPREME COURTS FINAL VERDICT Navtej Singh Johar & Ors. Vs. Union of India & Ors.²⁵

This case become the landmark judgement as the Apex Court was ask to deliver its final verdict on the same sex relationship in the

¹⁹ special leave petition (civil) no. 15436 of 2009

²⁰ writ petition (civil) no. 4755 of 2001

²¹ national legal services authority v. Union of India, (2014) 5 SCC 438

²² writ petition (civil) no.604 of 2013

²³ (2014) 5 SCC 438

²⁴ Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1

²⁵ (2018) 10 SCC 1.



country. The five-judge bench in Supreme Court on 6th, September 2018 unanimously struck down section 377 of IPC (Indian Penal Code) to the extent that it criminalizes the relationship between people who are attracted to same sex (homosexuals) consenting adults. Individuals belonging to LGBT Community being allowed engaging in consensual intercourse in India.

Facts of the case

In this case, the petitioner (Navtej Singh Johar) who is a dancer identified himself to be part of LGBT community, filed a Writ Petition in Supreme Court seeking inclusion of “right to sexuality”, “right to sexual autonomy” and “right to choice of a sexual partner” to be a part of right to life guaranteed by Article 21 of the Constitution of India.

The Writ Petition also prayed for upholding Section 377 of the IPC to be Unconstitutional, as the language of the section is vague and is violative of the basic structure of the Indian Constitution.

The three Judge bench of the Supreme Court looked to the importance, depth and seriousness of the matter, then it was addressed to the larger bench (five-judge bench) of Supreme Court.

Major Issues before the courts

1. Whether the section 377 is violative of Article 14, 15, 21 of the Indian Constitution.
2. Whether all sexual orientation (heterosexual, homosexual or bisexual) are equally natural and are established on consent of two individuals (adults) and none of them constitute to be a medical issue.

3. Whether the approach of Supreme Court applied in the case of Suresh Kaushal v. NAZ Foundation was appropriate.

Case Analysis

Court while adverting the concept of discrimination stated that, if any discrimination based on sex takes place then it is violative of article 15 and 16 of the Indian constitution and includes discrimination on grounds of Gender Identity.

Court founded that Sexual Orientation of a person is immutable and cannot change when desired, therefore the sexual relationship with people of same sex is their own choice and section 377 insofar have been discriminating them on the basis of their Sexual Orientation which is violative of article 14,19 and 21 of the Indian Constitution.

Starting the vagueness of the Section 377 which is core of the case, as the section states that any sexual act other than heterosexual is against the order of the nature and that is supposed to be accepted by the society. Moreover, the reason why people who identified themselves as part of LGBT community denied from the basic human rights and were treated as criminals in the society

Court founded that the criminalization of Section 377 has the effect of criminalizing the entire class of LGBT persons since any kind of sexual intercourse in the case of such persons would be considered to be against the “order of nature”, as per the existing interpretation.

However, the Supreme Court was able to bring a change after the case of NAZ Foundation v. Govt. of NCT of Delhi,²⁶ as the

²⁶ (2016) 15 SCC 619 (India).



court legalized homosexuality in the country. But in the case of Suresh Kumar Kaushal v. NAZ Foundation Supreme Court's decision was overruled by Delhi High Court on grounds, that Section 377 only regulated sexual conduct regardless of gender identity and sexual orientation, and such sexual acts can't be given priority over societal value. However, in this case Supreme Court struck down the grounds mentioned above, and stated that rights guaranteed by the constitution is for every individual in the country.

Court by decriminalizing Section 377 have allowed people belonging to LGBT community to live with dignity, respect and fear free and allowing them to be a part of society where they are not pressed on the basis of different Sexual Orientation and Gender Identity rather considered to be a part of society where every individual is same.

CONCLUSION

Different sexual orientation or gender identity does not refers to any mental disease rather all orientation (sexuality) is same. Any abuse or discrimination based on person's sexual orientation or gender identity whether torture, denial of family, medical treatment, jobs or recognition in society is violative of article 14, 15, 19 and 21 of Indian constitution as per the findings of the Supreme Court in case of Navtej Singh Johar and any person doing so shall be punished. It will not be wrong to say that the battle for rights and recognition of LGBT people in society is over, and society have started accepting them to as they are. The future India will be of full equality were all genders will be recognized as equal, and were people are not discriminated based on whom they are attracted to. The judgement of 6th, September

2018 has upheld the self-esteem and self-respect of people belonging to LGBT and have realized them that the struggle that they have faced over ages is now over and now they will not be judged on how they express themselves, how they identity themselves and what their sexual orientation is.

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