
Section 377 and Beyond*A New Era for Transgender Equality?*

The year 2018 changed the way we look at gender, sex and sexuality. The judgment of the Supreme Court in *Navtej Johar v. Union of India*¹ holding that consensual same sex under Section 377 of the Indian Penal Code was no longer criminalized was revolutionary in the manner in which it protected the rights of lesbian, gay, transgender persons, and sexual minorities. In protecting their rights, the Supreme Court also gave a broader and more expansive meaning to “sex” within the Constitution to include gender identity and sexual orientation. This expansive meaning has positive implications on how we think about gender beyond the binary of male and female, and beyond social stereotypes of gender roles. This landmark decriminalization makes one ask the question in the context of transgender rights—have we achieved full equality for transgender persons or do we need to go beyond Section 377?

This chapter begins in section I with the history of the legal campaign and litigation against Section 377 of the Indian Penal Code and the role of the transgender community in this litigation. In section II, I go on to examine the path-breaking role of the Supreme Court in the various judgments protecting transgender rights, starting with *National Legal Services Authority v. Union of India*² and culminating with the judgment in *Navtej Johar v. Union of India*. Finally in section III, what is the way forward now for the transrights movement post-*Navtej* is discussed. What are the next steps in the campaign for transgender rights? It is argued that far from being

1 (2018) 10 SCC 1.

2 (2014) 5 SCC 438.

an end or a culmination of the battle for recognition of transgender rights, *Navtej* is in fact a beginning—from which will emerge a whole new era not only for transgender equality but gender equality in India.

The History of the Legal Battles of the LGBTI and the Campaign against Section 377

The history of the legal campaign for the rights of LGBTI persons in India largely started with the legal challenge to Section 377 of the Indian Penal Code. Section 377 is an anti-sodomy provision derived from the Indian Penal Code of 1860, which reads as follows:

377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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.

While Section 377 impacted gay, lesbian, queer and transgender persons, there were many other colonial legislations and legal provisions that specifically criminalized transgender and intersex persons in India. Transgender persons are persons whose gender identity or gender expression does not conform to their biological sex. This includes persons who intend to or have undergone Sex Reassignment Surgery (SRS) to align their biological sex with their gender identity in order to become male or female, transsexual persons, cross-dressers and all other identities. Intersex persons are born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither (Office of the High Commissioner for Human Rights 2015). In India, “Transgender” is often used as an umbrella term to include intersex persons and also several identities including Hijras, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc.³

3. *NALSA v. Union of India*, N 3 *supra*.

In colonial legislations, transgender persons in India were referred to by the use of the highly stigmatizing and pejorative term ‘eunuchs’. Historically, laws that discriminated based on gender identity were earliest enacted by the British in passing the 1897 amendment to the Criminal Tribes Act of 1873, that applied specifically to ‘Eunuchs’. The Criminal Tribes Act was enacted on the presumption that certain communities were more ‘predisposed’ towards committing a crime (Narain 2009). A special section for the inclusion of ‘eunuchs’ was brought under the ambit of this legislation in 1897. In this law, “eunuchs” were defined as: “[A]ll persons of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent” and “Local governments were required to keep a register of the names and residences of all eunuchs who were “reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the IPC, or of abetting crimes under these provisions.” Under the Criminal Tribes Act, ‘eunuchs’ were required to be registered with the local authorities, and they were prohibited from being a guardian to any minor, making a gift or will, and adopting a son. They could be punished for imprisonment up to two years for violating these provisions. ‘Eunuchs’ who kept in their charge boys who had not completed 16 years of age could be punished with imprisonment for up to two years. ‘Eunuchs’ were prohibited from appearing ‘dressed or ornamented like a woman’ in a public street or place. They could not dance, play music or take part in any public exhibition.

The Criminal Tribes Act was repealed in 1949, but there were other legislations that used similar language to criminalize and enforce control and surveillance over transgender persons. These laws were the Andhra Pradesh (Telangana Area) Eunuchs Act 1329F, now renamed the Telangana Eunuchs Act, which were enacted in 1919, were identical to the chapter on ‘eunuchs’ in the Criminal Tribes Act. Under Section 4 of the Telangana Eunuchs Act, transgender persons could be arrested without a warrant for being found in

female clothing or performing in a public place.⁴ In Karnataka, the Karnataka Police Act 1963, had a provision in Section 36A which also had similar provisions of surveillance and assumption of criminality of ‘eunuchs’.⁵ These legislations were very similar to the municipal ordinances that were enacted in the United States from the 1850s onwards which made it illegal for people to appear in public “in a dress not belonging to his or her sex” (Stryker 2017).

Despite all these legislations that criminalized transgender persons, there was no mass transgender rights movement in the country that challenged these laws or fought against them. Although from the nineties, transgender activists were very vocal on the streets and had been the backbone of street protests around LGBTI issues in cities like Bangalore (Narrain 2009), they were not at that time organized into a strong transgender rights movement nor were they too actively thinking of legally challenging any of these legislations including Section 377.

The real legal battle for LGBTI rights started in 2001 with a petition filed by Lawyers Collective on behalf of Naz Foundation challenging the constitutionality of Section 377 in the Delhi High Court. This was not the first time that Section 377 was being challenged. It was first challenged in 1994 by a group called AIDS Bhedbhav Virodhi Andolan, which was working on HIV/AIDS, but their petition however was not actively pursued. Thereafter, in 2001 a public interest litigation (PIL) was filed by the Naz Foundation, which

4. Section 4: “4. Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with Imprisonment for a term which may extend to two years or with fine or with both”.

5. Section 36A. Power to regulate eunuchs.- The Commissioner, may, in order to prevent or suppress or control undesirable activities of eunuchs, in the area under his charge, by notification in the official Gazette, make orders for,- (a) preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences, (b) filing objections by aggrieved eunuchs to the inclusion of his name in the register and for removal of his name from the register for reasons to be recorded in writing; (c) prohibiting a registered eunuch from doing such activities as may be stated in the order. (d) any other matter he may consider necessary.

was working actively with the gay community. This was prompted after a police raid in Lucknow where the police arrested many persons on the grounds of suspected homosexuality while they were distributing condoms and other materials, as part of their HIV health rights work (Krishnan 2018).

When this PIL was filed in 2001 challenging Section 377, the LGBTI community and activism had not yet embraced litigation and the use of the law within their work. Critics within the community raised various concerns and often stood against using lawfare as a strategy in tandem with the popular approach in the US. Several argued that the broader goal was social transformation and that law and litigation only have a limited impact. Many felt that the police would harass sexual and gender minorities despite legal changes. There was fear about a negative impact and that India and the courts were not ready.

In 2004, the Delhi High Court declined to consider the petition, stating that the petitioners lacked standing. Thereafter, the petitioners appealed to the Supreme Court and in 2006 the Supreme Court allowed the Petitioner to take up the PIL and sent it back to the Delhi High Court to decide the case.

After this, there was great interest and ownership of the litigation by the queer community. In 2008, several organizations intervened in the case on the side of the petitioners. There were many organizations including a coalition called “Voices against 377”, human rights organizations, women’s organizations and others who joined in the litigation. Even at this time, the transgender community was not really part of the litigation either as individual petitioners or as organizations although there were affidavits filed by transgender persons who were arrested under Section 377 and faced violence at the hands of the police. It was in this limited manner that they were part of the early litigation against Section 377—and that too indirectly.

In 2009, the Delhi High Court passed a landmark judgment in *Naz Foundation v. Govt. of NCT of New Delhi and Others*⁶ where Section 377

6. (2009) 111 DRJ 1.

was read down and was held to be unconstitutional. This judgment led to celebrations all over the country and was a catalyst for change on recognition of LGBT rights in the country. This celebration however was short-lived. Many parties challenged this judgment before the Supreme Court and in a development that came as a serious setback to the LGBTI community, in 2013 the Supreme Court overturned the Delhi High Court judgment in *Souresh Koushal v. Union of India*.⁷ The Supreme Court held that Section 377 could not be read down and it was for Parliament to decide on decriminalization of homosexuality.

Against this judgment, review petitions were filed only to be dismissed. Curative petitions were also filed. The silver lining, however, was that LGBTI mobilization was very high and despite the Supreme Court verdict, the movement on the ground was growing rapidly and social acceptance for LGBTI concerns was increasing. All of this still did not make too much progress for transgender persons, who continued to be the most marginalized and vulnerable group within the LGBTI community. Trans persons were routinely arrested and harassed by police, were sexually abused, and had to bear the brunt of criminal threats as they were on the streets forced into begging and sex work.⁸ While trans activists were becoming more visible and active, there still was not a strong and organized transgender rights social movement on the ground.

The Supreme Court Trans-formed

All of this changed in 2014. In April 2014 a bench of Justices K.S. Radhakrishnan and A.K. Sikri of the Supreme Court passed a judgment in *National Legal Services Authority v. Union of India*⁹ (“*NALSA*”) holding that transgender persons have the constitutional right to self-identify their gender identity as male, female or transgender even without medical re-assignment and the right

7. (2014) 1 SCC 1.

8. Ondede, “A Report on the Human Rights Violations Against Transgenders in Karnataka 2014”, Available at: <http://orinam.net/content/wp-content/uploads/2015/08/FINAL-REPORT-ON-HUMAN-RIGHTS-VIOLATIONS-OF-TRANSGENDER-PERSONS.pdf> (Accessed on 18 March 2019).

9. (2014) 5 SCC 438.

to expression of their chosen gender identity. It was in *NALSA* that the Supreme Court held that the rights to life, dignity and autonomy would include the right to one's gender identity and sexual orientation.

NALSA brought with it great excitement and gave momentum to the trans rights movement in India. Transgender persons have been criminalized, discriminated, and deprived of access to education and employment. They have faced sexual and physical violence and even death due to their gender choices. *NALSA* for the first time gave public recognition to the violence and discrimination that the trans community faces in India and declared unequivocally their entitlement to constitutional fundamental rights. The fight for equality for those who fall beyond the mainstream notions of gender gained momentum with the Supreme Court's judgment in *NALSA* (Jos 2017). The judgment became a catalyst for the organization of the transgender movement in the country in a very significant way. This judgment also led to several government authorities providing an additional gender option as "TG" or "Other" in government documents such as passports, driving licenses, PAN Cards etc., and was really in many ways the beginning of the organized transgender rights movement in India.

The *NALSA* judgment also gave new grounds and indeed new hope to revive the Section 377 challenge. In 2016, two fresh petitions were filed under Article 32 of the constitution. The first petition was by Navtej Johar and others and the second was by Dr Akkai Padmashali, Umi and Sana, three transgender activists from Karnataka. Following this many more petitions by lesbian and gay activists were filed. All these petitions urged the Supreme Court to re-assess the constitutionality of Section 377 on the touchstone of *NALSA*. This was also the first time that the transgender voices were heard before the Supreme Court.

Thereafter in 2017, came another big judgment by the Supreme Court on the right to privacy in *Puttuswamy v. Union of India*.¹⁰ In this judgment, the Supreme Court held that there is a constitutional

10. (2017) 10 SCC 1.

right to privacy inherent in the right to life, equality and fundamental freedoms. The Court went on to hold that the right to privacy specifically includes the right to have intimate relations of one's choice and includes the right to sexual orientation and gender identity. Justice Chandrachud went as far as to hold that the reasoning of the Supreme Court in *Suresh Koushal* that only a miniscule minority was affected was flawed and held that:

A miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights, which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties.¹¹

After the *Puttuswamy* decision, more petitions and interventions were filed against Section 377. By this time, it was fairly clear that the doors were closed on Section 377.

In 2018, at a time when the LGBTI and the transgender movement had gained great social acceptance and the community was waiting with bated breath for a decision from the Supreme Court, on 6th September 2018, the Supreme Court in a 5-judge Bench, led by the Chief Justice unanimously held in *Navtej Johar* that Section 377 was unconstitutional to the extent that it criminalizes consensual relationships of any kind between adults and overruled *Koushal*. The impact of the *Navtej* decision is unprecedented. J. Chandrachud recognized that Section 377 had consigned a group of citizens to the

11. (2017) 10 SCC 1.

margins and was destructive of their identities and held that lesbians, gay, bisexual and transgender persons have the constitutional rights to full and equal citizenship and protection of all fundamental rights.

The most far-reaching contribution is the elaboration on the right against non-discrimination on the basis of sex, guaranteed in Article 15 of the constitution. The Supreme Court held that 'sex' under Articles 15 includes discrimination on the ground of gender identity and sexual orientation. It went even further and held that discrimination on the grounds of 'sex' would also include discrimination due to sexual orientation or sex stereotypes. This signifies that being gender non-conforming or not adhering to society's 'norms' of gender roles, be it in the way you dress, speak or behave, cannot be a ground for discrimination. One of the core reasons for violence against trans persons is that they do not conform to gender roles as defined by society. This inclusion of discrimination on the ground of sex stereotyping will go a long way in dismantling gender stereotypes not just for the LGBTI community but also importantly for women in India. Women who do not conform to society's expectations in the way they dress, speak, work, marry and indeed live their lives as per their own terms, have been punished and discriminated and there was no legal recourse against this, until now.

Chief Justice Misra made specific references to transgender equality in his separate judgments and emphatically noted that: "Bigoted and homophobic attitudes dehumanize the transgenders by denying them their dignity, personhood and above all, their basic human rights" and that: "This stigma, oppression and prejudice has to be eradicated and transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life."¹²

The Supreme Court in holding Section 377 to be unconstitutional recognizes the fundamental rights of sexual and gender minorities and Chief Justice Misra categorically declares that the right to life

12. (2017) 10 SCC 1.

and dignity includes the twin aspects of one's identity and sexual orientation. In this way, with the *Navtej Johar* judgment the Court has gone far beyond the anti-sodomy judgments from around the world that were referred to it. By recognizing these twin aspects of gender identity and sexual orientation, the Court acknowledges the voices of the most vulnerable sexual minorities within the LGBTI community and takes the stand that the constitution protects the rights of all.

Where do we go from here?

With Section 377 of the Indian Penal Code decriminalized, is this the culmination of the realization of transgender equality in India? Far from it. It signifies instead that we are now entering a new era for the recognition of transgender rights in India. The first phase for transgender rights was the phase of decriminalization. We have successfully made it through the first phase, with Section 377 being de-criminalized, the operation of the Telangana Eunuchs Act having been stayed by the Andhra Pradesh High Court¹³ and Section 36A of the Karnataka Police Act having been amended.¹⁴

The second phase of transgender equality would be for claiming positive rights. These include the right to marry, the right to reservations in education and employment, the right to adopt and have a family, inherit property, to have access to public services and the right not to be discriminated. It would also include the right of transgender persons to be protected from violence and would need criminal law to be reformed and for coverage of trans persons under legislations to protect them from domestic violence.

Some of this work has started, with the movement on getting a separate Transgender Persons Bill. There was a Rights of Transgender Persons Bill 2014 proposed as a private members bill. This draft, however, was not introduced and the subsequent drafts of the

13. Order dated 18.9.2018, passed in W.P. (PIL) No. 44 of 2018, by the High Court of Judicature at Hyderabad for the State of Telangana and Andhra Pradesh, Available at: <https://clpr.org.in/wp-content/uploads/2019/03/Telangana-Eunuchs-Act-Order.pdf>

14. Order dated 06.02.2017 in W.P. No. 1397 of 2015, Available at: <https://clpr.org.in/wp-content/uploads/2016/09/kar-Sexual-minorities-forum-vs-State.pdf>

Transgender Persons (Protection of Rights) Bills 2016 and 2018 that were introduced by the government were highly problematic and have been heavily criticized by the transgender community (Jos 2017, Dharmadhikari and Gopinath n.d.).

What is really needed presently is law reform for protection of transgender persons so that they can get full recognition as citizens. We need a detailed gender re-assignment legislation which will enable transgender persons to easily change their name and gender as well as get their legal documents to reflect these changes. This would enable them to access employment, higher education and other services. Transgender persons must be able to self-determine gender without requiring any kind of medical treatment or certification and be enabled by law to change their gender to male, female or the third gender in all identification documents. This has been the compelling demand of the community (Anuvinda P. and Siva 2016).

There is also the need for recognition of violence against transgender persons. The criminal law on sexual assault in India presently is still gender specific. It only recognizes rape and sexual assault where the victim is defined as a 'woman'.¹⁵ Thus, transgender persons facing sexual violence have no criminal remedy against sexual violence. Trans persons are also not covered under domestic violence protection legislations such as the Protection of Women from Domestic Violence Act 2006 despite them facing family and intimate partner domestic violence. All of these legislations need reform to include transgender persons. In all of this reform we also need to recognize that the biggest challenge facing the more progressive elements within the community is to ensure that the benefits are available to all trans people and not just those privileged by caste, class, religion and ability (Stryker 2017).

Conclusion

The Supreme Court decision in *Navtej* has been the tipping point for the realization of transgender rights and after *Navtej* we can see that the transgender movement is leading the campaign for broader

15. Section 375 of the Indian Penal Code.

LGBTI rights in India. In fact, it would not be too far from the truth to state that transgender battles for equality are leading and have succeeded in trans-forming the women's rights movement in India as well because it has changed our notions of gender and opened up our minds to gender expression that is non-conforming with mainstream gender stereotypes. A future for India with full equality will be one in which we recognize that all genders are equal. The transgender movement is taking us towards such a goal.

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