

## **Section 377- Obstructing Or Protecting Liberty Of Fundamental Rights In India**

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### Abstract

Constitution of India,1950 is said to be a spirited legal text book, that is, constitutionalism as a soul is present. Meaning by, there cannot be any arbitrariness in execution of the black and white words of the constitution. The parent law of India is that base on which pyramid of the criminal legal system is being built up and derives its sanctity of penalizing the wrong doers keeping in mind the Fundamental rights which are being awarded by the constitution to each and every individual. It is these fundamental rights which have kept in check the arbitrariness of the criminal procedure in India. However, it seems that fundamental rights and criminal procedure of the country are lost about this arbitrariness when it comes to the sexuality of a person and the ways in which the said person wants to express it. Heterosexuality has been and still is seen as the only accepted way of sexual expression by the society. On elaboration, it simply means that as far as biology is concerned then there are only male and females in the society who are hard-wired to express their all sexual desires opposite to each other. To make it a norm heterosexuality was painted with religion where a union of man and woman was forms only to pro-create a pure progeny with no reference to sexual desires. To maintain the spotlessness of the progeny many rules with penalization were formed and sexuality of women was controlled simply to maintain control on resources, her womb and children being one of them and so that loop continues intersex and transgenders lost their way in society and stood at wrong side of the law due to their sexuality. All these religious sanctions also flowed in legal texts as well. This research paper will be focusing on Section 377 of India Penal Code,1860 and its compatibility with Article 21 of the Constitution of India, which gurantees life and liberty to all except according to the procedure established by law and Section 377 is a procedure established by law but as per **Maneka Gandhi V. Union Of India**1978 AIR 597, procedure has to be just , fair and

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reasonable . This research paper will question the just and fairness of Section 377 which is penalizing all sexualities barring socially acknowledged heterosexuality.

## **Introduction**

Section 377 of Indian penal code is under discussion or in the limelight at least from the year 2009, in which Naz Foundation judgement was declared by Delhi High Court where Section 377 was declared as unconstitutional to the principles of fundamental rights granted by a parent law under article 14 and 21 mainly and stated that the part of section 377 which penalises even the consensual act of sexual activity among other adults is unconstitutional.

It is not the case where the problem pertaining to section 377 was discussed for the first time in the country in fact the problem was there but the legislation and the society collectively choose to ignore the problem in order to restore the functionality, morality, modesty etc.. of the society as an institution and no focus ever at least in India was there on individual rights, as a result of which there was a cold war going on between majority and minority, which began to creep over the plain white blankets used by the society to cover itself up. Considering the time and monetary limitations, this research paper is focusing on Indian society and Section 377 specifically. The research methodology adopted for this piece of work is historical analysis coupled with interview technique of data collection. The entire data has been collected and critical analysis has been adopted to derive the end result of the entire interview process.

## **Sexuality- Why Is It A Problem?**

To begin with sex and sexuality is a taboo in major parts of the world and India is no exception to it. The way both these concepts have been molded, a sort of purpose was affixed to them and that was pro-creation. The initial purpose or rather utility behind Procreation was to increase the headcount of the society. This was indeed required to protect the groups which humans were forming within themselves to utilize the resources available in order to survive. It was this need of Survival which made procreation a job and exploring of sex and sexuality a Taboo. This was followed by a chain of events where repercussions of each and every step followed each other in fact very religiously.

In order to make sure that every sexual Union results in progression it was heterosexuality which became a norm rather a grundnorm on the society. Heterosexuality became the base of

the pyramid on which the structure of the society was created. Because of biology and the nature procreation between a man and woman was only a possibility hence it was only their sexuality which was recognized and it was given a name of being heterosexual or being straight. Now if you focus on these heterosexual relations only then it has been observed by the researchers during the historical analysis of the data available which loudly says that even heterosexual unions should result in procreation now the problem before the society was how to make the possible.

In order to solve this problem, society collectively came up with a solution and burdened the sexuality with morality. The morality was not alone in itself in this problem it needed help and that help first provided by the religion and the notion of the modesty created by the society. In opinion on the researchers, this morality, modesty and religion together formulated an un-breakable wall in society which made difficult or rather impossible for sexuality to express itself. Things became so bounded / entangled that even heterosexuality found itself on a platform where it failed itself and its propagators or believers to express themselves at least not only in public but even in private spheres of their homes. This difficulty of expression was further faced by antonym of heterosexuality which is also known as homosexuality or being gay or being lesbian. but the extent of the difficulty of expression was so great that even the desire of making an expression went under covers and homosexuality became a secret which every society wanted to hide with a cost as high as the lives of its members. The fear, hatred of homosexuality has been so great that in the first place, societies put together as a whole is not ready to accept its existence willingly and for those who did, had sanctioned their acts by the usage of both religious and legal tools available at its disposal.

This fear was first highlighted in Hart-Devlin debate where link between morality and criminal law was debated. All the hot words were exchanged here on the issue of homosexuality wherein it was stated in the report that law specifically criminal law has nothing to do with morality of the society which is objecting on an act held with consent of two adults in private bedroom of theirs only because of the fact that they are biological males. The impact of this report was that an open debate about sex / sexualities came on surface and legal procedure segregated itself from the sexual acts of two consenting adults without paying any heed to the arguments of morality which till dates looks homosexuals with envy and hatred. HLA Hart in his work "Law, Liberty and Morality" had made aware of the dangers of

famous saying “Majority Rules” and questioned the practice of imposition of rules collectively with no regard to personal choices made.

### **Before Navtej**

Due to time restraints, researchers have tracked the recorded legal history from the year of 2009. Beginning with **Naaz Foundation v.NCT of Delhi**<sup>3</sup>, wherein it was held by the Delhi High Court that Section 377 of Indian Penal Code stands in total violation of the fundamental rights guaranteed by our parent law Constitution of equality, freedom of expression and liberty of life as coined under Article 14, 19 and 21 respectively. It is pertinent to mention that for the first time, it was noted by the courts of justice that legality has nothing to do with morality of the society and their job is to protect the fundamental rights allotted by the constitution so that independence, choice and dignity of human life could be restored. It was further noted by the Honorable Delhi High Court that this provision of law is a conclusion of Judo-Christian model which grants sanctity in sexual activity for a purpose only and that is reproduction of children which is biologically feasible only under heterosexual relations making all other sexual activities a crime not only morally but also in law. Society was seeking help of both moral structure as well as legal structure so that those who skip out from morally framed structure of the society could be limited by the aid of legal system and every instance of non-heterosexuality could be curbed. Then came in **Suresh Kumar Kaushal v.Naz Foundation**<sup>4</sup>, where the apex court overruled the judgment dictated by the High Court of Delhi and stated that judiciary cannot interfere with the work of legislature and gave value to a ground that, members of LGBTI community are mere handful and constitute a very small part of the Indian Society and an argument that it is merely misused sometimes, is not sufficient to declare it ultra-vires.

Then came in **National Legal Service Authority v. Union of India**<sup>5</sup>. In this case, came in the new light of wisdom, independence and justice and granted a much awaited legal identity to the persons who were not able to define themselves as a man and woman and were struggling miserably to fit in the gender roles of the society sketched in the shape of being feminine and masculine. An umbrella term was formulated coined as “Transgenders” and

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<sup>3</sup> (2009) 160 DLT 277.

<sup>4</sup> Civil Appeal No.10972 of 2013.

<sup>5</sup>Writ Petition(Civil) No. 400 of 2012.

every other sexual identity which was not recognizing itself as heterosexual was granted an option of utilizing the same , to give itself a name and a shape.

### **After Navtej**

On 6<sup>th</sup> September 2018 ,India created history by becoming 25<sup>th</sup> Nation where consensual same sex relations have been given acknowledgement and have been separated from the morality test laid down by the society from the time immemorial simply on the basis of principle called ‘Majority Rules’. Supreme Court of India, in **Navtej Singh Johar and others v. Union of India**<sup>6</sup> , struck of the part of Section 377 of Indian Penal Code, 1860 which has costed many citizens of the nation their dignities and lives not just physically but socially as well and along with it laid to the rest of the arguments rather clashes between the constitutionality and unconstitutionality of Section 377 and erased the obstruction caused by it to an individual which was risking its privacy / liberty/ choice/ freedom to express even after Justice K.S. Puttaswamy judgment<sup>7</sup>.It was declared by the apex court that consensual sexual relation between two adults are no longer concern of the penal code of India and this in opinion of researchers is a direct hit to nitty –gritty of moral structures and also to the concept of “normal and natural heterosexuality”. In opinion of researchers , the attempt of the apex court of separating constitutional morality from social morality is the key , which will protect the minority also known as LGBTI from the moral dictation of the majority which till date was hailing only heterosexuality. It was further stated by the apex court that Section 377 cannot support the argument of maintaining public morality and decency because relation of any sorts between two adults be it heterosexual or for that homosexual or transgender sex in nature in private doesnot in any way pull the moral threads of the ‘normal’ society.

### **Society After Navtej**

Now before commenting under this sub-heading , researchers are well aware of the fact that the reaction here as a matter of fact will be very nippy and full of uncertainties yet. But yet researchers made an attempt to know about the views on removal of partial unconstitutionality pertaining to Section 377 of Indian Penal Code, 1860. Researchers conducted a survey in one of the Kinnar / transgenderSamaj of old delhi. The sample size taken for this research paper was 15 and various questions related to their lives,

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<sup>6</sup> WP (CRL.) NO. 76/2016

<sup>7</sup> Justice K.S. Puttaswamy and Anr v. Union of India WRIT PETITION (CIVIL) NO. 494 OF 2012.

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sexuality, social standing were put up and their views were sorted on that. Out of all the questions asked, the questions which are of consideration for this piece of work are:-

- 1) What are your views on creation of third gender identity also known as transgenders?
- 2) Why do you think that there is so much of fear from homosexuality?
- 3) Do you think that after erasing of “problematic” part of Section 377 will bring any change for you?

For the first question 73% of the participants stated that though the term transgenders have been created but they are more at ease on being identified as ‘women’ in society which includes their representation on official papers as well. It was further stated by them that even before the NALSA judgment they did not face much of a problem for documentation as officials be it of bank or government offices were co-operative enough to identify them as women. However, researchers will like to note the fact that living in capital of the country might have included to the factor where there is awareness about the problem which cannot be assured in other parts of the country.

As far as second question is concerned, the participants were of the opinion that homosexuality is feared because society ‘hates’ it and also never gave any time to understand it. It was further stated that they as a kinnarsamaj have been excluded, it might be only 10-12 years when other people of the society have started to speak to them, visit their houses and still those who do are government officials or people from NGO in their official capacity. The head of the samaj further stated that despite this judgment, it will still take long for the society to accept anyone of them as a married partner to their children and live peacefully let alone the respect to this fact.

For the last question, the group collectively was of the opinion that this move will specifically save them from unnecessary harassment faced by them from the law enforcement authorities and residential societies and will specifically save their members who are living separately with their partners and are tortured by them only because of their sexual choices which have been limited to their private sphere but yet a bone of contention in eyes of public.

### **Conclusion**

The issue of obstruction of fundamental rights of expression including sexual expression, choices, liberty curtailed by Section 377 of the members of LGBTQI community have been

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resolved by the latest Navtej Singh Judgment. Now what is to be seen, is the effect of the judgment in long run in the society including both heterosexual majority section and homosexual minority group. It is important to understand that mere declaration of law either by legislation or by the highest court of law will not and can not force the society to follow it. This can be understood by the simple fact that Article 15 and 16 are present in our constitution from time of its formulation but yet number of women in work force of the country are disappearing day by day especially in high-end white collar jobs and the reason is lack of social support available to them to bring up their families. In opinion of the researchers, to see the result of erasing of unconstitutionality of Section 377, what is needed is extensive debate in society on 'being natural'. 'being moral' so that awareness rises with inclusion of non-metro parts of the country as well where the need of making people aware is at a higher end. And for this serious efforts not only from the government agencies are required to make the ends of dictation and execution of law meet but also "we the people", that is society of humans have to work in the direction of getting humanity right, irrespective of sex and sexuality of a person.