

# “I AM WHAT I AM, SO TAKE ME AS I AM”: S377 VERDICT AND THE WAY FORWARD

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*“If someone is gay and searches for the Lord and has good will, who am I to judge?”*

**-Pope Francis.<sup>1</sup>**

This quote reflects the multifarious connotations on the contemporary understanding of homosexuality and tolerance towards the same on a *de novo* level; since the dawn of human civilisation religion has dictated the conduct of men and women thereby compartmentalizing the society into binary units. As has been rightly said by Karl Marx, religion is opium for the masses.<sup>2</sup> The rigidity to deviate from such dictations enlarged the domain of violent acts being committed against, not only the gay claimants but also individuals suspected to be gay.<sup>3</sup>

Incidentally, Human Rights are said to be inalienable, universal and indivisible<sup>4</sup> and comprising of numerous other rights *inter alia*, right to life, right to found of a family, right to food et-al. The Indian legal system has treated right to privacy as a facet of right to life and consequently by analogy a human right.<sup>5</sup>

*“To deny people their Human Rights is to challenge their very Humanity.”*

**– Nelson Mandela.<sup>6</sup>**

<sup>1</sup> Express Web Desk, *From Denying Existence Of ‘Hell’ To LGBTQ In Churches, Here’s Why Pope Francis Has Raked Up A Storm*, The Indian Express, (Oct. 18, 2018, 3:13pm), <https://indianexpress.com/article/world/from-denying-existence-of-hell-to-lgbtq-in-churches-heres-why-pope-francis-has-raked-up-a-storm-5121762/>

<sup>2</sup> Karl Marx, the German original, *Die Religion... 1<sup>ST</sup> Das Opium Des Volkes*, (Oct. 12, 2018, 12:30pm), [https://en.wikipedia.org/wiki/Opium\\_of\\_the\\_people](https://en.wikipedia.org/wiki/Opium_of_the_people)

<sup>3</sup> Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, M. Nardi and Beth E. Schneider (Editors) with an Afterword by Ken Plummer, *Social Perspectives in Lesbian and Gay Studies*. A Reader, (Oct. 20, 2018, 1:15pm), [https://books.google.co.in/books?hl=en&lr=&id=xdbcAAAAQBAJ&oi=fnd&pg=PA412&dq=violence+on+suspicion+of+being+gay+newspaper&ots=TaqWy2Zwb&sig=gSLL7Fjo0ooO\\_Jmb1bbLu58Oha0#v=onepage&q&f=false](https://books.google.co.in/books?hl=en&lr=&id=xdbcAAAAQBAJ&oi=fnd&pg=PA412&dq=violence+on+suspicion+of+being+gay+newspaper&ots=TaqWy2Zwb&sig=gSLL7Fjo0ooO_Jmb1bbLu58Oha0#v=onepage&q&f=false)

<sup>4</sup> UNFPA, Human Rights Principles, (Oct. 18, 2018, 4:13pm), <https://www.unfpa.org/resources/human-rights-principles>

<sup>5</sup> R. Rajgopal v. State of Tamil Nadu and Others, (1994) 6 SCC 630

<sup>6</sup> Nelson Mandela, (Oct. 17, 2018, 2:12pm), [https://www.brainyquote.com/quotes/nelson\\_mandela\\_447259](https://www.brainyquote.com/quotes/nelson_mandela_447259)

However, the fact that the States have legislated on issues pertaining to private matters of an individual denies all the above-mentioned rights in toto. In such a scenario the third pillar / estate of democracy needs to accord and act as a guardian and watch dog for realising the rights therein. But alas! in 1864, during the British Rule in India Section 377 of Indian Penal Code had come into existence.

The moment Supreme Court announced section 377 as unconstitutional, the world went ecstatic especially LGBT Community in the Indian Society. Their joy, desire and to win know no bounds. This particular section has criminalised sexual acts with the same sex having utter disregard for individuals and the identities. The defect in the colonial legacy reflected in the section never took age factor or consent into consideration but only the gender of the parties involved in sexual acts. Various movements<sup>7</sup> have been carried out both with the first wave in US and subsequently percolated throughout all the nations in the world advancing the argument that not every homosexual is a criminal or homosexuality is not a crime.

Further, after the Renaissance period, with the advent of printing press, advancements in ICT, growth of human rights institution and the recent #metoo movement, individuals have been vocal about injustice and demand equality coupled with redressal for all breaches. It is apt to refer to following quote which is in ideology in itself.

“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”

-Martin Luther King Jr.<sup>8</sup>

The Five Judge Constitution Bench has pronounced Section 377 of the Indian Penal Code of colonial era as unconstitutional.<sup>9</sup> Having regard to the fact that LGBT are neither defined neither only by their sexual orientation nor by their labelling prevalent in the society. Hence, the test of *Intelligible Differentia* has been measured with the yardstick of changing social

<sup>7</sup> Pickett, Brent, *Homosexuality*, The Stanford Encyclopaedia of Philosophy, (Oct. 13, 2018, 12:30pm) <https://plato.stanford.edu/entries/homosexuality/>

<sup>8</sup> Martin Luther King Jr, *Letter from a Birmingham Jail*, (Oct. 13, 2018, 4:45pm), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html)

<sup>9</sup> Navtej Singh Johar & Ors. v. Union of India Through Secretary Ministry of Law and Justice, Manu/SC/0947/2018

norms. Since 2001, the proceedings against section 377 has begun before the Indian Courts as it was necessary to determine whether the sexual acts with the same sex is legal or not. The 2018 Supreme Court ruling on homosexuality is an example of '*Judicious Judicial Activism*' which is being tested with none other than the organic living document of India namely, the Constitution of India.

Further, the consent has been given privacy over any and every denial tactic. This essentially has contributed to projecting the proportionate relation between vulnerability and health rights of every human being. Though, the contentions were raised that fundamental rights are not absolute and S377 has devoid of unreasonableness has not been held tenable. The judgment facilitates 71 gender options as given by Facebook to its users, reflecting that the law has kept pace with advancements in ICT.<sup>10</sup>

Thus, contextual critical reference is needed for the Supreme Court's decision of decriminalising the 157-year-old- draconian law on homosexuality with underpinnings of privacy gamete. To elaborate the penal law criminalised and defined carnal love as against the order of nature whether homosexual or bestiality. Historically, the terminology 'gay' was restricted to men who have sex with men and consequently homosexuality was also termed as 'gay sex' which in itself reflects that women were either to be asexual or heterosexual only. On a careful analysis of prosecution (out of 200 or so in the last 150 years) under section 377 the accused was always the male, reinforcing the myth that women cannot be homosexual. Further, homosexuals always considered as has having hyper sexual medical disorders and thus deviants in law too.<sup>11</sup>

The judgment begins with juristic references to John Stuart Mill and Shakespeare focusing on the terminologies of identity, individuality and name which in its essence disregards Indian Literary Writers and any Indian perspective to erotic art and knowledge.

Prevailing social injustices of acceptance of diversity since ages has been categorized statistically as '*less than equal*' section of the society who have been deprived of socio-economic rights and equal opportunities thereby requiring apology. Contextual references are made to right to sexuality-sexual autonomy-choice of sexual partner- which have been debated

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<sup>10</sup> Rhiannon Williams, *Facebook's 71 gender options come to UK users*, The Telegraph, (Oct. 15, 2018, 5:30pm), <https://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>

<sup>11</sup> American Psychological Association, *Sexual Orientation & Homosexuality*, (Oct. 16, 2018, 4:40pm), <https://www.apa.org/topics/lgbt/orientation.aspx>

in the Naz Foundation<sup>12</sup> judgment wherein social morality had primacy over constitutional morality. The Naz Foundation judgment of the Delhi High Court read that S377 is unconstitutional as the values inserted in Art14, Art15 and Art21 do not apply to consenting adult as the sexual acts are being held in private and also further held that neither can be discriminated nor violate their rights on the basis of homosexuality.

The phrase '*identity is equivalent to divinity*' used in the judgement elaborates the natural rights perspective though simultaneously individual autonomy, liberty and equality have been considered as emanating from the constitution. Thus, the reference to NALSA case,<sup>13</sup> dealing with gender identity in relation to transgenders accords civil rights and observance of *fon juris* of Indian Constitution has by analogy been applied to the situation of identity based sexual orientation and choice.

Subsequently, the privacy judgment herald as the positive having impact on individuals' freedom of conduct in sexual life. For the first time '*order of nature*' has been limited to reproductive aspect rather than linking to the traditional perspective to support the same medico legal references have been elaborately mentioned to undo the Victorian mindset as its an individual choice to choose a lifestyle and partner irrespective of the gender on bed, non-conformist attitude / popular acceptancy and not to punish them as criminals.

*“Wilde had to live his life twice over, first in slow motion, then at top speed. During the first period he was a scapegrace, during the second a scapegoat. For the three and a half years he lived after his release from prison, he saw pass before him, mostly in dumb show, a multitude of people he had known earlier, who evaded him.”*

**- Richard Ellmann, Oscar Wilde.<sup>14</sup>**

In fact, the reference to Section 375 of Indian Penal Code accentuates and open the floodgates for according rights associated with companionship of gay people, namely, contemporary rights to procreation of children, marriage etc. The same can be construed having regard to Benchmark decisions delivered by the very same Indian Supreme Court as evident in

<sup>12</sup> Naz Foundation v. Government of NCT & Ors, Manu/DE/8069/2009

<sup>13</sup> National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438

<sup>14</sup> Richard Ellmann, *Oscar Wilde*, (Oct. 19, 2018, 5:50pm), <https://www.goodreads.com/work/quotes/8755-oscar-wilde>

the cases of Maneka Gandhi,<sup>15</sup> M. Nagaraj,<sup>16</sup> E.P. Royappa,<sup>17</sup> Shayara Bano,<sup>18</sup> Shreya Singhal.<sup>19</sup>

Sexual Intercourse not only plays a major role in human lives and its relations but also happens to be the biggest issue. The same has been dealt with in cases relating to relief of restitution of conjugality. In primitive times, the ancient Hindu manuscripts, architecture (Khajuraho) literary works and performing arts have been stimulated heavily with sex. Any pseudo claims of incorporating tolerance ideology from the Westerners has been set aside without explicit reference to ancient Indian texts.

The explicit mention in the 2018 decision that the Nine Bench opinion in Suresh Koushal<sup>20</sup> is unsustainable since it relied on International Precedents is to mask the glory of the current Bench. Though it can be said that the Supreme Court has discharged its constitutional duty it owed towards the minuscule faction of the society with the aid of Doctrine of Progressive realization of Rights and corresponding doctrine of non-retrogression as delineated by Edmind Burke and others. Hence, the role of the State has been modified to suit the needs of homosexuals and decriminalise the same.

The judgment reflects transition not just of society or the LGBT Community but also the honourable judges adjudicating on the matter. However, the definition of privacy was not given in the current judgment unlike in *R. Rajgopal v. State of Tamil Nadu and Others*.<sup>21</sup> The Supreme Court in the current judgment has referred to various decisions of Constitutional / Apex Courts right from United States-Canada-United Kingdom-France-Netherlands-Australia-SouthAfrica-Philippines elaborating on how laws breached, violated rights of LGBT.

It is pertinent to note that the Supreme Court has gladly accepted the submissions NGO / Civil Society in absence of any inter-governmental human rights instrument of LGBT where India is a party. The courts have inherent part to interpret the law in spirit rather than following the black letter as done previously in numerous decisions referred to in the judgment.

The quintessential linking of dignity with rights of LGBT has been put forth adequately whether on the foundational aspects of transformative constitutionalism, tolerance in a

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<sup>15</sup> Maneka Gandhi v. Union of India, (1978) 1 SCC 248

<sup>16</sup> M. Nagaraj and others v. Union of India, AIR 2007 SC 71

<sup>17</sup> E.P. Royappa v. State of Tamil Nadu and another, AIR 1974 SC 555

<sup>18</sup> Shayara Bano v. Union of India, (2017) 9 SCC 1

<sup>19</sup> Shreya Singhal v. Union of India, (2015) 5 SCC 1

<sup>20</sup> Suresh Kumar Kousha and Anr. V. Naz Foundation and Ors. (2014) 1 SCC 1

<sup>21</sup> (1994) 6 SCC 630



pluralistic society, constitutional morality, rule of law and individualism gives birth to legally sanctioned / sanctified by all the judges through concurring opinions be it Hon'ble Justice R.F. Nariman who has referred extensively to the historical development of legal precepts and judicial attitude regulating sexual conduct in England and (the then British India); Hon'ble Justice Dr. A.K. Sikri elaborating on Human Rights Paradigm; however, it is pertinent to note Hon'ble Justice Y.V. Chandrachud's castigating on the previous counterpart judgments elaborating on rights of LGBT through philosophical references to John Rawls. Hence, the recent decision trans progresses on numerous aspects on LGBT rights.

In the concluding remark one can, say humanity devoid of logical and reasonable underlying principles guiding legislative and judicial dictates is the basis for nullifying double standard laws effectuating punitive aspects of certain human acts or omissions. The essay has tried to portray an elegant and the egalitarian approach adopted by the Hon'ble Supreme Court by lighting the lamp of liveability and naturalness of human sexuality free from fear, persecution and misapplication of legal provisions not bound by territorial limitations / nation-state policy.

Thus, to conclude one can aptly say and concur with Oliver Wendell Holmes Jr. that "Life of Law is Not Logic But Experience."<sup>22</sup>

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<sup>22</sup> Oliver Wendell Holmes Jr. (Oct. 20, 2018, 2:00pm),  
[https://en.wikiquote.org/wiki/Oliver\\_Wendell\\_Holmes\\_Jr.](https://en.wikiquote.org/wiki/Oliver_Wendell_Holmes_Jr.)