

PRUNING OF SECTION 377, INDIAN PENAL CODE, 1860 AND CHANGED DYNAMICS OF MORALITY IN INDIAN SOCIETY

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Abstract

Purpose: The research paper has been written in order to analyze the impact of reading down the notorious section of Indian Penal Code, 1860 which being Section 377 which penalized every sexual act other than a heterosexual union even if consensual in the judgment given by the Supreme Court of India in *Navjot Singh v. Union of India* on the society of India. This paper aims to see its impact on the morality of the Indian community on the known definitions and working of the morality in the social and the legal system.

Methodology: In this work classical method of research has been followed which being doctrinal research also, a comparative analysis between the legal text of Section 377 of Indian Penal Code, 1860 and the judgments announced by the Supreme court of India has been undertaken with the proportional qualitative analysis done with moral set up of Indian Society.

Main Findings: The analysis conducted on law and social structure of Indian Society by the researchers point out to the fact that after reading down of Section 377, the social set-up of India is resenting the recognition granted to third sex and gender because it disturbs its moral thread which has knitted the social structure known as of now and introduces a third angle in known concepts of sex and sexuality which till now have been relying on parallel tracks of male and female sex/gender.

Application: This research piece will aid students in understanding the concept of morality and will demonstrate its effect on the working of the Criminal system of a country. Moreover, it will also give support in understanding the role of biological sex and sexual preferences in shaping law as known today.

Novelty/Originality: This research is novel in its attempt of wherein morality has been traced in the criminal legal system of the country which is most prominent in issues related to the sex of the human body and its sexuality.

Keywords: Section 377, Text, Implication, Indian Penal Code, 1860, Society, India, Morality.

INTRODUCTION

There is no doubt in the fact that ratio of Apex court of India in [Navtej Singh Johar](#) case which decriminalized consensual homosexual activities between adults, has been taken as a victory of the sexuality of LGBTQI community who had, have and still are living with the label of “being immoral” in our Society. This decision though received appreciation of International community and media around the world but within the borders of the country, the decision had churned the known definitions of as to what is sex, what is gender, what is moral, what is natural and above all what is needed to run a society with a hint of morality in its working and execution as opined by [Adv. S. Narra](#). This legal acknowledgment of homosexuality in Indian society which is labeled to be immoral by Indian society has challenged the very “basic structure” of Indian society and is questioning the very existence of law-making process, which was recommended by it years ago in order to introduce the fear of sanction in case of violation of the moral sanctity known. This judgment and few recent ratios-decide of the apex court of India have brought in the focus on sex, gender and sexuality of the human body and how they are entangled with the process of law-making and its execution. India and its society from the time immemorial have accepted only sexual union between a man and a woman and has labeled it as holy union undertaken only by the way of marriage to have children so that family name and the society, they are born into continues and flourishes happily. [Becker](#) has stated in his work that, it was this heterosexual companionship only which was the reason of inequality popping up between the two known sexes because man here was the provider while women were dependent on him with the only role of taking care of household and nourishing his children in order to continue the say of patriarchy in the society. Because of this inequality which made the status of women secondary in society, jurist developed a concept called gender justice so that concept of equality and human values could be restored in the society and women get their say and control on their lives and resources of the society which has also been vouched by [Prof. Nair](#) aptly in his work.

However, this entanglement in the judgment given by the apex court of India hits hard on the known concept of gender justice, in fact, the very concept of gender as a role is under alterations which were weighing upon the twofold gender and sex system where male sex with its masculine gender and female sex with its feminine gender was the only identified and

well taken care of subjects. But in the latest dictums given out by the supreme court of India have introduced Indian morality and the society with sex and gender which was lying dormant from ages. Its identity was willfully neglected and every attempt was made to keep it out of the mainstream society and that was intersex as the third biological sex and the third gender knew transgender in English while in India from time of sages they are being known as kinnars, hijras. Their acceptance disturbed the pattern which was known to the society and for this piece of work Indian society in particular. Introduction of third sex and gender and related sexualities in the mainstream made the society of India question everything which was known to them till [date?](#). And which is being ranged from as to what is morality to as to what is [\(un\)natural sexuality?](#). The roles and the responsibilities which have been made for man and woman have come under microscope here because everything was horizontally moving with each and had a compatible relationship with sudden recognition of third sex/ gender compelled society to think over their role allotment system also known as gender to be carried out and evaluated in the [society](#) Sketching out of a gender role for third sex will not be an easy job and a proper formulation will be requiring a considerable period of time because everything from morals to social conduct, family law to penal laws, marriage to sexuality will be needing restructuring because earlier society comprising of medical fraternity acknowledged only two human biologies and now legal verdict has introduced third sex to them. In short with this recognition society as known today is staring at a complete overhaul of its system.

Through this research paper, the researchers are aiming to detect those friction areas where the law and morality of Indian Society are clashing and making it difficult to grab hold of the higher aim of Gender neutrality and humanity in itself, in the near and distant future.

It is a very well-known fact that sexuality in India has always been a Taboo. Despite the fact that today we are living in the year 2019 with all the comforts of life and scientific advances and everything around us is so-called modernly and advanced but yet the way Indian society thinks and executes its act are still exact copy of centuries-old traditions and trumpet of morality is still blown at quite the same frequency with an added factor of rigidity where nothing seems to be changing ever. Now, coming back to the topic, one might wonder that at what is this with sexuality that even the law and its Framework are not free from and find itself entangled in the ever-changing frequency of morality, as a result of which the ultimate aim of justice, fairness, and equality which a legal framework shall aim to accomplish receives a setback and fails miserably. To discover the origin and probably a solution of this disturbing trend, researchers are focusing on the in-depth analysis of the recent Navtej judgment as dictated by the apex court of India and given the monetary and time constraints of the research will be limiting their focus area only on Section 377 of Indian penal code 1860. The reason for the limitation is also the fact that it is this particular provision of the Indian Penal Code, 1860 which is directly or indirectly talking about sexuality, making it a subject of penal laws of India. The section dictated originally that any non-heterosexual union is an offense. It further states that any sexual activity which is against the work of nature is a legal offense. However, with the recent legal dictate of the apex court of India, the legal frowning has been reduced to penalization of non-consensual sexual activities, bestiality only.

LITERATURE REVIEW

The spotlight is thrown first on the legal text of section 377. This provision is marking its presence from the 6th of October 1860. It is the day Legislative Council of British Crown awarded consent to it through the then governor-general of India. It finds a place under the heading of chapter 16 which penalizes offenses affecting the human body. The title which has been awarded to it is that of unnatural offenses making the heading itself quite interesting and intrigues the mind of a reader as to what is so unnatural which affects the human body in particular and is grave enough to be categorized as an offense.

For better understanding, researchers have broken it down to make the reader understand the bare text of the law. It simply says that whenever a person indulges in sexual intercourse which is against the order of nature with a man, woman or for that matter even an animal, such acts shall be penalized with imprisonment of life or with imprisonment for 10 years and fine. It further explains that to attract the Section, penetration is sufficient. In the [Childline India](#) case, the apex court of India went with core text and stated that to attract Section 377 two ingredients are required first being carnal intercourse and second sexual act which is against the order of nature. However what is important to note that despite getting the opportunity of interpretation, the court chooses to stay mum on as what is the order of nature and how can one can go against it?.

Since our focus area is only Indian laws and since the year 1860 the law has been silent on these questions and even the childline judgment and many others have miserably failed to answer these questions. It is not that these questions were raised before the courts of justice only in the given year of 2011 when the Childline India Foundation case came before the bench of Supreme Court. In fact, Section 377 has always been the bone of contention from initiation itself not only on India but in the parent country Britain itself. The evidence of this contention can be seen and in fact, has been noted in black and white in the debate of Hart and Devlin wherein the [Wolfendencommittee](#) report has been discussed and debated in detail which indeed gained the attraction and brought the fascination of law and society on the sexuality of a person out from the closet, has indeed bifurcated sexuality from law and said that law has nothing to do with what is happening in the bedroom of two

adult people who have consented to any given sexual act between them. As a result of which buggery act in Britain was abolished and homosexuality was no more a crime in Britain.

Unfortunately, the presence of section 377 still remained in bold in India even after that for over 100 years and homosexuality which was an open secret became a legal offense and morality of the society got so implicated in the execution of the legal text that the values of justice, fairness which is the ultimate aim of a legal system got lost in turn. And came into the picture the blatant neglect of human rights of which before independence the sacred text was vouching about and even after the independence, the Indian Constitution was advocating about.

As observed by [Spear](#) in her work that Indian society was not working in isolation and knowingly or unknowingly was in tune with the rest of the world where patriarchy was in control and only two biological Sex and gender that is being male/masculine and female/feminine were accepted. This acceptance was also highlighted and relied in the work of [Gurven and Hill](#) wherein it was emphasized by the authors that because of the comfort and ease of doing things where the male sex because of their biological capacity were taken to be Hunters and gatherers of the food and became providers while the women because of their biological capacity of producing children became the child-bearer became mute receivers. In the opinion of researchers, these biological capacities became the way in which the societies were being formed and specially for the women it sooner started resulting into a vice and in fact, they became a resource to be tapped, to increase the headcount of the society for supporting the given Nomadic nature of initial societies because Higher the number of people in the tribe better are they equipped for their fights of food and land improving the chances of survival which is also confirmed by the work of [Kristen](#).

The survival was possible only by the union of a man and woman who was blessed with a biological capacity of producing children which were named as heterosexuality and was thereby celebrated as it made survival possible as also sated by [Rada](#) in her work on gender stereotypes. It was because of this reason that sexuality became a primary concern of the society and only sexual relations between a man and a woman were accepted with added condition that it shall result in progeny making penile-vaginal intercourse an accepted norm of nature and indeed the very nature of the natural act, which is celebrated in the society and talked in law and all the sexual act which are not resulting in procreation of children became unnatural and immoral as well as a legal offense which is the very same unnatural act in law which is against the order of nature also professed not only in ancient dictates of the land but practiced and advocated even at the present presumably modern [times](#), which section 377 till the year 2018 was aiming to punish and sanction with the heavy hand.

HYPOTHESIS

This work is initiated by keeping in mind the proposition that the biological sex of the human body has affected the working of Indian criminal law and its system. It is further supposed that morality which has knitted the social structure of Indian society has made its way in the penal laws of the country wherein sexuality other than heterosexuality is termed to be still a moral offense despite the fact that the legal system has withdrawn itself from the variations of sexuality.

METHODOLOGY

In this research, the researchers have adopted the doctrinal method of research wherein various cases have been analyzed by the researchers. Thereafter a comparative analysis has been undertaken here between the black and white text of law with ratio decendi and obiter dicta formulated by the courts of law under judicial activism. Subsequent to that evocative assessment was made with the moral beliefs of Indian Society.

RESULTS

The fascination of the society with sexuality is not a very simple concept which can be easily elaborated. In fact, it is very difficult to understand why date society is so fascinated with sexuality despite knowing the fact that the human body like every other mammal is a sexual being and is entitled to enjoy its sexuality and celebrate it in the way that particular person wishes. Surprisingly the very same society is very well aware and in acceptance of homosexuality in other mammals. It is scientifically proved that homosexual relation exists in other mammals like lions, dogs, rabbits etc. Which demonstrates that there is nothing unnatural about homosexuality and is not something which is known only to humankind. It is very well present in other creatures of this world which are originated in nature itself and hence homosexual acts between two consenting human bodies cannot be an unnatural act in itself. As already explained above, the initial requirement for bifurcation based on sex and gender was to distribute work and make survival possible. The survival through procreating children was so much that any sexual act which was other than the penile-vaginal intercourse was sanctioned and was heavily looked down upon and sexuality became a task rather than a pleasure to be enjoyed by humans and labeling of sexuality as hetero and homo made sure that pleasure is evaporated out of natural need of human body and burdened it with only one purpose which was procreation.

Thereby society as a calculated tactic engaged the power of the divine to make sure that people abide by this penile-vaginal intercourse and produce children. As pointed out by [Mclaren](#), this engagement was then labeled as morality which begins to dictate as to what is right and what is wrong and how to live in a society and what to do to, so as to always be a part of it. This morality became the fabric and everybody without fail began dressing in the same. Though sometimes the shape and size of the bodies varied no mixing in the initial fabric was accepted. For instance, same-sex acts between two males were a moral crime but nothing as such has been never stated between same-sex acts of two biological females. And to make things more complicated, historically no evidence can be found to trace the sexuality of third biological sex known as intersex.

Heterosexuality which was rebuilt with the title of natural and moral to copulate made homosexuality an immoral act. However, the sacredness of divine and threads of morality began to give away and something extra was required by the society to keep its execution intact and this extra was raised out in the legal framework which was drawn by the society in name of law and order. It was this legal sanction that put weight on the moral dictates of the society and made sexuality other than heterosexuality a crime which was awarded imprisonment as high as that of life and fine.

Now when in 1860 homosexuality was declared as an unnatural offense under section 377, all other non-heterosexual tendencies got merged together and were brushed under the carpet as an unnatural acts or something against the natural course of business, the morality of Indian society got excited and dictated it's victory over its moral fibers and offered to explain as to what can be an accepted sexuality or rather Immoral sexuality and again created the fact that it is only the heterosexuality which results in a childbirth is accepted by the divine while rest all other acts of sexuality which is intended for pleasure are nothing but moral sin and also penalized with the heavy hand of legal hammer.

It is not that section 377 has gained its attention only by the recent judgment of the Navjot Singh Johar case but in fact, it had been a long attention which was left unattended notably at least since 1994 and it was revived only when an NGO namely AIDS Bhedbhao Virodhi Andolan filed a petition in the High court of Delhi against the decision of Kiran Bedi, the then superintendent of Tihar Jail when she refused to allow its volunteers to distribute condoms among the male jail inmates as reported in [Indian Express](#). It was then for the first time when the same-sex relations between men were highlighted in conservative Society of India and went to the public forum of the courts of Justice, however, this NGO petition was dismissed by the Delhi High Court on the grounds of non-prosecution as a group itself ceased to survive.

It was then in the year 2001 when the [Naaz foundation](#) case came knocking at the doors of Delhi High Court and challenged the constitutionality of section 377 and in 2004 the Delhi High Court comprising of a two-judge bench of chief justice B. C Patel and Justice Badar Durrez Ahmed dismissed the case in 2004 labeling it has a matter of only academic indulgence and utilize the theory of no locus standi. It was further stated by the court that Naaz Foundation was not affected by Section 377 in any case and hence is not eligible to challenge the law. However, Naaz Foundation filed a review petition which was again rejected by the Delhi High Court. Then in 2006, the Naaz Foundation approach Supreme Court through appeal which ordered that the case be remanded back to Delhi High Court can the matter be heard on merits only. Then in a groundbreaking move in 2006 itself national AIDS control organization filed an affidavit before the Delhi High Court stating that the presence of section 377 is a blocking obstacle before it as it stops the acceptance the homosexuality and knowledge of protection and prevents the efforts to educate about HIV to people in same-sex relationships. Then in 2009 the Delhi High court announced and read down Section 377 of Indian penal code and declare that consensual act between two adults in private is beyond the purview of law or any bar to it is violative of Article 14, 15 and 21 of the constitution and was the stated that section 377 continues for all non-consensual sexual acts and also for the same-sex acts where minors are involved. However the matter did not go well down before the morality of Indian society and 15 Special Leave Petitions were filed to challenge the Naaz foundation judgment and in the year 2013 through [Suresh Kumar](#) judgment, Naaz Foundation judgment was reversed and the sanctity of section 377 was restored as a result of which sex between two consenting adults again became a crime. However the tables began to turn in 2014 through [NALSA](#) case, the apex court of India recognized that there is a presence of third sex and gender in the society which needs protection and granted constitutional rights to them under the umbrella term of "transgender" where all the members and all sexualities other than known heterosexuality popularly known as LGBTIA community became protected subjects of law. It was this recognition of the transgender community and their rights which again brought the sexuality on the table and again a fight became visible to recognize homosexuality and all other known sexualities other than heterosexuality as normal and a natural way of enjoying sexual pleasure. This fight gained more momentum after the judgment of [Puttaswamy J. \(Retd.\)](#) The case where the right to privacy became a fundamental right and paved out a way to question the notion of law which was getting into the bedroom of two consenting adults only on the basis of their same-sex and sexual attraction towards each other at their own sweet will and for their own pleasure. It was on 6 September 2018 when and through Navtej Singh Johar v. Union of India when Section 377 of Indian penal code was finally read down and decriminalization of homosexual acts between two consenting adults in a private setting were identified and sexuality and most importantly human bodies and their sexual will was given its much-awaited freedom from the legal clutches.

CONCLUSION

To brief up, researchers are of the opinion that it is only after Navtej Judgment, human rights and the spirit of constitutionalism have in real being recognition in our Indian Society. Now, what is to be seen that whether acceptance to the non-heterosexuality by the society as a whole will be given and when will the society lift the veil of normalcy or abnormally from sexuality. As of now, it will be too quick to reach the conclusion of acceptance or non-acceptance but still, the sexuality of few is deformity for the majority and law by its decree is trying to bring a change in this majority.

LIMITATIONS OF THE RESEARCH

As far as limitations of this research piece are considered they mainly have been fiscal and related to time. Thereby doctrinal research to track the effects of the sexuality of a person in the morality of society has been undertaken keeping in mind the social set-up and legal framework of India only.

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