

A New Era of the Rise of ‘the Other’

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On 06 September 2018, the Supreme Court of India issued a verdict unanimously, ruling that Section 377 is unconstitutional as it infringed on the fundamental rights of autonomy, intimacy and identity, thus essentially legalising homosexuality in India. The Court explicitly overturned its contradictory 2013 judgement. They accepted that criminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional. In essence, the passage of this verdict decriminalises homosexuality and rules that consensual, adult, gay, sex is not a crime. The lives of the LGBTQ community will now drastically change for the better in a variety of ways. Two decades ago, this momentous decision by the Supreme Court of India was unimaginable; most ‘gays’ in India felt confusion,



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anger and sadness, realising that homosexuality was considered a criminal act – most felt horrified at the idea of people not being allowed to choose who they loved and wanted to be with. This expert speak section aims to look into the psycho-socio-economic implications that the LGBTQ community have been facing over the centuries, not just in India but also abroad and the repercussions of doing away with Article 377!...literally speaking, ‘the rise of the other’... gender.

“History owes an apology to the members of the LGBTQ (Lesbian, Gay, Bisexual and Transgender and Queer) community and their families...for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution.” With these words, Justice Indu Malhotra, one of the judges of the Indian Supreme Court, held that section 377 of the Indian Penal Code (IPC), which criminalises consensual, sexual acts between adults of the same sex, was unconstitutional.

The pronoun “he” is used to refer to males and “she” to refer to females. But in today’s era, some people have started identifying themselves as neither gender, or both (neither ‘he’, nor ‘she’ but ‘they’ or ‘ze’) which is why I refer to this new age era as *the rise of ‘the other’*....

To be identified as “genderqueer”, (even if one is) is not acceptable to many people and so a variety of terms have been coined to describe the various transgender terms: *Transgender*: Applies to a person whose gender is different from their “assigned” sex at birth. *Cisgender*: Applies to someone whose gender matches their “assigned” sex at birth. (i.e., someone who is not transgender) *Non-binary*: Applies to a person who does not identify as either “male” or “female”. *Genderqueer*: Similar to “non-binary” – some people regard “queer” as offensive and so prefer to be called by the above term, whereas others embrace this one. *Genderfluid*: Applies to a person whose gender identity changes over time.

Increasing acceptance of the ‘gays’ and the ‘lesbians’ amongst us is one of the most defining social changes in the past century. Though people have branded homosexuality as wrong or “queer” since the last several centuries, some factions of society, today, have started concurring with the statement that homosexuality is “not wrong at all.” Today, the number of people tolerant towards the LGBTQ groups has increased to more than half of any given population, whether abroad or back here in the home ground. The sweep of these shifts, as well as their broad social and political consequences, has sparked a great deal of interest across the social sciences.

The Anatomical Sex

A person's sex as male or female stands as a biological fact that is identical across all countries and cultures. What that specific sex means in reference to a person's gender role as a woman (care-giver) or a man (bread-winner) in society also varies very little, cross culturally. The third gender or third sex is a concept in which individuals are categorized into a social category, either by themselves or by society, as neither man nor woman, thus recognizing three or more genders. So, if we were to classify today, as to who is considered masculine or feminine, the scenario has changed quite a bit, slowly but surely over the last few centuries, both abroad and in India and has become food for thought all over the world.

The Gender Roles

A gender role is "everything that a person says and does to indicate to others or to the self the degree that one is either, male, female, or androgynous/transgender. ("hijra" in Indian terms or a member of South Asia's traditional transgender community) This includes appearance, mannerisms, sexual and erotic arousal and response as well as clothing preferences. Gender identity is one's own personal experience with gender role and the persistence of one's individuality as male, female, or androgynous, especially in self-awareness and behaviour.

Gender systems have been the social structures that establish the associated gender roles in every society. The 'gender binary' is one example of a gender system. A gender binary is the classification of sex and gender into two distinct and disconnected forms of masculine and feminine, similar to the two accepted biological sexes.

Not all cultures have strictly defined gender roles. In the case of the "Navajo", there were four genders: man, woman, masculine female-bodied person ('nádleeh'), and feminine male-bodied person ('nádleeh'). Intercourse between two people of different genders, regardless of their biological sexes, was not stigmatized. Most cultures, unlike the Navajos, however, put a stigma on those individuals who indulge in same biological sex intercourse/love, even going a step further and branding them as common criminals, punishable for no other offence than their own carnal sexual inclinations.

The recognition of more than two sex/genders is recorded in India too, as early as the eighth century BCE. Unfortunately, the Indian culture today frowns upon such 'same biological-sex' liaisons. (An after effect of the British colonial rule perhaps) Another point in fact is that these cultural definitions can be easily questioned by the various art forms in the ancient Ajanta and Ellora caves,

dating to before the advent of the East India Company or the British rule in India, which tell us an altogether different story of an Indian era a long, long time ago, where homosexuality was an accepted norm.

Section 377, criminalising homosexuality, was introduced in Indian criminal law by these western oppressors and their western notions of morality, based on Abrahamic ideologies and not the ancient Indian dictums. At the time of its introduction, limited consideration was given to a contradictory morality that had existed for several centuries in the subcontinent, and which had openly acknowledged and recognised homosexuality, and definitely did not criminalise it.

Only in cultures where the gender binary is prominent and important, transgender people are considered to be a major exception to the societal norms (related to gender). Intersex people, those who cannot be biologically determined as either male or female, are another obvious deviation. But, it is now becoming increasingly important to recognize that many cultures have their own practices, independent of the gender binary accepted by the West.

The LGBTQ Community

Defining gender roles leads us to defining sexual orientation and sexual orientation is one of many biological phenomena, which is natural and inherent in an individual and is controlled by neurological and biological factors. No biological phenomenon, as long as it is not harming any other human being, under any circumstances, deserves the label of “a criminal behaviour” to it. Serial killers and murderers, who actually harm other human beings, too are allowed this dignity of a benefit of doubt based on neurological factors...then why not the harmless citizens of the LGBTQ community?

The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one’s sexual orientation would therefore entail a violation of the fundamental right of the freedom of expression.

In contrast to the age stability observed for many other attitudes, whereby opinions formed in young adulthood generally change little with a little maturity, societal acceptance of homosexuality largely reflects change within one’s community. No kind of prejudice and discrimination can however, continue in perpetuity.

The LGBTQ Population in India

There are no official demographics for the LGBTQ population in India but reports from 2012 suggest that the government has pegged that around

2.5 million people in India were homosexual. These figures are only based on individuals who have spoken about belonging to the community to the Ministry of Health and not the ones who have not publicly proclaimed themselves yet. The actual statistics may be vastly different since many have so far feared and some still fear discrimination and social stigma.

More than half of the Indian citizens today, agree that gay, lesbian and bisexual people should enjoy the same rights as straight people, though a small percentage continues to disagree. The educated and forward classes also agree that the LGBTQ community should be protected from workplace discrimination and people in same-sex relationships should not be charged as criminals. As for transgender people, again the majority of Indians agreed that they should have the same rights, and be protected from employment discrimination as well as given the freedom change their legal gender.

So, it is easy to see why the supreme court of India too needs to recoup on the original section 377 which seems really obsolete and unfair in today's times. Disgust and contempt have been the central themes of feeling for section 377 since its inception. Historically, the feeling can be dated and so can the changes in feeling by the very public remarks made for/against it: The main drafter of the IPC, Thomas Macaulay, in 1830 called homosexual sex "odious" and "revolting". Soon, thereafter, a court in north India ruling on the prosecution of a 'hijra', commented on the physical examination of the accused and commended the police's desire to "check these disgusting practices". Before independence, a judge in Sindh (now Pakistan) described a man who had consensual sex with another man as "a despicable specimen of humanity". After independence too, as recently as in 2003, the government of India said that decriminalising homosexuality would "open the floodgates of delinquent behaviour". And in 2013 a Supreme Court ruling on an earlier challenge to section 377 (overruled by the judgment of September 2018) held that LGBT people constituted a "minuscule minority" who bore only "so-called rights". Clearly, this contempt had and continues to have real consequences.

In the late twentieth century, when the HIV/AIDS epidemic arrived in India, homosexuality became synonymous with the disease and contagion in the public mind. In 1992, the Delhi police arrested 18 men in a park as part of a "clean-up" drive. The allegation was not that they were having sex but "were about to indulge in homosexual acts". In 2006, the Lucknow police raided the offices of an HIV/Aids outreach organisation on the grounds that it was abetting the commission of a section 377 crime. And, in Haryana, two women were brutally beaten to death by their nephew for being in an "immoral" relationship.

This is merely a drop in the ocean of harassment, blackmail and ostracism faced by the LGBTQ people on a daily basis. While in a narrow sense, the September 2018 judgment is about section 377, it is so much more than that. Like the LGBTQ movement in India, this case was forced to come out of a need to address every day, structural and endemic forms of violence against a section of people of our society.

Same-Sex Marriages

As a result of this stigma attached to anyone falling outside off this gender binary, the idea of ‘same-sex’ marriages was also taboo all over the world, till as late as the 1980s. The issue of same-sex marriage was a focal point in the media of a developed country like the U.S. too. The topic garnered a substantial amount of attention in 2013, with the repeal of the Defence of Marriage Act, and the legalization of same-sex marriage in eight U.S states and five foreign countries, as well as the passing of the Russian Anti-Gay Law.

However, a lack of human interest perspective was also unearthed because the general citizens of these countries showed little reaction when exposed to the issue of same-sex marriage. But, now, their acceptance in the woven fabric of modern society has become a stand of forward thinking across all major ethnic and racial groups and among all but a handful of nations. Is India one of this ‘throwback’, narrow-minded nations?

In India, most public opinion attitudes are reasonably stable over time. The typical change rates of public attitudes cannot be quantified as one cannot ascertain the exact extent to which changes in same-sex marriage approval have occurred (or liberalization in attitudes toward gay rights in general, for that matter). This is because many do not voice their opinions in public surveys, either out of embarrassment or simply because they do not want to be seen taking a stand on such a taboo issue.

One can demonstrate and discuss several potential historical and social movement theory explanations for the rapid liberalization of attitudes toward gay rights. But, public opinion regarding LGBTQ rights in India is complex. According to a 2016 poll by the International Lesbian, Gay, Bisexual, Trans and Intersex Association, only one-third of Indian people were in favour of legalising same-sex marriage, with a further one third opposed to it. Another survey by the “Varkey Foundation” found that support for same-sex marriage was higher among the younger 18-21 year olds, more than half the population, rather than in the older age groups who appeared to be still prejudiced against this taboo topic.

India is a secular country with citizens following several religions, and so, it goes without saying that religious variables play a powerful role in influencing any thought-process, especially one such as the gender binary and in structuring attitudes about same-sex unions. If we were to analyze the relationship between religion, measured in terms of religious affiliation and 'religiousness', on one hand and public opinion about same-sex marriage, civil unions, and a federal constitutional amendment that aims to prohibit gay marriage, on the other, the chances would be that religious variables perform better than the demographic measures in models of attitudes about same-sex unions. Those who participate actively in a devout, religious life and individuals with conservative attitudes toward morality and secularism are more likely to oppose such unions and the broad minded, educated class is much more likely to support same-sex unions.

Moreover, homosexuality appears to be a major component on the "amoral values" list. On the contrary, religious variables play a weaker role in predicting support for a constitutional amendment to prevent gay marriage than they do in predicting attitudes toward same-sex unions. So, all in all, religion does not favour same-sex marriages in India.

In spite of this bleak scenario, overall, support for same-sex marriages clearly appears to have increased exponentially in the past two decades. And about half the change appears to be due to individuals changing their minds in favour of same-sex marriage; a somewhat modern, open-minded thinking of an advanced species. The differences in these trends are not uniform and probably arise from differences in individual attitude change, as effects are similar across sub-populations. Ideological and religious differences remain very strong but do not seem to be widening the chasm between the actual differences. Whatever the reason, whether cohort replacement, other population changes, changes in religious beliefs or individual attitude, there is a rising support, which varies meaningfully across all communities.

Doing away with Section 377 has legalised homosexuality but nowhere does it mention legalising of 'same-sex' marriages. Earlier this year, a lesbian couple jumped to their death. In their notes left behind, they are reported to have written: "We have left this world to live with each other. The world did not allow us to stay together." Scrapping section 377 seems to make it possible that people may no longer see fear in the future; a hope appears to be blooming, but how far does it actually remove that inherent feeling of taboo for same sex marriages that has been inculcated into us for so long?

The Naz Foundation

It has been a long and trudging journey that started with the "Naz Foundation", a non-governmental organisation (NGO) fighting for gay rights;

it instituted the original lawsuit in a Delhi high court in 2001, seeking to decriminalise homosexuality. Almost immediately dismissed, the Supreme Court however returned the petition to the High Court to reconsider the case on merit, leading to the widely-documented and widely publicized hearing that followed. In favour of the LGBTQ community was the fact that this case included contradictory stands taken by the government itself.

In 2009, delighting the LGBTQ community, in a landmark judgement, a division bench of the Delhi High Court held, among other things, that section 377 violated fundamental human rights as delineated in Article 21 of the Indian Constitution. Dampening this short-lived euphoria, in 2013, a two-judge bench of the Supreme Court reversed the HC's 2009 decision; a thoughtless judgment which re-criminalised millions of Indians in an instant.

The 'Naz Foundation' was persistent in its aim and filed a curative petition, arguing that the 2013 decision wrongly held that a "minuscule fraction of population cannot claim fundamental rights". Meanwhile, another two-judge bench of the Supreme Court had granted "personhood" to transgenders in 2014, a sign that the highest court was open to considering more expansive notions of freedom.

The effect of this relentless persistence led from one thing to the other and finally in 2017, a constitution bench of the Supreme Court held that privacy is a fundamental right, calling out to all who would hear that the Section 377 decision was simply "unsustainable" and that the "right to privacy and the protection of sexual orientation lying at the core of the fundamental human rights was not being guaranteed as per the Articles 14, 15 and 21 of the Indian Constitution". This bench did not out rightly declare Section 377 to be unconstitutional, as the review petition was still pending for determination. But, everyone had come to a realisation and a sort of unspoken consensus that it was only a matter of time when it would be reconsidered.

The present decision, as much as it was expected, leads one to believe that the Indian judiciary is indeed trying to uphold the fundamental rights of all sections of society in the country, something that should have naturally been a part of our constitution, seeing that we are one of the biggest democracies in the world today. The legislature and the executive each had their chances to undo what our colonisers had left behind, but chose to do nothing. The judiciary, after swinging this way and that, eventually found balance in its scales, and brought order to chaos.

Section 377 Unconstitutional

On 06 September 2018, the Supreme Court issued a verdict unanimously, ruling that Section 377 is unconstitutional as it infringed on the fundamental

rights of autonomy, intimacy and identity, thus essentially legalising homosexuality in India. The Court explicitly overturned its 2013 judgement. The overruling of section 377 on this very sensitive topic of LGBTQ has thus had an impact that is being felt much beyond India. Justice AP Shah, credited with being the architect of this landmark Delhi high court judgment that first decriminalised homosexuality in July 2009, had stated that sixty-eight years after the founding fathers of the Republic of India encoded the right to freedom of life and liberty, the Supreme Court has finally upheld the right of every human being to be free, regardless of sexual orientation or identity. With this, the section 377 of the IPC will no longer apply to consensual sexual relations among adults in private. By ruling against the colonial-era law, the court essentially delivered a powerful riposte to institutionalised disgust and contempt aimed at the LGBTQ community in India.

Out of context, the words used in the 2018 judgment, like privacy, dignity and equality, can seem like a salve to the wounded souls of many a person of the LGBTQ clan. In fact, they lie at the core of what it means for our communities to survive. Earlier this year, a lesbian couple jumped to their death. In notes left behind, they are reported to have written: "We have left this world to live with each other. The world did not allow us to stay together." This judgment makes it possible that people may no longer see fear in the future, but hope.

There was no possible, explicable justification for this law to remain. The Indian government as well as other public institutions, over the decades, have tried to aid and abet this antiquarian, outdated, ideas which are rested on nothing more than deep-rooted gender stereotypes, passed down through the ages that merely reinforce sexism. Hence the effort to end discrimination against homosexuals should be seen more as a part of the effort to end the inequality of the sexes than to give rights to the LGBTQ community. The sexual orientation of an individual is natural and discrimination on the basis of sexual orientation is a violation of freedom of expression. The members of the LGBTQ Community have the same rights as any ordinary citizen/human being. By labelling gay sex as a criminal offence, society is being irrational and this is reprehensible and indefensible. This provision of IPC (that consensual sex between LGBTQ people is criminalized) is in direct violation of basic democracy as originally provided by the constitution of India.

The Supreme Court's decision to decriminalize homosexual behaviour can be considered as the first step towards righting an age-old wrong and providing equal status and rights to the LGBT community in India. It further opens doors (which should ideally have been open in the first place, democratically speaking) for the community to claim their right to marry, adopt, and even have a family.

Since the judgment only dealt with the criminalisation aspect of Section 377, it can be expected that the laws on same-sex marriage, adoption and inheritance of LGBT community will soon follow.

The end of section 377, thus marks the end of an era, where this law will no longer be used or abused, to foster, or to promote an atmosphere leading to human rights violations of any kind, and will hopefully put an end to the unjust discrimination that many millions have faced over the years, because of their sexual orientation or gender identity. It also marks an era of the rise of the “OTHER”...gender. India, henceforth, joins a proud league of nations that recognises true freedom of gender identity and sexual expression.

This ruling of the Supreme Court of India will not impact India alone, but will have far reaching consequences abroad too. It has thankfully undone the artificial, unfair construct of the Section 377, and in doing so, it also recognises the triumph of constitutional morality over public morality. It is becoming evident that the effect of this judgement is being felt in other common-law countries, hopefully, providing an impetus or a guideline to have equivalent provisions in their statute books, and to critically consider the lawfulness and legality of provisions similar to the ones that label consensual sexual relations as a criminal activity. On 11 November 2013, even Bangladesh decided to begin a third gender birth certificate. Even as we speak, the UK and other jurisdictions are abandoning the criminalising of gay sex for a more reasoned position of homosexuality being nothing but a variation in human nature.

Throughout this process of deliberations around law making generally, one should not lose sight of the fact that laws like those found in the (IPC are neither Indian nor god-given...and definitely not immutable; so, they tend to lose value if they are not abandoned, rewritten, or amended, to suit changing social, cultural, and economic needs. Our immediate and jubilant reaction of relief, and joy, should not make us lose focus on the fact that this decision is only the beginning of the long walk to ultimate freedom for all humanity.

International law is very strict and prohibits any kind of discrimination on the grounds of either sexual orientation or gender identity. The Office of the UN High Commissioner of the Human Rights is obliged to clearly state in favour of protection of all individuals from homophobic violence; prevent such violence; decriminalise homosexuality; prohibit discrimination; and respect fundamental freedoms of all people, irrespective of the community to which they belong. The removal of Section 377, which decriminalises homosexuality, is merely one step towards meeting these obligations.

Justice Kennedy’s majority opinion in the gay marriage ruling in the US Supreme Court clearly stated: “The nation’s courts are open to injured individuals

who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.”

Conclusion

Ideally, a law should be enacted, such that it explicitly protects against discrimination, rather than promotes it. The detrimental effects of laws like Section 377 should be recognised before their conception and nipped in the bud before they affect generations of people in our country in such a shoddy fashion. The target populations have not just been psychologically scarred, but subjected to painful violence and discrimination of a severe degree, not just at the hands of the police and enforcement authorities, but also by the society at large.

We can change the law, and then, change it again...maybe a million times over...but will we be able to change the society at the grass root level? One must remember, that the LGBTQ movement talks of a tomorrow free from all forms of collective oppression and aims to kindle the hopeful dream of an equal society. How much will the court's judgment (removal of the section 377 to be specific) help in realising that dream? The LGBTQ are frantically calling for freedom, and one cannot help but wonder whether the removal of just this one section will make a dent on the discrimination, oppression and humiliation faced by them over the past few centuries. Will it ameliorate the suffering of a community that has virtually not been able to keep pace with the rest of the rat race?

So, this reading down of Section 377 is only the start of a larger drive to protect this idea of freedom of personal identity. Going forward, this cannot mean mere passive non-interference, (because that is all the scrapping of section 377 in September 2018 has achieved so far) but also active protection of, vulnerable populations. This may also mean that some form of affirmative action is required to make sure that frictionless assimilation actually takes place.

Beyond decriminalising homosexuality, we now also need to think about how the LGBTQ community: persons who identify themselves as being outside the conventional gender binary, can be integrated into society without using their gender or sexuality as the focal point of their identity in the society. So, we need to start rethinking on how social institutions like marriage or parenting can be redefined...we also need to redesign pedagogical tools to embrace these differences and redevelop institutions like schools and workplaces to make them all inclusive without any form of discrimination.

Social scientists often have been called upon to weigh in on such social issues, and they have a solution to this pressing question of the 'other' gender or

same-sex marriages as well. When they draw conclusions based on quantitative and qualitative data from national and international surveys, the statistics is nothing but the very public voice of society at large. This article has made an attempt to evaluate four of the most prominent arguments raised by opponents of same-sex marriages in court cases. Though the data sometimes, undermines (and may ultimately define) these arguments and counter-arguments, four lessons about the gender issue can be surmised from public opinion:

- (1) Opposition to the LGBTQ community is merely hostility by a faction with a different opinion.
- (2) Marital status can bring clear benefits to couples, whether ‘same-sex’ or otherwise.
- (3) Marital laws should be uniform across the country and to a larger extent across the world to prevent vulnerability and discrimination of same-sex couples and the LGBTQ community.
- (4) Legal alternatives to same-sex marriage do not obviate the need for same-sex marriage.

True and complete freedom is yet to be achieved. It can be said that complete freedom has been won only when everyone, all over India, genuinely and wholeheartedly, believes that no person is ‘different’. The idea that everyone is equal should be sacrosanct: that everyone can love equally, freely and fearlessly. The day we can assure each ourselves of this, is the day we can say that we have truly won our freedom because the freedom of the LGBTQ community is really the freedom of humanity as a whole. The recently expanded Yogyakarta Principles, referred to by both the Delhi high court and the SC in their judgments, further reiterates the application of international human rights law to LGBT people. This is an opportune moment to adopt these principles in a structured manner. Inarguably, this decision is only the gateway for many more changes.

It is certainly difficult to right a wrong by history. But, we can set a better course for the future. This is beyond decriminalizing homosexuality. It is about people wanting to live with dignity and other people allowing them that dignity.

Furthermore, discrimination on the basis of sexual orientation is a violation of the Indian Constitution and a gross injustice on one faction of our species if human rights are considered as they should be.

All this again, merely highlights the continuing importance of social science research—in particular, public opinion research—for understanding issues that will emerge as the perceptions of and legal rights afforded to same-sex couples all over the world.

So, it is still left to be seen what the far reaching consequences of removing Section 377 are going to be in India in the near future. Is it the beginning of a storm?...or has it not even begun to make a dent in this massive structure of centuries of wrongly conceived beliefs and prejudices. Has there really been the rise of the other? ...Only time will tell. But the change in public attitude is promising and the future appears to hold a lot of good tidings for the LGBTQ community.

Yay! for the LGBTQ community the world over! Every country that decriminalises homosexuality is new hope for the whole human race, worldwide. India, today like ancient India, before the advent of the British has taken the first step towards becoming socially liberal. Next step would be to legalise gay marriage. We live in interesting times, that's for sure. Though this only means the dawn of a new era....

...it is the era of the "OTHER"!