Section 377: Whose Concerns Does The Judgment Address?

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The Supreme Court’s recent judgment reading down Section 377 of the Indian Penal Code is a landmark on many counts. But while we celebrate the judgment, it is important to remember that Section 377 meant different things to different groups of queer people. While for some it was the symbolic harm of their desire being designated as “unnatural,” for others it had a material significance in their everyday negotiations with harassment and violence in public spaces.

In Navtej Singh Johar and Others v Union of India (2018), a five-judge bench of the Supreme Court found Section 377 of the Indian Penal Code (IPC) to infringe upon key fundamental rights, and read it down to exclude consensual sexual acts done by adults in private from its ambit. While the verdict has been widely reported and is being celebrated as the Court having “decriminalised homosexuality,” it must be noted that homosexuality or sexual attraction towards persons of the same sex or gender was never a crime in the first place. On the face of it, what the section did was to criminalise certain sexual acts, irrespective of age or consent of the persons involved, and that has now been undone. Having said that, the section has meant different things to different classes of queer persons. Any assessment of the Court’s judgment in the Navtej Singh Johar case must, therefore, take place on multiple registers.
Many Narratives

So, what did Section 377 do? The wording of the section does not tell us clearly what it was intended for or who it was targeted at. All that we are able to gather is that it made any voluntary act of “carnal intercourse against the order of nature” an offence punishable with up to 10 years imprisonment. The two judges of the Supreme Court, who in 2013 upheld the constitutional validity of the section, maintained that it proscribed certain sexual acts, but said nothing about the gender or sexual orientation of those committing them (Suresh Kumar Koushal & Anr v Naz Foundation & Ors 2013). The judges wrote:

“What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if ... the person is found guilty”.

Indeed, there are cases where men have been convicted of committing anal intercourse with women too, both in consensual (State v Prashant Kaushal 2015) and non-consensual (Raju v State Of Haryana 1997) situations. Thus, one narrative about what the section did is that it simply represented the law’s disapproval of certain sexual acts, irrespective of who committed them, and hence, was not discriminatory. Let us call this narrative, N1.

A second narrative that seeks to counter the first is presented by those who challenged the section in this and previous cases. We will call this N2. Here, it is argued that though neutrally worded, the section criminalised persons identifying as lesbian, gay, bisexual and transgender. It is further argued that the criminalisation of what is referred to by the section as “unnatural sex” created negative social identities for the above persons and devalued them in the eyes of the law. But just like N1, there is an element of truth in this one too. Judges applying the section to cases involving two men, have often constructed those committing the prohibited acts as persons with innate moral deficiencies. In Mirro v Emperor (1947), the judge wrote, referring to the accused:

“It seems clear to us that he is not only a desperate character but is a man of depraved morality.”

A 1968 Gujarat High Court judgment noted that where sexual acts between two persons had no possibility of culminating in peno-vaginal sex, such “deviation is liable to be termed perversion” (Lohana Vasantlal Devchand and Others v The State 1967). In the 1982 judgement, Fazal Rab Chowdary v State of Bihar, two judges of the Supreme Court remarked, “the offence is one under Section 377 IPC, which implies sexual perversity.”

On the other hand, in cases of anal intercourse involving men and women, be it in criminal law or in divorce law where sodomy committed by the husband is a ground for divorce available to the wife, one finds judges condemning the act—“revolting”, “disgusting”,
“loathsome”, “depraved”—but without turning the actors into pathological entities. Without doubt, therefore, Section 377 has been used to create a pathologised identity for queer persons, and articulate disgust towards them. But, is the social prejudice faced by queer people solely attributable to such judicial utterances? Besides, bearing a negative social identity is different from bearing a criminalised identity. I hope to clarify the need to maintain this distinction in the next paragraph.

A third narrative about what Section 377 did places it outside the debate on act and identity, and frames it as a tool of harassment, extortion, illegal arrest, detention and violence employed by the police against queer persons. This narrative—N3—is not an extension of the previous one. While the section may have foisted a negative social identity on all queer persons, certain groups have been more vulnerable to its use/abuse by the police, than others. These are working-class transgender persons and effeminate gay men. Their class position as well as gender performance made them hyper-visible in public spaces. Their vulnerability to police abuse not being just on account of Section 377, but due to both the IPC and state police laws concerning public nuisance, sex work, indecent behaviour in public, and so on. In other words, the symbolic harms of Section 377 are distinct from its material harms, and so are the classes of queer people suffering them. Arguably, in a number of cases the two merge. For instance, where a policeman extorts money from a gay man, the former plays both into the latter’s sense of shame at being exposed as the bearer of a negative social identity as well as the threat of being charged under Section 377 (Dore 2015). But broadly speaking, I think we gain analytically by keeping the two aspects separate.

**The Undoing of Section 377**

Having delineated the different doings of Section 377, we now turn to the Supreme Court’s judgment in the Navtej Singh Johar case to see whether and how they were undone. The five judges delivered four separate judgments, which concurred on the outcome, but differed in terms of reasoning. The thrust of Chief Justice Dipak Misra’s judgment, which he wrote for himself and Justice Ajay Manikrao Khanwilkar, is the place of freedom in our constitutional framework. Justice Misra frames the problem thus:

> “The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another’s choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not dented.”  
> (Misra J, Para 9)

As we read on, it becomes clear that by “choice” here, Justice Misra does not mean sexual orientation as a matter of choice, but rather, the choice of one’s sexual partner, what he
genteeelly calls the “right to a union” (Para 155).

Like the other judges, Justice Misra frames sexual orientation to be natural, innate and immutable—a conception at odds with an expansive understanding of sexual rights. Incidentally, all the judges refer to the Yogyakarta Principles, a document prepared in 2006 by a group of human rights experts that illustrate the application of current international human rights law to issues of sexual orientation and gender identity. But the judges’ recourse to these can only be described as superficial, as the Yogyakarta Principles, very consciously, avoid the language of immutability. The principles use phrases like “each person’s capacity for profound emotional, affectional and sexual attraction,” “deeply felt internal and individual experience of gender,” “the personal sense of the body” and so on, to define sexual orientation and gender identity, precisely to not attribute any core or essence to these categories.

Justice Misra thus derives two aspects of freedom from the fundamental right to privacy protected by the Constitution. One, the freedom to express one’s sexual identity—the freedom to be oneself, the freedom of self-determination, the freedom to be different. And two, the freedom to choose one’s partner—which he has emphasised earlier, in the Hadiya (Shafin Jahan v Asokan and others 2017) and honour crime judgments (Shakti Vahini v Union Of India 2018). He finds Section 377 to be unconstitutional as it impinges on both these aspects of constitutionally guaranteed pursuit of individual freedom.

Justice Rohinton Fali Nariman in his separate concurring judgment underlines the fundamental rights to autonomy and privacy in intimate matters. While Justice Misra tackles the issue of negative social identity and stigma attached to same-sex desiring persons by emphasising the naturalness of their desire, Justice Nariman turns to the Mental Healthcare Act, 2017 (MH Act) as reflecting the most updated legislative stance on regulating sexuality. Section 21 of the MH Act guarantees non-discrimination in treatment on the grounds of sexual orientation, while Section 120 provides that the act shall override all other laws. Justice Nariman reasons that the ideas of morality underlying the notion of “unnatural sex” have now been replaced by current medical knowledge that accepts homosexuality as a natural tendency and also acknowledges that discrimination on the basis of sexual orientation could harm the mental health of individuals. When the reason for the prohibition of “unnatural sex” has ceased, so must the law, and therefore, he concludes, “Victorian morality must give way to constitutional morality” (Nariman J, Para 78).

Justice Dhananjaya Y Chandrachud begins his judgment by summarising the doings of the section under challenge:

“Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of the state to perpetuate social stereotypes and encourage discrimination. Gays,
lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.” (Chandrachud J, Para 6) (Emphasis mine)

Justice Chandrachud’s approach to the issue is defined by the above framing of the problem. He identifies the harm of section 377 not by reference to the nature and scope of the offence, but by the range of outcomes authorised and enabled by it. He goes on to note:

“… while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights.” (Para 34)

In other words, he invokes the theory of indirect discrimination, which is concerned not with whether a law is discriminatory in its face (direct discrimination), but with the discriminatory effects of neutral-looking laws.

Justice Chandrachud applies this theory to the petitioners’ case that Section 377 discriminated on the grounds of sex, prohibited by Article 15 of the Constitution. Section 377 is neutrally worded; it does not specify the gender of the actors. But, the ideas underlying the section, he argues, are those that validate stereotypes about men and women, which in turn sustains unequal treatment on the grounds of sex, which is prohibited by Article 15. Three quotes read together shows how he weaves (a) the effect of neutral-looking laws, (b) gender stereotypes, and (c) constitutional prohibition on sex discrimination, to find Section 377 discriminatory:

“The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of a provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice.” (Para 51)

“A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex…” (Para 52)

“History has been witness to a systematic stigmatization and exclusion of those who do not conform to societal standards of what is expected of them. Section 377 rests on deep rooted gender stereotypes.” (Para 53)
Interpreted thus, the scope of the constitutional mandate of prohibiting discrimination “on grounds ... of ... sex” under Article 15 is no longer limited to just ending inequality between men and women, but is opened up to accommodate claims of discrimination by gay men and transmen as well.

The fourth concurring judgment, by Justice Indu Malhotra, turns on the proposition of sexual orientation as an immutable characteristic and an expression of “normal” human sexuality. The denial of this aspect by the operation of Section 377 leads her to find violations of the fundamental rights to equality, non-discrimination, privacy, freedom of expression and life with dignity. Similarly, the ignorance of this aspect by past generations leads her to call for

“... an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries.” (Malhotra J, Para 20)

I have already noted above that arguments based on immutability provide weak foundations and limited scope to recognition of the rights of those marginalised on account of their sexual orientation or gender identity. The main work done by arguments from immutability is to create the figure of a victim who has been wronged for no fault of theirs, and who the law now must protect from any further wrongs. But that precisely is the appeal of the immutability argument; all four concurring judgments in the Navtej Singh Johar case are a testament to that. Justice Malhotra even goes on to hold that, “Where a legislation discriminates on the basis of an intrinsic and core trait of an individual,” (Para 14.3) it cannot be a constitutionally permissible classification. It will be instructive to see what traits are deemed intrinsic and core, and what traits are not, in future cases. Curiously, Justice Malhotra extends her call for apology to the families of queer persons too, which is at odds with the fact that often family members themselves are instrumental in the oppression of queer people—something that is borne out by the narratives of intervenors that Justice Chandrachud records in his judgment (Para 49–51).

As must be evident by now, the narrative that moved each of the judgments was N2, that of one’s sexual orientation or identity being rendered criminal by Section 377. All the judges rejected N1, noting that the work done by a facially neutral law is evidenced from its operation in different contexts, and that is what matters in determining violation of fundamental rights. But occasionally, the judges also put this formulation aside, like when Justice Chandrachud remarks that Section 377 is “anti-homosexual legislation.” Judges are moved by the figure of the homosexual citizen who is “born this way.” They help destigmatise them through recourse to nature and modern medical knowledge, and secure them the constitutional guarantees of dignity, privacy, equal treatment, freedom of expression, life and liberty.
All these aspects of the Navtej Singh Johar case are extremely important for advancing the constitutional ideal of equality. But that should not prevent us from acknowledging that they all speak to N2. We are hard-pressed to find anything in the judgment that speaks directly to N3, the narrative about Section 377 that poses it as just another quotidian symbol of state authoritarianism one has to negotiate with. As author and transgender activist, A Revathi remarked while responding to the verdict, “We all know who is going to benefit out of it” (Maktoob Media 2018). The refrain of “decriminalisation of homosexuality” in the media in the aftermath of the verdict testifies to the power and influence of N2 in shaping popular discourse on the issue. The sheer absence of the third narrative in this celebratory discourse also underlines the relevance of the distinction between the second and the third narratives.

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