

**LEGAL IMAGINATIONS AND LEGAL REALITIES: REVIEWING  
GENDER-BASED VIOLENCE AGAINST LGBTQ INDIVIDUALS POST  
THE 2019 NAVTEJ SINGH JOHAR JUDGEMENT**

Gaurangi Gyanesh Singh

Delhi Public School, R.K. Puram

**ABSTRACT**

There exists a difference between case laws and the actual practice and implementation of these changes and reforms since the time of the Navtej Singh Johar vs. Union of India judgment in 2018. There continue to be multiple incidences of gender-based violence towards the LGBTQ populations since the cases in New Delhi as well as other parts of India, which have been documented in various ways. This includes a direct link of moral policing and justification for the same in the name of tradition or “culture” which hints at a larger necessity for societal reform. This, one can consider, was discussed by Justice Dipak Misra as a matter that needed constitutional morality that needed to be learned, as opposed to pre-existing social morality. This paper, thus, looks to discuss the difference between the text and practice, between legal imaginations of the existing case law and the legal realities, the actual realities and the happenings in society, with respect to incidents of violence against LGBTQ people in India from across the country since the Navtej Singh Johar judgment, to discuss a more practical framework of the limitations of the law. The paper also posits recommendations for the need for new law enforcement sensitization in a robust manner to counter such negative social forces that create an oppressive environment in the country.

**Keywords:** Gender, LGBTQ, Society, Violence, HIV/AIDS

**INTRODUCTION**

On 6th September, 2018, Section 377 of the Indian Penal Code – a colonial era law that criminalized “carnal intercourse against the order of nature” was read down and homosexuality was decriminalized in New Delhi, with the delivery of the judgment for the *Navtej Singh Johar vs. Union of India* case, by five judges of the Supreme Court of India (Hall, 2019; Jain, 2013). Prior to this judgment, the *Naz Foundation vs. Government of NCT of Delhi* on the 2nd of July 2009 had held that consensual homosexual sex between adults as a crime is a violation of

fundamental rights protected by India's Constitution (Jain, 2013). However, after this, the *Suresh Kumar Koushal vs. Naz Foundation of India* case in 2013 resulted in this being overturned, and homosexuality once more being classified as a criminal offense under Section 377 (Tiwari, 2019). The justifications used in the latter was that firstly, there were not as many LGBTQ individuals in the country, and that secondly, sexuality was a matter “privacy”, and thus therefore not one requiring a separate judgment; the bench said that the country’s LGTQ population was a “miniscule fraction” and that the previous decision had wrongly relied upon international precedents “in its anxiety to protect the so-called rights of LGBT persons” (Hall, 2019; Jain, 2013).

This in effect re-criminalized sexual intercourse “against the order of nature”. In its judgment the Supreme court bench of justices G. S. Singhvi and S. J. Mukhopadhaya stated —

“In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable.” (Hall, 2019; Jain, 2013) Both judges however noted that the Parliaments should debate and decide on the matter. A bench of justices upheld the constitutional validity of Section 377 of Indian Penal Code that makes anal sex a punishable offense (Tiwari, 2019). This, itself, was followed in the next few days by the former Finance Minister Yashwant Sinha calling for the arrest of same-sex companions of US diplomats, citing the Supreme Court of India's recent upholding of Section 377 of the Indian Penal Code (Hall, 2019). This resulted in multiple other incidents of violence against members of LGBTQ populations in different parts of India, with international condemnation coming in for the recriminalization of gay sex, from the United Nations, prominent academics, other countries, and more.

The previous case with the Naz Foundation resulted in a judgement that primarily discussion sexuality, specifically homosexuality to be something that is a matter of privacy, which “belongs in the bedroom” and cannot be discussed or brought into the foray in public spheres, almost in a “don’t ask don’t tell” metric of law and legality in India (Jain, 2013). The Navtej Singh Johar judgement, however, resulted in the discussion of an alternative paradigm of understanding, with gender and sexuality both being also considered as something to be practiced publicly and without fear -- Justice D.Y. Chandrachud stated that not only must homosexual couples be able to love one another privately, but must also be able to do so in a public fashion -- as in the case of holding hands, or other forms of love that are conventionally considered acceptable for cisgendered and heterosexual practices of love in India (Hall, 2019). He further stated as a part of the judgement that institutions such as the police and law enforcement should be sensitized and trained in order to protect such situations from an

otherwise existence of oppression, something which, despite explicit mention in the judgement, is uncertain whether it has taken place since the judgement (Hall, 2019).

Particularly, this is a primary element that comes into the foray while discussing gender based violence after the judgement -- the difference between the existence of different case laws on such matters and the actual practice and implementation of these changes and reforms since the time the judgements take place. There continue to be multiple incidences of gender-based violence towards the LGBTQ populations since the cases in New Delhi as well as other parts of India, which have been documented in various ways (Jain, 2013). This includes a direct link of moral policing and justification for the same in the name of tradition or “culture” which hints at a larger necessity for societal reform (Jain, 2013; Tiwari, 2019). This, one can consider, was discussed by Justice Dipak Misra as a matter that needed constitutional morality that needed to be learned, as opposed to pre-existing social morality. This paper, thus, looks to discuss the difference between the text and practice, between legal imaginations of the existing case law and the legal realities, the actual realities and the happenings in society, with respect to incidents of violence against LGBTQ people in India from across the country since the Navtej Singh Johar judgment, to discuss a more practical framework of the limitations of the law. The paper also posits recommendations for the need for new law enforcement sensitization in a robust manner to counter such negative social forces that create an oppressive environment in the country.

## **BACKGROUND**

Taking back from what was previously mentioned of B.R. Ambedkar speaking of the need of constitutional morality to be enforced, that it is something to be learned as opposed to a social morality that organically exists, and is many times not a form of justice -- this is due to the fact that the formation of a social morality is through majoritarian means and heavily influenced by power, social status of the people contributing to such social morality and more -- thus drastically reducing the ability of such consensus creation and discussion to include the voices of minorities and communities in the periphery and margins of society (Hall, 2019). A democracy, on the other hand, is prided upon its focus on rule by the majority, yet working towards the interests of the minorities, a crucial factor of the social contract between the population and the people. This difference between the law as *text* and the law as *practice*, is something commonly observed in the everyday spheres of life. Gender-based violence thus propagates as a function of this social morality, which in the case of LGBTQ populations is empowered by the backing of a society which is still yet unconvinced of the equal citizenship of these minority members, the applicability of a Supreme Court judgement in a land where implementation of laws has always seen incredible demographic, state, district level variations and difference, and where social morality has yet mostly prevailed over constitutional morality (Tiwari, 2019).

## **DISCUSSION**

In 1984, when queer theorist Gayle Rubin wrote her famous essay *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, she referred to a ‘moral sexual hierarchy’ which places heterosexuality and homosexuality differentially (Pergadia, 2019). This sexual hierarchy is sustained mainly by anti-sodomy laws and supported by the profession of mental health, social practices and popular ideology (Pergadia, 2019). Therefore, confrontation with these structures is inevitable when the sexual hierarchy is challenged. The Lesbian Gay Bisexual Transgender and Queer (henceforth LGBTQ) movements across the world have been engaged in this task of appealing and struggling for legal reform (Hall, 2019)(Pergadia, 2019). While LGBTQ communities from across the world have struggled through a variety of different forms of oppression, there has been one common link that have tied together struggles in a historical basis, resulting often in widespread mobilization: the HIV/AIDS crisis (Tiwari, 2019). AIDS arrived as a threat to the world on a global level in the 1980s, with a specific impact on LGBTQ people, in a manner that made discrimination that was until then more subtle or based on the identity into a more explicit manner, with countries such as the UK and US, where LGBTQ organisations also existed seeing a resurgence in a consolidation of activism and a rise of solidarity -- yet when AIDS came to India in the latter half of the 1980s, there was a more paradoxical effect.

On the one hand, it stigmatised people who were afflicted by the disease, and they tried to make themselves invisible, and on the other hand, it made visible those people who were invisible on account of their sexualities. HIV/AIDS prevention programmes and health activists realised that Section(S)377 of the Indian Penal Code (IPC) was a major stumbling block that deterred detection and prevention among high-risk groups (tiwari, 2019). People who engaged in same-sex activities were reluctant to come forward for HIV testing and condom distribution programmes because they could be punished under S377 (Hall, 2019). It is in the unfortunate collision of the disease with the law that HIV/AIDS activists realised the inevitability of confronting the anti-sodomy law in India. ‘New sexual movements’ emerged that have engaged with and confronted anti-sodomy laws, primarily focussing on the experiences from the United Kingdom and the United States of America.

Similar to the movements that emerged then, now after the decriminalization of homosexuality, violence towards LGBTQ populations still exists. Instances of couples denied entry to hotels, public places, ejected from colleges, and denied housing are common in reported news media. Further, there is a need to consider non cisgendered populations, with transgender violence still high (Jain, 2013). In this case, there is a duality of the stereotype of trans persons as sex workers, and secondly the stigmatization and violence towards sex workers who are considered second

class citizens and often the victim of exploitation, trafficking, and everyday violence by police. The streets are yet to be claimed as safe, with oppression towards LGBT people being particularly visible in certain spaces such as airport and metro-rail security checks, gendered toilet segregation (with gender neutral toilets being yet unavailable in most spaces), and other scenarios where the gender binary is furthermore enforced as a matter that is yet to be deconstructed and reformed in world systems (Tiwari, 2019).

In this fashion, the violence isn't just physical as with harassment on the streets by eve teasers or by transgender individuals facing unlawful police harassment, but rather structural and systemic (Jain, 2013). The spectre of 377 is still used as a method of oppression, and further with the newly passed Transgender Bill in India, this has only seen the further deletion of cultural and social identities and rights of people. As the judgment stated, there is a need to move beyond conversation of privacy to look at the public sphere, and the gender-based violence faced by people in Delhi and other parts of India (Hall, 2019). There is a lack of proactive and positive schemes to integrate previously oppressed populations into society, and to sensitize populations to prevent further segregation and discrimination (and violence). There is further a lack of specific schemes targeted towards making the filing of FIRs by transgender individuals easy and without the harassment that usually persists -- such as being forced to produce a gender certificate even while reporting sexual harassment -- and there is a need for more inclusive bills and laws that can integrate this populace into a central location in political and social society (Tiwari, 2019).

## **CONCLUSION**

The paper, thus, has seen the need for violence to be countered through a number of forms - legal, social, political, and via appropriate institutional interventions such as with police personnel (Johar, 2019). However, it is important to clearly note that there has been a largescale reduction in police and general harassment against homosexual behavior in India, which Dipika Jain states, "The effect of criminal sanctions against homosexual behavior include violence against homosexuals, blackmail, police intimidation and entrapment, reluctance by homosexual men to report rapes or other crimes for the fear of implications with homosexual activity, adverse psychological effects, which may even result in suicide, and the inability to acknowledge and express sexual preferences without fear of social discrimination, stigmatization and ridicule." (Jain, 2013) Abuse, still persists however, through verbal, physical and symbolic forms, and interrogation without reason (Johar, 2019). Specifically, police harassment and gender-based violence has reduced against MSM, outreach workers, but only to a small extent among the hijra and kothi groups (Jain, 2013; Johar, 2019). This requires change through largescale sensitization,

among both society as well as institutions to better facilitate changes that are conducive to oppressed groups, and to tackle the systemic causes beyond the symptoms.

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