

CRIMINALISATION OF HOMOSEXUALITY

The South Asian Story

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SOUTH ASIA IN ANCIENT TIMES HAD A TRADITION OF SEXUAL TOLERANCE AND FREEDOM, AND THERE IS LITTLE OR NO EVIDENCE THAT HOMOSEXUALITY WAS FROWNED UPON; THERE IS CERTAINLY NO EVIDENCE TO SUGGEST THAT GAY SEX OR TRANSGENDERS WERE SUBJECTED TO CRIMINAL SANCTIONS.

- Ancient excavations from pre-historic sites suggest that the Indus Valley Civilisation recognised the attraction between members of the same gender, both in animals and human beings.
- Judging by temple sculptures and erotic art, sexual acts between persons of the same gender appear to have been acknowledged and accepted in Ancient India as also in Medieval Empires.
- Even in the late medieval Islamic Empires, including the Mughal Empire, there is no evidence to suggest that homosexuals were treated differently from the rest of the populace.

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SOUTH ASIA, LIKE MANY PARTS OF THE BRITISH EMPIRE, FELL VICTIM TO THE IMPOSITION OF VICTORIAN MORES AND INHIBITIONS IN THE MID-NINETEENTH CENTURY, RESULTING FOR THE FIRST TIME IN THE CRIMINALISATION OF HOMOSEXUALITY.

- In 1833, Thomas Babington, Lord Macaulay, was appointed to chair the First Law Commission of India, and in four years his Commission submitted its draft for the Indian Penal Code.
- This draft, which was ultimately adopted as The Penal Code, 1860, after receiving the assent of the Governor General in Council on October 6, 1860, included within it the provision that became Section 377.
- Section 377 of the Indian Penal Code survived unchanged in India for the next 158 years.

SECTION 377

OF THE INDIAN PENAL CODE, 1860

- “Section 377. Unnatural offences.--
- Whoever voluntarily has carnal intercourse against the order to nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
- *Explanation.*--- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

- *Note: The original section used the words “transportation for life”, which was, post-Independence, amended to read “imprisonment for life”.*

THE MACAULAY PRESCRIPTION SPREADS ACROSS THE GLOBE

- India, Pakistan and Bangladesh, all successor nations to pre-Independence India, continued with Section 377 as it earlier stood, though in Pakistan the Section was amended to provide a minimum mandatory sentence of “*not less than two years*”.
- Sri Lanka also got a similar provision in its Penal Code, which later became Article 365 of the Sri Lanka Penal Code.
- Malaysia has a similar provision in Section 376 of its Penal Code.
- And across the globe, in virtually every nation that continued as a British Colony in the late Nineteenth Century and beyond, similar provisions were introduced; commonly referred to as the “sodomy law” or “buggery law”, these provisions came to be used primarily to criminalise homosexuality and bestiality.
- Bewilderingly, these provisions continued to be used to prosecute sexual relationships and acts between consenting adults, long after homosexuality had been de-criminalised in the United Kingdom itself.

NEPAL LEADS THE CHARGE IN SOUTH ASIA

- Following the lead of the High Court of the Fiji Islands in 2005, groups of gay rights activists in Nepal filed petitions before their Supreme Court under the provisions of Article 107 of their Interim Constitution.
- On December 21, 2007, Mr. Justice Balaram K.C., speaking for a bench that included Justice Pawan Kumar Ojha, delivered a landmark judgment in ***Sunil Babu Pant v. Nepal, 2008 NJA Law Journal 262.***
- Having held that discrimination against gays, transgenders and all members of the LGBT community violated the equal protection clauses of the Interim Constitution, as well as Nepal's international commitments to human rights treaties and conventions, the Supreme Court issued broad-ranging directions to the Government.
- The Court ordered the Government to legally recognise a third gender category;
- The Court directed that all laws in the nation be audited to identify those that discriminated against LGBT people;
- And lastly, the Court directed that a committee be set up to examine the feasibility of recognising same sex relationships.

FROM THE COURT TO THE PEOPLE--- NEPAL'S IMPLEMENTATION OF THE JUDGMENT

- In the years immediately following the 2007 Judgement in *Pant v. Nepal*, the Nepalese Government identified 100 laws that needed to be amended to eliminate discrimination against LGBT people; and it appears that many of them have indeed been amended.
- In 2010, the Election Commission of Nepal had added a third gender option in Voter Rolls.
- In 2011, Nepal became the first country in the world to include a third gender in the Federal Census.
- By 2014 or 2015, Nepal started issuing Passports with the option of a third gender.
- In 2015, when the nation adopted its new Constitution, it became the 10th country in the world to incorporate specific constitutional protections for members of the LGBT community.

MEANWHILE, IN INDIA, THE SEE-SAW BEGINS

- In 2009, the Delhi High Court (which functions both as a court of appeal and the constitutional court for the National Capital of Delhi) delivered its pathbreaking judgment in ***Naz Foundation v. Union of India, (2009) 111 DRJ 1.***
- Chief Justice Ajit Prakash Shah, speaking for himself and Justice S. Muralidhar, held that to the extent that Section 377 criminalised consensual sexual acts between adults, the section violated both the equal protection clause in Article 14 of the Constitution of India, as well as the right to life and liberty in Article 21.
- The Delhi High Court delved deep into the transformative nature of the Indian Constitution, the right to privacy, the right of every citizen to be treated with human dignity, and a conspectus of other rights, and held that unless Section 377 is read down to exclude non-violent sexual acts between consenting adults, regardless of gender, the Section would be liable to be struck down as unconstitutional.

THE SUPREME COURT OF INDIA STEPS IN

- ***Naz Foundation v. Union of India, (2009) 111 DRJ 1*** was accepted by the Government of India, which took a conscious decision not to appeal.
- The Supreme Court nevertheless intervened at the instance of several individuals as well as religious groups, who assailed the Delhi High Court's judgment essentially on moral and religious grounds.
- Having heard parties at length, and reserved its judgment for over 14 months, a bench comprising of Justice G.S. Singhvi and Justice S.J. Mukhopadhyay finally pronounced its judgment in December, 2013, on the very day when its author, Justice Singhvi, was to retire.
- The Supreme Court, in ***Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1***, held that Section 377 of the Indian Penal Code was a valid and non-discriminatory piece of legislation, and accordingly overruled the Delhi High Court.
- In arriving at this decision, the Court proceeded on an assumption that gays and LGBT people made up a minuscule percentage of India's population, and came to the astounding conclusion that if the subject of discrimination is a tiny minority, such discrimination is constitutionally permissible.

THE TRANSGENDER RIGHTS CASE

- Close on the heels of *Suresh Kumar Koushal* came a judgment by another bench of the Supreme Court of India in *National Legal Services Authority (NALSA) v. Union of India, (2014) 5 SCC 438*, where Justices K.S.P. Radhakrishnan and Dr. A.K. Sikri, in concurring opinions, firmly established the rights of transgender persons to equality and equal protection of the laws.
- *NALSA* was the anti-thesis of *Koushal*, its diametric opposite, but since it was delivered by a coordinate bench of the same size as that which pronounced *Koushal*, this landmark judgment could not override or overrule the Section 377 judgment.
- But in *NALSA* the bench held that transgenders or other persons who felt trapped in a gender which they believed they did not belong to, were entitled to assert their gender identity to the fullest extent, and to enjoy not only freedom from police action or state suppression, but the active and complete support of the State.
- The Court issued wide-ranging directions to ensure equal treatment and upliftment of transgenders and the third gender.

COMING FULL CIRCLE WITH NAVTEJ SINGH JOHAR V. UNION OF INDIA

- Though a review petition against the *Koushal* judgment was dismissed by the Supreme Court, a bench presided over by Chief Justice T.S. Thakur later directed that “curative petitions” should be heard in open court.
- Before this could happen, a subsequent Chief Justice, Dipak Misra, referred a batch of writ petitions to a Constitution Bench of five judges.
- This Constitution Bench, with concurring opinions authored by Chief Justice Misra, and Justices Rohinton F. Nariman, Dhananjaya Y. Chandrachud and Indu Malhotra, unanimously overruled *Koushal* by its judgment in *Navtej Singh Johar v. Union of India, (2018) 10 SCC 1*.
- The concurring opinions which overruled *Koushal*, restored the Delhi High Court judgment in *Naz Foundation*, and struck down Section 377 to the extent that it criminalises consensual homosexual acts and relationships, are based on a wide-ranging application of the fundamental right to privacy, to human dignity, to the Constitutional protection that extends to the smallest or most minuscule minority, and to overarching principles of constitutional morality and the transformative nature of the Constitution of India.

AND WHAT OF THE REST OF SOUTH ASIA?

- Section 377 in its original form continues in force in Bangladesh, except that “transportation for life” was substituted by “imprisonment for life” in 1985.
- Bhutan’s Penal Code of 2004 contains Section 213, which defines “unnatural sex” as “sodomy or any other sexual conduct that is against the order of nature”; and Section 214, which mercifully classifies the offence of unnatural sex as a petty misdemeanour, and prescribes a penalty of imprisonment for less than one year, but with a minimum term of one month.
- The Penal Code of the Maldives does not regulate sexual conduct, but uncodified Sharia Law criminalises homosexual acts whether by men or by women, with banishment from 9 months to a year for men, and one year’s house arrest for women.
- Myanmar and Pakistan both have a similar Section 377 in their respective Penal Codes, though Pakistan prescribes a minimum mandatory sentence of two years imprisonment.
- And Sri Lanka has similar provisions in Article 365 of its Penal Code.