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# SECTION 377 AND BEYOND: LGBTQIA RIGHTS IN INDIA

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DISCUSSION PAPER

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## EXECUTIVE SUMMARY

In India, the last decade has seen major legal battles being held in the fight for LGBTQIA rights, ones that have brought these issues to the forefront of public discourse. The fight for self-determination and equality goes beyond just legal definitions of inclusiveness and dignity, in order to address the ways in which the everyday lives of people from the LGBTQIA community are affected by socio-economic and structural discriminations. This was also highlighted in the Navtej Johar judgment which struck down Section 377; “Equality does not only imply recognition of individual dignity but also includes within its sphere ensuring of equal opportunity to advance and develop their human potential and social, economic and legal interests of every individual and the process of transformative constitutionalism is dedicated to this purpose”(P. 104). This paper attempts to highlight the discussions surrounding LGBTQIA rights in India over the past decade. It posits legal verdicts that have defined various mobilisations of sexual minorities in the country, while noting the lack of data available regarding LGBTQIA communities as a representative group for a variety of reasons. The major themes present include; the porous boundaries between public and private spheres; the conceptualization of sexual minorities as rights-bearing citizens of India; the role of globalization and media platforms, and finally the ways in which these multidimensional understandings are further complicated by other identities like class, caste, geography, religion and disability. The way forward now that Section 377 has taken its last breath is not entirely clear. This paper attempts to highlight a spectrum of debates and opinions put forth. This is substantiated by arguments to decriminalize begging, to argue for marital rights and illustrate the marginalization felt by these communities in the sphere of health and education in order to address them – and posits that efforts to articulate sexuality in spaces other than the few privileged ones is perhaps the only way forward.

## INTRODUCTION

In defining what LGBTQIA (Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual) rights mean, there are multiple explanations which vary from country to country, region to region, and even organization to organization. Based on historical, cultural, and socio-economic realities, these definitions nonetheless offer certain universal understandings; firstly that sexuality is an integral part of a person’s identity, and secondly that, given this, fighting against the everyday discriminations LGBTQIA communities face is essential in the constitution of their human rights, which include their right to equality, life and liberty. These rights encompass a multitude of spheres, material and ethical, including employment, health, marriage, adoption and education among others, within the purview of the nation-state and outside of it<sup>1</sup>.

In India, the last decade has seen major legal developments in the fight for LGBTQIA rights - ones that have, in effect, brought these issues to the forefront of public discourse. *Naz Foundation versus Government of NCT of Delhi and Ors.*<sup>2</sup>, 2009 saw the first instance of striking down Section 377 on the basis that it violated the Right to Equality, Life and Liberty, while the 2013 verdict<sup>3</sup> saw its subsequent

<sup>1</sup> It is important to note here that the assemblage of the letters “LGBTQIA” does not capture the full range of sexual identities in India. Language, class, caste and geography play an important part in these conceptualizations. However, for the sake of bringing coherence to this paper, these series of letters will be used.

<sup>2</sup> *Naz Foundation v. Government of NCT of Delhi and Ors.*, WP(C) No. 7455/2001

<sup>3</sup> *Suresh Kumar Koushal and Ors. v. Naz Foundation and Ors.*, SLP (Civil) No. 15436 of 2009 and Ors.

upholding by the Supreme Court on the basis that it does not, in fact, violate these premises cemented in the Indian Constitution. The Supreme Court additionally noted and that it is not up to the courts to decide the constitutionality of a specific section. This created ripples, with many criticizing the sudden consciousness of “selfrestraint” and judicial deference to Parliament, especially in light of the growing judicial activism of the courts (Kirpal 2016). Holding that the Delhi High Court judgment was legally unsustainable, the Supreme Court further based its own judgement on the lack of evidence given to sustain the notion that people from LGBTQIA communities were discriminated against, noting that less than 200 people had been prosecuted under 377 in the last 150 years (Monalisa 2013). The community took further umbrage to the Supreme Court’s assertions of the “so-called rights” (NDTV 2013) of LGBTQIA communities, justifying it on the basis that people from these groups constituted a miniscule part of the population, thereby upholding a Victorian Law in modern times which maintained the element of criminality to issues relating to life, liberty, and selfdetermination - rights which are otherwise deeply entrenched in the country’s Constitution.

The turning point came with 2014 NALSA judgment<sup>4</sup>. This decision not only recognized the fundamental rights of transgender people through its recognition of the ‘Third-Gender’ category and its push to allow for self-determination, but also gave broad directives to state and central governments on issues ranging from affirmative action, public health, and other social welfare initiatives for the community. This meant not only highlighting the need for better public health and sanitation facilities and socio-economic rights, but also the necessity for increasing public awareness on these issues.

This ruling was imperative in that it contradicted the 2013 judgment to uphold Section 377 in a variety of ways. The bench noted that the assertion of “miniscule minority” from the 2013 judgment was troubling in that people who identified as transgender were still people, and their struggles with harassment, physical abuse and sexual assault - in public, in jails and in the privacy of their homes - curtailed their rights to dignity, privacy and equality. It was argued that despite this judgment, Section 377 still existed, and the burden of discrimination from this law usually disproportionately fell on transgender people who often did not have the privilege of going back into the closet because of their visibility in public life, and the stigmas and subsequent socio-economic challenges attached to it.

The 2014 Right to Privacy judgment<sup>5</sup> further shook the already fraught foundation upon which Section 377 lay. With the Supreme Court now highlighting privacy as intrinsic to life and liberty, and therefore a part of Article 21 of the Constitution, Justice A.P Shah, who was on the bench of judges who read down 377 in 2009, stated that, at this point, “there is very little scope” to defend it (The Wire Staff 2017). 2018 finally saw the discriminatory Section struck down with the Navtej Johar<sup>6</sup> verdict. Employing judgments from other countries, the Supreme Court found that public morality cannot be the basis on which people’s fundamental rights are curtailed (Press Trust of India 2018). This verdict cannot be taken out of context of all those that came before it, and as Gautam Bhatia notes (Bhatia 2018) this is because of two themes; “Constitutional morality and transformative Constitutionalism.” These themes essentially highlight that equality, inclusiveness, and most importantly pluralism, lie at heart of Constitutional morality, which the Delhi High Court was chastised for upholding in 2013, and that while fighting for rights to privacy and dignity is important, ultimately the fight has to be taken to existing structural inequalities as well;

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<sup>4</sup> National Legal Services Authority v. Union of India and Ors., WP (Civil) No. 604 of 2013

<sup>5</sup> Justice K S Puttaswamy and Anr. v. Union of India and Ors., WP (Civil) No. 494 of 2012

<sup>6</sup> Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, WP (Criminal) No. 76 of 2016, D. No. 14961/2016

“Equality does not only imply recognition of individual dignity but also includes within its sphere ensuring of equal opportunity to advance and develop their human potential and social, economic and legal interests of every individual and the process of transformative constitutionalism is dedicated to this purpose” (P. 104 of the September 2018 Judgment).

## I PUBLIC/PRIVATE AND POROUS BOUNDARIES

Leading up to the 2016 Right to Privacy Judgment, a few broad themes can be highlighted through these legal proceedings – the first is the binary between public and private spaces, and the second is the differentiation between consensual and non-consensual acts. The latter is important here because of the nature of Section 377 of the Indian Penal Code, which does not mention anything about ‘consent’ when defining “intercourse against the order of nature”. The upheld binary between public and private spaces similarly falls apart in offering no differentiation. What is interesting to note here, however, is the reality of the porous boundary between the two, especially given the heightened visibility of LGBTQIA discourse over the years. The 2016 judgment on the Right to Privacy, which brought Section 377 back into the limelight, along with the NALSA verdict and the recent striking down of 377 by the Supreme Court have all harked back to consistent arguments surrounding the right to privacy and choice as hugely important in ensuring that people from LGBTQIA communities are rights bearing citizens of India.

A large part of this visibility has also been this association of rights bearing citizenship with modernity and progress. In its 2009 verdict, the Delhi High Court saw petitioners employ the use of judgments made in the United States, Canada, South Africa, United Kingdom along with practises related to the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity<sup>7</sup>, 2007, and various United Nations decisions and Human Rights treaties<sup>8</sup>. When 377 took its final stand in 2018, its striking down was hailed as a victory for modern India, a doing away with colonial shackles into a postcolonial, liberal, and most of all, inclusive reality (The Hindu Net Desk 2018).

The porous boundaries between public and private are further highlighted with the influence of globalization and mass media. International organizing around HIV/AIDS, implementation of The Yogyakarta Principles (which outline binding principles for states to implement), and a growing understanding of a ‘global’ mobilization towards equitable rights concerning sexuality go hand in hand with the proliferation of mass media. The sheer scope of social media as a platform for self-determination and awareness creation is one aspect of this, another is the proliferation of popular culture; mainstream movies, popular music, television shows which showcase people of various sexualities are some examples. In India, when *Fire* was released in 1996, it was subject to fierce criticism and vandalism from Right-Wing Hindu groups who felt it tarnished Indian ‘culture’. LGBTQIA communities in Hindi cinema have, over the years, been subject to fairly stereotypical representations; as comic reliefs and as having mental illnesses (Bhuyan 2013). Over the years, there have been steps to produce more nuanced

<sup>7</sup> The website for the Yogyakarta Principles notes; “In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.”  
<https://yogyakartaprinciples.org/>

<sup>8</sup> <https://indiankanoon.org/doc/100472805/>

depictions, for instance in movies like *My Brother Nikhil*, *Kapoor and Sons* and most recently, *Ek Ladki ko Dekha to Aisa Laga*, a step forward in understanding the complex realities of private and public (and political) processes.

This is particularly important with regards to identity and a conception of citizens as rightsbearing in varying social, culture and historical backdrops. In India, homosexuality has frequently been connected to religious and cultural discourses, conflating sexual identity with a larger conception of what it means to be “Indian”. For instance, religious entrepreneur Baba Ramdev expressed his views on homosexuality in 2013, as being a mental disorder, curable through Ayurvedic medicine, yoga and meditation. An insight in Patanjali Chikitsalayas in Delhi NCR showed terms like ‘normal’, ‘culture’ and ‘unnatural’ frequently being used by Ayurvedic doctors who saw homosexuality as a turning away from ‘Indian’ cultural sensibilities (Agarwal and Dam 2018). Further, during the course of various judgments, religious groups frequently employed religious scriptures as evidence of the historical condemnation of homosexuality, along with citing its disagreement with personal laws and public morality (The Hindu Net Desk 2018).

“ History owes an apology to the members of this community and their families, for the delay in providing redressal for their 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. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality ”

**Justice Indu Malhotra**

on the striking down of Article 377 on September 8, 2018

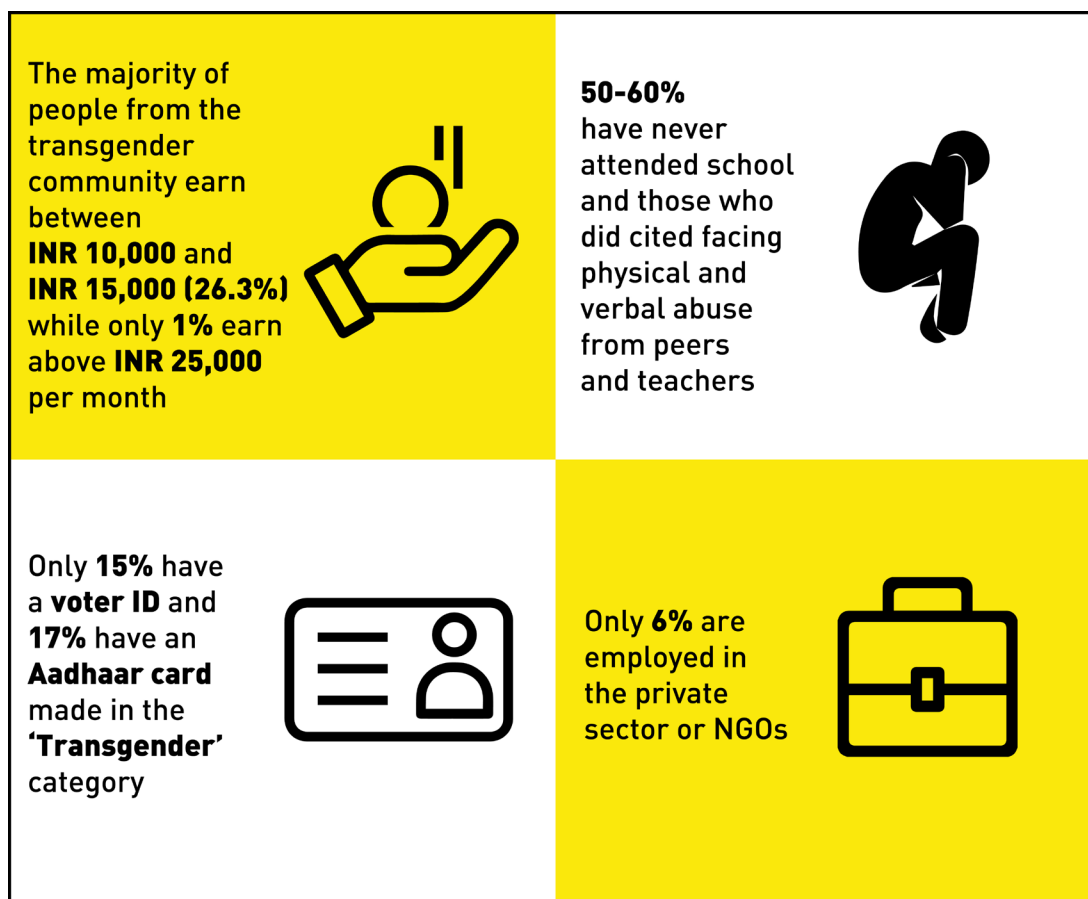
## I BEYOND THE RAINBOW FLAG

A study by University of Massachusetts Amherst on behalf of the World Bank showed that India has been losing almost 1.4 of its output due to discriminatory policies against LGBTQ people, costing the economy almost 26 billion dollars a year (Lee Badgett 2014). For example, in the case of multi-national companies, executives who are openly LGBTQIA may be reluctant to relocate to places where these communities are discriminated against or employees may suffer physical abuse and mental health problems from the effects of stigmas attached to these communities, thereby limiting their productivity (Ibid 2014). Corporations like Godrej, TATA, and the Royal Bank of Scotland made strides to support LGBTQIA employees, even before the 2018 ruling, making way for a 'Pink economy' whereby companies, governments and urban centres can benefit from more inclusive policies and higher rates of labour supply (Marlow and Trivedi 2018). However, the process of actively ensuring safe and accepting workplaces through providing support and targeting the stigmas attached to these communities is still ongoing.

Furthermore, corporate sponsorship in LGBTQIA mobilizations (like Pride Parades) have been extensively studied and subsequently criticised for promoting homogenized representations of these communities, hiding the marginalization and discrimination which they face on a daily basis within the purview of the nation state<sup>9</sup>. For instance, it was noted that while Adidas had a section of rainbow coloured merchandise to celebrate Pride Month (held in June to commemorate the Stonewall Riots in the United States), it was simultaneously a major sponsor of the 2018 FIFA World Cup held in Russia, a country with stringent anti-LGBTQIA laws (Abad-Santos 2018).

In India specifically, there is a clear lack of data available on LGBTQIA people as a representative group for a variety of reasons, one of the foremost being the fear of discrimination due to stigmatization, as well as other structural issues. In this case, the notion of visibility becomes important to understand further. Certain sexualities like Hijras, Kothis and Panthis embody their sexual identity, not necessarily conforming to the notion of 'coming out' as other sexualities do. This is also because of the clear class, religious and caste differentiation between various sexualities, along with urban and rural ones. This last difference was especially visible in the 1990s, where connections between LGBTQIA organizing and HIV/AIDS initiatives, as well as diasporic South Asian communities were made (Kumar 2014: 11). The concept of privilege is also seen to play an important part in defining then who gets to have a private life in a private space, and how the law is employed by various actors in the face of this visibility.

<sup>9</sup> Jasbir Puar's notion of "Homonationalism", taken from her monograph *Terrorist Assemblages: Homonationalism in Queer Times* (2007), is pertinent here. She defines the conceptual framework of Homonationalism as a; "brand of homosexuality (which) operates as a regulatory script not only of normative gayness, queerness, or homosexuality, but also of the racial and national norms that reinforce these sexual subjects." (2) In the context of India, this can be taken to substantiate the evolution of inclusivity of marginalized communities in the larger context of legal and political battles for LGBTQIA rights within the larger understanding of the Indian nation –state and citizenship, while hiding the inherent complexities of these identities (class, caste, religion, disability and gender).



A study done by the Kerala Development Society, on behalf of the National Human Rights Commission (Kerala Development Society 2017), mentions the NALSA judgment and its directives to state and central governments to combat the stigma attached to transgender communities in India through its recognition of a 'Third Gender' category and its push for affirmative action in educational institutes and government posts. It also highlights the importance for self-determination in applying for various identity cards and access to other socio-economic necessities. Citing the discrimination and harassment faced by transgender people in education, health (Paliwal 2017) and sanitation, employment, jails and public places (The Times of India 2016), the study showcased some shocking results.

Sample data from Delhi and Uttar Pradesh showed that almost 99% of transgender people have faced social discrimination, even from their families, and as a result almost 96% are denied jobs due to which they have to take on low paying and 'undignified' (Chauhan 2018) jobs in the informal sector such as Badhai work, sex work, selling fruits and vegetables and begging. Data also shows a caste wise distribution of livelihood activities; Upper-Castes took on Badhai work on auspicious occasions, Middle-Castes were involved in begging and Lower-Castes were more likely to be involved in sex work. The majority of transgender people earn between INR 10,000 and 15,000 (26.3%), while only 1% earn above INR 25,000 a month. Only 6 per cent are employed in the private sector or NGOs. As per the 2011 census, there are 4.8 lakh people who identify as transgender, out of which only 30,000 are registered with the Election Commission. In the data provided by respondents in Delhi and Uttar Pradesh, only 15% have a voter ID, and only 17% have an Aadhar Card made in the category 'Transgender'. Furthermore, 50 to 60% have never attended school, and those who did cited facing physical and verbal abuse from peers and teachers.

There have been critiques of the NALSA judgment, one being that it is too vague in its definition of 'Third Gender' and another that it does not take into account the intersections of caste and gender in its blanket conceptualizations and implementation of reservations (Semmalar 2014). Similar critiques on the basis of caste, class religion and gender have been highlighted for many years, particularly against LGBTQIA organizing in urban areas. The reality is that socioreligious differentiations have often been hidden in an effort to bring communities under the single umbrella of the law, ignoring the way people go about their everyday lives. This includes matters like marriage<sup>10</sup> and dating<sup>11</sup>, public events like Pride Parades<sup>12</sup>, and access into religious sites<sup>13</sup>. Studies have also been done to show how the everyday lives of people who identify as LGBTQIA in rural and semi-urban spaces are often made invisible, as a way to push back against 'Westernization' on one hand (Kumar 2014: 12), and on the other, in ways that are reluctant to deal with the concept of simultaneous discriminations of class, caste, religion, disability, and gender.

<sup>10</sup> Baudh, Sumit, *Indian Express*, Groom for Groom, May 25, 2015; <https://indianexpress.com/article/opinion/editorials/groomfor-groom/>

<sup>11</sup> Gautam, Manish, Round Table India, Caste and LGBT, June 30, 2015; [http://roundtableindia.co.in/index.php?option=com\\_content&view=article&id=8203:caste-and-lgbt&-catid=119&Itemid=132](http://roundtableindia.co.in/index.php?option=com_content&view=article&id=8203:caste-and-lgbt&-catid=119&Itemid=132)

<sup>12</sup> Jyoti, Dhruvo, Feminism in India, Being A Queer Dalit And The Assertion Of Dalit Identities In Pride Marches, June 22, 2017; <https://feminisminindia.com/2017/06/22/queer-dalit-assertion-pride-marches/>

<sup>13</sup> Goel, Ina, *The Wire*, Caste and Religion Create Barriers Within the Hijra Community, May 18, 2018; <https://thewire.in/lgbtqia/caste-religion-hijra-community>

## GOING FORWARD

In January 2019, creative incubator Suno Labs organized a multimedia exhibition titled 'Both Sides of the Veil: Living and Loving in Queer India' in New Delhi. An insight into the multifaceted lives of people from the LGBTQIA community after the striking down of Article 377 in September 2018, the exhibition aimed to invoke feelings of destabilization, noting that "Despite the newfound legal freedom for members of India's queer community, there are many social barriers that remain before anything like true equality can be claimed" (Suno Labs). Over the years, a number of photo essays, exhibitions, documentary films and such have showcased the inner lives of LGBTQIA communities; urban centres have accommodated Pride Parades and protests for equal rights; higher education departments have incorporated gender and sexuality studies in their curricula; homegrown media publications like *Bombay Dost*, *Gaysi*, *Gaylaxy*, *Pink Pages*, and *Labia* have been introduced and address issues relevant to these communities. NGOs and other organizations have emerged across the country as resource groups and collectives for marginalized voices; these include stalwarts like Naz Foundation, Humsafar Trust and Nazariya, as well as organizations like The Alternative Story which provides ethical and affordable mental health resources for individuals in need (The Alternative Story)<sup>14</sup>.

What is clear is that the work for inclusion, recognition and non-discrimination has only just begun. While issues like marriage and parenting rights are being talked about as the next steps towards equitability<sup>15</sup>, the need to understand the intersections between gender, class, caste, religion, disability, and urban and rural differentiations is integral. This is evidenced by legal struggles like the decriminalising of begging (which the police often use to harass transgender communities)<sup>16</sup>, the criticism levied against the recent surrogacy bill which does not allow same-sex couples to adopt<sup>17</sup>, studies about discrimination in the providing of sexual and reproductive health care<sup>18</sup> and even literature around the insufficiency of the regional LGBTQIA experience<sup>19</sup>.

When asking the question then – where do we go from here? – efforts to articulate sexuality in spaces other than the few privileged ones is perhaps the only way forward.

<sup>14</sup> The Alternative Story;

<http://alternativestory.in/services/>

<sup>15</sup> Pandit, Ambika and Garg, Abhinav, *Times of India*, Now, time to give LGBTs marriage & parenting rights, September 7, 2018;

<https://timesofindia.indiatimes.com/india/now-time-to-give-lgbts-marriage-parenting-rights/articleshow/65712127.cms>

<sup>16</sup> Banerjee, Ajita, *The Wire*, Decriminalising Begging Will Protect Transgender Persons From Police Harassment, August 17, 2018;

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<sup>17</sup> Nadimpally, Sarojini, Deepa V., and OshinSiao Bhatt, *The Wire*, Surrogacy Should Be Regulated, but the New Bill Falls Short, December 20, 2018;

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<sup>18</sup> Soumya, Elizabeth, *Aljazeera*, Indian transgender healthcare challenges, June 18, 2014;

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<sup>19</sup> Times of India Blog, *Times of India*, 'Being gay in rural India is different. Literature needs to capture that', August 27, 2017;

<https://timesofindia.indiatimes.com/home/sunday-times/all-that-matters/being-gay-in-rural-india-is-different-literature-needs-to-capture-that/articleshow/60235843.cms>

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