

**Gender Rights and the Classroom:
Queer Story of Section 377 in Our Lives**

Pawan Dhall, Rafiquel Haque Dowjah

The Idea of the Indian Constitution
Delhi Public School, Pune
February 7-9, 2020

Session outline

- What did Section 377 say or not say?
- How was Section 377 applied: Prosecution versus persecution?
- Why was Section 377 unconstitutional – what did its opponents and the court say?
- Post-decriminalization: Is Section 377 gone for good? What stand have courts taken? What can we as citizens do?

Critical look at Section 377

- **Section 377, Indian Penal Code:** Unnatural offences: Whoever voluntarily has carnal intercourse against the order of 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.
- What is carnal? Why carnal?
- No difference between voluntary and coercive sex? Arbitrary?
- Order of nature? Is sex only for reproduction? Not for pleasure?
- Modern or archaic? Victorian? In tune with ancient or medieval Indian values around sex and sexuality?
- Who did it apply to? Who did it impact the most? Why?

1) The IPC was drafted in 1860 by Lord Thomas Babington Macaulay, Chairman of the 1st Law Commission of India set up in 1834. Section 377 itself was introduced into the IPC in 1861. Lord Macaulay was also the one who first proposed the structure for higher education in India and other British colonies in the 19th century.

Critical look . . .

- Did Section 377 stand up to current global mental health perspectives?
- World Psychiatric Association (WPA) holds the position that same-sex sexual orientation (or transgender identity) per se does not imply objective psychological dysfunction or impairment in judgement, stability, or vocational capabilities . . . WPA considers same-sex attraction, orientation, and behaviour as normal variants of human sexuality . . . WPA supports the need to decriminalise same-sex sexual orientation and behaviour and transgender identity, and to recognise LGBT rights to include all human rights.
- Similar stands taken by World Health Organisation and Indian Psychiatric Society.

1) WPA SOGI position statement issued in March 2016; IPS statement in July 2018.

Section 377: Prosecution

- Slides 6 and 7, Lawyers Collective presentation for overview of prosecutions – meaning and scope of Section 377.
- One of the earliest cases was the judgment of Allahabad High Court in *Queen Empress Vs. Khairati* in 1884 wherein a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a “habitual sodomite” but was later acquitted on appeal.
- In those days trans persons were typically associated with the proscribed sexual acts. Unfortunately, they still are by the police even after decriminalization!

Section 377: Prosecution

- Case of Bharosa Trust, July 2001: An outreach worker of Bharosa Trust in Lucknow was arrested while distributing condoms in one of their outreach sites. The day after his arrest, the offices of Bharosa Trust and sister NGO Naz Foundation International were raided by the police and queer activist Arif Jafar along with two other colleagues were also arrested under charges related to Section 377 and a host of laws on abetment and obscenity.
- Arif Jafar, in particular, spent 54 days in prison before managing bail with the help of legal aid organization Lawyers Collective, Delhi. But the case against him is still pending resolution because of technicalities. In 2018, Arif Jafar was one of the petitioners in the Supreme Court seeking a reading down of the law.

1) Mention why Section 377 has been read down rather than repealed outright.

Section 377: Prosecution

Points to ponder on:

- Just around 200 prosecutions under Section 377 in 157 years, with many cases till 2012 being complaints related to child sexual abuse.
- Why did we depend on a law for 'unnatural offences' to deal with cases of child sexual abuse?
- Many cases of Section 377 also involved complaints by married women of forced sodomy by their husbands. Sadly, because family laws or laws against domestic violence did not recognize marital rape in any form!
- Thus you had Section 377 being used for many things but for the stated purpose of punishing sex against the order of nature!!
- So what has Section 377 been used for the most?

1) Dependence on Section 377 to deal with child sexual abuse because earlier no specific law was available for the purpose. Section 375 was used in cases of girl children, but it was not quite robust to deal with different forms of sexual abuse and did not protect boys from sexual abuse. POCSO Act of 2012 was the first law that dealt with child sexual abuse comprehensively, though it has problems related to overreach and criminalizing all forms of intimacy between children and adolescents.

Section 377: Persecution

- In August 1992, Delhi Police arrested 18 people from Central Park, Connaught Place, a cruising area popular with gay and bisexual men, *kothis* and other queer people. The arrests were based on mere suspicion of sexual acts being performed in the park.
- Point to note – Section 377 was *not* the grounds for arrest. Specific sections of the Delhi Police Act dealing with vagrancy, public nuisance or indecency were used. But it was common knowledge that the police would often use Section 377 only as a threat to extort money or get sexual favours done from queer people in cruising areas. The threats would usually work because of the fear of social ostracism, and sometimes even without the mention of any specific law.

Section 377: Persecution

- If a person did not oblige and was indeed arrested, they would be produced before a magistrate but charged under other, 'lesser' laws. The case would usually be resolved with the payment of a small penalty.
- The police would probably never have intended to press charges under Section 377 because of the absence of forensic or medical evidence required to prove that any sexual act 'against the order of nature' had at all taken place.
- Similarly, there were and still are innumerable accounts of trans women being picked up from public places, harassed and beaten up in the police lock-up. Earlier in the name of Section 377, now under other laws, or simply because the police often act as moral guardians and *seem to* have unaccountable power.
- Section 377 has been read down, but police harassment of trans persons and queer couples in public places still happens.

1) Mention 'lesser' laws as those against sex work, vagrancy, decency and obscenity. In some states, some of these laws or some sections of these laws have been repealed. But they are still in effect in the vast majority of the country.

Section 377: Persecution

- Section 377 also affected lesbians and bisexual women, including couples, in the form of threats and violence by family members and police harassment *in the name of the law*.
- Customs Department notice (1997) for distributing “Trikone Magazine” in India (display notice pages)
- Impact of Section 377 on the sexual health and mental health of queer people in India, including vulnerability to HIV.
- Influence of Section 377 on laws related to obscenity, representation of women, insurance, housing and labour rights.

(Un)constitutionality of Section 377

Section 377 violated Fundamental Rights:

- Article 14 (Equality and Equal Protection of Law)
 - Vague, arbitrary
 - Unreasonable classification and disproportionate impact
- Article 15 (Non-discrimination)
 - Prohibited grounds of sex includes sexual orientation and gender identity
- Article 19 (Freedom of speech, expression and association)
 - Obstructed right to receive / impart information
 - Forbade self-expression, prevented organizing
- Article 21 (Right to Life and Liberty)
 - Intrusion in privacy without compelling State interest
 - Violated right to dignity, infringed right to health

1) Reference: Lawyers Collective presentation.

2) Discuss issue of disproportionate impact – on paper Section 377 was applicable to everyone, but in effect it impacted queer people far more than heterosexual people. Section 377 was not a 'gay sex' law as the popular media made it out to be.

3) Mention Supreme Court verdict on right to privacy in *Justice K. S. Puttaswamy & Another Vs. Union of India & Others* (August 2017) as being instrumental in ensuring that Section 377 was read down.

Section 377 verdict of 6/9/18

- *Navtej Singh Johar & Others Vs. Union of India Ministry of Law and Justice.*
- Screening of film *Section 377 Verdict, September 6, 2018 - Highlights and Implications*, Bengali with English sub-titles, Varta Trust, SAATHII, CREA.
- Final verdict of the Supreme Court: “. . . it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.”

1) If needed add the following to the final verdict: “The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.”

Post-decriminalization

- Since September 2018, lawyers and courts across India have been citing the Supreme Court's verdict in cases involving adult queer couples facing family opposition and police harassment.
- But the Supreme Court also has expectations from citizens: Citizen activists also have a role to play in the transformation of Indian society in line with the concepts of 'constitutional morality'.
- Justice Chandrachud noted, "Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which above all, the Constitution seeks to achieve."

The way forward

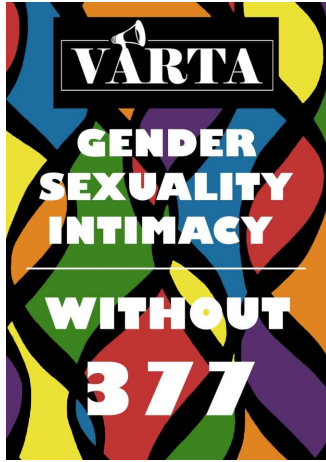
To take forward a constitutional education on queer rights, we must:

- Launch a media campaign on the judgment
- Translate a summary of the judgment into all Indian languages
- Create posters, leaflets, memes with quotes from the judgment
- Produce short video clips on key concepts in the judgment in as many languages as possible
- Ensure that activists, intellectuals, writers, **teachers**, actors, media personalities comment on key passages in the judgment and ensure dissemination of the same in different languages
- Hold seminars on the verdict in **colleges, universities**, workplaces
- Ensure that police stations, **schools, colleges**, workplaces have informational material which explains the Supreme Court's verdict on Section 377.

Larger implications

- The implications of the Section 377 verdict are not restricted to the queer communities. It has unleashed hope among all those working to deepen the values of the Constitution that there are institutions which can stand up to majoritarian pressure.
- The apology to the queer communities has triggered the demand that the systemic injustice caused to other 'minorities' should also be acknowledged, be it manual scavengers, adivasis, sex workers or religious minorities.

Thank you!



Rafiquel Haque Dowjah:
rafiquel_haque_dowjah@yahoo.com

Pawan Dhall: vartablog@gmail.com

* * *