

Decriminalisation in the Indian Context

Presentation by Arvind Narrain at the Global Convening on Decriminalization, Barbados, 24-26 July, 2019

I am incredibly proud to be sharing this forum with Menaka, Arundhati and Vivek all of whom apart from being dear friends are alumnus of the same law school in Bangalore which we all studied in. We also know that there were many other lawyers, activists and members of the LGBT community who were part of this long socio-legal battle to decriminalize LGBT lives in India. I see activism in the streets and activism in the courts as two strands of a double helix which contributed to this magnificent result.

The judgment in *Navtej Singh Johar* which decriminalized the lives of LGBT Indians of which we are inordinately proud is the outcome of a broad ranging struggle across multiple fronts waged at least 17 years ever since the Naz petition was filed in 2001. In the background is a legal time line from 1994 to 2018 which summarizes key legal moments in the battle.¹

Why we extol the judgment so much is because it removed the taint of second class citizenship from LGBT Indians, by noting that Sec 377 violated an expansive understanding of privacy, dignity, non discrimination and equality which the judges elaborated in the judgment. I want to make three points about the judgment itself

Firstly, the judgment is animated by a spirit of judicial atonement for wrongs caused and suffering inflicted, which is unparalleled in global judicial LGBT history. Be it *Lawrence v Texas*, or even the remarkably sensitive South African decision, no judgement is animated by this spirit.

As Justice Indu Malhotra put it,

History owes an apology to the members of this community and their families, for the for the ignominy and ostracism that they have suffered through the centuries.

As Justice Chandrachud put it,

It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations

¹ <http://altlawforum.org/publications/right-to-love-navtej-singh-johar-v-union-of-india-a-transformative-constitution-and-the-rights-of-lgbt-persons/>

Where did this idea of apology come from? J. Malhotra during the hearings referenced the speech of Theresa May, in the Commonwealth Conference in which Theresa May, said that *As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today.* ”

Justice Indu Malhotra transmutes a weak ‘regret’ into a full blooded apology. The ‘regret’ which has had such momentous consequences did not come from the air but is the result of remarkable activism at the commonwealth level headed by Kenita Placide and Rossana Caldera which made the point in Britain’s UPR that

We seek an apology not to look backwards but rather to look forward. The apology is a forceful reiteration of the fact that the criminalisations of same sex relations has nothing to do with precolonial cultures or traditions but everything to do with outdated Victorian moralities and by so stating will immeasurably strengthen the hands of those fighting for freedom from these laws.

So thank you to Kenita and Rosanna and the many others for your work in making possible perhaps the most moving judicial moment in a remarkable judgment.

Secondly, I want to make about how the judgment has implications beyond the LGBT community is Justice Chandrachud’s invocation of the implications of the right to love. In Anglo American perhaps progressive circles, this right is derided as a bourgeoisie right. I want to make a case for the deeply progressive implications of the right to love.

What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority. Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all.

Thirdly, I want to highlight how the judgment highlights the issue of judicial responsibility towards minorities in a majoritarian society. In a country in which the mob has felt empowered by the powers that be to lynch religious and caste minorites for the food they eat, the religion they worship or the names that they have, this judgment’s declaration of the role of the judiciary is important.

As Justice Nariman put it,

These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. [...] Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.

What contributed to this remarkable judgment?

The battle for decriminalisation was a 'freedom song sung by those who dream of flight'. These dreams of freedom were articulated from a million hearts and the final victory is owned by all of them. To give you one example of a transgender person in Bangalore, who after the victory was won in 2018 said that when we marched against the law year after year beginning in 2004 when a transgender person suffered a brutal rape right through the pride marches every year from 2008 to 2018 we thought we were mad to imagine that the law would go. But the law has and we are immensely proud of what we have achieved.

Who are the authors of rights?

Here I would like to assert with eminent human rights activists, K Balagopal that 'On the whole, without some struggle or agitation, rights do not accrue.' As Upendra Baxi put it, rights are authored by 'communities in struggle and people in resistance'. Or as Justice Shah said in 2009 when the Delhi High Court in a historic judgment decriminalized same sex relations, 'the court does not confer rights, it merely confirms them'. In fact *Navtej Johar* acknowledges its debt to *Naz* handsomely and takes *Naz* forward in new and exciting directions and can rightly be called *Naz* plus.

To give you a sense of the awe inspiring nature of social and political mobilization in a campaign called, 'No Going Back', which was initiated after the negative judgment in 2013 which conveys something of the passionate intensity with which LGBT Indians and their allies opposed Section 377 and brought about its demise. See link for video [here](https://vimeo.com/114100475). (https://vimeo.com/114100475)

Why this movement dimension is important is because end of the day our objective is not only that the law should go but that it should go as the result of a wide ranging social and political mobilization. The campaign against the law needs to transform social attitudes and dissolve prejudices in our homes, schools and workplaces. For that a public campaign is an essential tool.

We still have a long way to go in displacing social morality with a constitutional morality. The judgment of 2018 is a key moment in our struggle it's up to us now to implement one of the directives of the judgment. As Justice Nariman put it, 'the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media and initiate programs to reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment'.

This is still to be implemented by the Indian state. However, what we have is a landmark judgment which empowers us to fight with our hands untied.

What the Indian struggle to my mind demonstrates is both the multiple sources of inspiration (lives of LGBT persons who suffered persecution, academic literature, historical accounts, comparative jurisprudence (decisions of Fiji, Hong Kong, Belize, Trinidad which were cited by the SC) as well as the multiple strategies which are important in the time going forward.
