

A Legacy of Colonialism: The Criminalization of Homosexuality in India

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Abstract

In 2018, the Supreme Court of India decided to decriminalize “homosexuality” in India by repealing Section 377, a colonial-era anti-sodomy maintained within the Indian Penal Code. This was a remarkable decision, however, in 2013 the same court upheld Section 377 as integral to Indian law and society. What changed between 2013 and 2018 that led to the reconsideration of the Supreme Court decision? In this paper, I seek to explain this process of decriminalization by analyzing the judicial interpretation of the anti-sodomy law in three key Court cases: *Naz Foundation v. Government of NCT of Delhi & Others*, 2009; *Suresh Kumar Koushal v. Naz Foundation and others*, 2013; and *Navtej Singh Johar and others v. Union of India*, Thr. I use an inductive approach and qualitative coding methods to analyze the validity of Section 377 in those legal documents. I argue that a shift in the Court’s language when addressing the rights of sexual minorities contributed to a new rights discourse that changed the way Section 377 applied to the Indian Constitution. While Section 377 in its application was held to be unconstitutional, the reasons for doing so appear reflective of both a traditional and secular notion of gender and sexual orientation. This new discourse involved a move towards secularized notions of gender, as well as a nod to traditional Indian culture surrounding gender variance. We can view this discursive shift as essentially authorizing a break with colonial understandings of sex and gender and validating in law a more fluid conception of sexual identity.

Keywords: Anti-Sodomy Laws; section 377; Supreme Court of India; British colonialism; gender and sexuality

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Chapter 1.

Introduction

A 2009 Delhi High Court decision marked the beginning of a lengthy legal battle over the existence of a colonial-era anti-sodomy law in India. By 2009, most of the “Western” world had moved beyond the criminalization of “homosexuality” through such sodomy laws; however, this was different for most former British colonies, including India.

In 2009, Naz Foundation, a non-profit organization, challenged Section 377 of the *Indian Penal Code* (IPC), a colonial-era anti-sodomy law, in the Delhi High Court.¹ This Section deemed that sexual acts between same-sex couples were “against the order of nature” and therefore is to be prosecuted. The IPC was enacted in 1862 by the British which included Section 377. In practice, this section targeted the “homosexual”² community by criminalizing same-sex activities amongst consensual adults (Gupta 2006). The British enacted this law in former British colonies, including India, which was the first colony to have the law in place. The use of Section 377 has been detrimental to the LGBTQ+ community, as members of the community claimed the law unfairly targeted individuals for being “homosexuals,” leading to increased harassment and abuse for those belonging to the LGBTQ+ community. Hence, *Naz* challenged Section 377 in Court on the basis that it violated the constitutional right to protection from discrimination, equality before the law, freedom of expression, and life and personal liberty (*Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* 2009). The Court decided in

¹ The “High Court” is the highest Court of the specific State (i.e. Delhi High Court, highest in the State of Delhi); an appeal to this decision would have to be granted by the Supreme Court of India.

² The term “homosexual” is a contested term when referring to members of the LGBTQ+ community; however, it has been used within the language of the Indian Penal Code, as well as the Court judgements. For this reason, I use it in this paper solely within that context.

favour of the Petitioners,³ stating that Section 377, insofar as it criminalizes consensual sex amongst adults, violates the fundamental rights protected by the Constitution (ibid).

While this was a win for the LGBTQ+ community, those who opposed this decision submitted an appeal which was taken on by the Supreme Court of India. In 2013, the Court decided to reinstate Section 377, stating that the section did not violate any constitutional rights, and therefore it should not be removed from the Penal Code (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013). The Supreme Court held that the law does not target “homosexual” identity, just a specific sexual act, and hence is gender-neutral. Despite the efforts of many activists, and organizations, the Supreme Court maintained the need for a colonial-era anti-sodomy law, within modern Indian society.

The LGBTQ+ community and their allies did not share this view. They continued to raise issues concerning police oppression and harassment targeted towards the members of the community. Testimonies documented in human rights reports find instances of harassment against members of the community for holding hands in public with an individual of the same sex or dressing a certain way (“Human Rights Violations against Sexual Minorities in India: A PUCL-K Fact-Finding Report about Bangalore” 2001). The report documented cases of extortion, where police would threaten and extort money from members of the LGBTQ+ community under the veil of Section 377 (“Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore” 2001). Other forms of oppression included physical and verbal abuse. Members of the community have spoken out about abuses conducted by police, which included obscene language, violence, and sexual abuse (ibid). In terms of documented arrests made under the Section, there has been an increase in cases reported since 2014. The National Crimes Records Bureau started recording the cases reported under Section 377 since 2014, where there were 1,148 cases reported that year, 1,347 cases reported in 2015, and 2,187 cases reported in 2016; this does not include many

³ See Appendix C for further details on parties involved in the court cases

unreported cases (Thomas 2016; National Crime Records Bureau: Ministry of Home Affairs 2016).

As these violations and arrests continued, NGOs, LGBTQ+ members, and allies petitioned the Supreme Court to reconsider their decision on the constitutionality of Section 377, resulting in the Court calling for a five-judge constitutional bench.⁴ Based on testimonies within the petitions, as well as local and international legal precedents, the Court held that Section 377 was unconstitutional; resulting in the “reading down”⁵ of the law as it applies to cases of consensual same-sex acts committed by adults in private (*Navtej Singh Johar & Ors. v. Union of India*, 2018).



Figure 1. Legal Battle over Section 377

This decision led to the decriminalization of homosexuality; however, it begs the question of why now? What changed between 2013 and 2018 that led to the reconsideration of the Supreme Court decision? To understand the decriminalization of “homosexuality” in India, I focus on interpretations of Section 377 within the Indian criminal code in relation to the Constitution of India, as the application of Section 377 plays a vital role in how “homosexuality” was criminalized. In analyzing the Court judgements over the validity of Section 377, I identify a shift in language in how the Court addressed gender and sexuality within the Constitution. This shift represents, I

⁴ Through a curative petition, which within the Indian context is the last resort for a legal reconsideration of a Supreme Court decision. This was introduced with a 2002 Supreme Court case, which questioned the right of an “aggrieved party” to question the SC decision, if that decision is to have a negative effect on them. The Court decided that appeals in this case can be made. This stands with section 137 of the Indian Constitution, stating that the Supreme Court has the power to review any judgement made by the Court (*Rupa Ashok Hurra vs Ashok Hurra And Another*, decision made 2002; *Constitution of India*, 1949).

⁵ A narrow interpretation of a law in accordance to the Constitution. Here Section 377 is not removed from the statute, rather the Court attached a specific interpretation of the law that would apply to future cases.

argue, a new rights discourse. The Court re-defined gender and sex within the law to be more fluid and inclusive of non-binary identities. This discourse involved a move towards secularized notions of gender, as well as a nod to traditional Indian culture surrounding gender variance. We will never really know what led the Court to this discursive shift, but we can view it as essentially authorizing a break with colonial understandings of sex and gender and validating in law a more fluid conception of sexual identity.

I base my argument on an analysis of judicial interpretations in three key Court cases: *Naz Foundation v. Government of NCT of Delhi & Others*, 2009; *Suresh Kumar Koushal v. Naz Foundation and others*, 2013; and *Navtej Singh Johar and others v. Union of India, Thr. Secretary, Ministry of Law and Justice*, 2018. Examining these judgements, I focus on two main dimensions. The first focus is on how the court's interpreted the Section, within the different Court judgements, and how that affected their decisions. As we have seen, the final decision made by the Supreme Court of India in 2018 held a narrow interpretation of Section 377. It stated that the Section violates the Constitution as it applies to same-sex acts committed by consenting adults in private. The Court decided that the Section is used to target sexual minorities as a class rather than a criminalized sexual act, regardless of gender or sexual orientation. In determining that Section 377 targeted a specific class of people, the Court also stated that Section 377 was unconstitutional. However, this was not the interpretation that was used in the Court's decision in 2013. Hence, I focus my analysis on how the Court reached its final interpretation of the law, which led to the "reading down" of Section 377. The second focus of my analysis is on precedents set in 2014 and 2017, which expanded the terms "sex" and "gender" to include sexual minorities and introduced the protection of a self-determined gender as integral to one's identity and dignity. These precedents resulted in the evolution of the Constitution.

I argue that this new rights discourse drew from both past-and present knowledge surrounding LGBTQ+ identity. While we see that Section 377 in its application was held to be unconstitutional, the reasons for doing so appear reflective of *both* a traditional *and* secular notion of gender and sexual orientation. This is significant, as it is a move away

from the colonial knowledge ingrained within key Indian legal and societal institutions. It further alludes to the notion that the Court is reclaiming traditional values on gender and sexuality held before colonialism. Before the laws enacted by the British, there were no Hindu laws in place that criminalized gender variance or acts of sodomy (Nanda 1989; Reddy 2005). The following sections of the paper explore these ideas more in-depth to understand the formation of this new rights discourse and its implications for Indian law and society.

The paper includes two main sections: The first sets the scene to understand the LGBTQ+ community in India. Using existing literature on the subject, I outline the effects of Section 377 on Indian society, and why it is essential to study its existence within Indian law and society. This includes an understanding of the legacy of colonialism that lies within the treatment of sexual minorities and its contrast with the pre-colonial history of gender variance in India. Furthermore, I look at the origins of Section 377 and its legal history until 2018, when the Supreme Court repealed the law.⁶ In doing so, it gives an overview of how the law came to be, why it was retained, and how it impacted the LGBTQ+ community in India.

The second section of the paper seeks an explanation for the change in the law in 2018. While Section 377 was put in place by the British, the Indian government retained the law after independence, and the Supreme Court reaffirmed its existence in 2013. In applying an inductive, interpretive method of analysis to narrow down the underlying reasons behind the Court's decision, I argue that a shift in language within the Court's judgements, and reasoning contributed to a ruling upholding the rights of the LGBTQ+ community, and the repeal of Section 377. The judgements marked the existence of a new rights discourse. There were specific precedents that contributed to a new definition of gender and sexual orientation. These definitions were more fluid and moved away from the binary understandings of gender/sex that was reinforced by Section 377, leading to a change in how the Constitution applied to sexual minorities. The evolution of understandings of gender and sexuality includes both traditional knowledge, with the

⁶ The repeal was conditioned on the law applying only to consensual same-sex acts committed by adults in private.

official recognition of “Third Gender,” as well as a secular understanding of “gender” and “sex” within the Constitution that moves away from a binary understanding reinforced by Section 377. By shifting the way LGBTQ+ identity was addressed, the Courts contributed to a new rights discourse that merges secular and traditional knowledge. By doing so, the Courts moved towards reclaiming traditional Indian values of gender, initiating a dismantling of colonial power embedded within British laws retained by India after independence.

Chapter 2.

Section 377 and The Legacy of Colonialism

The Significance of Anti-Sodomy laws and Section 377

Anti-sodomy laws ban specific sexual acts such as anal sex and more broadly non-procreative sexual acts. The laws themselves evolved from targeting the specific sexual acts, to the person who commits those acts, the “sodomite.” In doing so, the law targeted the “homosexual” community, as they are often associated with the acts described within the law (Gupta 2006). The following section gives a brief explanation of the importance of studying sodomy laws, their origins, and the specific impacts on Indian society.

The origins of anti-sodomy laws go back to British “buggery” laws. Douglas Sanders (2009) shows the evolution of the law, from its origins in early the 1500s to current instances within criminal codes of former British colonies, shedding light on the heavy “Western” and British influence on the nature of the act. Enze Han and Joseph O’ Mahoney (2014) look deeper into the relationship between colonialism and anti-sodomy laws. By doing a comparative study of analyzing sodomy laws in former British, Spanish, and French colonies, they found that former British colonies are more likely to maintain laws that criminalize “homosexual” activity. They also allude to the idea that, by enacting this law, the British have impacted its decriminalization process after the colony’s independence (Han & O’Mahoney, 2014). This does not involve an active British role in prohibiting decriminalization; rather, the focus is on the mechanism used by the British that differs from the Spanish and French making the reversal of the law harder for former British colonies.

Looking more closely at the Indian context, many scholars have researched the impact of Section 377 on the LGBTQ+ community in India (Misra 2009; Gupta 2006; Radhika Ramasubban 2007; Singh 2016). Geetanjali Misra (2009) speaks to some of the specific implications of the law, outlining how the community is marginalized by Indian

society, as their identities and sexualities are forced to be hidden from family and society. Section 377 had a crucial impact on how police treated members within the LGBTQ+ community. Many stories told involve members being physically and mentally abused for being in public places with men.

Other scholars within this area focus on the effects of Section 377 on public health (Singh 2016; Diehl et al. 2017; R. Ramasubban 2008). A common theme that arises in these articles is a societal belief that homosexuality is a health issue and can be “cured,” leading to a pathologization of homosexuality. Pawan Singh (2016) argues that the move towards providing better health care for the LGBTQ+ community must start by countering this pathologizing view of homosexuality. By criminalizing homosexuality, society stigmatized “homosexuality” as a disorder, resulting in “treatment options” such as conversion therapy, and forced marriage, used by families (Singh 2016; “Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore” 2001). Within the Indian context, the research focus has been on the impact of Section 377 on Indian society; however, this paper looks at the topic through an institutional and discursive lens to analyze the legality of how “homosexuality” was decriminalized.

India is home to one of the most vibrant gender-variant communities, commonly referred to as the “third gender” of India (Moorti 2016; Nanda 1989; Reddy 2005). The communities have various names depending on their region; for example, in North India, the Hijra community is the most prominent, and in South India, the Aravans are the most common (ibid). The uniqueness of these communities has to do with their non-binary nature, often seen as “neither man nor woman,” and the community’s rich connection to the Hindu religion. Many scholars have studied these communities in India and the vital role they play within the community (Reddy 2005; Nanda 1989; Nagar and DasGupta 2015; Moorti 2016). Ethnographies conducted by Serena Nanda and Gayatri Reddy are essential texts that provide detailed information about the life and origins of the Hijra community. Drawing on these works, other scholars speak to the community’s ties to colonial authority (Hinchy, 2013; Narrain, 2004; Ramasubban, 2007). The connection between gender-variance and colonialism is essential in this case, as the British Criminal

Tribes Act of 1871 criminalized the Hijra or “eunuch” community in India during colonial rule, making them criminal due to their “nature” (Moorti 2016). While the government did not retain this law after Indian independence, the sentiments towards the community remain the same in various areas of Indian society; and criminalization continued through Section 377.

As the above briefly describes, existing literature on this topic is limited to the effects of Section 377 on Indian society, or more broadly to the role of anti-sodomy laws in general. This study fills a gap in this literature as the case in India has been ongoing, and many key judgements made on the issue have been very recent. My study provides a different perspective on the topic, as it will include the most recent changes made, i.e. the decriminalization of “homosexuality.” By focusing on this process, the study shows a shift in the rights discourse around the rights of sexual minorities within the country. The following section speaks further to how existing literature on this topic has informed my study, focusing on the legacy of colonialism that has been solidified by the implementation of Section 377.

A Legacy of Colonialism

While many factors aided in the decriminalization of “homosexuality,” the case also shows a history of knowledge replacement through British colonialism that had a significant impact on the way that “homosexuality” was viewed, by society and law, in India. Section 377 originated from early English views on “buggery”; however, this was not the case prior to colonialism. Before the English arrived in the region, Hindu law, and culture was more accepting of same-sex relations. This section explores the contrasts between the pre-and post-Colonial treatment of the LGBTQ+ community and how Section 377 left a legacy of colonial power within independent India.

There is a long-standing history of transgender and gender-variant communities in India. These communities have been in existence long before colonialism and are still a strong presence today. One of the most prominent gender variant communities in India is the Hijra community. The Hijra community consists of people who are biologically male,

taking on a female gender role (People's Union of Civil Liberties, 2001, 6). Gayatri Reddy (2005), in her ethnography of Hijras in India, shares the various characteristics that make up the community. She points out that hijras are biological men, dressing in female clothing, out of which some abandon sexual desire by undergoing the procedure of genital emasculation. Serena Nanda's (1999) ethnography, shares the compelling stories within Hindu mythology that serve as origins some of the practices of the Hijra community, as well as their existence in general. When asked about the genital emasculation, the hijras state:

There was once a king who asked a hijra to show him her power. The hijra clapped her hands three times and immediately the door of the palace opened automatically, without anyone touching it. Then the king said, "Show me your power in some other way." By the side of the road, there was a thorny cactus. The hijra just took the thorn of the cactus and emasculated himself. He showed the king that he had the power (Nanda, 1999, p.24).

This procedure of emasculation is a significant source of the hijra power and is dedicated to goddess Bedhraj Mata, also known as Bachuchara Mata, or Mother Goddess (Reddy, 2005, p.2). Bachuchara Mata is a key icon of devotion for the hijras. Hijras are often present in temples that worship her; where they act as servants of the gods and bless worshippers that visit (Nanda, 1999, p.25).

One of the main characteristics of the Hijra community is their identification as non-binary, "neither man nor woman"; categorized as the "third gender" of India. This again can be drawn back to Hindu mythology within the famous epic Ramayana. Ramayana is the story of Lord Ram, an avatar of Vishnu, and his wife Sita, who was taken away from him by the demon Ravana and was later defeated by Ram. Within the story, Ram was sent into the forest for 14 years in order to meditate and was followed by members of his village who were devoted to him. Ram, however, did not want them to suffer and ordered the ladies and gentlemen to return to the village. He later found that those who did not identify as either male or female remained, meditating for 14 years alongside him. As a result of their loyalty to Lord Ram, the community gained his blessing (Nanda, 1999, 13). This epic's story confirms the hijra identity as "neither man

nor woman”, but as a third gender of society which does not conform to specific male or female binaries (Nanda, 1999).

There is also a strong religious component to the existence and behaviours of the Hijra community. The community believes that they possess the power to grant fertility to newlyweds and newborns (Reddy, 2005; Nanda, 1999). This “power” speaks to the traditional and ritualistic role of hijras within society, as they are often seen giving their blessings, and performing during weddings and other auspicious events (Reddy, 2005). A Hindu story about the god Krishna shows where the hijras get this power. Lord Krishna takes a female form to destroy the demon Araka. Araka gains his strength from his chastity, and in order to weaken him, Krishna transforms into a beautiful woman and married the demon. Three days into the marriage, a battle broke out where Krishna killed Araka and revealed himself as Krishna to the other gods (Doniger, 1999, 265). The hijras point out that when Krishna reveals himself to the other gods, he said “there will be more like me, neither man nor women, and whatever words come from the mouths of these people, whether good [blessing] or bad [curses], will come true” (ibid)

The Hindu tradition also has many instances of bisexual behaviour, clearly pointing out that there are strong Hindu traditions for gender-variant communities and actions. Through these traditions, hijras have been integrated into Indian society. The Hijra community and those alike, have been respected by Hindu culture and society in many ways prior to the British. There were no laws in place that prohibited their community or actions, until the British Criminal Tribes Act, categorizing “eunuchs” as a criminal community, and Section 377 which further criminalized their behaviour; subjecting the community to further harassment and exploitation. This shows how traditional Indian knowledge around gender and sexuality was replaced by the British. To understand this further, we need to look at the origins of British sodomy laws.

Pre-colonial India contained a multiplicity of cultural, religious, and political structures, which had no single Hindu, Muslim, or Christian authority (Chitnis & Wright, 2007). The people were diverse, comprising of a population consisting of multiple tribes, castes, sects, and family groupings that cross familial and religious lines (Chitnis &

Wright, 2007). Law at this time was mostly customary, giving outsiders the interpretation that pre-colonial India lacked a legal structure. Initially, British rule over India started through the East India Company, which gained authority over three regions, Bengal, Bihar, and Orissa (now called Odisha) (Sanders, 2009). This was a way for the British to have authority without setting up a sovereign state (Chitnis & Wright, 2007). With the justification that there was a lack of law and order within the region, the East India Company, and later the British Raj, established its control over the population by creating new political and legal structure of governance, which were to replace the existing customary practices and traditions; this included the Indian Penal Code (Chitnis & Wright, 2007)

The Indian Penal Code (IPC), drafted by Thomas Babington Macaulay, came into force in 1860 as the first criminal code in the British Empire and became the model for other colonies (Sanders, 2009). Section 377 was integrated into the penal code, making it the first colonial sodomy law, and later spread to other British colonies within Asia and Africa (Gupta, 2008). The act reflected the “Western” values that the British held, extending from early laws on “buggery”; leading to the criminalization of sexual acts, termed “carnal intercourse,” that was “against the order of nature” (Sanders 2009; Gupta 2006).

Section 377 was an extension of the British beliefs against “buggery,” and a reflection of the existing sodomy laws. The act was a way of testing how the use of systematic law would work within the Empire. Through comprehensive writings of codes, and refining the meaning of sodomy, the act became a criminal offence (Gupta 2006). Sodomy laws in England dated back to the medieval era, which viewed sodomy “as an offence against God” (Gupta, 2008, p.92). In 1533, a statute restated the criminality of sodomy as an issue within the state, rather than the church. The act of sodomy was defined as “acts committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by woman kind with brute beast” (Gupta. 2008. P.93). In addition, it included any act of anal sex between a man and man, or man and woman. This definition was further clarified and broadened when drafted within the Indian Penal Code. When drafting the Indian Penal

Code, Macaulay introduced “fresh language” to the policy. He intended to “reformulate the buggery law by broad provisions against any touching with intent to gratify unnatural lust” (Sanders, 2009, p.11). The section in 1860 read as follows:

Whoever voluntarily has carnal intercourse against the order of nature with a man, woman, or animal, shall be punished with transportation 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.

It is not necessary to prove that the act was against the will or without the consent of the person upon whom the offence is committed. If that person is consenting, both are guilty of the offence (Indian Penal Code, 1860, 326).

This law reflects a kind of “civilizing mission” as the IPC, along with other laws of the time, were made to project the western British morals and values. Another example of this was the Criminal Tribes Act, which had a similar law, enacted after the IPC, specifically targeting gender-variant communities within India. This legislation was put in place to supervise the acts of the Hijra and transgender communities as they were considered “innately criminal and addicted to the systematic commission of non-bailable offenses” (*National Legal Services Authority v. Union of India and Ors.* 2014,13). Through this act, “eunuchs” were registered, surveilled, and controlled as a criminal tribe. (ibid, 14). Those who fit the category, based on appearing or dressing as women or dancing and playing music in public places, were arrested and detained without warrant, and imprisoned for up to two years or fined, or both (ibid). Other conditions under this act included the following:

...[registering]the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the IPC, or of abetting the commission of any of the said offences... the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son (*National Legal Services Authority v. Union of India and Ors.* 2014, 14).

The Criminal Tribes Act reflects the treatment of the LGBTQ+ community in modern India, especially the gender variant and transgender community. While the Act was repealed in 1949, the IPC was retained in 1947 after Indian Independence, along with Section 377. The “framers” of the new Indian Penal Code debated and used public opinion to determine what laws should be maintained after independence. Regarding Section 377, the questionnaire asked two questions: 1. “Should unnatural offences be punishable at all, or with heavy sentences as provided in section 377?” 2. “Should an exception be made for cases where the offence consists of acts done in private between consenting adults” (Indian Penal Code, 1971, 281)

The results of the questionnaire were “conflicting.” They stated that those who wished to share their opinion on the matter supported retaining Section 377 (Indian Penal Code, 1971, 281). The questionnaire resulted in mixed responses with some stating that acts committed under the section in private should not be considered as offences; however, others argued that these acts were “abominable and litesome which tend to make men and women depraved” and deserve to be punished, including consensual acts in private (Ibid). There was also an impression among the responses that the punishments under the section were unrealistic, and judges were not likely to convict men with imprisonment for life under the act (Indian Penal Code, 1971, 281)

Based on the responses, the law was retained. One of the main reasons the framers justified retaining the law was due to society’s negative view on homosexuality, saying “we are inclined to think that Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify [homosexuality] being treated as a criminal offence even where adults indulge in private” (Indian Penal Code, 1971, 282). The language in Section 377 was slightly altered, stating:

377. Buggery – Whoever voluntarily has carnal intercourse against the order of nature with any man or woman shall be punished with imprisonment of either description for a term which may extend to two years, or with a fine, or with both; and where such offence is committed by a person over eighteen years of age with a person under that age, the imprisonment may extend to seven years

Explanation: - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section (Indian Penal Code, 1971, 282).

In retaining Section 377 after independence, the framers of the “new” Indian Penal Code solidified the colonial era sodomy law into modern Indian society. This became a challenge to the LGBTQ+ community, sparking a rights movement in the early 90s. The LGBTQ+ rights movement in India is mostly an urban-based movement of young professionals. Since the early 1990s, they have sought from the State equal democratic rights for members of the LGBTQ+ community. Currently the movement was more prominent for their fight against Section 377. Their demands for the advancement of civil liberties include rights for all sexual minorities, including the hijras and other gender-variant communities. They argued that Section 377 affects all sexual minorities, hence justify the creation of an all-encompassing movement. Non-profit organizations and members of the LGBTQ+ community have been pivotal in the repeal of Section 377, by petitioning the Court both in 2001 (leading to the 2009 High Court decision), and in 2016 (leading to the Supreme Court decision in 2018).

An Inductive Approach: Method and Data Collection

This section speaks further to why I chose to study the Indian case, and how I will be conducting my data analysis.

I study India for two sets of reason. First, India was one of the first colonies to have an anti-sodomy law (Section 377) implemented by the British, which later served as a template for other British colonies (Han & O’Mahoney, 2014; Sanders, 2009a). Second, the case was topical, in that the Supreme Court of India reaffirmed the use of Section 377 in 2013, and the Section was repealed by the same Court in 2018. Third, India makes for a fascinating case due to its traditional history of gender-variance, prior to colonialism, which conflicts with the practices of Section 377.

During the data collection process, I wanted to narrow down the scope to focus on key instances that affected the legal status of Section 377, and one which encompassed

the overall process of decriminalization. Based on this, I focused on three main legal documents:

1. Delhi High Court:
 - a. *Naz Foundation v. Government of NCT of Delhi & Others* (Decision made: 2nd July 2009)
2. Supreme Court of India:
 - a. *Suresh Kumar Koushal v. Naz Foundation and others* (Decision made: 11th December 2013)
 - b. *Navtej Singh Johar and others v. Union of India, Thr. Secretary, Ministry of Law and Justice* (Decision made, 6th September 2018)

The documents analyzed were the direct judgements, ranging from 200-500 pages each, from each of the court cases listed above. The documents are the Court provided judgement, and includes the opinions and reports written by the Court. The documents are essential for this study for two main reasons: first, the cases represent the most recent court battle for the removal of Section 377. They speak to the overall narrative of how this law came to be, and why/why not, it needs to maintain within Indian law. Second, these documents encompass various voices within the debate, including the government, society, and the courts. These cases and corresponding documents provide an overall perspective of the issue. The four main court cases, along with relevant sections of the Indian Constitution and the Indian Penal Code (IPC), are the data I use for this study.

Drawing from grounded theory, I use an inductive method of analysis, by first collecting data relevant to Section 377 and then using a coding method, inspired by methods outlined by Johnny Saldaña (2016). This project is inductive, as I aim to draw theory primarily from the data collected. Through these methods, I seek to understand how the Supreme Court repealed section 377 by analyzing the changes in rhetoric between 2013 and 2018. While the study is primarily inductive and designed to “let the data speak for itself,” the coding could not be purely inductive due to the nature of the documents. As legal documents are designed to have strategic language, codes designed for first-person accounts, such as interviews, would not work. Due to this, I used a few specific descriptors commonly found within legal documents. These included national

and international precedents used in the arguments and decisions, international human rights conventions, the use and interpretation of the Constitution, moral and cultural values used in arguments, and general background speaking to origins of laws, values, and communities. These descriptors are specific to legal cases, as the parties involved often use them to make their arguments and decisions.

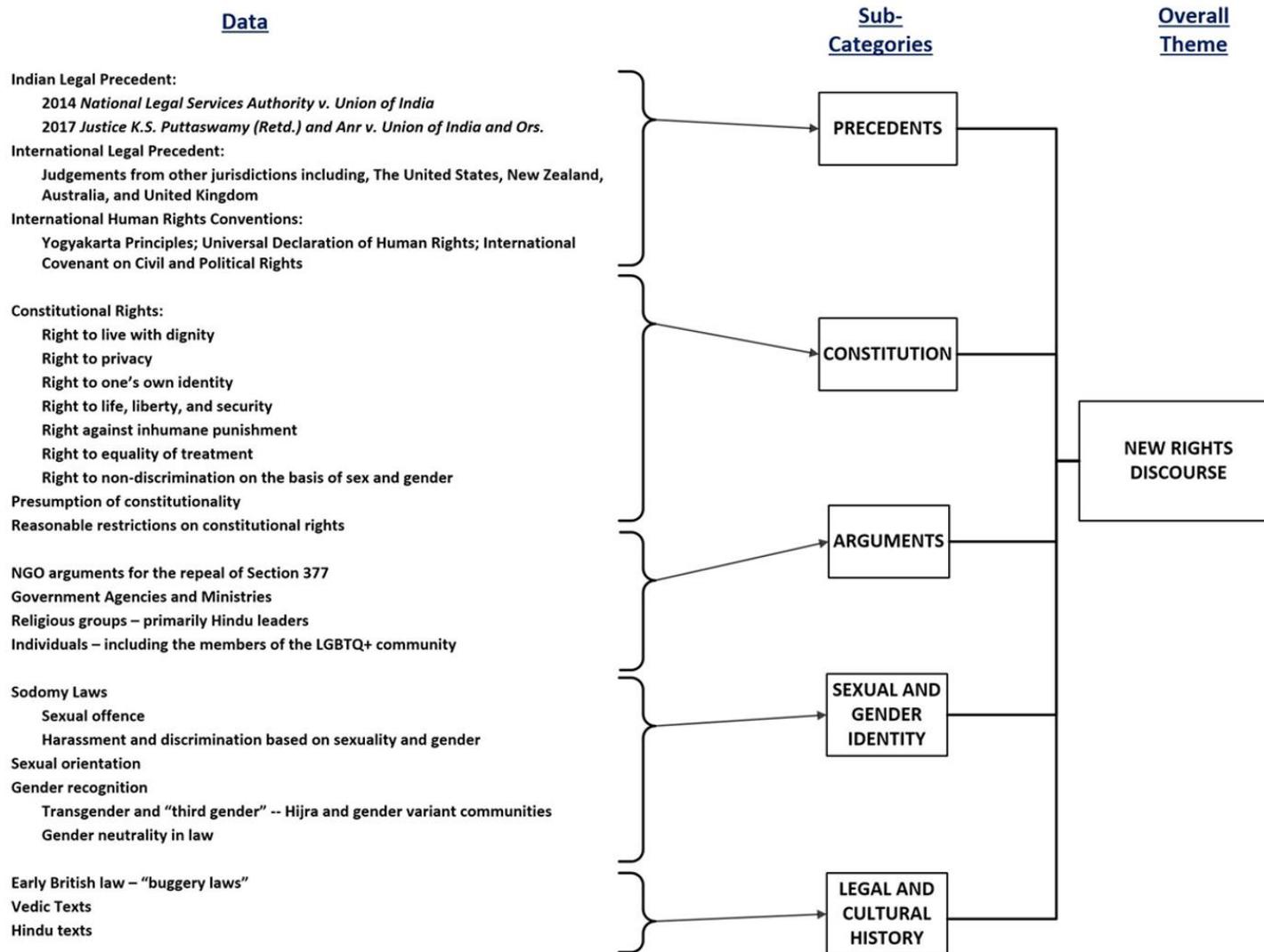


Figure 2. Coding analysis process/results

In accordance with my method of analysis, Figure 2 shows the process I used to code my data. Primarily using an inductive approach to let the data gathered “speak for itself,” I used two cycles of coding based on grounded theory analysis, on three primary court documents dealing with the legality of Section 377.⁷ In the first cycle of coding, I used *exploratory* and *descriptive* coding methods,⁸ as defined by Johnny Saldaña (2016) to get a better understanding of the data (this part is represented as “data” in Figure 2). Here, due to the legal nature of the documents, I went in with a few discerning characteristics of Court decisions, such as the arguments presented by the actors involved, the use of domestic and international precedent, the reference to international human rights conventions, the application of the Constitution, and any moral or cultural values.

The second cycle of coding was used *thematic* and *pattern* coding,⁹ to further analyze the codes found in the previous cycle (this part is represented as “sub-categories” in Figure 2). For this stage, therefore, the data collected in the first cycle are compared together for similarities and differences. The similar data are then grouped to form broader themes or conceptual headings, which is then further analyzed and integrated around a core category. For example, descriptive data such as the right to privacy, right to equal opportunity, and the right against discrimination based on gender, are grouped under Constitutional values. Through this, I found that there was a heavy reliance on the use of precedents (including domestic, international, and human rights conventions), the application of the Constitution, and the discussion around the definitions of gender and

⁷ *Naz Foundation v. Government of NCT of Delhi & Others* (Decision made: 2nd July 2009), *Suresh Kumar Koushal v. Naz Foundation and others* (Decision made: 11th December 2013), and *Navtej Singh Johar and others v. Union of India, Thr. Secretary, Ministry of Law and Justice* (Decision made, 6th September 2018).

⁸ *Descriptive coding*, “assigns labels to data to summarize in words or short phrase the basic topic of a passage of qualitative data” (Saldaña 2016, 292)

Exploratory coding, “open-ended investigation and preliminary assignments of codes to data before more refined coding systems are developed and refined” (Saldaña 2016, 293-294).

⁹ *Pattern Coding*, “a category label (“meta code”) that identifies similarly cited data. Organizes the corpus into sets, themes, or constructs and attributes meaning to that organization” (Saldaña 2016, 296).

Theme, Theming the Data, “unlike a code, a theme is an extended phrase or sentences that identifies what a unit of data is about and/or what it means... Themes can consist of such ideas as descriptions of behaviour within a culture; explanations for why something happens; iconic statements; and morals from participant stories (Saldaña 2016, 297).

sexuality within Indian society and law, within the Courts decisions. In further analyzing the sub-categories, and comparing them across the different Court judgements, you can see a change in the Court's language and interpretation when addressing the law and its application to the Constitution. The following section speaks more to this change, within the interpretation of Section 377, and its application to the Constitution, which contributed to a new rights discourse for addressing the rights of sexual minorities within Indian society.

Some of the limitations that I have encountered refer to my location and resources available for the research. Being located in Canada, I will not be able to conduct interviews or be able to access certain documents that are located in India. While Skype or online interviews may have been a possible solution, due to the case having gone through major changes very recently, many organizations involved were non-responsive. This includes supplementary Court documents, such as court transcripts and petitions filed to the court. Due to this, I rely heavily on the Court judgements, which outline the views and arguments of the various actors that were involved in the case, including the government, NGOs, and LGBTQ+ members. However, since my study is focusing on how the Courts made their decisions, the focus is already on the Court's interpretation, rather than the actors themselves. Therefore, despite this limitation, this study provides an important contribution to the literature on the subject.

As a graduate student, time and money also play a role in limiting what I can do in regard to conducting the project, either by traveling to India or in conducting in-depth interviews on the subject. While these limitations are in place, it is still valuable to conduct this study on a smaller scale, to get a better understanding of the issue at hand.

Chapter 3.

Qualitative Analysis

Analyzing the Legal Landscape: Section 377 in Court (2009-2018)

The dispute over the legality of Section 377 plays out in a lengthy legal battle (figure 1), which started with Naz Foundation (and other organizations) challenging the law to Delhi High Court in 2001 and ends with the repeal of the section in 2018. These judgements include the opinions and arguments given by the Court, non-profit organizations, members of the LGBTQ+ community, the government (represented through the Union of India and other ministries), religious organizations, and individuals.¹⁰ This section analyzes the main arguments within each court case, including the Court's reasoning for their decision.

Naz Foundation v. Government of NCT of Delhi & Ors. Delhi High Court Decision 2009

In 2001, Naz Foundation challenged Section 377 in the Delhi High Court, on the basis that the law, banning all “carnal intercourse” regardless of consent, is a violation of the fundamental rights provided by the Constitution of India (articles 14,15,19, and 21).¹¹ They further added that the law should “apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors” (*Naz Foundation v. Government of NCT of Delhi*, 2009, p.2). Naz Foundation works within the field of HIV/AIDS, and is closely connected with communities that are most vulnerable to disease, including the LGBTQ+ community, specifically “men who have sex with men” (MSM). The arguments made by Naz and others were broadly on the way Section 377 posed

¹⁰ It is important to note that the opinions and arguments laid out by different actors come from the Court judgements, rather than any court transcripts. Therefore, unless directly quoted the arguments laid out are based on the Court's interpretation outlined within the judgements.

¹¹ See Appendix A for Constitutional articles

challenges to HIV/AIDS prevention efforts, as well as an excuse to harass and exploit members of the LGBTQ+ community, by police and overall society.

The Court stated Naz and other respondents¹² argued that the community is being denied its fundamental human rights, and are exposed to harassment, abuse, and assault from the general public and public authorities. The Ministry of Health and Family Welfare acknowledges that Section 377 is a hindrance to the efforts for HIV/AIDS prevention. National Aids Control Organization (NACO) substantiates its case by providing statistics showing that the MSM community is a vulnerable group in terms of contracting HIV/AIDS. The Court stated, "...HIV/AIDS prevention efforts were found to be severely impaired by discriminatory attitudes exhibited by the state agency towards the gay community, MSM or trans-gendered individuals, under the cover of enforcement of Section 377 IPC..." (*Naz Foundation v. Government of NCT of Delhi*, 2009, p.6-7).

Arguments were made on the unconstitutionality of Section 377, stating that the law strips away fundamental rights from sexual minorities. The Court stated, on behalf of Voices Against 377, an organization that seeks to protect minority rights:

...Section 377 IPC by criminalising the aforementioned kinds of sexual acts has created an association of criminality towards people with same sex desires. [Voices against 377] pleads that the continued existence of this provision on the statute book creates and fosters a climate of fundamental rights violations of the gay community, to the extent of bolstering their extreme social ostracism (*Naz Foundation v. Government of NCT of Delhi*, 2009, 18).

Naz Foundation further argued that the human need for an "intimate personal sphere" is based on the principle of privacy. Hence, to protect the "pursuit of happiness" and human dignity, it is essential the constitutional freedoms, as enshrined in Article 21, apply to the LGBTQ+ community to enable individuals to pursue sexual autonomy (*Naz Foundation v. Government of NCT of Delhi*, 2009, 8).

The counter-argument, arguing against the repeal of Section 377, was primarily given by the Ministry of Home Affairs of the Union of India (representing the

¹² See Appendix C for specific details on the individuals/organizations involved in each case

government). There were mainly two main arguments. The first being that the law does not target acts committed by sexual minorities but has been enforced over allegations of child sexual abuse and serves as a balance to cover the gaps within rape laws (*Naz Foundation v. Government of NCT of Delhi*, 2009, p.11). Second, the government argued that the section does not target sexual minorities as a class, rather it criminalizes the sexual act regardless of gender or sexual orientation (*Naz Foundation v. Government of NCT of Delhi*, 2009). The counter-arguments made focus on separating Section 377 from the LGBTQ+ community. In that, the law does not solely apply to this one community but is vital in protecting other areas of society as well. Hence, they held that as the Section does not target a specific class of people, it did not violate any Constitutional law.

Based on these arguments, the High Court decided to “read down” the law, stating “... that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14, and 15 of the Constitution” (*Naz Foundation v. Government of NCT of Delhi*, 2009, 105).¹³ Further stating:

We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15 incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15 (*Naz Foundation v. Government of NCT of Delhi*, 2009, 85)

By stating this, the Delhi High Court redefined “sex” within this context to include sexual orientation. By extending “sex” beyond just gender, it redefines the term used within the constitution. Hence, the protection against discrimination is extended to sexual minorities, providing equality before the law. While this decriminalized homosexuality, the decision was appealed to the Supreme Court in 2013.

¹³ Here the law was not removed completely, but parts of it were deemed unconstitutional.

Suresh Kumar Koushal and another v. Naz Foundation and others (2013)

Suresh Kumar Koushal and another v. Naz Foundation and others 2013 was the appeal to the earlier Delhi High Court decision (2009). They argued that there was a lack of foundational facts in the respondent's arguments made in the Delhi High Court case, to find the law in question unconstitutional (*Suresh Kumar Koushal and another v. Naz Foundation and others*, 2013). Furthermore, they argued that Naz and others did not provide any "tangible material" in court that the law directly targeted "homosexuals." The appellants¹⁴ argued that the statistics provided by NACO were insufficient in proving that Section 377 had an adverse effect on the prevention of HIV/AIDS within the "homosexual" community, or that the repeal of the act would be beneficial. They also added that the statistics were fraudulent (*Suresh Kumar Koushal and another v. Naz Foundation and others*, 2013).

The appellants suggested that Section 377 is not in violation of right to privacy and dignity, stating that under Article 21 the right to privacy does not infer that individuals have a right to conduct sexual acts prohibited by the Section. The government further outlined the consequences of court's decision to remove Section 377, stating that it would have drastic impacts on Indian social structure and the "institution of marriage," and it would tempt the youth towards "homosexual" conduct (*Suresh Kumar Koushal and another v. Naz Foundation and others*, 2013, 25). The Court outlined the one of the appeal's argument stating:

[A]ll fundamental rights operate in a square of reasonable restrictions... High percentage of AIDS amongst homosexuals shows that the act in dispute covered under S.377 IPC is a social evil, and therefore, the restriction on it is reasonable (*Suresh Kumar Koushal and another v. Naz Foundation and others*, 2013, 27).

The panel of two Supreme Court judges allowed the appeal and overturned the Delhi High Court decision. The court found that Section 377 does not violate the Constitution, and dismissed the petition filed by the respondent. The Court concludes:

¹⁴ Suresh Kuman Koushal and others. See Appendix C for specific details on the individuals/organizations involved in each case

[U]nless a clear constitutional violation is proved, this Court is not empowered to strike down a law merely by virtue of its falling into disuse of the perception of the society having changed regards the legitimacy of its purpose and its need (*Suresh Kumar Koushal and another v. Naz Foundation and others*, 2013, 62).

In terms of specific arguments brought by the respondents, specifically that Section 377 violates the fundamental rights provided by the Constitution, the Court held that there is insufficient evidence to prove the Section violates these provisions. In response to the allegations that the law is used to abuse, harass, blackmail and torture certain individuals, the Court stated that the treatment is “neither mandated by the section nor condoned by it...”; and the abuse by the police and others is not a reflection of Section 377 (*Suresh Kumar Koushal and another v. Naz Foundation and others*, 2013, 91). Here the Court sided with the interpretation that Section 377 did not target a specific class or group of people and was necessary for public safety. They stated that the majority of Indian society disapprove of the acts prohibited by Section 377 and held that it was a good reason for the law to stay in place. This decision reinstated the status of Section 377; however, NGOs and members of the LGBTQ+ community continued the fight by petitioning the Court once again.

Navtej Singh Johar & Others v. Union of India (2018)

After the 2013 Supreme Court decision to reinstate Section 377, NGOs and members of the LGBTQ+ community petitioned the Supreme Court through a curative petition to reconsider the constitutionality of the law. The Court decided to form a five-judge constitutional bench to re-evaluate if Section 377 was Constitutionally valid.

According to the Court judgement, the arguments presented on behalf of the petitioners, in this case, members and NGOs within the LGBTQ+ community stated that sexual orientation is a vital aspect of one’s individuality, and personhood, which must be protected by law.¹⁵ Further stating that one’s sexual orientation is an “expression of choice” between consensual adults, which is “neither a physical or mental illness”

¹⁵ See Appendix C for specific details on the individuals/organizations involved in each case

(*Navtej Singh Johar & Ors. v. Union of India*, 2018, 16-17). Leading to their position that making acts of “homosexuality” and expressions of sexual orientation a criminal offense goes against the Indian Constitutional right to privacy and autonomy and freedom of expression (ibid). The Union of India, in this case, did not present any counter-arguments, filing an affidavit that did not oppose the petitioners, and “left the matter to be considered by the wisdom of this Court” (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 74)

Based on this, and other legal precedents the Court decided to overrule the decision in *Suresh Koushal*, stating that Section 377 is unconstitutional, therefore decriminalizing “homosexuality”. While the Court decided that Section 377 was unconstitutional, such a law can still be permissible if it was needed for the betterment of society or public safety; referring to the “Litmus Test.” Therefore, in addition to stating that section 377 is unconstitutional, the Court found that the law does not have any legitimate use for Indian society. They state, “... it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals, or transgenders, hardly serves any legitimate public purpose or interest” (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 140). The Court highlights that the section criminalises consensual acts between adults in private, which is “neither harmful nor contagious to society” (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 140)

Their decision further addressed the constitutionality of the section, as well as its use and impact on Indian society, stating,

... we have no hesitation to say that Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 142).

The Court disproves the decision made in *Suresh Koushal* by stating that it was “constitutionally impermissible”;

... [the] reasoning in Suresh Koushal (*supra*), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 160)

Based on the above reasons, the Court decided to overrule the previous decision and decriminalize homosexuality.

The above analysis, including the legal battle, shows how Section 377 was repealed by the Supreme Court. This recent legal history emphasizes an evolution in the way the law was interpreted, by the Court, government, and NGOs at each step. We see the colonial legacy of Section 377 playing a role, as its resulting legal battle was lengthy and complicated; where the law was repealed, by the High Court, in 2009, reinstated in 2013 by the Supreme Court, and finally repealed again by the Supreme Court in 2018. Now that “homosexuality” is decriminalized, it begs the question why now? Why after the Supreme Court decision made in 2013, did the Court decided to re-evaluate and revert their own decision? The following section deals with these questions to give a possible explanation to how the Court decisions changed between 2013 and 2018. The focus here is on the interpretation of Section 377 and the evolution of the Constitution to show how a shift in language in the Court’s decision, when addressing sexual minorities, contributed to a new rights discourse that merged both secular and traditional definitions of gender and sexual orientation.

A Deeper Analysis of Meaning in a Post-Colonial Context

The legal battle for the repeal of Section 377 has not been easy. Once the Supreme Court decided to reinstate the law in 2013, there was little indication that the Court would change its decision. However, as we now know, the law was repealed by the same Court a few years later. The question that arises is what changed between 2013 and 2018 for the Court to decide in favour to repeal Section 377, insofar as it applies to same-sex acts between consenting adults. By focusing on two main aspects of the Court judgements, Section 377 and the Constitution of India, I argue that a shift in language and

interpretation in the application of Section 377 to the Constitution, contributed to a new discourse. This new discourse re-defined “gender” and “sex” as non-binary, that altered the way the Constitution and policies apply to sexual minorities.

The arguments within the court judgements (2009, 2013, 2018) sheds critical light on the dispute over the interpretation of Section 377 by the various institutions and interest groups. Arguments provided for the maintenance of the law broadly states that the nature of the Section is not meant to target specific groups of people, rather a specific act. The Learned Additional Solicitor General (ASG), representing the Government of India, when countering the petition for the repeal of Section 377 in *Naz 2009* stated: “Section 377 IPC is not enforced against homosexuals and there is no need to “read down” the provisions of Section 377 IPC” (*Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* 2009, 24). The interpretation of the section is key in understanding how the Court made its decision to repeal the law, as it governs how the law applies to the Constitution (Table 1). If the Court agreed with the counter-argument, in this case, the Government, the existence of Section 377 would not be unconstitutional. Whereas, if the Courts sided with the interpretation that the law targets sexual minorities as a group, it violates the Constitutional protection against discrimination.

Table 1. Interpretation of Section 377 in Each Court Case

<i>Court Case</i>	<i>Court Decision</i>	<i>Interpretation of Section 377</i>
<i>Delhi High Court: Naz Foundation v. Government of NCT of Delhi & Others. (Decision made: 2nd July 2009)</i>	Court "read down" the law, stating that Section 377, insofar as it criminalizes same-sex acts amongst consenting adults is unconstitutional	The Court held that Section 377 criminalized individuals on the basis of "gender" and "sex" which violates Articles 14, 15, and 21 of the Constitution (105).
<i>Supreme Court of India: Suresh Kumar Koushal v. Naz Foundation and others (Decision made: 11th December 2013)</i>	The Court decided against the High Court decision, stating that there was insufficient data provided to justify that Section 377 violated the Constitution; therefore, the law was reinstated to the IPC. Further stating that the violence against members of the LGBTQ+ community is not "mandated" or "condoned" by Section 377.	The Court held that there was insufficient evidence provided, that shows Section 377 targets a specific group or individuals, rather it criminalizes an act.
<i>Supreme Court of India: Navtej Singh Johar and others v. Union of India, Thr. Secretary, Ministry of Law and Justice (Decision made, 6th September 2018)</i>	The Court overruled the previous Supreme Court decision. They stated that Section 377 violated the Constitution as it unfairly targeted members of the LGBTQ+ community, by criminalizing same-sex acts conducted by consenting adults in private.	The Court held that Section 377 targeted sexual minorities as a class, therefore violating the Constitutional right to equality, and freedom from discrimination based on gender or sex.

When countering the judgement made in *Naz 2009* to repeal Section 377, the appellants,¹⁶ as stated by the Court, argued,

...the High Court committed a serious error by declaring Section 377 IPC as violative of Articles 21,14, and 15 of the Constitution insofar as it criminalises consensual acts of adults in private... [Naz Foundation] had not placed any tangible material before the High Court to show that Section 377 had been used for prosecution of homosexuals as a class and that few affidavits and unverified reports of some NGOs relied upon by [Naz Foundation] could not supply for recording a finding that homosexuals were

¹⁶ See Appendix C for individuals involved as the appellants in this case

being singled out for a discriminatory treatment (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013, 21-22).

According to the Court, Shri Amrendra Sharan, the Senior Advocate for the appellant, stated that the language of the law does not target any specific groups. Therefore, stating that the High Court decision does not stand, as the law does not violate Article 14¹⁷ of the Constitution (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013, 24-25).

While the Union of India did not have any objections to the petitioners in *Navtej Singh Johar 2018*, other judgements showed that the Government, for the maintenance of the law, were firm in their interpretation of Section 377 as one that does not target a specific class of people, in this case, “homosexuals.” Hence, if the law does not target a particular community, it would not violate anti-discriminatory provisions within the Constitution.

A counter interpretation was given by NGOs, and individuals who either belong to the LGBTQ+ community or are allies of the community. They argued that public officials, especially the police, used Section 377 as a tool for harassment, and discriminatory attitudes targeted towards sexual minorities. They argued that Section 377, classifying same-sex acts as criminal, leads to the community being labeled and targeted as criminals by the police and society. In *Naz 2009* the Court outlined the petitioner's¹⁸ argument stating,

...Section 377 IPC serves as the weapon for police abuse; detaining and questioning, extortion, harassment, forced sex. Payment for hush money; and perpetuates negative and discriminatory beliefs towards same-sex relations and sexual minorities (*Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* 2009, 7).

The Court further outlined the petitioner's arguments, that Section 377 has been used to criminalize “homosexual” activity and is discriminatory towards sexual minorities as a class (*Ibid*, 9). Therefore, arguing that while the language within the act itself does not

¹⁷ See Appendix A

¹⁸ See Appendix C

target sexual minorities, in practice it labels the LGBTQ+ community as criminals merely for belonging in a particular class, violating discriminatory laws under the Constitution.

The interpretation of the law was one of the deciding factors to the High Court's decision in 2009 to repeal the law; as well as, to the Supreme Court's decision in 2013 to reinstate Section 377. Here we can see the two Courts holding to the two different interpretations. The High Court supported Naz and other organization's interpretation of Section 377 targeting sexual minorities, hence violating the constitution; whereas, the Supreme Court in 2013 decided that the Section does not apply to a specific class of people, stating:

In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by the police authorities and others is not a reflection of the vires of the section (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013, 91)

In 2018, however, the Supreme Court altered its view and held that Section 377 unfairly targeted the LGBTQ+ community and is unconstitutional (*Navtej Singh Johar & Ors. v. Union of India*, 2018). While this dispute over the application of Section 377 was key in understanding how the Court made their decision it does not provide a complete story for why the Supreme Court altered their decision. In order to answer that, it is important to analyze how the Courts used the Constitution in each case.

The Court in 2018 used the Constitution heavily in deciding whether to repeal Section 377, stating:

Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 157-158).

The notion that the Constitution is transformative was not always the case in the previous judgements, which is why it was a significant factor in the ultimate decision to repeal Section 377. Now the focus moved towards the terminology used in these Articles in relation to gender/sexuality, and how the constitution protects the reasonable expectation of privacy, when applied to sexual acts between consensual adults performed in private; as well as, the evolution of the term “gender” and “sex” within the Constitution. Both of these changes were influential in creating a new rights discourse. This change can be attributed to the inclusion of two new legal precedents that were set within 2014 and 2017, which altered the way the Constitution applied to Section 377, and sexual minorities within Indian society and law (Table 2).

Table 2. Role of Precedents

<i>Court Case</i>	<i>Constitutional right to privacy as applied to Section 377</i>	<i>Constitutional rights as applied to gender and sexuality</i>
Supreme Court of India: <i>Suresh Kumar Koushal v. Naz Foundation and others</i> (2013)	Section 377 does not violate the right to privacy, as "right to privacy does not include the right to commit any offence as defined under Section 377 IPC or any other section "(Suresh Kumar Koushal v. Naz Foundation and others, 2013, 23)	The Court held a binary understanding of sex and gender. The Court sided with the appellants in this case, arguing against the removal of Section 377 as it would drive the youth towards "homosexuality". The judgement shed a negative view on gender-variance and a fluid sexuality
Supreme Court of India: <i>National Legal Services Authority v. Union of India</i> (2014)	The right to privacy, while not directly mentioned, the Court affirmed that discrimination based on one's gender identity violates Article 21 of the Constitution, which protects the right to privacy, autonomy, life, liberty and dignity	The decision expanded the terms “sex” and “gender” to include transgender and other sexual minorities, which played a crucial role in the repeal of Section 377

<i>Court Case</i>	<i>Constitutional right to privacy as applied to Section 377</i>	<i>Constitutional rights as applied to gender and sexuality</i>
Supreme Court of India: <i>K.S. Puttaswamy and another v. Union of India and others</i> (2017)	The Court held that Sexual orientation is a important part of the right to privacy. Stating that that the "right to privacy and the protection of sexual orientation lie at the core of fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution (K.S. Puttaswamy and another v. Union of India and others, 2017, 124)	In reference to discrimination based on gender, or sexual orientation the Court stated, "Equality demands that the sexual orientation of each individual in society must be protected on an even platform." (K.S. Puttaswamy and another v. Union of India and others, 2017, 124)
Supreme Court of India: <i>Navtej Singh Johar and others v. Union of India, Thr. Secretary, Ministry of Law and Justice</i> (2018)	The Court in 2018 stated that sexual orientation is considered a vital part of one’s privacy and individual autonomy, and discrimination on the sole basis of sexual orientation is “offensive to the dignity and self-worth of the individual” (Navtej Singh Johar & Ors. v. Union of India, 2018, 104).	The Court re-affirmed a fluid understanding of gender and sexuality, stating that the right to a self-determined gender identity and one's sexual orientation is protected by the Constitution. The Court upheld the definition of self-determined gender identity as stated in the NLSA decision (see p.45 for more details).

To understand the changes in how the court’s interpreted the right to privacy, pertaining to Section 377, it is important to pay attention to how the Court’s addressed its role of starting from the 2009 Delhi High Court case. There is no specific law within the Constitution that protects the right to a reasonable expectation of privacy; instead, the Court has interpreted the right to privacy through Article 21¹⁹ as part of personal liberty. The argument shifted to whether the right to privacy protects sexual relations. In *Naz 2009* the petitioners submitted,

...while right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity,

¹⁹ “No person shall be deprived of his life or personal liberty except according to procedure established by law” (Constitution of India, 1950, p.10-11).

individual autonomy and the human need for an intimate personal sphere require that privacy ... It is averred that no aspect of one's life may be said to be more private or intimate than that of sexual relations, and since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie easily at the core of the "private space", they are an inalienable component of right of life (*Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* 2009 p.8).²⁰

The High Court reaffirmed this notion stating that "the right to live with dignity and the right of privacy both are recognized dimensions of Article 21" (*Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* 2009, 40). Further stating that Section 377 violates this provision, as it criminalizes the identity on the sole basis of sexuality (*Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* 2009). The appeal in 2013, however, denied this interpretation, with the Court stating, on behalf of the appellants,

[t]hat the impugned order does not discuss the concept of "carnal intercourse against the order of nature" and does not adequately show how the section violates the right to privacy... The right to privacy does not include the right to commit any offence as defined under Section 377 IPC or any other section (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013, 23).

The Supreme Court, in their 2013 decision, did not directly state that Section 377 did not violate the protection of privacy, instead, they held that,

In its anxiety to protect the so-called rights of LGBT persons and to declare the Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon judgements or other jurisdictions. Though these judgements shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013, 93)

By stating that Section 377 is constitutionally sound, the Supreme Court set a precedent, on how the Constitution applies to issues of discrimination against sexual minorities, and the protection of sexual identity and sexual relations.

²⁰ See Appendix C for specific details on the individuals/organizations involved in each case

The Court further added that the Section has a “presumption of constitutionality”, based on the notion that the Legislature and Parliament act in accordance to the interest of the people they are accountable to, and under the restrictions of the Constitution (*Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* 2013, 54). Stating further that the presumption of Constitutionality applies to pre-constitutional laws such as Section 377, as they were enacted by Parliament without amendments (ibid). In addition, holding that Section 377 does not target a specific class, they confirmed their decision that Section 377 does not violate any equality or discriminatory laws. This is important to note as it set a precedent for the Constitutionality of Section 377, confirming both the interpretation of Constitutional language, as well as the language in the Section. While this was the case then, the Supreme Court changed this precedent in 2018.

In 2018, the Supreme Court focused on the transformative nature of the Constitution; resulting in the evolution of personal liberty and privacy, as well as expanding the terms “sex” and “gender” to include sexual minorities within the Constitution. I argue that this was due to two legal precedents, decided between 2013 and 2018, which altered how Section 377 applied to the Constitution, by shifting the discourse in which the Court should address issues of gender and sexual discrimination. These cases were: *K.S. Puttaswamy and another v. Union of India and others*, 2017, and *National Legal Services Authority v. Union of India*, 2014 (NLSA).

The decision in *K.S. Puttaswamy and another v. Union of India and others* (2017), defined privacy as a crucial part of individual autonomy. This autonomy contains the notion of self-determination, including sexual orientation and sexual identity as innate to one’s self (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 96). Now privacy and individuality applied to Section 377 differently, as it confirmed that one’s sexual orientation falls under the “sphere of privacy,” which is protected by the Constitution. In addition, the majority opinion in *Puttaswamy* stated that the reasoning within the judgement in *Suresh Koushal* to disregard privacy under Article 21 of the Constitution is not valid on a constitutional basis, (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 103). Justice Chandrachud criticized the Court’s decision in 2013 stating,

the reasoning in Suresh Koushal's decision to the effect that "a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" is not a sustainable basis to deny the right to privacy (ibid).

The Court in 2018 stated that sexual orientation is considered a vital part of one's privacy and individual autonomy, and discrimination on the sole basis of sexual orientation is "offensive to the dignity and self-worth of the individual" (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 104). The Court in citing the decision made in *K.S. Puttaswamy and another v. Union of India and others* (2017) stated,

...that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution. (ibid).

By setting this precedent, sexual orientation and identity became a pivotal aspect of one's life, dignity, and personal liberty, all of which are protected by the Constitution; hence, it became one of the main reasons why the Court in 2018 disregarded the judgement made in 2013. Here we can see this shift in language and meaning when referring to the right to privacy for sexual minorities. Before the decision in 2017, sexual minorities did not have the right to consensual same-sex relations between adults in private. However, by expanding the definition of privacy, the Court's changed the way that the Constitution applied to sexual minorities, despite Section 377. Hence, this precedent invalidated the use of Section 377, as the law criminalized consensual sexual relations among adults in private, going against the Constitution.

National Legal Services Authority v. Union of India (NLSA), was a decision made in 2014, which was known for officially recognizing "third gender," resulting in an acceptance of transgender identities in India. The decision expanded the terms "sex" and "gender" to include transgender and other sexual minorities, which played a crucial role in the repeal of Section 377. In reference to the Constitution, the Court declared that Article 21 protects the right of self-determination, which includes gender. The Court further shows that Articles 14, 15, 16, 19, and 21²¹ of the Constitution do not exclude

²¹ See Appendix A

Hijras/Transgenders,²² stating that the terminology used within the Articles are gender-neutral.

Article 14 has used the expression “person” and the Article 15 has used the expression “citizen” and “sex” so also Article 16. Article 19 has also used the expression “citizen”. Article 21 has used the expression “person”. All these expressions, which are “gender neutral” evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender... Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender (*National Legal Services Authority v. Union of India and Ors.* 2014, 85)

By not recognizing the transgender identity within, the law is denying the community equal protection under the law and subjects them to increased discrimination; going against the Constitution (*National Legal Services Authority v. Union of India and Ors.* 2014). Based on this reasoning the Courts decided,

...that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community (*National Legal Services Authority v. Union of India and Ors.* 2014, 86).

In setting this precedent, the Supreme Court altered the interpretation of the Constitution to include sexual and gender minorities. The inclusion of self-determined gender identity as a human right changed the way that Section 377 applied to the Constitution. The Court in 2018 stated,

the [NLSA] judgment, as is manifest, lays focus on inalienable —gender identity and correctly connects with human rights and the constitutionally guaranteed right to life and liberty with dignity. It lays stress on the judicial recognition of such rights as an inextricable component of Article 21 of the Constitution and decries any discrimination as that would offend Article 14, the “fon juris” of our Constitution (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 9)

²² Here Transgender is used as an umbrella term to include the traditional gender-variant communities of India. See Appendix B for further details on how the Court defines “transgender”

Not only did the 2014 case add protection of sexual orientation, and the right to self-determine gender to the Constitution, but also led to the Court stating that these were an essential part of individuality; adding that the protection of this identity is equal to the protection of fundamental human rights ((*National Legal Services Authority v. Union of India and Ors.* 2014).

In reference to Section 377, the Court decided that if the statute were to remain, it would incite harassment and exploitation of the LGBTQ+ community based on their gender identity or sexual orientation. Also adding that the Section goes against the right to privacy, which is protected by the Constitution. The Court stated:

...[W]e have no hesitation to say that Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 151).

This decision set a few precedents on future Constitutional disputes. The decision set precedent on the presumed constitutionality of laws. The Court decided that the maintenance of pre-colonial laws cannot simply be based on the notion that it is presumed to be meet constitutional standards, as it was passed by Parliament; who are accountable to the public and the Constitution. This opens the door for other disputed pre-colonial laws to be challenged. Other than that, the Court also made an important decision on the role that the Indian “majority” plays in this dispute, stating;

The test of popular acceptance, in view of the majority opinion, was not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection. The Court noted that the discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream', but in a democratic Constitution founded on the Rule of Law, it does not mean that their rights are any less sacred than those conferred on other citizens (*Navtej Singh Johar & Ors. v. Union of India*, 2018, 104).

In stating this, the Court directly spoke to the protection of minority rights, even if it goes against majority opinions.

While these are remarkable precedents that can impact future Constitutional disputes, the main focus is on how the decision changed the way that Indian law and policies should define “gender” and “sex.” In doing so, the Court decision marked a new rights discourse that identifies both a secularized understanding and pre-colonial knowledge of gender. The Court accepted a non-binary definition of gender and sex, which includes the existence of gender variance found in pre-colonial Indian history. By elaborating gender to recognize “Third Gender,” the Court interpreted the Constitution to protect the right to self-determine one’s own gender identity. In doing so, they took a secular understanding of gender, and sexual orientation that encompasses “LGBTQ+.” In this respect the Court ruled, that

...self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person’s internal sense of being male, female or a transgender, for example hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a —third gender. (Navtej Singh Johar & Ors. v. Union of India, 2018, 8).

The Supreme Court in 2018 extended this thinking to gender identity as a whole, stating that this identity is an integral part of fundamental human rights, and should be protected under the right to life, liberty, and dignity (Navtej Singh Johar & Ors. v. Union of India, 2018, 9). The Court stated,

gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category (Navtej Singh Johar & Ors. v. Union of India, 2018, 7-8).

The same logic was applied to an individual’s sexual orientation; in this regard, the Court stated that

sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression (Navtej Singh Johar & Ors. v. Union of India, 2018, 160).

By applying these definitions, the Court changed how gender and sexual orientation are treated by law; in doing so, the Court's altered future legislation, and policy for gender and sexual minorities, to be more inclusive. Through this, we can see how essential the definition of gender/sexuality is to how law treats sexual minorities. If the definition is restricted to a binary and biological understandings of gender and sexuality, it is more likely that the State restricts LGBTQ+ rights. This is evident in this case, where Section 377, and the restriction of "homosexual" sex, came from a belief that gender is binary and resulting sexual relations were made to adhere to the Christian understandings of procreative sex.

Whereas pre-colonial India had a different understanding of gender, and sexuality, as the Hijra community was a prominent "third gender," breaking the male/female binary, and there were depictions of bi-sexual relations between Indian gods in various Hindu epics. Based on this, gender and sexuality were defined by law and society as fluid, and hence, the laws governing them were not as rigid; therefore, "same-sex" identities and "homosexual" sex were not criminalized. Thus, by reclaiming the same "fluid" definitions of gender and sexuality, held prior to colonialism, and adding a secular understanding of how the law applies to sexual minorities, we get a new discourse that further protects the identities of gender and sexual minorities; through the decision to decriminalize "homosexuality (refer to Table 3).

Chapter 4.

Conclusion

A New Rights Discourse

The aim of this paper was to explore the role of sodomy laws in India and its history with Section 377 and the LGBTQ+ community. Section 377 has been a great challenge for the LGBTQ+ community in India, as, in practice, it criminalized “homosexuality.” The law has been in place for decades, as it was first enacted by the British in the 1860s. The process to repeal the law has been a long battle, until its end in 2018 when the Supreme Court of India held that Section 377 was unconstitutional and served no purpose in Indian society. In analyzing this legal battle, I argued that the 2018 decision to decriminalize “homosexuality” contributed to a new discourse that adopts at once a traditional *and* secular definition of gender and sexuality. This definition goes beyond the rigid and binary notions that were set by the British, and which were adopted by Indian law by the retention of Section 377.

The analysis also shows the importance of knowledge and power, in understanding the origins of legislation. The retention of British rule as Indian, through the Indian Penal Code, not only adopted the law into the newly independent country but also solidified colonial knowledge into the Indian system. The first instances of criminalization of same-sex acts, and homosexuality was through British enacted law; however, after independence, Indian society, law, and the government claimed this knowledge as integral to Indian culture. This shows the underlying power that lies within such acts due to the knowledge it holds. In this case, Section 377 contained a form of knowledge that criminalized a community that was well respected, by Hindu religion and society, before colonialism.

The retention of Section 377 solidified this recognition of gender variance and sexual minorities as criminal, through the knowledge that gets ingrained within these laws. Michel Foucault’s understanding of power gives a better understanding of why

Section 377 had the impact it did. We can see this power in the reasoning given to justify the retention of Section 377, after Indian independence. Here the argument surrounded the idea that the majority of Indian society was against “homosexuality”; also holding that, removing the law would have severe risks to the status quo of Indian culture, due to the longevity of the law within the Penal Code (Indian Penal Code, 1971, 281-282). Here we can see a clear knowledge replacement, where British values and morals were reinforced through legal codes, by the Indian government, as integral to Indian society. Due to the nature of Section 377, and by enforcing it within independent India, the Indian government reinforced colonial power and knowledge within Indian society. As we have seen, Section 377 originates from British colonial values, held at the time, regarding sexual relations; a value that did not exist within Hinduism. Therefore, by adopting Section 377 as inherently Indian, the State ignored the long vibrant history of gender-variance from Indian knowledge. This resulted in the criminalization and marginalization of the Hijra community, as well as the overall LGBTQ+ community.

While we see the prominence of this “knowledge replacement,” it was also clear that India went back to its traditional knowledge of gender-variance, through the formal recognition of “third gender.” By conducting an inductive, in-depth analysis on the subject, I argue that this “reclaiming” was due to a shift in how gender and sexuality applied to the Constitution. My analysis found that the Indian Constitution plays a crucial role, as it justified the use and later the removal of Section 377. The decision to adopt a secular understanding of gender and sexuality reflects the secular ideals that were prominent during the time of Indian independence and how the Constitution was framed. This analysis sheds light on the ever-changing effects of a Constitution and shows the importance of how key terms can evolve to change law. In this case, the terms “sex” and “gender” expanded to formally recognize “third gender” and include self-determined gender as an integral part of one’s individual autonomy, and identity; resulting, in the repeal of an anti-sodomy law that targeting sexual minorities, solely based on their gender and sexual orientation. The case changed the way that the Constitution applies to sexual minorities and gender-variant communities. As this case is ongoing, this new precedent can be essential to the LGBTQ+ rights movement, as there are many more strides to be made.

References

- Besnier, Niko, and Kalissa Alexeyeff. 2014. "Gender on the Edge: Identities, Politics, Transformation." *Gender on the Edge*: 1–30. <https://muse-jhu-edu.ezproxy.library.ubc.ca/chapter/1081073>.
- Chandra, Prabha S. 2014. "Will the Supreme Court 's Judgement on Section 377 Affect Mental Healthcare for LGBT Groups ?" VI(4): 2008–9.
- Chitnis, Varsha, and Danaya Wright. 2007. "The Legacy of Colonialism : Law and Women 's Rights in India." *Washington and Lee law review* 64(4): 1315–48.
- Crime in India 2016: Statistics*. 2016. National Crime Records Bureau: Ministry of Home Affairs.
<http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>
- Diehl, Alessandra et al. 2017. "Social Stigma, Legal and Public Health Barriers Faced by the Third Gender Phenomena in Brazil, India and Mexico: *Travestis, Hijras and Muxes*." *International Journal of Social Psychiatry*: 002076401770698.
<http://journals.sagepub.com/doi/10.1177/0020764017706989>.
- Gupta, Alok. 2006. "Section 377 and the Dignity of Indian Homosexuals." *Economic and Political Weekly* 41(46): 4815–23.
- Han, Enze, and Joseph O'Mahoney. 2014. "British Colonialism and the Criminalization of Homosexuality." *Cambridge Review of International Affairs* 27(2): 268–88.
<http://dx.doi.org/10.1080/09557571.2013.867298>.
- Hinchy, Jessica. 2013. "Troubling Bodies: Eunuchs, Masculinity and Impotence in Colonial North India." *South Asian History and Culture* 4(2): 196–212.
- Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore*. 2001. <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf>.
- Indian Penal Code (1860). Act XLV of 1860
- Indian Penal Code (1971). Forty-Second Report. <http://lawcommissionofindia.nic.in/1-50/Report42.pdf>
- Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors.*[2017] WP(Civil) No.494 of 2012 (Supreme Court of India).

- Misra, Geetanjali. 2009. "Decriminalising Homosexuality in India." *Reproductive Health Matters* 17(34): 20–28.
- Moorti, Sujata. 2016. "A Queer Romance with the Hijra." *QED: A Journal in GLBTQ Worldmaking* 3(2): 18–34.
- Nagar, Ila, and Debanuj DasGupta. 2015. "Public Koti and Private Love: Section 377, Religion, Perversity and Lived Desire." *Contemporary South Asia* 23(4): 426–41.
- Nanda, Serena. 1989. *Neither Man nor Woman: The Hijras of India*. Belmont: Wadsworth Publishing Company.
- National Legal Services Authority v. Union of India and Ors.* [2014] WP(Civil) No.400 of 2012 with WP(Civil) No.604 of 2013 (Supreme Court of India)
- Navtej Singh Johar & Ors. v. Union of India, THR. Secretary, Ministry of Law and Justice* [2018] WP(Crim) No.76 of 2016 (Supreme Court of India)
- Naz Foundation & Ors. v. Government of NCT of Delhi & Ors.* [2009] WP(C) No.7455/2001 (Delhi High Court)
- Ramasubban, R. 2008. "Political Intersections between HIV/AIDS, Sexuality and Human Rights: A History of Resistance to the Anti-Sodomy Law in India." *Global Public Health* 3(SUPPL. 2): 22–38.
- Ramasubban, Radhika. 2007. "Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India." In *Sex and Politics. Reports from the Front Lines*, , 91–125.
http://www.sxpolitics.org/frontlines/book/pdf/capitulo3_india.pdf.
- Reddy, Gayatri. 2005. *With Respect to Sex: Negotiating Hijra Identity in South India*. Chicago: University of Chicago Press.
- Saldaña, Johnny. 2016. *The Coding Manual for Qualitative Researchers*. Third Edit. London: Sage Publications.
- Sanders, Douglas E. 2009a. "377 and the Unnatural Afterlife of British Colonialism in Asia." *Asian Journal of Comparative Law* 4(1).
- Singh, Pawan. 2016. "Between Legal Recognition and Moral Policing: Mapping the Queer Subject in India." *Journal of Homosexuality* 63(3): 416–25.
<http://dx.doi.org/10.1080/00918369.2016.1124700>.
- Suresh Kumar Koushal & another v. NAZ Foundation & Ors.* [2013] Civil Appeal No.10972 of 2013 (Supreme Court of India)

Thomas, Shibu. 2016. "14% of Those Arrested under 377 Last Year Were Minors." *The Times of India*. <https://timesofindia.indiatimes.com/city/mumbai/14-of-those-arrested-under-section-377-last-year-were-minors/articleshow/54573741.cms>.

Appendix A.

Fundamental Rights under the Constitution of India²³

ARTICLE 14:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

ARTICLE 15:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

ARTICLE 16:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

ARTICLE 19:

(1) All citizens shall have the right— (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions [or co-operative societies]; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) to practise any profession, or to carry on any occupation, trade or business.

ARTICLE 21:

No person shall be deprived of his life or personal liberty except according to procedure established by law

²³ Constitution of India, (1950), 6-11 Retrieved from https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf

Appendix B.

Gender-Variant Communities under the term “Transgender”²⁴

“**Hijras:** Hijras are biologically male who identify themselves as neither man nor women, abandoning their masculine identity. Hijras have a long history within Indian traditions and culture, which grant them respect within society. There are regional variations in the use of terms referred to Hijras.

Eunuch: Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed – as a Hijra.

Aravanis – Hijras in Tamil Nadu identify as “Aravani”. Tamil Nadu Aravanigal Welfare Board, a state government’s initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male’s body.

Kothi – Kothis are a heterogeneous group. ‘Kothis’ can be described as biological males who show varying degrees of ‘femininity’ – which may be situational. Some proportion of Kothis have bisexual behavior and get married to a woman. Kothis are generally of lower socioeconomic status and some engage in sex work for survival. Some proportion of Hijra-identified people may also identify themselves as ‘Kothis’. But not all Kothi identified people identify themselves as transgender or Hijras.

Jogtas/Jogappas: Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. ‘Jogta’ refers to male servant of that Goddess and ‘Jogti’ refers to female servant (who is also sometimes referred to as ‘Devadasi’). Sometimes, the term ‘Jogti Hijras’ is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the Hijra communities. This term is used to differentiate them from ‘Jogtas’ who are heterosexuals and who may or may not dress in woman’s attire when they worship the Goddess. Also, that term differentiates them from ‘Jogtis’ who are biological females dedicated to the

²⁴ *National Legal Services Authority v. Union of India and Ors.* [2014] WP(Civil) No.400 of 2012 with WP(Civil) No.604 of 2013 (Supreme Court of India) 55-57

Goddess. However, 'Jogti Hijras' may refer to themselves as 'Jogti' (female pronoun) or Hijras, and even sometimes as 'Jogtas'.

Shiv-Shakthis: Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv-Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva (deity). Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross dress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms.

Appendix C.

Parties involved in the Court Cases

Naz Foundation v. Government of NCT of Delhi and Ors 2009

Petitioner: Naz Foundation

Through: Mr. Anand Grover, Sr. Advocate with Mr. Trideep Pais, Ms. Shivangi Rai and Ms. Mehak Sothi and Ms. Tripti Tandon, Advocates

Respondents: Government of NCT of Delhi and Others

Through : Mr.P.P. Malhotra, ASG with Mr.Chetan Chawla, Advocate for UOI. Ms.Mukta Gupta, Standing Counsel (CrI.) with Mr.Gaurav Sharma and Mr.Shankar Chhabra, Advocates for GNCT of Delhi. Mr.Ravi Shankar Kumar with Mr.Ashutosh Dubey, Advocates for respondent No.6/Joint Action Council Kannur. Mr.H.P.Sharma, Advocate for respondent No.7/Mr.B.P. Singhal. Mr.S.Divan, Sr. Advocate with Mr.V.Khandelwal, Mr.Arvind Narain, Ms.S. Nandini, Mr.Mayur Suresh, Ms.Vrinda Grover and Mr.Jawahar Raja, Advocates for respondent No.8-Voices against 377.

Suresh Kumar Koushal and another v. Naz Foundation and others 2013

Appellants: Suresh Kumar Koushal and another

Respondents: NAZ Foundation and others

Navtej Singh Johar and Ors. V. Union of India 2018

Petitioner: Navtej Singh Johar and Ors.

Respondents: Union of India, THR. Secretary, and Ministry of Law and Justice

National Legal Services Authority v. Union of India and Ors. 2014

Petitioner: National Legal Services Authority

Respondents: Union of India and Ors.

K.S. Puttaswamy and Another v. Union of India and Ors. 2017

Petitioners: Justice K.S. Puttaswamy (retd.) and Another

Respondents: Union of India and Others