

*"Will Traditional Indian Politicians stand up
for LGBTQ Rights and Repeal Section 377 in
a Politically Resurgent India?"*

Research Essay

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“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.”

-Chapter XVII, Section 377, Indian Penal Code¹

Section 377 came into existence in 1860 during the British Raj to repress sexual identity and brand certain sexual acts as “impure”. The Colonists wished to re- model the culture and norms of Indian society to mimic their own. India gained independence in 1947 but India’s constitution, and indeed its psyche (after 200 years of British rule) retained the laws and ideology of Victorian society. Now, even England has far surpassed India socially in accepting homosexuality in their society. This transformation began with the “Sexual Offences Act”² of 1967 which decriminalized sexual intercourse between the same sex in private setting. Much of the colonial era ideology remains deeply rooted within India today. It is commonly mistaken as the “Indian Ethos”.

To repeal such a law there are two methods that interested parties may pursue. There exists a Judicial process and/or a Legislative process. It is recognized that the Judicial process is relatively less complicated when a comparison is drawn with the Legislative method. This was taken into account by the interested parties as they decided to appeal to the Delhi High court in the hope to repeal Section 377. A favourable judgement by the Delhi High Court³ led the government to appeal to the Supreme Court of India due to the reluctant acknowledgment of what was a hidden community. A major challenge faced was that the LGBTQ community in India had been relatively underground for centuries because of a fear of public shame and hence garnered no sympathy

¹ <http://www.ssb.nic.in/WriteReadData/LINKS/THE%20INDIAN%20PENAL%20CODE,%201860b2d7f6b7-29cf-4366-9dc1-1d00eda619b8.pdf>

² http://www.legislation.gov.uk/ukpga/1967/60/pdfs/ukpga_19670060_en.pdf

³ <http://www.lawyerscollective.org/files/Naz%20Foundation%20Judgement.pdf>

among the practitioners of law due to their conservative backgrounds. To add to their hurdles, nobody was willing to come out in court and reveal any injustices that had been enacted against them. The movement arguing for the removal of Section 377 argued that the Section scared the secretive LGBTQ community and deterred them from coming out. Due to this the community was being affected by the HIV/ AIDS epidemic and in turn were spreading the disease within their community and further into society due to a lack of knowledge about the disease. The case festered back and forth between the High Court and the Supreme Court for eight years before it gained momentum.

The Supreme Court Judgement in 2013⁴ was justified with the following twisted analogy. The Supreme Court observed that there have been less than 200 cases of prosecution under this section since 1860. However, it failed to recognize that such cases are only ever brought into the public eye that to if they go to a court higher than the local level. Such local cases stem around harassment by the government machinery and this provision is constantly abused by the system. This claim by the judges does not include the alleged harassment of suspects by the police. It held that the LGBTQ community was not a significant minority for them to act. However, this is not an acceptable explanation for their decision as an important function of the court is to uphold the right to equality for communities even if they are a small minority. This extends to any law that is unconstitutional and violates the rights of Indian citizens. The court argued that the rules apply to everyone and are only against certain sexual acts and not against sexual identity. When this law was established it gave protection to children and animals from sexual abuse when there were no cemented laws on such issues. However, there are now laws that protect those categories from

⁴ <http://orinam.net/377/wp-content/uploads/2013/12/Naz-judgement-SC.pdf>

harm. This would make the use of this law for such a purpose obsolete. When I questioned BJP MP Poonam Mahajan on this issue⁵ she agreed with this: *“Section 377 applies to all types of unnatural intercourse. It even envisages unnatural sex with an animal - that particular provision needs to be remain unamended. Consensual intercourse between adults of the same gender must be removed from the ambit of this section.”*

In my view, the current significance of the law is that it completely restricts any homosexual intercourse and in doing so it is destroying their identity. Even if one was to accept the court statement of the law “only being against certain sexual acts” as a sound explanation it would make their argument unsuitable for the times the youth is living in, in terms of accepting societal changes and sexual freedoms and experimentation. This argument is simply sexually regressive and oppressive. Furthermore, the Supreme Court cleverly deflected the issue by holding that such a law should be addressed and debated by parliament. This feeble statement by the court endorses the earlier idea that they made a misstep and executed an error in its judgement. It is one of the purposes of the Supreme Court to challenge laws that may be unconstitutional. In this respect, it has failed. Clearly, the judges were prisoners of their own Conservative background. In being so narrowminded, the court has failed on delivering a sound judgement akin to its purpose. Due to this the issue has become highly politicized. Now, the future of LGBTQ rights in India is dependent on a political climate that is incredibly divisive in its opinion on this issue.

Hinduism and the LGBTQ Community

In pursuit of research for this essay, I spoke with some of the members of the BJP (Ruling national party). I got the impression that they were not aware that Hinduism was accepting of Gay culture

⁵ http://StitchAndShare.com/uR_MNNqjawU

and its rights. Hinduism has shown support for the LGBTQ community in its mythology. Stories such as ‘Shikhandi’⁶ (A critical character in the famous Hindu epic; “The Mahabharata”) demonstrate a positive view on the transgender community. The transgender character, ‘Hari Har Putra’ (This translates to ‘son of Vishnu and Shiva’. Vishnu is considered the Creator of the Universe and Shiva is the Destroyer of all beings. Both are fundamental in the creation myth of Hinduism) also known as Ayyappa, suggests a theme of homosexuality within the stories of Hinduism’s two most incremental male gods and sends a very powerful, if unintended message to the Queer community. The deity’s temple Sabarimala⁷ is one of the most visited in the south of India. Religious mythology can be interpreted by different worshipers as they wish. On the other hand, physical carvings of homosexual imagery (such as those on the walls of the Khajuraho Temples)⁸ represent Hinduism’s blatant openness to the Gay community as being literally set in stone. There are many more prominent examples in Hinduism that need not be cited.

Bharatiya Janata Party (BJP) Views on the LGBTQ Community:

⁶ “Shikhandi and Other Queer Tales they don’t Tell You”, Page 39, Written by Devdutt Pattanaik, Published by Penguin Books in 2014

⁷ <http://sabarimala.kerala.gov.in/>

⁸ <http://devdutt.com/articles/applied-mythology/queer/did-homosexuality-exist-in-ancient-india.html>

I personally believe that the BJP will win the next General Election of the country and remain in power even if it loses some seats in Parliament. Its main rival; the Congress Party has been plagued by scandals and corruption for the last decade of its rule. This has caused the political atmosphere to receive them with hostility and for them to be the focus of satire and ridicule in the country. Having taken this into account I have chosen to focus on the BJP's position as it is the most relevant to the near future of LGBTQ rights.

The BJP has not cited an official position on Section 377 or the LGBTQ Community. However, there is a varying view on what the community represents to their politicians. This led me to research the views of the BJP members on this issue. At the highest levels of the party, Prime Minister Modi has come forward in support of transgender people. He stated that they should not be discriminated against for something that “they were not responsible”⁹ for. When I questioned her, MP Poonam Mahajan explained that *“I do not believe that there are major political challenges. Recently, the Standing Committee on Social Justice and Empowerment chaired by Mr. Ramesh Bais from my party tabled its report titled ‘The Transgender Persons (Protection of Rights) Bill, 2016’¹⁰ in Parliament on the 21st of July 2017. Members of the Committee belonging to various political parties acknowledge the immediate need to protect the rights and interests of LGBTQ community.*

The Committee's assurance to the citizens from LGBTQ community encourages hope. It states, ‘A historic shift is underway; you are not alone in your struggle for the end of violence and discrimination. It is a shared struggle. Transgender is not an anomaly. It is a part of the spectrum of people's realities. While there is no shame in being gay, lesbian, bisexual,

⁹ <http://www.hindustantimes.com/india-news/modi-asks-bjp-mps-to-reach-out-to-transgenders-seeks-their-2-year-report-card/story-2CTEOmBYs1qAIPXdCiIngK.html>

¹⁰ <http://www.prsindia.org/uploads/media/Transgender/Transgender%20Persons%20Bill,%202016.pdf>

transgender or intersex or even straight - there is a most certainly shame and dishonor in being a homophobe, a transphobe and a bigot.” She has pointed out that there have been sincere efforts from politicians that are trying to

Many people in her party do not share this progressive attitude. In all my research, I was amused at the fact that I could not find an instance where the Prime Minister has chosen to speak on any “LGB” struggle. This choice demonstrates a larger dichotomy at play. The BJP has shown support for the Transgender community of India but will not do the same for the Gay, Lesbian or Bisexual population. Many other politicians within the BJP’s ranks have come out in support of 377 or against the LGBTQ community in general. Subhramaniam Swamy¹¹, a member of the Rajya Sabha (Upper House) and a respected economist in Indian politics claimed that “**legitimizing**” of homosexuality would be a “**genetic flaw celebrated.**”¹² Swamy has had a history of targeting the minorities of India on social media and enthralling himself in twitter spats between Indians that oppose his views. He spreads his message to his 4.6 million (approx.) twitter followers. While this number is unimpressive for a country of 1.3 Billion people, it is still a fairly large minority among the politically charged, young population that can afford to have some sort of device to access the social media site. Shaina N C, a BJP national spokesperson, Treasurer of the State Unit and member of the National Executive Council stated in a newspaper article that she believed that while she “*personally may not agree with their choice*” she could not view it “*as a criminal act.*”

¹³When I met her, she revealed that this issue is not currently a priority for the BJP as they must focus on matters that in their view require a greater level of attention. These would be the current

¹¹ https://en.wikipedia.org/wiki/Subramanian_Swamy

¹² <https://twitter.com/Swamy39/status/670903373168697344>

¹³ <http://www.deccanchronicle.com/discourse/300717/when-is-india-dropping-sec-377.html>

quality of life of most Indians having been ruined by poverty and the growth of the country. Many of these issues are vital and so a case could be made that the BJP is prioritizing the best they can and doing so correctly, if this indeed is the reason behind a lack of constructive conversation.

The unfortunate reality is that political parties often only respond to vote banks. A study recently suggested that the LGBTQ community could have a presence anywhere between 2%-13% in India.¹⁴ When presented with this information, MP Poonam Mahajan stated that *“Although I am a politician I don’t look at people as vote banks. People are who they are and everyone should be given an opportunity to live with dignity.”* In contrast, when I interviewed Shainia NC she said that *“this is an important issue but we are simply trying to repeal SC 377 at the moment. However, even this is not a priority.”*

The RSS View on the LGBTQ Community

The RSS (Rashtriya Swayamsevak Sangh meaning National Volunteer Organization)¹⁵ of which the BJP is the political arm, seemed to have a clear- cut opinion on this matter a few years ago. RSS leader Dattatreya Hosabale said that homosexuality should not be criminalized.¹⁶ He then did an about- turn, tweeting that homosexuality should not be punished but should be treated as a psychological issue¹⁷, clearly under pressure from others in the party. This idea of homosexuality being a psychological disorder presents a new problem within Indian politics. Many members of the RSS and BJP believe that homosexuality could indeed be a mental disorder. This idea parallels

¹⁴ <http://timesofindia.indiatimes.com/india/Gay-count-varies-from-2-to-13-of-population/articleshow/4731097.cms>

¹⁵ <http://rss.org/>

¹⁶ <https://thewire.in/25275/rss-ambiguity-on-homosexuality-masks-larger-problem-of-indian-polity/>

¹⁷ <https://twitter.com/DattaHosabale/status/710675675527585798>

that of Western “Conversion Therapy”¹⁸ where being gay can be “cured” by psychologists and doctors. Spreading an idea that being gay can be reversed could lead to a situation for the LGBTQ that is worse than remaining silent.

The Congress Party View

The Congress Party ruled India for a majority of its independent history. As of 2015 it had ruled India for 49 years out of its 70 years of independence. My research revealed that it treated the LGBTQ community as untouchable in the entirety of its history. In 2016 Dr. Shashi Tharoor, former Under- Secretary of Communications and Publication for the United Nations and a member of the Congress Party¹⁹ introduced a bill into the Lok Sabha (Lower house of India’s Parliament).²⁰ This bill, known as the Anti- Discrimination and Equality Act²¹ was created with the purpose of promoting equality within the country. The bill included references to LGBTQ in detail but was not limited to the group. It was also drafted with communities that commonly face hurdles placed by society. Part of the bill was dedicated to fighting racism with mention of fair treatment for those with darker skin. Unfortunately, the bill was crushed in its first introduction to the ‘Lok Sabha’. It received a 71- 24 margin in terms of votes. Tharoor’s alleged supporters were absent on the day of the vote. Having been defeated once but not ready to give in, he tried to introduce it for a second time. His bill was trodden upon with even more force with a 58- 14 margin. Tharoor, a man that is given to thought had crafted a beautiful bill that had the potential to act as a catalyst for progressive change in the country. Instead it was made to rot and was then scrapped. A repeated failure of the bill to pass makes it crucial to question whether it is simply the BJP that are divided

¹⁸ <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/>

¹⁹ https://en.wikipedia.org/wiki/Shashi_Tharoor

²⁰ https://en.wikipedia.org/wiki/Lok_Sabha

²¹ <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2991.pdf>

on the issue of homosexuality? In the recent past the LGBTQ community unanimously denounced any support for the BJP. During the 2014 general election the party refused to bring out a position on the issue. It was taken as a sign that they do not support rights for the LGBTQ community. However, the defeat of the Anti- Discrimination act suggests that the issue is just as divisive within other prominent parties as it is within the BJP. The Congress Party used the LGBTQ community as a weapon with which to attack the BJP. They did not act on this issue when they were in power and when the time came to act they let a whole community down. This has provided even more proof for the shameful political tactic employed by the Congress that attacks the BJP in words but does not attempt to right any of the opposition's wrongs.

Conclusion:

To serve a practical purpose, homosexuality should be far from condemned by the BJP in India as our problems with overpopulation and a growing divide in the ratio of men to women lead to a higher rate of violence and assault- related crimes. Having said that, I believe that there may not be a repeal of Section 377 in the current political climate of the country. The LGBTQ community is supposed to vary between 2%- 13%¹⁴. In a country of 1.324 Billion people. Taking a median of 7.5% that would amount to approximately 99 Million people that of the LGB community as well as the 6 Million of the transgender community. This could be a 'jackpot' of a vote bank in many other countries. If this is put into context of voters that would be against the repeal of 377 it may reveal why politicians are reluctant to touch on the issue. While it is not possible to definitively argue that all Muslims in the Indian Islamic population of 14.2%²² would be against the repeal, it can be assumed that a significant amount would be pro SC377. Out of India's population of over

²² <http://www.hindustantimes.com/india/muslim-population-grows-marginally-faster-census-2011-data/story-yAhd2F6z57ezaFWiwwYU7H.html>

a 150 million Muslims, even a third could create significant opposition when combined with the number of Conservative Hindus out of the 78% population and possibly those from other backgrounds that would be conservative regardless of religion. Any sensible party in India would not risk becoming unpopular with such large communities that hold their values very dear. If the BJP wishes to remain in power it would not attempt to rock the boat for fear of losing a significant number of votes. Any parties opposed to the BJP in the general elections would follow a similar example as they will be even more vulnerable to losses with a thinner support base. There may be passive, divisive acceptance of the 'LGB' but whenever this issue flares up in the media many politicians decide to come out against a repeal of section 377 in a move which I believe is mainly to preserve their vote bank.

So why then, are the transgender community supported by political parties? The transgender community has been suffering in the public eye for decades. Support for them would be interpreted as the party taking pity on their plight and acting as a champion of the public by aiding them. In contrast, the 'LGB' has remained hidden from the public until recently and so would be considered alien and taboo. Lastly, not many people wish to touch this issue. This is possibly for fear of public smearing. The courts and the politicians are constantly deflecting the issue towards each other. Due to this nothing significant will be achieved unless the Supreme Court panel of 5 judges comes through in favour of a repeal of SC377.

Historically, the Subcontinent has been of a majority Hindu population that was comfortable with different sexualities and genders. Many Hindu deities were transgender (or 'Hijra' as transgenders are known in India). Sacred Hindu texts had stories and references to homosexuality. For over a

thousand years, India has been subject to societal change conducted by the Delhi Sultanate and the Mughal Occupation as well as the Colonization of parts of the subcontinent by the British “Raj” (Rule). With their power, these empires all respectively brought with them Abrahamic religions that dictate laws which are homophobic in nature. The Bible refers to “Sodomy” derived from the story of the town of Sodom that God destroyed due to its practice of sexual acts considered to be against natural law. More directly, in Leviticus 20:13 it addresses homosexuality by forbidding the procreation of two men. I would assume that the same laws apply to women. The Quran is also against homosexuality but it is simply not clear on what the punishment should be²³. Throughout history these views on homosexuality will have assimilated into society along with the settlers that held them. Section 377 stands as testimony to this idea during a time when the British empire was Christian in practice. These views have survived into the modern day and taken hold among a large population in India. When I met with Ashok Row Kavi, a leading journalist and one of the first activists to fight for the repeal of Section 377, he expressed the deep and secretive integration of homosexual people within one of the most sacred institutions of India: ‘Family’. **“Many Indians are old enough to remember a time when we lived in extended families that worked as a massive support system for each member. I am sure it is common for people to recall that one aunt or uncle that was unmarried and had their special ‘friend’ that visited them privately. Many of the family members would have been aware and protective of this person’s sexuality and worked to keep it hidden from society.”**

Many of the politicians in India holding positions of power come from a Conservative upbringing. Out of the 543 constituencies of India, a significant amount of them would belong to areas where

²³ <http://theconversation.com/friday-essay-the-quran-the-bible-and-homosexuality-in-islam-61012>

there may not be levels of liberal development that match metropolitan cities because of intimate societal structures in which people are more fearful of their community's views on them or their family. This leaves a lack of desire for any acceptance of the Gay community which is perceived as "western culture" that is beginning to thrive in urban areas. Homosexuality has truly been part of Indian history far longer than the existence of an established civilization in the West. In their bid to uphold 'tradition' they would be reluctant to bring forth any change to society. My view here aligns with that of veteran activist Vikram Doctor. When I interacted with him, he stated that he did not expect any political movement on this issue but any progress would be from the Judicial side. Parties such as the BJP have confused fundamental aspects of Hindu Nationalism with those of older, outdated Christian and Islamic values so deeply embedded into what they mistake to be their religion. Others like the Congress Party, while having had a chance to act on important social issues such as this one, squandered their reputation with scandals and corruption. Now, it comes down to the idea of whether the parties see the LGBTQ community as a significant voter base to cater to. The BJP does not consider there to be any successful voter base and other parties might be afraid to lose out on support due to the Conservative nature of the masses and the taboo nature of the subject. If any repeal is possible within the next few years, it will only be through the Judicial process of the country.

Addendum:

While acting on an unrelated judgement on Privacy in August 2017²⁴, a panel of 9 Supreme Court justices went the extra mile to condemn the 2013 Supreme court's judgement on Section 377 in the paragraphs 124 to 128. In a move that was considered a "bolt from the blue", The Court stated

²⁴ http://supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf

that the reasons provided in the judgement could not be **“regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution”**. The Supreme Court’s decision to bash the previous judgement suggests an admittance that it was unconstitutional and unfair. This direct decision is significant as it will trigger movement on this issue. While yet to be made official it is now possible to say that Section 377 will be repealed through the Judicial process. Unfortunately, the issue will continue to languish in politics as matters regarding co- habitation, Marriage and Adoption still belong to political debate rather than judicial action. Currently, neither transgender nor Same- Sex couples can adopt or have a surrogate child in India²⁵. This will become a major hindrance as the LGBTQ community look to expand their rights beyond having to fight to be acknowledged. Politicians will continue to remain stubborn on these issues if they believe that it plays an important role within their vote bank politics.

²⁵ [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf)