Decriminalising Homosexuality in India as a Matter of Transformative Constitutionalism

Kanad Bagchi

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What role does the Indian Constitution play towards the emancipation of the society's most marginalized and excluded? What vision does the Constitution espouse with respect to basic fundamental rights and freedoms? And what conception of inclusion and pluralism does the Constitution pursue in a society that remains deeply divided and disjointed? All these searching questions came to form a distinct part of the decision of the Indian Supreme Court (Court) when it was called upon to rule on the constitutional validly of Section 377 of the Indian Penal Code, 1860. It was not the first time however, that the Court was examining Section 377 on the touchstone of the Constitution, as the case previously travelled through several levels of judicial adjudication involving different jurisdictional procedures (covered on this blog here, and also useful to refer here). In this post, I do not detail the entire set of constitutional argumentation that was advanced in what came out to be almost 500 pages of judicial reasoning. Instead, I highlight how the Indian Constitution was singularly understood and interpreted in the light of its transformative potential and through its mandate of ushering change within the Indian society.

Embodying the ethos of Victorian morality, Section 377, a colonial-era law, criminalized '…carnal intercourse against the order of nature with any man, woman or animal…'. Anything that was not penal-vaginal sexual encounter was 'against the order of nature' and as a consequence 'unnatural'. Through this provision, homosexual acts even between consenting adults was considered and proscribed as a criminal offense punishable with imprisonment. Thus, a significant section of the population comprising the LGBT+ community remained perpetually ostracized by the Indian society, persecuted by State authorities and marginalized in the discourse of constitutional rights. Therefore, when the Court decided in *Navtej Johar v Union of India* that Section 377 in so far as it criminalizes same sex acts between consenting adults, violates the constitutional mandate enshrined under the Fundamental Rights chapter, especially, Art. 21 (life and personal liberty), Art. 14 (equality and equal protection of laws), Art. 15 (non-discrimination) and Art. 19 (Freedom of expression), truly, it was a historic undoing of injustice towards the LGBT+ people. In other words, as a result of this decision, LGBT+ people who were historically and by default considered 'criminals' under the law, came a bit closer to acquiring an 'equal moral membership' of the society and the State.

Transformative Constitutionalism and the Indian Constitution

In declaring Section 377 to be unconstitutional, however, the Court was deeply reflective about the fact that for Constitutional rights to acquire a meaningful purpose for the marginalised communities, disciplining State action alone will not be sufficient. In this regard, the Court did not mince words when it stated that it is both, criminality of the law and the 'silence and stigmatization' of the society towards the LGBT+ community that orchestrates the marginalization and the exclusion of the former. Implicit in that claim was the understanding that inequality, hierarchy and prejudice transpires as much from State action as it does from societal sanctions, community conventions and private relationships. In the context of such social realities, what is the stated role of the Constitution and the laws? Is the mandate of the Constitution simply confined towards ordering the relationship between the State and the individual (vertical) or does the Constitution have an equal role to play in shaping

normative values among individuals within the society?

The Court unequivocally embraced the latter narrative and found that the Indian Constitution envisions an expansive role for both the State and the individual to actively promote social change within the contours of the Constitution. It seeks transformative change 'in the order of relations not just between the State and the individual, but also between individuals'. The transformative potential in Indian Constitution is a conscious 'attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society'. Therefore, the Constitution, the Court surmises, obliges not only the State not to violate fundamental rights, but also individuals to 'act in a manner that advances and promotes the Constitutional order of values'.

The understanding of a constitution as a transformative document is certainly not new and has an established lineage in several post-colonial constitutions. The idea of transformative constitutionalism lies in its emancipatory pursuit and in the conviction that large-scale social change within a certain political system is possible through the process and instrumentality of the law. Transformative constitutionalism enjoins a certain reading of the constitutional text that eschews formalism, pure positivism and legalism and advances an interpretation that acknowledges and responds to the reality of hierarchical structures and power relationships within a society. Most importantly, however, a transformative constitution breaks with the legal tradition of situating private relationships and community conventions outside of the constitutional mould, subjecting societal mores to constitutional values.

True to that vision, the Court held that a substantive understanding of Art. 14 reflects 'the quest for ensuring fair treatment of the individual in every aspect of human endeavor and in every facet of human existence'. Substantive equality entitles LGBT+ people to equal protection of the laws and to participate in both public and private affairs as equal citizens of the country. Similarly, by acknowledging that Section 377 violates Art. 15 (sex discrimination) as it 'perpetuates stereotypes' against the LGBT community that is rooted in traditional gender roles, the Court essentially uncovered the relationship between 'heterosexual expectations of society' and State criminalization of homosexuality. It is this unwholesome nexus between State law and 'public morality' that transformative constitutionalism purports to break and imagine instead, 'a transformation in the order of relations' among individuals, society and the State.

Such a demanding standard notwithstanding, the Indian Supreme Court was equally pragmatic and underscored that transformation and change within the Indian society, especially through the instrumentality of the law is going to be an incremental process. Through which framework and within what paradigm does one need to advance such transformation? The Court answers that it is only through the ideals of 'Constitutional morality' that the transformative vision of the Constitution fully comes alive. Constitutional morality in this sense is the 'guiding spirit' to achieve transformation within the society. Referring to one of the founding members of the Indian Constitution, Dr. B.R Ambedkar, the Court identified constitutional morality in its most pristine form as encapsulating the notion of 'diversity' and 'inclusiveness'. Therefore, law and in this case Section 377 which perpetuates discrimination and breeds inequality towards a certain social class, even if endorsed by 'public/social morality', fails the test of constitutional validity.

The Court's reading of the Indian Constitution in the present case is far-reaching, especially as regards the question of when and under what circumstances the State is allowed to restrict fundamental rights. The Court's insistence on an expansive reading of substantive equality would entail a higher scrutiny of future State legislation that tramples individual rights. The use of 'legitimate State purpose' to circumscribe a certain right can no longer be merely a reflection of 'public/social' morality and has to meet the test of 'constitutional' morality. Moreover, the real import of transformative constitutionalism lies in positive measures that the State ought to take in bringing the Constitution closer to the most deprived. It will be interesting to see how that translates into a fuller

interaction of the chapter on Directive Principles of State Policy and Fundamental Rights under the Constitution.

ABOUT THE AUTHOR

Kanad Bagchi
Kanad Bagchi is a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

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