

Human Rights and LGBT Movement in Kolkata after Supreme Court's Verdict of December 2013: Nature and Consequences

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I. Introduction

Throughout history, humans have complained about the things they disliked. Sometimes they do more than complain; they band together with others to change things. In modern societies, more than ever before, people have organized themselves to pursue a dizzying array of goals. In the early nineteenth century the luddites broke into early British factories and smashed new machines. There have been dozen of revolutions like those in France, China, Russia, Cuba, and Iran. Some of this movement has looked for opportunities to claim new rights while other has responded to treats or violence. Some have sought political and economic emancipation and gains; while others have fought lifestyle choices they disliked or feared. Some have created formal organizations other have relied upon networks, and still others have used more spontaneous actions as riots. Movements have regularly had choose between violent activities, illegal and legal ones, disruption and education, extremism and moderation.

Social movements are conscious, concerned and sustained efforts by ordinary people to change some aspect of their society by using extra-institutional means. They are more conscious and organized than fads and fashions. They last longer than a single protest or riot. There is more to them than formal organizations, although such organizations usually play a part. They are composed mainly of ordinary people as opposed to army officers, politicians, or economic elites. They need not be explicitly political, but many are.

The city of joy: Kolkata saw a same kind of mass movement against the Supreme Court's Verdict on IPC 377, dated 11th December 2013. Supreme Court bench upholds constitutional validity of Section 377, which holds that same-gender sexual relationship is against the order of nature, which provides a maximum sentence of life imprisonment for indulging in anal sex, even if it is consensual. The bench further says court can't legalise such sexual relationship; it is 'for the legislature to look into desirability of deleting Sec 377'. The judgment sets aside Delhi HC order of July 2, 2009 which decriminalized gay sex. It had ruled that intercourse between two consenting adults in private is not an offence.

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II. Social movement and Gender

Formally, social movements have been defined as conscious, organized, and collective actions to bring about or resist social change. The twentieth century can boast of a wide range of social movements. The workers' rights and trade union movement has strong in India during 1940s. Movements for national liberation and independence from foreign colonizing powers swept through Africa, Latin America, and Asia during the 1950s and 1960s. At very last, most of us are generally familiar with the contemporary social movements in India that have sought rights for groups subjugated on the basis of caste, ethnicity, religion, gender and sexuality such as civil rights, women liberation, and LGBT² rights.

Despite the differences between them, social movements share some common characteristics that set them apart from other forms of collective behavior. Their definitive features include organization, consciousness, non-institutionalized strategies, and prolonged duration. In contrast to riots, fads, and crowd behavior, social movements commonly exhibit some degree of structure and organization; a consciousness that links social discontent and grievances with a rationale or logic; non-institutionalized action strategies; and a relatively long duration.

Gender is not as straightforward a concept as many believe. First, it is distinct from sex, the physical and physiological features that differentiate females and males. As opposed to being a biological designation, gender is a social construction-the differentiation and institutionalization of the expected characteristics, norms, and behaviours associated with being female or male in any specific social context. Gender also refers to the rank ordering of this social division, and subsequent statuses, on interlocking societal levels. The distinction operates in the family, the economy, religion, political systems, educational institutions, and culture. It also interacts with other systems of social differentiation such as race, ethnicity, class, and sexuality. Defining and understanding the complex nature of gender as a social category has been contested terrain which on one level has been characterized by ideological struggles between essentialist and social constructionist conceptions of gender.

New social movement theories, such as identity model, reestablished the importance of social psychological and subjective factors in social movement processes. This broad range of theories emphasizes the role of identity formation and symbolic action as central elements of social movement activity and de-emphasizes social structural factors as the basis

² LGBT stands for Lesbian, Gay, Bisexual and Transgender community.

for resistance activity (Melucci 1985; Foweraker 1995; Buechler 1995)³. These theorists contend that “new grievances” based on identities and social location that are not necessarily class-based form a contemporary basis for activism (Melucci 1985; Buechler 1995)⁴. These perspectives also promote the importance of a sense of collective identity and ideological frames as crucial in linking individuals to resistance struggles (Snow et al. 1986; Snow and Benford 1988)⁵.

Taylor and Whittier (1992)⁶ for example, emphasize the development and strategic use of collective and oppositional identity and identities (Noonan 1995)⁷ in the social movement process. This process includes the establishment of boundaries that identify and distinguish the collectivity; consciousness and interpretive oppositional ideologies; and negotiation, the interactive process of restructuring symbol or social systems (Taylor and Whittier 1992; Gerson and Peiss 1985)⁸.

The fact that new social movement theories emphasize collective identity and social location, both of which are central to the construction of gender, makes them conducive to a gendered analysis, on one level. Other new social movement theorists stress collective action frames as important in the micro-mobilization process. These frames are the “interpretive schema” or logic that links individuals and their personal experiences to the goals and objectives of a larger social movement. These action frames are adopted through a process of frame alignment including: (1) frame bridging, the

³ Alberto Melucci, “The Symbolic Challenge of Contemporary Movements” *Social Research*, 52(4), winter. 789-816 (1985)

Joe Foweraker, *Theorizing Social Movements* (Pluto Press, London, 1995)

Steven M. Buechler, “New Social Movement Theories” In the *Sociological Quarterly* Vol. 36, Issue. 3. P. 441-464 (1995).

⁴ Ibid.

⁵ David Snow et.al. “Frame Alignment Processes, Micromobilization, and Movement Participation”, *American Sociological Review*, no.51. p. 464 (1986). D. A. Snow and R.D. Benford, “Master Frames and Cycles of Protest” In A. D. Morris and C. M. Mueller (eds.), *Frontiers in Social Movement Theory* 133-155 (Yale University Press, New Haven, 1992)

⁶ Verta Taylor and Nancy Whittier “The New Feminist Movement” In Laurel Richardson and Verta Taylor (eds.), *Feminist Frontiers: Rethinking Sex, Gender and Society* (McGraw-Hill, New York, 1992).

⁷ Rita K. Noonan “Women against the state: Political opportunities and collective action frames in Chile’s transition to democracy”, *Sociological Forum* 10 (1): 81-111 (1995).

⁸ Verta Taylor and Nancy Whittier “The New Feminist Movement” In Laurel Richardson and Verta Taylor (eds.), *Feminist Frontiers: Rethinking Sex, Gender and Society* (McGraw-Hill, New York, 1992). Judith M. Gerson and Kathy Peiss “Boundaries, Negotiation, Consciousness: Reconceptualizing Gender Relations” *Social Problems* 32: 317-31 (1985)

linking of two or more ideologically congruent but unconnected frames regarding an issue; (2) frame amplification, clarification and invigoration of an interpretive frame; (3) frame extension, portraying movement objectives as congruent with values/ interests of potential adherents; and (4) frame transformation, a reframing or systematic alteration of accepted or old values or meanings (Snow et al. 1986)⁹.

A gendered analysis looks at the ways in which gender ideologies become linked to collective action frames and identities. Gendered symbols are used to construct identity that is associated with the movement. However, an intersectional analysis argues that movement participants often occupy several statuses simultaneously, with the importance of any single identity determined, to some degree, by the context (King 1988)¹⁰.

This frame-bridging process can also work the other way around. In the application of the collective action frame model to social movements, the focus is on movement organizations connecting their “framing” of the situation to belief systems that potential participants already hold. Approaches to movements that have stressed subjective motivations for social movement involvement have been convinced of the importance of perceptions and other ideational factors in stimulating social resistance efforts. Ideas, cultural elements, symbolism, and shared meaning/ ideologies have been key variables in these investigations. Not only do socially embedded constructions of gender impact the justifications for protest, gender is also constructed and reconstructed in the process of movement participation.

III. The LGBT movement in India

The Indian lesbian, gay, bisexual and transgender (LGBT) movement is truly a rainbow of many fascinating hues. This movement is gradually bringing to light, documenting and representing the rich diversity of genders and sexualities that have existed in our cultures since thousands of years. It is advocating that this diversity should be respected and discrimination against LGBT people should be stopped.

As an organized political movement the Indian LGBT movement is still quite young, having taken its first steps only in the early 1990s. However, it is not as if the movement started overnight. Rather it was a

⁹ David Snow et.al. “Frame Alignment Processes, Micromobilization, and Movement Participation”, *American Sociological Review*, no.51. p. 464 (1986)

¹⁰ Deborah King “Multiple jeopardy, multiple consciousnesses: The context of a Black feminist ideology” *Signs: Journal of Women in Culture and Society* 14 (1): 42-72 (1988).

result of several visible and invisible developments taking place over the years in the world and Indian contexts.

As of current knowledge, these developments in modern-time India can be traced back to the early 20th century, though even this boundary is likely to be constantly pushed back. Till perhaps categories such as modern-time and earlier India blur and merge with each other. As some people argue, developments whether in the past, present or future are all part of a single continuum and linked in both obvious and unexpected ways!

In December 2002 Naz India¹¹ filed a Public Interest Litigation (PIL) to challenge IPC section 377 in the Delhi High Court. On 4 July 2008, gay activists fighting for decriminalization of consensual homosexuality at the Delhi High Court got a stimulus when the court opined that there was nothing unusual in holding a gay rally, something which is common outside India.

In September 2006, Nobel Laureate Amartya Sen and acclaimed writer Vikram Seh came together with scores of other prominent Indians in public life to publicly demand this change in the legal regime. The open letter demands that 'In the name of humanity and of our Constitution, this cruel and discriminatory law should be struck down.' On 30 June 2008, Indian labour minister Oscar Fernandes backed calls for decriminalisation of consensual gay sex, and the Prime Minister Manmohan Singh called for greater tolerance towards homosexuals. On 23 July 2008, Bombay High Court Judge Bilal Nazki said that India's unnatural sex law should be reviewed. The Law Commission of India had historically favoured the retention of this section, but in its 172nd report, delivered in 2000 it recommended its repeal.

On 2 July 2009, in the case of *Naz Foundation v National Capital Territory of Delhi*¹², the High Court of Delhi struck down much of Section 377 of the IPC as being unconstitutional. The Court held that to the extent Section 377 criminalized consensual non-vaginal sexual acts between adults; it violated an individual's fundamental rights to equality before the law, freedom from discrimination and to life and personal liberty under Articles 14, 15 and 21 of the Constitution of India. The High Court did not strike down Section 377 completely – it held the section was valid to the extent it related to non-consensual non-vaginal intercourse or to intercourse with

¹¹ The **Naz Foundation (India) Trust** is a non-governmental organisation (NGO) in that country that works on HIV/AIDS and sexual health. It is based in the Indian capital of New Delhi. Naz acted as the petitioner in the Delhi High Court case that found that Section 377 of the Indian Penal Code was unconstitutional.

¹² *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 111 DRJ 1. (2009) 111 DRJ 1. *Naz Foundation v. Govt. of NCT of Delhi*, Civil Appeal No. 952 of 2006 decided on 3-2-2006 (SC). (2009) 111 DRJ 1.

minors – and it expressed the hope that Parliament would soon legislatively address the issue. The eight-year-long legal proceedings ended with the Delhi High Court legalizing gay sex among consenting adults and again Supreme Court of India criminalized section 377.

If we trace the judicial verdicts regarding section 377 we will be able to locate the following stages¹³:

2001: An NGO fighting for gay rights, Naz Foundation files PIL seeking legalization of gay sex among consenting adults.

September 2, 2004: Delhi High Court dismisses the PIL seeking decriminalization of gay sex.

September 2004: The gay right activists file review petition.

November 3, 2004: The HC dismisses the review plea.

December 2004: Gay rights activists approach the apex court against the order of the High Court.

April 3, 2006: The apex court directs the HC to reconsider the matter on merit and remands the case back to High Court.

October 4, 2006: The HC allows senior BJP leader BP Singhal's plea, opposing decriminalizing gay sex, to be impleaded in the case.

September 18, 2008: Centre seeks more time to take stand on the issue after the contradictory stand between the Home and Health ministries over decriminalization of homosexuality.

The Court refuses the plea and final argument in the case begins.

September 25, 2008: The gay rights activists contend that the government cannot infringe upon their fundamental right to equality by decriminalizing homosexual acts on the ground of morality.

September 26, 2008: The Court pulls up the Centre for speaking in two voices on the homosexuality law in view of contradictory affidavits filed by Health and Home ministries.

September 26, 2008: Centre says that gay sex is immoral and a reflection of a perverse mind and its decriminalization would lead to moral degradation of society.

October 15, 2008: The High Court pulls up the Centre for relying on religious texts to justify ban on gay sex and asks it to come up with scientific reports to justify it.

¹³ See The Times of India, July 3, 2009 and Times of India (Times Nation), December 12, 2013, p. 11.

November 2008: Government in its written submission before the High Court says judiciary should refrain from interfering in the issue as it is basically for Parliament to decide.

November 7, 2008: High Court reserves its verdict on petitions filed by gay rights activists seeking decriminalization of homosexual acts.

July 2, 2009: High Court allows plea of gay rights activists and legalises gay sex among consenting adults.

July, 2009: Various petitions challenging the Delhi High Court's order filled in Supreme Court.

February 15, 2012: Supreme Court starts day-to-day hearing of the case.

March 27, 2012: Supreme Court reserves judgment.

December 11, 2013: Supreme Court junks Delhi High Court's order.

Back in 2009, Lesley Esteves was dancing in the streets after judges in Delhi decriminalized homosexuality. When the Delhi High Court suspended the draconian Section 377 of the Indian penal code which dated from the days of British rule, India's lesbian, gay, bisexual and transgender community thought there was no turning back.

Five years on the euphoria has gone. In December 2013, the country's highest court overturned the lower court's ruling, once again making gay sex a crime punishable by up to ten years in jail and putting tens of millions of Indians at risk of prosecution or harassment. Last month, that court – which had said gay people in India were just a “minuscule minority” – upheld its decision against an appeal and said it was up to the government to change the law.

IV. LGBT movement in Kolkata after 11 December 2013

With the Supreme Court ruling on December 11, 2013 that a same-gender sexual relationship is an offence, members of the lesbian, gay, bisexual and transgender (LGBT) community in Kolkata asserted that their fight would only get even stronger.

Academic Nabaneeta Dev Sen expressed "shock" and dismay at the apex court ruling. "It is extremely regressive...going backwards...I can't support this verdict in any manner. I am extremely shocked and irritated. With the 2009 verdict, I thought now we can show to the world that we are a truly independent nation and our citizens have freedom of rights and expression... how I live my life within a democracy is a matter I will decide, and that is a human right," Dev Sen said. "It's neither here nor there... it's a

hindrance... now they are referring to parliament. They didn't take care of it completely... what do they want?" Dev Sen asked¹⁴.

Noted historian and columnist Ramachandra Guha tweeted: "The Supreme Court judgment on Section 377 is a step backwards towards barbarism and medievalism."¹⁵

Sanjoy Nag, Maker of *Memories in March* said that, "from what I could gather, Justice is actually paving way for injustice. Criminalization of gay sex can never be accepted. Who decides what is legal and what is illegal? Who decides what is normal and what is not? This is basic human nature. This is supposed to be a democracy. How, then, can a governing lay down guidelines about how we should be leading our lives? I have worked extensively with the subject of sexual identity in *Memories in March* and I don't think legalities can be imposed on a human being's nature"¹⁶.

The next step for activists such as Pawan Dhall of SAATHII would be to "explore legal options to review the petition". "While the high court order had promised to hasten decriminalization of homosexuality, the SC ruling turns the clock back. Community members will now be hounded in neighborhoods, public places and roads" said Mr. Dhall, calling the SC order "unsympathetic and insensitive".

After the Supreme Court's verdict on 11 December 2013, the scores participated in a protest outside Academy of Fine Arts in Kolkata¹⁷. The movement is "strong" and will, with "renewed vigour", take on the verdict, said the members who gathered at the Academy of Fine Arts for a meeting.

The protest was headed by Sappho for equality and Pratyay Gender Trust on behalf of all LGBT persons and organizations in West Bengal. They were with the opinion that:

"We are deeply disappointed at the decision of the Supreme Court in overturning the historic Delhi High Court Judgment which recognized that LGBT persons are full citizens of India. In doing this, the Supreme Court has, dealt a severe blow to questions of fundamental rights and dignity of LGBT persons who as per the Indian Constitution are entitled to equal treatment. It withdraws the protective arm of the constitution from LGBT persons and renders them vulnerable to discrimination, violence and harassment.

¹⁴ The Times of India, December 12, 2013. P. 11.

¹⁵ <http://www.legalindia.in/news/kolkata-lgbt-activists-continue-fight-rights>

¹⁶ The times of India (Matinee Masala), 12 December 2013. P.6.

¹⁷ The author himself was prwsent in the protest movement held at Academy of Fine Arts.

It is a tragedy that this judgment forgets the vision of the founders of the Indian Republic which was so eloquently captured by the Delhi High Court. By recriminalizing LGBT persons the judgment ignores the spirit of inclusiveness which is the heart of the Indian Constitution as articulated by Jawaharlal Nehru. It equally abandons the principal of constitutional morality (i.e. majorities do not have a charter to discriminate against minorities purely because they are majorities) articulated by Dr. Ambedkar which is the cornerstone of a diverse and plural nation.

The judgment is thus a deep betrayal of the fundamental Constitutional promise that the dignity of all citizens would be recognized and that equal treatment is a non negotiable element of the world's largest democracy. In this betrayal of constitutional faith, the court has shredded the very principles it has sworn itself to uphold.

The decision today along with the decisions upholding the Emergency (1975) and legitimizing rape (Mathura Rape Case, 1979) marks the lowest ebb in the illustration history of the Supreme Court. In 2013 the Supreme Court has held, in effect, that LGBT persons are not human beings whose dignity and life is violated by a colonial law".

While replying to the future plans, they said "Hard as this decision is and difficult as the road forward may be, we draw strength and inspiration from ordinary LGBT persons who will not allow this to affect the way they lead their lives. In the course of the last decade or so, LGBT persons have begun to lead their lives openly and publicly proclaiming their claim to equal citizenship.

We proclaim that in spite of the judgment of the Supreme Court, the only way the LGBT movement will go is forward and the arc of history though long will turn towards justice.

We will explore all legal options, including legal review"¹⁸.

Not only the LGBT people and various organizations supported the movement but the normal students of Presidency University and Jadavpur University also supported the movement and raised their voice against the Supreme Court's verdict¹⁹. On a rally from College Square to Dharmatala organized by the students of Presidency University and students from various educational institutions protested against the decision. They started

¹⁸ Leaflets were distributed during protest movement. The quoted lines have been borrowed from the leaflet.

¹⁹ The Author himself witnessed the protest rally. The slogan was carried out by the protestors.

the rally with the slogan of, “*Amar Shorir amar mon, Dur hato Rajshason*”²⁰. They said that, “IPC 377 is not only against the homosexuals but also against the ‘Love’”.

On December 20, 2013 a public meeting was held on Supreme Court’s verdict on section 377 at Rotary Sadan, Kolkata. The meeting was to discuss on the judgment, its implications, legal and immediate strategies. They have opted for the strategy of mobilize people through media, education, and workplace and take measures regarding potential cases of harassment and abuse.

On 21st of December 2013, Association of Transgender/Hijra in Bengal (ATHB) organized a rally to protest the Supreme Court verdict on section 377 thereby reinstating the criminality of homosexuality in India, from Forum, Elgin Road Kolkata to Academy of Fine Arts. The whole purpose of the rally is to communicate their protest to a larger forum and develop a strong public support. They were with the view that:

‘This order is totally against our constitutional fundamental rights of freedom and independence and the right to live with dignity and respect and without being discriminated. The order has not only exposed the LGBT movement to uncertainty but has exposed the entire LGBT community to being subject of violence and stigma. The order has also sent wrong signals about India to the outside world as our country’s biggest asset is its democracy. The order has itself defeated the entire essence of the word democracy’²¹.

Six months after members of the LGBT community and rights activists proudly paraded through the streets of Kolkata in a Pride Walk, they are now seeking legal options for review of the apex court decision.

The Delhi High Court in a verdict in 2009 decriminalized the sexual relationship between consenting adults of the same gender, thus overturning Section 377 of the Indian Penal Code, which criminalizes sexual activity "against the order of nature". That Delhi High Court’s verdict has now been set aside by the Supreme Court.

For Meenakshi Sanyal, managing-trustee of Sappho for Equality, one of the primary non-governmental organizations supporting the LGBT community in eastern India, the verdict reflects how regressive the country has become. Despite the initial jolt, Sanyal asserted that the movement will "only grow stronger". "It's a complete about-turn... we strongly condemn this. This is not decriminalizing, but recriminalisation... Is the country going

²⁰ Slogan in bengali promoted by the protestors through out the kolkata which means – ‘my body, my heart and rulers have no right to interfere in our personal issues’.

²¹ Leaflet distributed during the protest on 21st December, 2014.

forward or backward? This is a national movement and we will fight for justice," Sanyal told²².

Echoing Sanyal, Debi Debnath, a lesbian, who participated in the Pride Walk, stressed that action would be initiated within the ambit of the legal system. "Whatever we do will be within the law... sexual orientation is part of human rights. We are not looked at with respect, and now, with this verdict, our fight for respect will become even stronger," she told²³.

Pointing out that the ruling comes a day after World Human Rights Day, Sanyal said the matter did not merely concern the LGBT community, but was about upholding the rights of citizens²⁴.

V. Conclusion

The LGBT movement is a movement for equal rights in the Indian multicultural setup, where constitution promotes individual as well as group rights, and in the process, stresses the failure from the state's part to accommodate sexual minority. They are trying to have their voice heard through the protest movement. If we follow the movement from the very beginning we will be able to note that the nature of the movement always follows a path of nonviolence and self resistance.

The LGBT movement in kolkata though it started long time ago but have been able to put some level of influence in society, though the flow the movement is very uncertain. It takes its picks only during some occasions. The continuous flow of the movement is missing somewhere. The LGBT community in Kolkata use to organize a pride walks every year but the continuous demands and struggle cannot be located. On the other hand the movement is not organized in its nature. Different institutions, organizations, NGOs try to operate the movement separately in their own way and there is a clash between the organizations as well.

But if we look into the nature of the social movements in India, will be able to note that the struggle has moved away from the state, only short term agitations are there and the case of LGBT movement is not exceptional in that sense.

²² <http://www.dnaindia.com/india/report-kolkata-lgbt-activists-to-continue-fight-for-rights-respect-1933399>

²³ Ibid.

²⁴ Ibid.