

COMMENT

Section 377 and The Mental Healthcare Act, 2017: Breaking barriers

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Abstract

The Supreme Court of India recently decriminalised homosexuality by passing a landmark judgment in the case of *Navtej Johar and Others v. Union of India*. In its judgment, the Court held that Section 377 of the Indian Penal Code, 1860 is unconstitutional in as much as it criminalises consensual sexual acts between two adults. The Court held that Section 377 discriminates against persons of the LGBTIQ community based on their sexual orientation and violates their fundamental rights guaranteed by the Constitution of India. The Court arrived at this conclusion after considering established principles of constitutional law, foreign precedents and expert opinions. However, a crucial part of the Court's reasoning was based on a close reading of the Mental Healthcare Act, 2017. The Court relied on the anti-discriminatory provisions of the Mental Healthcare Act, 2017 to observe that homosexuality is not a mental illness or mental disorder, and that LGBTIQ persons cannot be discriminated against on the basis of their sexual orientation. The Court's reading of the Mental Healthcare Act, 2017 and Section 377 is significant as its rationale can be extended further to challenge other laws which discriminate against persons with mental illness. The Court also highlights the responsibilities of mental health professionals and counsellors while providing mental healthcare to LGBTIQ persons. Finally, the Court's reading of the Mental Healthcare Act, 2017 is also a recognition of its commitment as an anti-discrimination legislation which upholds constitutional values and protects the rights of persons with mental illness.

Introduction

The Supreme Court of India in the recent case of *Navtej Johar and Others v Union of India* (1) delivered a historic verdict on the constitutionality of Section 377 of the Indian Penal Code, 1860 (2). The present case was referred to a five-judge bench to revisit the Court's decision in *Suresh Kumar Koushal and another v Naz Foundation and others* (3) which upheld the

constitutionality of Section 377 by overruling the decision of the Delhi High Court in *Naz Foundation v Government of NCT of Delhi and others* (4). In a judgment comprising four concurring opinions, a five-judge bench ruled that Section 377 is unconstitutional insofar as it criminalises consensual sexual acts between adults of the same sex. The Court also held that members of the LGBTIQ community "are entitled to the full range of constitutional rights including the liberties protected by the Constitution" as other citizens. The Court in its reasoning drew heavily from constitutional law, foreign precedents, international laws relating to human rights of LGBTIQ persons, and the scholarly opinions of experts. However, one of the most significant aspects of the Court's decision is the reliance it placed on the Mental Healthcare Act, 2017, (MHCA) (5) to declare that Section 377 discriminates against LGBTIQ persons on the basis of their sexual orientation. The Court's reading of the MHCA is significant from two aspects: (i) the Court recognises the MHCA as an anti-discriminatory legislation that reflects constitutional values; (ii) the Court's reasoning with respect to Section 377 opens further avenues for challenging discrimination faced by persons with mental illness under other laws. It is important to recognise that the Court's decision was influenced by multiple factors including the discourses which have challenged heteronormative notions of gender and sexuality. However, the scope of this article is limited to discussing those aspects of the Court's reasoning that relied on the provisions of the MHCA. We also briefly discuss the rationale used by the Court in testing the constitutionality of Section 377; and how its decision can potentially be applied to challenge other laws which have a discriminatory effect on persons with mental illness.

Rationale in *Navtej Johar*: Scope for challenging discrimination against persons with mental illness

The Court's verdict on Section 377 is based on the rationale that it discriminates against LGBTIQ persons on the basis of their sexual orientation. In particular, Section 377 violates: (i) Article 14 which guarantees equal protection of laws and protection from arbitrariness (ii) Article 15 which prohibits discrimination based on sex (iii) Article 19 (1) (e) which guarantees the freedom of expression and (iv) Article 21 which guarantees the right to life, right to dignity, the right to privacy and the right to health (6). In summary, the Court arrived at this conclusion based on the following principles:

1. Identity is an integral part of one's right to life and right to dignity. Sexual orientation is an inherent aspect of one's identity.

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To cite: Kapoor A, Pathare S. Section 377 and The Mental Healthcare Act, 2017: Breaking barriers. *Indian J Med Ethics*. Published online on November 26, 2018. DOI: 10.20529/IJME.2018.095.

Manuscript Editor: Rakhi Ghoshal

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2. The right to sexual orientation and the right to express the same are inherent components of a person's right to live with dignity.
3. The right to make choices about one's personal life, and to express the same, is an expression of one's decisional autonomy and the right to privacy.
4. Discrimination based on stereotypes about gender roles amounts to discrimination based on one's sex.
5. The right to health is an integral part of the right to life.

While examining the constitutionality of Section 377, the Court applied three broad principles which are relevant for testing the constitutionality of any law on the grounds that it violates fundamental rights:

- (i) The law must satisfy the test of *reasonable classification*. This means that if the law discriminates against a particular class of individuals, then this classification (i) should be based on some intelligible criteria and (ii) it must have a rational nexus with the object that the law seeks to achieve (7, 8).
- (ii) The law must not be *manifestly arbitrary*. This means that if a law is made by the legislature irrationally or without any reason, or is excessive and disproportionate then it would be manifestly arbitrary (9).
- (iii) What is relevant is the *effect* that the law or its operation has on the fundamental rights of a person. If the *effect* of the law is to infringe a person's fundamental rights (irrespective of the object or intention of the law), then it is sufficient to establish the unconstitutionality of such a law (10, 11). Further, with respect to discrimination on grounds of sex, the Court referred to its previous judgments (12, 13) and reiterated that discrimination based on gender and sexual orientation violated Article 15 of the Constitution. The Court further held that discrimination based on sexual orientation was premised on stereotypes of gender roles, which violated Article 15 of the Constitution. The Court concluded that any *direct* or *indirect* ground of discrimination based on stereotypes about the roles of men and women, would amount to discrimination based on one's sex (6) under Article 15.

On this basis, the Court held that even though Section 377 is "facially neutral" (in that it does not expressly mention sexual orientation or LGBTIQ persons) its effect is to indirectly discriminate against LGBTIQ persons by criminalising their identity. It is manifestly arbitrary as it criminalises *consensual* sex between two adults. It discriminates against LGBTIQ persons on the basis of their sex since discrimination based on sexual orientation is based on societal stereotypes of sex and gender. Further, it prevents such persons from expressing their sexual orientation, violates their right to make choices regarding intimate matters, and compels them to live in an environment of fear and persecution.

The Court's observations have significant implications beyond the scope of Section 377. The Court's rationale, especially with respect to the *effect* of a law on persons and their rights-

can also be extended to laws which discriminate against persons with mental illness. For instance, persons with mental illness are discriminated against, particularly in the case of marriage laws such as the Hindu Marriage Act, 1955 (14) and the Special Marriage Act, 1954 (15), which include mental illness as a ground for divorce and annulment of marriages. These provisions are discriminatory for the following reasons: First, they are based on an unreasonable classification as they single out mental illness from all other physical illnesses as a ground for divorce and annulment without any rational basis. Further, these provisions violate Article 23 (1) of the United Nations Convention on Rights of Persons with Disabilities (16) (ratified by India) which provides for measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood, and relationships on an "equal basis with others". Second, they perpetuate false and ingrained stereotypes of persons with mental illness as lacking capacity to support and nurture a family which furthers the stigma and discrimination against persons with mental illness (17). Third, their effect is to discriminate against women based on their gender and sex, as these provisions are mostly used by husbands against their wives particularly if the latter do not conform to stereotypical and patriarchal notions associated with their gender roles (18). Thus, as is evident, these provisions have a discriminatory *effect* on persons with mental illness and violate their fundamental rights under the Constitution. To use the Court's logic then, these provisions in the Hindu Marriage Act, 1955 (14) and the Special Marriage Act, 1954 (15) can be challenged as unconstitutional.

Homosexuality is not a mental illness

One of the linchpins of the Court's reasoning in *Navtej Johar* is the argument that homosexuality is not a mental illness or mental disorder. In the opinion of the Court, the provisions of the MHCA are an unequivocal declaration of Parliament of the prevailing global consensus that homosexuality is not a mental illness or mental disorder. The Court relied on the definition of "mental illness" as explicated in the MHCA which is based on internationally accepted medical standards (5: S 2 (1) (s)). It recognised this definition of "mental illness" as a major advance in the law which "throws to the winds all earlier misconceptions of mental illness..." and makes it clear that "homosexuality is not considered to be a mental illness". The Court further recognised that as per the MHCA, the notion of mental illness must "keep pace with international notions and accepted medical standards including the latest edition of the International Classification of Diseases of the World Health Organisation, under Section 3 (1) of the Act". Here, it is pertinent to note that while the MHCA does effectively outlaw discrimination based on sexual orientation, the scope of Section 3 of the MHCA is much wider as it provides that mental illness *cannot* be determined based on:

- (i) "Social status, or membership of a cultural group or for any other reason not directly relevant to the mental health of the person; or

- (ii) Non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community."

From the above, it is clear that the MHCA recognises that "mental illness" may be used as a ground to discriminate against those individuals who do not conform to the prevailing values, beliefs or expectations in society. This is extremely significant since mental illness is often wrongly attributed to a person based on grounds of caste, gender, sexual orientation (as seen above) or behaviour which does not conform to "mainstream" or "majoritarian" notions of propriety or morality. For example, if women behave in a manner which does not conform to the stereotypical roles they are expected to perform, they are often labelled as having a mental illness (19). It is to prevent such abuse by using *mental illness* as a disciplining tool, that the MHCA makes it emphatically clear that the only standards for determining mental illness are domestically and internationally acceptable medical standards and no other grounds.

Right to access mental healthcare and non-discrimination

Next, the Court relied on the anti-discrimination provisions of the MHCA to hold that sexual orientation *cannot* be a ground for discrimination. In particular, the Court referred to Section 18 (2) and Section 21 (1) (a) of the MHCA which state:

"18. Right to access mental healthcare. — ... (2) *The right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.*"

"21. Right to equality and non-discrimination.—(1) *Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:— (a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;*"

Through a reading of Section 21 (1) (a) the Court acknowledged the MHCA as a "parliamentary recognition" of the fact that LGBTIQ persons along with other persons can be affected with mental illness and should be treated as equal to other persons with such illness...". The Court further stated that Section 18 (2) read with Section 21 (1) (a) provides for "the right to access mental healthcare and equal treatment of people with physical and mental illnesses without discrimination, inter alia, on the basis of sexual orientation."

A simple reading of these two provisions of the MHCA implies the following:

- (i) The right to access mental healthcare and treatment is guaranteed for *all* persons *without* discrimination based on any of the grounds mentioned in Section 18 (2) including sexual orientation. It is important to note that the grounds of discrimination mentioned in Section 18 (2) of the MHCA are not exhaustive. The provision includes the phrase "on any other basis" which implies that the prohibition of non-discrimination extends to any other grounds not mentioned in Section 18 (2). Thus, this leaves open possibility of a discrimination claim for a person who is denied the right to access mental healthcare on a ground not mentioned in Section 18 (2).
- (ii) All persons with mental illness should be treated as equal to persons with physical illness in the provision of all healthcare (*principle of parity*).
- (iii) No person with a mental illness or physical illness can be discriminated against on any of the grounds mentioned in the provisions including sexual orientation.

According to the Court, this gives rise to a paradoxical situation. On the one hand the MHCA ensures the right access to mental healthcare without discrimination based on sexual orientation. However, on the other hand, the effect of Section 377 is that it criminalises LGBTIQ persons which "inhibits them from accessing health-facilities" and violates their right to health. The Court makes an important point here: if a person cannot be discriminated against based on their sexual orientation in accessing mental healthcare, then how can such a person be discriminated in any other aspect of their rights and liberties protected by the Constitution? The law cannot prohibit discrimination for a particular group of individuals under one legislation and permit the same under another legislation. Based on this logic, the Court declared that Section 377 is unconstitutional in so far as it discriminates on the grounds of sexual orientation. The principle implicit in the Court's reasoning here can be extended to challenge other laws which discriminate against persons with mental illness or any other group of individuals. Such a challenge would be sustainable if (i) the person is discriminated against based on their gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or (ii) persons with mental illness are not treated on an equal basis with others.

Implications for mental health professionals and clinical practice

The verdict in *Navtej Johar* has significant implications for the clinical practice of psychiatrists, mental health professionals, and other stakeholders involved in mental health. These implications extend to (i) clinical practice with LGBTIQ clients (ii) implementation of the MHCA for treatment of persons with mental illness.

The Court has urged mental health professionals to re-examine their own views on homosexuality given "repercussions of prejudice, stigma and discrimination" faced by LGBTIQ persons. The Court also reiterates that counsellors must focus

on providing support to LGBTIQ clients to help them become comfortable with who they are, rather than provide a cure for something which is not a disease or illness. Accordingly, counsellors must develop their sensitivity and understanding of the life concerns of LGBTIQ persons, and the medical community must “share the responsibility to help individuals, families, workplaces and educational and other institutions to understand sexuality completely in order to facilitate the creation of a society free from discrimination...” The Court’s observations must be interpreted as a definitive stand against the practice of “conversion therapies” which are used by many mental health professionals and “religious healers” with the aim of “curing” homosexual persons (20). Any person who administers such therapies would be in direct contravention of the anti-discrimination provisions of the MHCA and subject to imprisonment and/or fine under Section 108 of the MHCA.

For those who have a duty to implement the provisions of the MHCA, it is crucial to recognise that the law is embedded in the values of the Constitution as is reflected in its rights-based approach to treatment of persons with mental illness. Based on this approach, the MHCA provides a charter of rights for persons with mental illness to protect their privacy; access to information regarding their treatment; protection from cruel, inhuman or degrading treatment; and the right to remedies for violations of their rights. These safeguards also ensure that the will and preferences of persons with mental illness are considered primary while providing treatment and mental healthcare. This principle is reflected in provisions such as “advance directives” which ensure that persons with mental illness have the right to be treated in accordance with their wishes should they not have capacity to take decisions regarding their mental healthcare in the future. Further, the obligation to take the informed consent of persons with mental illness (with or without support from their nominated representatives) ensures that every person’s right to make choices as guaranteed by the Constitution, is protected during their mental healthcare and treatment. In light of the above, the law mandates it as the duty of every mental health professional to comply with these constitutional safeguards while providing mental healthcare and treatment to persons with mental illness.

Conclusion

The Court’s decision in *Navtej Johar* is a landmark verdict for the rights of LGBTIQ persons. However, what is particularly important from the perspective of mental healthcare is the Court’s emphasis on the provisions of MHCA in arriving at its decision. In doing so the Court has identified the MHCA’s commitment to constitutional morality, and the dignity, autonomy and liberty of all persons with mental illness regardless of their identities. This crucial link not only validates the MHCA’s objective in protecting the rights and

liberties of persons with mental illness, but also opens the future path for challenging discrimination of persons with mental illness under other laws in force.

Declaration: Dr. Soumitra Pathare has previously provided technical assistance to the Department of Health & Family Welfare, Government of India, in the drafting of the Mental Healthcare Act, 2017. Dr. Soumitra Pathare also submitted affidavits as an intervener to the High Court of Delhi in the case of *Naz Foundation v. Government of NCT of Delhi and others*; and to the Supreme Court of India in the case of *Suresh Kumar Koushal and another v. Naz Foundation and others*, stating that homosexuality is not a mental illness or mental disorder.

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