
LEGALIZING LOVE: SECTION 377 AND THE STRUGGLE FOR LGBTQ RIGHTS IN INDIA THROUGH THE LENS OF ALIGARH

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ABSTRACT:

This paper provides a critical analysis of the movie "Aligarh," which highlights the struggles of the LGBTQ+ community in India and their fight for equal rights. The movie depicts the conflict between a man's right to his sexuality and society's invasion of his privacy through the story of a university professor who was suspended and harassed after being filmed engaged in same-sex sexual activity. The paper also explores the legal and socio-political issues surrounding homosexuality in India, including the history of criminalization under Section 377 of the Indian Penal Code and the legal challenges to its constitutionality. The paper argues that Section 377 violated the fundamental rights of homosexuals and examines the impact of the partial decriminalization of homosexuality by the Delhi High Court in 2009. The paper concludes that the movie "Aligarh" serves as a powerful portrayal of the plights of homosexuals in India and their struggle for equal rights.

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The underlying principle of human rights is that everyone should be treated equally and with the same dignity. The breach of this principle leads to discrimination. Homosexuals, who are sexually attracted to people of their sex, have faced the plight of discrimination and inequality since the very beginning. It has been effectively portrayed in the movie 'Aligarh.' The film is about the conflict between a man's right to his sexuality and society's invasion of his privacy. This review intends to critically analyze the movie 'Aligarh' while capturing the legal and socio-political issues depicted in the film's plot.

Aligarh is a compelling movie that strongly portrays the plights of homosexuals and their fight for equal rights in society. It depicts the conflict between a man's right to his sexuality and society's intrusion into his privacy. The movie is about an incident of February 8, 2010, in which Professor S. R. Siras, who taught the Marathi language at Aligarh Muslim University, was un-consensually filmed and harassed when he was engaged in a same-sex sexual activity with a rikshaw-puller in his private space. Later, he faced backlash from the public in the form of protests and was suspended and charge-sheeted by the Aligarh Muslim University as his homosexual act was considered immoral and against the decency that prevailed in the society. The media was flooded with articles that covered Professor Siras in a negative light. However, a Delhi-based reporter, Deepu Sebastian, stressed covering this story with a different angle, calling it "a human story" rather than a "sex scandal." After this incident, the professor was seen as a criminal in society and faced unacceptance and extrusion. Officials of the university systematically harassed Siras by sending him notice to vacate his allotted quarters within seven days and limiting his electricity supply unreasonably. In the latter half of the film, Professor Siras moves to the Allahabad High Court with the support of some activists to get justice, where his lawyer argues for his rights, citing the historic judgment of the Naz Foundation v. NCT of Delhi, which decriminalized consensual homosexual acts in private. Later the High Court gave its decision in favor of the professor, asking the university to cancel the suspension. However, Professor Siras is found dead in unusual circumstances at the movie's end.¹

¹ *Aligarh* (Directed by Hansal Mehta 2016) <<https://www.youtube.com/watch?v=zBbDBiNWFDI>> accessed October 29, 2022

The incident of February 2010 took place amidst discussions about the legal contention of homosexuality in Indian courts. Homosexuality was not a new concept; we counter its existence in several ancient texts like Kamasutra and Arthashastra.² It was prevalent throughout Indian history from ancient and medieval times to the modern era, though in a negative light of unacceptance; it took the face of criminalization only in the colonial period with the introduction of the Indian Penal Code by Lord Macaulay in 1837. The Indian Penal Code criminalized the act of homosexuality, terming it as “against the nature” with the introduction of section 377, which read,

Unnatural offenses.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or 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 offense described in this section.³

Section 377 discriminates between homosexuals and heterosexuals by penalizing their exercise of sexual autonomy. Some subtle movements against Section 377 began in the 1980s, contesting the wrong-held beliefs about homosexuality. However, section 377 faced various legal challenges in Indian courts, starting from the Public Interest Litigation (PIL) filed by the AIDS Bhedbhav Virodhi Andolan (ABVA) in 1994⁴, which was later rejected by the PIL filed by the Naz Foundation, a non-governmental organization working with gay men, opposing the constitutionality of section 377 and demanding the legalization of homosexuality. It argued that Section 377 created a class of vulnerable people continuously victimized and directly affected by the provision by criminalizing consensual same-sex conduct.⁵ In the case of Naz Foundation v. Union of India, the Delhi High Court read down certain provisions of section 377 in the 2009 judgment, setting a historical judgment that decriminalized the sexual act of two consenting adults in private.⁶

² Nisha Tamang, *Section 377: Challenges and Changing Perspectives in the Indian Society*, 1, CHANGING TRENDS IN HUMAN THOUGHTS AND PERSPECTIVES: SCIENCE, HUMANITIES, AND CULTURE 68, 72

³ Indian Penal Code 1860, s 377.

⁴ Rakshita Data, *Same-Sex Marriage in India and Private International Law*, 4 INT'L J.L. MGMT. & HUMAN. 230, 234 (2021).

⁵ Naz Foundation Vs. Government of NCT and Ors., (2009) MANU/DE/0869/2009 (India).

⁶ *Id.*

However, this judgment of the Delhi High Court, which partially read down section 377 of IPC, had limited application. As per Article 227 (1) of the Constitution, “*every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.*”⁷ Hence, the 2009 judgment was limitedly applicable only to the Delhi High Court's jurisdiction, and homosexuality was still criminal if exercised elsewhere. Although the judgment held persuasive value over other jurisdictions, the 2009 decision was not binding on them. Similar contention has been shown in the movie ‘Aligarh,’ where even after the decriminalization of homosexuality in 2009 by the Delhi High Court, the decision was not binding in the Allahabad High Court but had persuaded the court to give a judgment in favor of the professor.

As contested in various cases, section 377 discriminated against homosexuals violating their fundamental rights, given in part III of the Indian Constitution. More specifically, it violated the right to equality, the right against discrimination, and the right to life and personal liberty.⁸ Section 377 criminalizes “carnal intercourse” with a same-sex person, whereas it is legal in the case of exercising heterosexuality consensually. Discrimination based on a person’s sexual orientation is extremely offensive to that person’s sense of value and dignity. Equality in society demands the protection of sexual orientation on an even platform.⁹ This discrimination against homosexuals goes against Article 14 of the Constitution, which guarantees the right to equality because there seems to be no reasonable classification between the two groups in exercising their sexual autonomy. Moreover, section 377 is violative of Article 15 (1) of the Constitution if it is to be read with the evolving nature of the society and inclusivity. Article 15 states, “*The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*”¹⁰ If we consider it through the lens of inclusivity, which is one of the objectives of Article 15, the ground of sex should also include the ground of sexual orientation, and discrimination based on sexual preference will be against the provisions of Article 15. Also, as observed by Justice Bhagwati in Francis Coralie Mullin’s case, the right to life includes the right to carry on such activities as required to constitute one’s

⁷ INDIA CONST. art. 227, cl. 1.

⁸ Naz Foundation Vs. Government of NCT and Ors., (2009) MANU/DE/0869/2009 (India).

⁹ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors., (2017) MANU/SC/1044/2017 (India).

¹⁰ INDIA CONST. art. 15, cl. 1.

self-expression.¹¹ Section 377 limits the personal liberty of persons to engage in consensual sexual activities with a partner of their choice, which is Article 21. The section inhibits them from entering into sexual relationships as per their consent. As a result, they are forced to lead a solitary life with the identity of a criminal.

Another pertaining issue in the movie 'Aligarh' was the infringement of the right to privacy of Professor Siras when he was recorded by some people un-consensually in his private space. One's right to privacy is essential for thoroughly enjoying all other rights and freedoms guaranteed by the Constitution.¹² The right to privacy is in accordance with the principles of the preamble of 'liberty' and 'dignity,' as well as the human conceptions of 'life' and 'personal liberty' that are enshrined in Article 21 and the broad freedoms that are protected under Part III, which are seen as being necessary for a meaningful human existence. It is also acknowledged by the United States' Protection of Human Rights Act of 1993 and other international accords. Even in the sections of Part III where it is not explicitly specified, the right to privacy has always been the fundamental premise for further rights.¹³ However, in 2010 right to privacy was not considered a fundamental right because of the precedents established by the courts in *Kharak Singh v. State of Uttar Pradesh* and *M.P. Sharma and Others v. Satish Chandra and Others*. This highlights the limitations of the principle of *stare decisis*, which translates as 'to stand by decisions'; that is, it is an established policy of judicial process that "similar cases be decided in a similar manner." (McLeod 126) where judgments based on unsound reasoning carry binding value and negatively affect justice delivery. Finally, it was in the case of *K.S. Puttaswamy and Anr. Vs. Union of India and others* (2017), the supreme court overruled the previous judgments on the right to privacy and declared it a fundamental right under Article 21 of the Constitution.¹⁴

The issue of persecution versus prosecution can also be identified in the movie 'Aligarh.' The prosecution is the act or process of holding a trial against the person who is accused of a crime to see if that person is guilty. In contrast, persecution is severe discrimination that denies or infringes fundamental rights. In the movie, when the two anonymous men entered the

¹¹ Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and Ors., (1981) MANU/SC/0517/1981 (India).

¹² Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors., (2017) MANU/SC/1044/2017 (India).

¹³ Kishita Gupta and Shristi Suman, *Constitutional validity of Aadhar Act in the case of Justice K.S. Puttaswamy (Retd.) and Anr. Vs. Union of India*, iPLEADERS (October 27, 2022, 08:02 AM), <https://blog.iplayers.in/justice-k-s-puttaswamy-ret-d-and-anr-vs-union-of-india/>

¹⁴ *Id.*

professor's house and filmed him with the rikshaw-puller un-consensually and did not allow them to wear clothes and used physical force while beating them with sticks. This surveillance by the two men resulted in the infringement of the professor's and rickshaw-puller's fundamental rights. This was also evident in the first case filed under Section 377 in India, *Queen Empress v. Khairati*, in 1884. Khairati was arrested for cross-dressing and singing with a group of women in her village by the police in a suo moto action. He was eventually found not guilty due to the lack of evidence, but the police were praised for keeping such "disgusting practices" in check.¹⁵

The movie 'Aligarh' also presents an example of how politics within an institution or state diminishes the rule of law. The rule of law implies that nobody is above the law, and it restricts the arbitrary exercise of power. The Aligarh Muslim University suspended the professor, claiming that his act was against the morals of the prestigious institution. The professor was exercising his autonomy in his private space, which was also out of the course of his employment at the institution. He was not even heard, violating one of the principles of natural justice, which says that no one should be condemned unheard, justifying university officials' arbitrary use of power. The politicized institutions do not only discriminate on the basis of sexual orientation, as shown in the movie. Other factors like gender, caste, religion, etc., also lead to discrimination by the institutions restricting the rule of law, as seen in the recent example of St Xavier's Kolkata, where a female teacher was arbitrarily forced to quit after a student looked at her swimwear pictures on social media.¹⁶ She was unreasonably targeted for posting pictures in exercising her liberty by terming the pictures as "objectionable," which diminished the institution's reputation. Here, the teacher's right to life and personal liberty was violated due to the institution's idea of "morality" for doing an act outside her course of employment.

The movie 'Aligarh' has realistically portrayed the condition and discrimination faced by homosexuals in society. No other film has given much importance to the plights of homosexuals in society like 'Aligarh.' This movie does not show any signs of bias in the portrayal of different characters; it also presents several thought-provoking legal and socio-

¹⁵ *Queen-Empress v. Khairati*, (1884) ILR 6 All 204 (India).

¹⁶ Bishwanath Ghosh, *Teacher's forced resignation over bikini pictures on social media triggers anger in Kolkata academia*, THE HINDU (August 14, 2022), www.thehindu.com/news/cities/kolkata/teachers-forced-resignation-over-bikini-picture-on-social-media-triggers-anger-in-kolkata-academia/article65765274.ece, (last visited on October 29, 2022).

political issues. The major importance has also been given to the link between justice and morality, showing how morals could hamper justice delivery in society.