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OPINION

Dear Supreme Court, let's get real about sexual identities and sexual desire

In a short span, the apex court has dug itself a massive legal hole by issuing two contradictory judgments that pull in two separate directions.

by CYRIL GHOSH and CHAPAL MEHRA

April 15 marks the second anniversary of a landmark Supreme Court ruling that recognised the status of a "third gender". The judgement made it legal to identify oneself as a transgender in India, even though it remains illegal to have sexual relations "against the order of nature". So what then constitutes the "order of nature" in a country where we are willing to allow gender fluidity? Apparently, the Supreme Court has no clue.

In a short span, the Supreme Court has dug itself a massive legal hole by issuing two contradictory judgments that pull in two separate directions on the issues of gender identity and sexual desire. The first of these judgments is Suresh Kumar Koushal and Another vs Naz Foundation and Others, which in 2013 overruled a Delhi High Court judgment that "read down" Section 377 of the Indian Penal Code. Section 377 is a "sodomy law" that penalises crimes committed "against the order of nature". In India, this law has been mainly used to harass, coerce and persecute sexual minorities, primarily homosexuals and transgenders.

The second judgment is National Legal Services Authority vs Union of India. This 2014 decision upholds "third gender" or "transgender" as a legally permissible gender identity category, allowing several citizenship rights.

Complex questions

In the first judgement, the court seems unable to recognise that sexual orientation and gender identity are deeply interlinked. The inconsistency between these judgements would be obvious to anyone who has ever bothered to Google the term "transgender". The word is an umbrella term that covers individuals who are trans women, trans men, transvestites, genderqueer, agender, hijras, and a host of other gender identities.

Not only this, the term also includes both those who have undergone sex reassignment surgery and those who haven't. Among those who have undergone sex reassignment, some may have had only upper body surgery and others may have had both upper and lower surgery. In normative terms, many of these bodies defy any "order of nature", both in "performance" and through medical alterations.

Moreover, what of desire that these unnatural bodies wish to express? Can these individuals with gender binary-defying bodies have sex with whoever they please? Will it not be a crime "against the order of nature" if they do so? As it turns out, the answer is both yes and no.

Consider persons born male but who identify as transgender; they would not be breaking the law if they had a penis and had sex with traditional gendered women. But they would be criminals if they had sex with a non-trans (cisgendered) man. However, if these same persons had sex reassignment, and no longer had a penis, presumably they could legally have sex with

men. But then they could no longer have sex with cisgendered women. A similar pattern of confusion presents itself in the case of those who identify as men but were assigned female at birth. At the heart of all this lies the court's inability to grasp or navigate the vast spectrum of sexual identities and diverse expressions of sexual desire.

Inclusive approach

Perhaps recognising the unnatural contradiction it has perpetuated, a constitution bench of the Supreme Court on February 2 admitted a curative petition on Section 377. A curative petition is the last judicial resort available for the LGBTQI+ community to have Section 377 "read down". The three-judge bench that heard the curative petition agreed that the matter was of such importance that it needed to be referred to a five-judge Constitution Bench for an in-depth hearing. The matter has since been the subject of intense media scrutiny and public debate – and for good reasons.

There is little doubt that Section 377 needs to be struck down. The court has to recognise that the question of gender identity is closely related to the question of sexual orientation and desire. Sexual orientation minorities are often, although not always, gender identity minorities and vice versa. It is for this reason that the Yogyakarta Principles, devised in 2006 by a group of human rights lawyers, activists, and other stakeholders, address the relationship and application of sexual orientation and gender identity to international human rights law, which is otherwise relatively silent on gay and lesbian rights as well as transgender rights. The court cites the Yogyakarta Principles in both cases but somehow arrives at contradictory conclusions.

By issuing the two judgments, the Supreme Court has denied this imbricated relationship between sexual orientation and gender orientation. The court seems to lack a fundamental understanding of the fact that granting gender fluidity means little without granting the right to express sexual desire in gender non-conforming ways. Moreover, this position ignores a long subcontinent history where both same-sex love and fluid gender identity have been accepted and celebrated. In doing so, the court has demonstrated a culturally schizophrenic and logically inconsistent attitude with regard to the rights of sexual and gender minorities. It's time the court recognised the relationship between sexual orientation and desire and understood its own cultural history on these issues for what it has always been – diverse and inclusive.

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