

**INTERNATIONAL JOURNAL OF LAW  
MANAGEMENT & HUMANITIES**  
**[ISSN 2581-5369]**

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**Volume 4 | Issue 1**  
**2021**

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# Section 377: Against Indian Culture or Victorian Sensibilities?

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## ABSTRACT

*The society is growing everyday and growth is all about changes and developments towards the better. One such major development done in the Indian societal structure was the striking down of Section 377 of the Indian Penal Code which criminalized unnatural offences in its terms. But those which is unnatural for some is completely natural to others. But the changes that were expected did not come with the Judgment of the Court. Changes are to be incorporated in real within the people, in the society. Acceptance of this great decision of the court still seems very difficult for the Indian masses who believe to have their roots of culture in the long histories of centuries. After the decriminalization of section 377, the next step on the road is the development of this newly identified community-LGBTQ and the recognition of their relationships which can be achieved through the way of marriage. The researchers in this paper try to deal with the scope and boundaries of the people of this community. The paper will deal with the problems that is faced by this community and their social acceptance, the historical aspects, different religious sentiments, and different topics will be brushed upon. Also, there are many issues that can also be dealt with if acceptance of these marriages can be positively done and the paper highlights them too. This paper will try to find solutions to the many questions that are supposedly raised on the validity of LGBTQ+ marriages in an oriented manner.*

*Keywords: LGBTQ, Sec 377 IPC, Marriages, Adoption, Development.*

## I. INTRODUCTION

On 6<sup>th</sup> Sept, 2018, two years of litigation was ended with the historic judgment of decriminalizing Section 377 of the Indian Penal Code<sup>3</sup>. This very Section had been in the roots and nerves of the Constitution since its adoption. This very section formulated on the long rituals and societal structure of the country had never been imagined to be struck down by the Apex Court, but the judgment shook the base of Indian culture. Where this decision was happily accepted by the LGBTQ+ community, their families and supporters, there was still a larger

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<sup>3</sup> Indian Penal Code, 1860.

group of the society which had a big NO to acceptance of this decision and is still against this decision.

The foundation of Indian values got shaken up, Vishwa Hindu Parishad called homosexuality as an “imported disease”. Subramanian Swami claims fighting for LGBTQ+ is an American game. The strongest opposition to decriminalising homosexuality in India, was on the grounds of being against our Indian culture. But is it really?

Kamasutra in 4<sup>th</sup> century A.D. mentions physical pleasure in male-male unions in vivid details. The Kama Sutra is an ancient Sanskrit Indian text providing details on sexuality, pleasures and states that same-sex experience. 14<sup>th</sup> century Bengal folklore tells the story of a sexual relationship between 2 widows. Bhakti Saints in medieval India would effeminise themselves to worship Krishna and Shiva.

Nawabs in the Court of Awadh, in 18<sup>th</sup> century would dress up as women on certain holy days. Scholars point out that while these queer practices might not have been widely practiced norms they were never derided or looked down upon.

In fact, till early 1800's Indian poets like Insha and Rangin were openly writing about male-male and female-female relations in the same tones as heterosexual relationships. Heterosexuality became to be viewed as crime against order of nature only in 1860, when Thomas Macaulay introduced Section 377 into IPC 1860, modelled after the English Buggery Act of 1533, which made anal and oral sex, a punishable offense. Victorian sensibilities were aghast at text like Kamasutra, in fact India's openness towards sexuality ironically became one of the reasons the British classified it as backward civilisation. Indian nationalists asserted the ‘respectability’ of Indian culture in turn adopting conservative Victorian attitudes towards our own ‘non-hetero normative’ traditions. By 1920's, when Hindi writer ‘Ugr’ published short story collection, ‘chocolate’, it caused an uproar, even though the book denounced homosexuality, Journalists, writers and reformers criticised the author for writing about homosexual desire, a subject they felt not to be mentioned. By 1967, Britain passed a law legislation legalising same sex relations, but the Victorian idea of same sex relationship being Unnatural had become entrenched as an integral part of Indian Values. In 1998 for instance when Indo-Canadian Filmmaker Deepa Mehta's lesbian Love story ‘Fire’ was released in Indian theatres, it led to large-scale protests by Indian political parties. From Bajrang Dal to BJP, who attacked theatres and burnt effigies of the actors, accusing the film being ‘alien’ to Indian traditions and cultures. But LGBTQ+ activists fought back against those perceptions and held counter protests. It is their legal and social work over the years that highlighted our rich

history of queer traditions and uniquely Indian experiences of queerness. This activism combined with the courage of prominent LGBTQ+ individuals (like Navtej Singh Johar, Jafar Ali) paved the way for long legal battle that led to Supreme court finally decriminalising homosexuality in 2018.

## **II. THE NEW ERA/ROLE OF INDIAN JUDICIARY**

In 2001 the legal battle for LGBTI started. Challenging the constitutionality of section 377 in Delhi High Court a petition was filed by the Lawyers Collective on behalf of Naz Foundation. It was first challenged in 1994 by a group called AIDS Bhedbhav Virodhi Andolan, which was working on HIV/AIDS, but their petition however was not actively pursued. Thereafter, in 2001 a public interest litigation (PIL) was filed by the Naz Foundation, which was working actively with the gay community.<sup>4</sup> On the grounds of suspected homosexuality where after a police raid in Lucknow police arrested many people.

Challenging Section 377 when this PIL was filed in 2001, the LGBTI community and activism did not make use of the law and litigation within their work. Many argued that the bigger goal was social transformation and change in mindsets which law and litigation have a limited impact only. Many were afraid that despite legal changes the police would harass sexual and gender minorities. There was fear about a negative impact and that India and the courts were not ready.

In 2004, consideration of the PIL was declined by the Delhi High Court stating that the petitioners lacked standing. The petitioners then appealed the Supreme Court and in 2006 the Supreme Court then allowed the Petitioner and sent it back to the Delhi High Court to decide the case.

This litigation arose great interest in the queer community. Later, many organizations intervened in the case and were on the side of the petitioners including a coalition called “Voices against 377”, women’s organizations, human rights organizations and others who joined in the litigation. In this litigation the transgender community either as individual petitioners or as an organisation was not really part of the litigation although the transgender persons who were arrested and faced violence by the police under section 377 filed affidavits.

The Delhi High Court passed a landmark judgment in 2009 in *Naz Foundation v, Govt. of NCT of New Delhi and Others* where Section 377 was held to be unconstitutional. Though this celebration was short lived and people opposed, many parties challenged this judgment before

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<sup>4</sup> Naz Foundation v Government of NCT of Delhi and Others ((2009) 111 DRJ 1), (Naz Foundation).

the Supreme Court. The Supreme Court overturned the Delhi High Court judgment in *SoureshKoushal v. Union of India* in the year 2013. It was held by the Supreme Court that Section 377 could not be read down and it was for Parliament to decide on decriminalization of homosexuality. Review petitions were filed against this judgement only to be dismissed.

However, that LGBTI mobilization was very high and despite the Supreme Court verdict, the movement on the ground was growing rapidly and social acceptance for LGBTI concerns was increasing. All this still did not make too much progress for transgender persons, who continued to be the most marginalized and vulnerable group within the LGBTI community. The police routinely arrested the trans persons. The trans persons were sexually abused and had to bear the criminal threats as they were on the streets being forced beg and into sex work.

### **III. RELIGIOUS BELIEFS ON HOMOSEXUALITY**

Through evolved heroes and instances, Hindu Mythology has displayed elements of gender variance and non-heterosexual sexuality which was subtly spoken. Homosexuality and LGBT themes have been documented through folk tales and ancient literature

Samba, the son of Krishna, is also a patron of eunuchs, transgender people and homoeroticism. Samba dresses in women's clothes to mock and trick people, and so that he can more easily enter the company of women and seduce them.<sup>5</sup> In the *Mausala Purana*, Samba, dressed as woman, is cursed after being questioned about "her" supposed pregnancy. As a result of the curse, Samba, although remaining male, gives birth to an iron pestle and mortar.<sup>6</sup>

The epic *Mahabharata* features the transgender character *Sikhandin*, and depicts the warrior *Arjuna* cross-dressing to become *Brihannala*, teacher of fine arts. GALVA further notes, "Vedic culture allowed transgender people of the third sex, known as *hijras*, to live openly according to their gender identity."

Ayatollah Khomeini issued a fatwa in 1987 authorising sex operations. Nevertheless, Muslim transgender people face discrimination in most Muslim countries.

Believers who want to follow the texts of the Bible and the Koran literally, condemn homosexuality based on some texts. It can be difficult for atheists and for public institutions to deal with such convictions.

#### **(A) Fundamentalism**

It must be realized that the image many people have of sexual and gender diversity is still

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<sup>5</sup> Conner Sparks (1998), p.303, "shamba".

<sup>6</sup> Chattopadhyaya, Bankim Chandra. *Krishna Charitra*. Pustak Mahal. pp. 165–166.

limited and often distorted. This applies to the population in general. The image should not be based on what media provides of the extravagant parts of LGBT Festivals and Prides, the diversity of LGBT+ lifestyles should be explained. In some cultures, there are words for homosexual behaviour, but often they are negative and derogatory terms, and sometimes these terms are synonymous or associated with pedosexuality and rape. No matter what, the educators should respect their opinion even if it might seem oversimplified, judgmental, intolerant or harsh. For good educators, it is essential to cultivate an intense curiosity for the world and feelings of young people. Young people are not well informed about their own faith. Young people adopt things that their parents, imams, pastors or religious authorities tell them. Teens often need clear guidelines as to what is good and what is bad when they feel that their sense of security is under a threat when they don't conform to stereotypical expectations of gender and sexuality.

It is important to have a respectful and open discussion about their ideas and backgrounds where their insecurity is at play.

#### **IV. IS INDIA READY FOR SAME SEX MARRIAGES?**

Homophobia is discrimination towards Homosexuality, that is often related to religious beliefs. The country India has mostly interpreted its laws based on its culture and societal pressure. The laws even though have legalized the marriages between inter castes based on the Fundamental Rights of equality and no discrimination guaranteed under Article 14, it is still a living taboo. The fate of acceptance in the society is feared. In, this patriarchal country People are still struggling find an individual identity of respect and honor.

In this society, the only accepted relationship is that of heterosexual beings and that too once it is officially certified through marriages. A marriage in order to get accepted of the heterosexuals too must undergo several criterions- being in the same castes, between two families of equal status, and most important maybe-with a partner chosen by the families and so many more. Love may be there in marriages only after marriage is instituted, love before the institution of the marriage is again a questionable factor. And the LGBTQ+ community, who has newly found its recognition-that too in mere laws, believe that this love that they find as the base for any two being to be together and stay happy will be accepted in the country India?

In India currently there is no legal status of the relationship shared by the people of the LGBTQ+ community. Since people share no legal status it makes things way difficult to transfer property rights, making medical decisions on behalf of each other in case. There is no

legitimacy and still LGBTQ issues are largely considered as a taboo. But the ruling has a profound effect on the young LGBTQ people who have now gained confidence in self-acceptance. The verdict helped young people to embrace their identity in all its complexity. However, the lack of legal recognition has made of the aspects of normalizing the relationship difficult. There is no vocabulary for couples. Even after the supreme court struck down section 377<sup>7</sup>, LGBTQ Indians still find it difficult to come out and find acceptance in their traditional families. Many people keep enduring the discrimination, violence and threat by family members and other people. Its for the same reason some activists believe that India might not be ready for same sex marriage at least until gender and sexual orientation discrimination is outlawed.

In October 2017, a gaggle of citizens proposed a draft of a replacement Uniform Civil Code that might legalize same-sex marriage to the Law Commission of India.

It defines marriage as “the legal union as prescribed under this Act of a man with a woman, a man with another man, a woman with another woman a transgender with another transgender or a transgender with a man or a woman. All married couples in partnership entitled to adopt a child. Sexual orientation of the married couple or the partners not to be a bar to their right to adoption.

There are currently several same-sex marriage petitions pending with the courts. On 12 June 2020, the Uttarakhand High Court acknowledged that while same-sex marriage may not be legal, cohabitation and “live-in relationships” are protected by the law. To answer the question whether India is ready for same sex marriage is possibly yes but then it’s a long journey.

It is pertinent to observe that same-sex marriages are not illegal in India. While Section 377 of the Indian Penal Code criminalises sexual acts between persons of the same sex, it is possible to argue that same-sex marriages are not equal to the performance of such acts.<sup>8</sup> Nonetheless the marriage laws in India do not explicitly permit same-sex marriages, and, in fact, reflect a strong heterosexual bias and use terms suggesting only a heterosexual partnership. Moreover, on a realistic note, so long as a provision in a criminal statute such as Section 377 is considered non-discriminatory it would be illogical to seek legal recognition under civil marriage laws.

## **V. OPPOSITION AND CRITICISMS**

Public opinion regarding LGBT rights in India is complex. According to a 2016 poll by the

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<sup>7</sup> Navtej Singh Johar & Ors. v Union of India (Writ Petition (Criminal) No. 76 Of 2016) (Navtej Singh Case).

<sup>8</sup> Ruth Vanita, *Democratising Marriage: Consent, Custom and the Law*, in *Law Like Love*, 351, (Arvind Narrain & Alok Gupta eds., 2011).

International Lesbian, Gay, Bisexual, Trans and Intersex Association, 35% of Indian people were in favor of legalizing same-sex marriage, with a further 35% opposed.<sup>9</sup> A survey by the Varkey Foundation found that support for same-sex marriage was higher among 18–21-year-olds at 53%.

According to a 2017 poll carried out by ILGA, 58% of Indians agreed that gay, lesbian and bisexual people should enjoy the same rights as straight people, while 30% disagreed. Additionally, 59% agreed that they should be protected from workplace discrimination. 39% of Indians, however, said that people who are in same-sex relationships should be charged as criminals, while a plurality of 44% disagreed. As for transgender people, 66% agreed that they should have the same rights, 62% believed they should be protected from employment discrimination and 60% believed they should be allowed to change their legal gender.<sup>10</sup>

Acceptance toward LGBT people is reportedly far higher in top government institutes, such as IITs. According to a poll conducted at IIT Delhi in 2015, 72% of respondents agreed that “being homosexual is normal as being heterosexual”. [199] Many IITs have their own LGBT clubs, namely “Saathi” (meaning “Friend”) at IIT Bombay, “Indradhanu” at IIT Delhi, “Ambar” at IIT Kharagpur, “Unmukt” at IIT Kanpur, “Anchor” at BITS Pilani and more.<sup>11</sup>

According to a 2019 survey, the Indian states/union territories which showed the highest acceptance of the LGBT community were Uttar Pradesh (36%), followed by Tamil Nadu (30%) and Delhi (30%). The states which showed the highest rejection to same-sex relationships were Mizoram (87%), followed by Nagaland (63%), Jammu and Kashmir (63%) and Kerala (58%). The states with the most undecided respondents were West Bengal (60%), followed by Assam (40%), Punjab (39%) and Tripura (37%). [201] Acceptance of same-sex relationships was highest in the Hindu community. Around 22% of Hindus, while only 13% of Muslims and Christians, expressed acceptance of same-sex relationships. Opposition was highest among Christian respondents (70%), followed by Muslims (50%) and both Hindus and Sikhs at 40%.<sup>12</sup> According to the 2020 Pew Research, 37% of the Indians said Homosexuality should be accepted by society, this was a massive increase from 15% in 2014.<sup>13</sup>

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<sup>9</sup>The Personal And The Political: Attitudes To Lgbti People Around The World (Jan- 29,2021, 9:09 AM), [https://ilga.org/downloads/Ilga\\_Riwi\\_Attitudes\\_LGBTI\\_survey\\_Logo\\_personal\\_political.pdf](https://ilga.org/downloads/Ilga_Riwi_Attitudes_LGBTI_survey_Logo_personal_political.pdf).

<sup>10</sup>ILGA-RIWI Global attitudes survey, (Jan- 29,2021, 10:09 AM), <https://web.archive.org/web/20180523101715/https://ilga.org/what-we-do/ilga-riwi-global-attitudes-survey/>

<sup>11</sup>8 Schools And Colleges In India With In-Campus LGBTQ Support Groups (Jan- 30,2021, 9:09 AM), <https://homegrown.co.in/article/53174/8-schools-and-colleges-in-india-with-in-campus-lgbt-support-groups>.

<sup>12</sup>Nikhil Rampal, Section 377 anniversary: Half of country still doesn't approve of same-sex relationships India Today, (Jan- 31,2021, 11:09 AM), <https://www.indiatoday.in/diu/story/section-377-anniversary-same-sex-relations-1596408-2019-09-06>.

<sup>13</sup>Jacob Poushter And Nicholas Kent, The Global Divide on Homosexuality Persists, Pew Research *Global*



11 December 2013 judgement of the Supreme Court, upholding Section 377 was met with support from religious leaders. The Daily News and Analysis called it “the univocal unity of religious leaders in expressing their homophobic attitude. Usually divisive and almost always seen tearing down each other’s religious beliefs, leaders across sections came forward in decrying homosexuality and expressing their solidarity with the judgement.” The Daily News and Analysis article added that Baba Ramdev, India’s well-known yoga guru, after praying that journalists not “turn homosexual”, stated he could “cure” homosexuality through yoga and called it “a bad addiction”.

The Ministry of Health and Family Welfare opposed the upholding of Section 377, stating that it would hinder anti-HIV/AIDS efforts.<sup>14</sup> According to the NCRB, in 2015, 1,491 people were arrested under Section 377, including 207 minors (14%) and 16 women.<sup>15</sup> Human Rights Watch also argues that the law has been used to harass HIV/AIDS prevention efforts, as well as sex workers, homosexuals, and other groups at risk of the disease, even though those found guilty of extortion in relation to accusations that relate to Section 377 may face a life sentence under a special provision of Section 389 of the IPC.

Constitutional rights NALSA<sup>16</sup> brought with it great excitement and gave momentum to the trans rights movement in India. Transgender persons have been criminalized, discriminated, and deprived of access to education and employment. They have faced sexual and physical violence and even death due to their gender choices.

NALSA for the first time gave public recognition to the violence and discrimination that the trans community faces in India and declared unequivocally their entitlement to constitutional fundamental rights. The fight for equality for those who beyond the mainstream notions of gender gained momentum with the Supreme Court's judgment in NALSA (2017). The judgment became a catalyst for the organization of the transgender movement in the country in a very significant way. This judgment also led to several government<sup>17</sup> authorities providing an additional gender option as "TG" or "Other" in government documents such as passports, driving licenses, PAN Cards etc., and was really in many ways the beginning of the organized transgender rights movement in India.

The NALSA judgment also gave new grounds and indeed new hope to revive the Section 377

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*Attitudes & Trends* (Jan- 31,2021, 11:09 AM), <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/>.

<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*

<sup>16</sup> National Legal Services Authority

<sup>17</sup> *National Legal Services Authority vs Union of India (2014) 5 SCC 438 (NALSA)*.

challenge. In 2016, two fresh petitions were filed under Article 32 of the constitution. The first petition was by **Navtej Johar<sup>18</sup> and others** and the second was by **Dr Akkai Padmashali, Umi and Sana<sup>19</sup>, three transgender activists from Karnataka**. Following this many more petitions by lesbian and gay activists were filed. All these petitions urged the Supreme Court to re-assess the constitutionality of Section 377 on the touchstone of NALSA. This was also the first time that the transgender voices were heard before the Supreme Court. Thereafter in 2017, came another big judgment by the Supreme Court on the right to privacy in **Puttuswamy v. Union of India<sup>20</sup>**. In this judgment, the Supreme Court held that there is a constitutional right to privacy inherent in the right to life, equality and fundamental freedoms. The Court went on to hold that the right to privacy specifically includes the right to have intimate relations of one's choice and includes the right to sexual orientation and gender identity.

## VI. ENGLISH LITERATURE

Literature plays a crucial role in voicing the issues of the Queer community around the world. In India, there was no pro-gay fiction, and most of the time the author's failed to understand the complexities of queer issues. In such a milieu, In Kerala, Kamala Das addressed their Issues both covertly and overtly. She airs her views with boldness unparalleled and she hopes society might Change their attitude to those who suffer and are humiliated. There were many authors who chose to address LGBTQ through literature some are mentioned as follows: -

### The Ministry Of Utmost Happiness

#### Arundhati Roy

Arundhati Roy writes about an Intersex character coming to terms with their own sexuality. In *The Ministry Of Utmost Happiness*, born a male, Aftab transitions to Anjum, an intersex Muslim woman who strives to guard her community after witnessing communal riots. This book isn't only a commentary on current day India, but it also tackles the complex subject of gender identification.

#### A Life Apart

#### Neel Mukherjee

It is layered, complex, and transverses across sections of societies as well as of time. A young Ritwik goes to Oxford to study but spends more time 'cruising' in public men's toilets, Mrs.

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<sup>18</sup> Supra note 5.

<sup>19</sup> *Dr. Akkai Padmashali & Ors vs. Union of India*, W.P (Civil) 572 of 2016 (This case is connected with W.P. (CrI) 76/2016).

<sup>20</sup> Justice K. S. Puttaswamy v. Union of India, WP (C) 494/2012.

Gilby lives in an India that is transitioning from Colonial rule to independence and Mrs. Cameron deals with the death of her gay son. *A Life Apart*, deals with issues of Colonial India, the violence faced by homosexuals as well as the problems of gay sex work in current times, amongst other topics.

### **THE TRUTH ABOUT ME: A HIJRA LIFE STORY**

#### **A. Revathi & V. Geetha (Tr.)**

The autobiography of A. Revathi, a transsexual woman who is a leading activist and a strong voice for the *hijra* community, is a must-read to understand the issues faced by transsexuals and intersexes in India. Assigned the male gender at birth and named Doriasamy, Revathi was bullied mercilessly for her feminine ways growing up. It ultimately drove her to run away from home, start living with the *hijra* community, undergo a painful sex-change operation and resort to sex work to make ends meet. She finally becomes a famous activist, and this book tells of the pitiable conditions in which *hijras* have to live, the sexual abuse they face by policemen, the lack of earning opportunities and the prejudice, scorn and even fear afforded to them by society.

### **The Man Who Would Be Queen**

#### **Hoshang Merchant**

This autobiographical fiction, written in the form of lyric essays, tells the story of Hoshang Merchant, an out and proud gay man, who has had to deal with dysfunctional parents, unaccepting sisters and rejection from lovers because they were scared to come out of the closet. Vividly describing his sexual encounters, Merchant doesn't shy away from telling it how it is- be it the issues related with being out in a society that is primarily heterosexual or the need for clandestine affairs for fear of societal backlash. This book paints an accurate yet beautifully written picture of what it is to grow up gay in India.

### **Same-Sex Love In India: A Literary History**

#### **Ruth Vanita (Ed.) & Saleem Kidwai (Ed.)**

In *Same-Sex Love in India*, Vanita and Kidwai collate and edit literary works from ancient Indian epics such as the Mahabharata, religious texts such as the Rig Veda, and even present-day literary fiction. The works range from memoirs, biographies, short stories, excerpts from novels and even letters, and all contain homosexual themes. This book will prove that 'queerness' is a part of Indian tradition and the taboo associated with it is a relatively modern phenomenon.

## **VII. CONCLUSION AND SUGGESTIONS**

With section 377 decriminalized we've entered a new era not only for transgender equality but gender equality in India. Despite decriminalization of 377, conversion therapies are still performed in India. These practices usually involve electro convulsive therapy (which may cause memory loss), hypnosis, the administration of nausea-inducing drugs, or more commonly talk therapy where the individual is told that homosexuality is caused by "insufficient male affirmation in childhood" or "an uncaring father and an overbearing mother".

There have been many reports of abuse, harassment and violence over the years directed against LGBT people.

Teachers and activists will need to find a way in their classes to discuss with their students how we deal with such shameful or aversive feelings. In a democratic country you are encouraged to feel everything and to have any opinion, but you cannot express all your aversions disrespectfully or violently. So, the point is to look for a social relationship where we treat our differences with respect.

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