

# LEGAL LANDSCAPE OF SAME-SEX RELATIONSHIPS IN INDIA: ROLE OF NAVTEJ SINGH JOHAR V. UNION OF INDIAN IN ETCHING EQUALITY FOR THE LGBTQ+ COMMUNITY

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*“If I wait for someone else to validate my existence, it will mean that I’m short-changing myself.”*

- *Zanele Muholi<sup>i</sup>*

## ABSTRACT

The Supreme Court of India in, its much celebrated, Navtej Singh Johar<sup>ii</sup> judgment unanimously held that section 377<sup>iii</sup> of the Indian Penal Code was unconstitutional in criminalizing consensual sex between two adults of the same sex. Understandably, then, this judgment has been critically reviewed and cherished in popular socio-cultural and legal literature. However, forgetting the long-fought battle to this milestone would be equivalent to undermining the experiences of the people from the LGBT community. In light of this, the paper presents the following three questions: First, we will try to locate the historical position of LGBT community in the Indian societal structure. Second, we trace the legal developments in India leading to the Navtej Singh Johar judgment, and; finally, we analyze the status quo and how we stand in terms of our international commitments leading to 2030 Sustainable Development Goal (‘SDG’) agenda. Essentially, this paper looks at the plight of the LGBT community from a socio-legal lens.

## INTRODUCTION

In the course of 20<sup>th</sup> century “pragmatism” emerged as the leading Indian philosophy and policy analysis – also called “legal realism” which became the dominant method of interpreting Indian Constitutional Law. The speed in which same-sex relationships are getting legally and socially accepted is due to the fact that Indian legal system embraces realistic rather than ideological forms of thinking, and the growing recognition of same-sex marriage in the law by decriminalizing *section 377<sup>iv</sup>* and *section 497<sup>v</sup>* in the past is due to the fact that we interpret our Constitution in accordance with realistic analysis. In this paper we will firstly, commence with identifying and locating the historical background of LGBTQ community in India and their movement since 1977 when Shakuntala Devi published the first study of homosexuality in India. Secondly, we will try to trace down the legal developments which took place through the years and which event out of all brought the paradigm shift and lastly, we will address and critically examine the present scenario of same-sex relationships in India and how far we have reached in terms of our commitments leading towards 2030 *Sustainable Development Goals* (“SDG”).

## HISTORICAL DEVELOPMENTS: THE BATTLE OF DECRIMINALIZATION

The battle of decriminalization of *section 377* can be traced back to 1977 when the first article on homosexuality in India was published by Shakuntala Devi in her book titled as “*The World of Homosexuals*”.<sup>vi</sup> It has inferences of ancient Hindu literature like *Kamasutra* and its inter-connection with colonial rule which trapped Indian society in the gambit of morality. Shakuntala Devi in her book talks about how this pre-colonial law which has lingering effect on Indian legal system. Understandably, what we can infer from it is how these laws attached with social stigmas are burdensome and if not amended or decriminalized, will take us back to that era of helplessness, dependence and vulnerability. Another instance in this process can be tracked down 20 years ago when HIV and AIDS victims belonging to the AIDS Bhedbhav Virodhi Andolan (ABVA) published a comprehensive document detailing the experiences of gay men. The 70-page report revealed the shocking extent of blackmail, extortion, and violence

that gay people faced, especially at the hands of the police.<sup>vii</sup> The report called for the decriminalization of Section 377 as it was discriminating against the LGBTQ+ community. Further controversy arose in 1994 when an inspector general in Tihar jail in Delhi refused to provide condoms to the inmates as he believed it would promote homosexuality, instead of accepting the fact that such indulgence happens in the cells. In response to this, ABVA filed a writ petition in the Delhi High Court demanding the distribution of condoms to the inmates and recognition of Section 377 as unconstitutional. The petition was eventually dismissed in 2001 despite the long-running effort and support that it had received.

In December of the same year The Naz Foundation, a sexual health organization, filed a Public Interest Litigation (PIL) challenging the constitutionality of Section 377 and legalization of homosexuality in the Delhi High Court. However, the Delhi High Court dismissed this PIL in September 2004 citing an absence of a valid cause of action and held that this, being a purely academic issue, did not fall within the ambit of the courts. In February 2006, Naz Foundation filed a special leave petition which led to the Supreme Court asking the Delhi High Court to look into the issue for a second time. In July 2009, a landmark judgment was given by the Delhi High Court, striking down Section 377 claiming it to be a violation of the fundamental right to life, liberty, and equality. This decision was further challenged in the Supreme Court. In December 2013 the judgment was overturned citing "*377 does not suffer from the vice of unconstitutionality and the declaration made by the division bench of the high court is legally unsustainable*".<sup>viii</sup> This judgment turned out to be a significant blow to the LGBTQ community.

In 2016, Navtej Singh Johar a Bharatnatyam dancer based in Sonapat, Haryana filed an PIL under article 32<sup>ix</sup> of the Constitution of India challenging the validity of section 377 of The Indian Penal Code, 1860 on the grounds that it violates article 14, article 15(1), article 15(2), article 16(1), article 19(1), article 19(2) and article 21 of the Constitution of India. The arguments presented by the petitioners also contended that the debate of constitutional morality is also negated when the 'basic structure' of the constitution is challenged. This argument was based on Dr. Ambedkar's speeches in the Constitutional Assembly Debates where he quoted George Grote and explained the real meaning of '*Constitutional morality*' coupled with its implications and limitations.<sup>x</sup> In the same speech<sup>xi</sup>, Dr. Ambedkar had quoted Grote who had observed: *The diffusion of 'constitutional morality', not merely among the majority of any*

*community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves.*<sup>xii</sup> This statement of Dr. Ambedkar underscores that constitutional morality is not a natural forte for our country for the simple reason that our country had attained freedom after a long period of colonial Rule and, therefore, constitutional morality at the time when the Constituent Assembly was set up was an alien notion and being an transformative democratic legal system we cannot be plunged at old-age concepts which finds no relevance in developing and triumphed democracy like India. However, the strengthening of constitutional morality in contemporary India remains a duty of the organs of the State including the Judiciary.<sup>xiii</sup>

## **LEGAL DEVELOPMENTS IN INDIA LEADING TO NAVTEJ SINGH JOHAR V. UNION OF INDIA**

We have all heard of the widely critically examined section 377 of The Indian Penal Code, 1860 which criminalizes homosexuality. However, there are numerous misconceptions regarding its origin and history. The history of this infamous section is described below and how it got decriminalized after going through number of judicial pronouncements.

### **1. *The Buggery Act of 1533***

This Section (Section 377) was drafted by Thomas Macaulay around 1838 but was only brought into effect in 1860 in light of the Sepoy Mutiny (First War of Independence) 1857. This law in British India was modelled on The Buggery Act, 1533<sup>xiv</sup> which was enacted under the reign of King Henry VIII. This law defined ‘buggery’ as an unnatural sexual act against the will of God and man. Thus, this criminalised anal penetration, bestiality and in a broader sense homosexuality.

### **2. *Offences against the Person Act 1861***

In 1828, the Act was repealed and replaced by the Offences against the Person Act 1828. This Act broadened the definition of unnatural sexual acts, and allowed for easier

prosecution of rapists, but also homosexuals. This act is what is considered to be the inspiration for Section 377 of the Indian Penal Code. In years to come this Act would be repealed by the British and replaced by the Offences against the Persons Act, 1861.<sup>xv</sup> Finally homosexuality was decriminalised in the UK by the Sexual Offences Act, 1967. It is interesting to note that while the British government made same-sex marriage legal long back, the Indian government followed this archaic law written in the 1830s and enacted in 1860 till 2018.

**3. *Naz Foundation v. Govt. of NCT of Delhi***<sup>xvi</sup>

Naz Foundation (India) Trust challenged the constitutionality of Article 377 under Article 14, 15, 19 and 21 before the Delhi High Court. The Delhi High Court ruled in 2009 that Section 377 cannot be used to punish sex between two consenting adults - this violates the right to privacy and personal liberty under Article 21 of the Constitution. The Court held that classifying and targeting homosexuals violates the equal protection guarantee under Article 14 of the Constitution. Section 377 thus violated human dignity which forms the core of the Indian Constitution.

**4. *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors***<sup>xvii</sup>

The Supreme Court reversed the Delhi High Court Verdict in 2013 in its judgment and held that the decision of decriminalizing homosexuality can only be done by the Parliament and not the Court. It also held that Section 377 criminalises certain acts and not any particular class of people. It also alluded to the minuscule number of people who were members of the LGBTI community and the fact that only a fraction amongst them had been prosecuted under Section 377.

**5. *Navtej Singh Johar v. Union of India***

The Supreme Court on January 5, 2018, formed a constitution bench for hearing the challenge to Section 377 in a comprehensive manner, even though the curative petitions were pending before the Court. This could be due to the observations made in the 9-judge decision in the Right to Privacy case which hinted at the inherent wrongness of the reasoning and decision in Suresh Koushal. The 5-judge bench of Chief Justice

Dipak Misra, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud, Justice R.F. Nariman and Justice Indu Malhotra heard the matter from July 10th, 2018. On 6th September, 2018 the five-judge Bench partially struck down Section 377 of the Indian Penal Code, decriminalising same-sex relations between consenting adults. LGBT individuals are now legally allowed to engage in consensual intercourse

## **PRESENT STATE OF SAME SEX RELATIONSHIPS IN INDIA AND INDIA'S COMMITMENTS TOWARDS ('SDG' - 2030)**

As with the most contentious social issue, same-sex relationships have their proponents and opponents explaining or justifying their respective positions. To better understand the present socio-economic scenario and likely future developments, we will have to give consideration to the restraints and impediments which people from LGBTQ communities are facing or have faced despite of the decriminalization of Section 377 in *Navtej Singh Johar v. Union of India* case<sup>xviii</sup>.

On 6th September 2018, 5 judge bench of the Supreme Court led by the Chief Justice unanimously held in *Navtej Johar Singh Case*<sup>xix</sup> that Section 377<sup>xx</sup> was unconstitutional to the extent that it criminalizes consensual relationships of any kind between adults. But legal recognition of same-sex marriage is still a dream in India. Understandably, the shift has begun from a mentality of fear to the confidence to assert citizenship rights, but the trauma of criminalisation may last a lifetime. The need is of creating a holistic environment which is receptive to such new institutions like same-sex relationships and acceptance to LGBTQ communities. In societies like India, where marriage has godliness and holiness attached to it legal pronouncements are never enough to bring the changes at the grass root levels. In order to bring such changes a society has to collectively take responsibilities on their shoulders and it has been observed from the gestures and initiatives taken by strong institution of our country. Bollywood is seeing changes, too. Film has the power to create a moral narrative that reaches all corners of the country and they have come out with movies depicting neutral gender stories, stories proclaiming LGBTQ rights.

The other big-step taken in order to spread the awareness about such rights was held in Amritsar and Jalandhar where first pride-parade was held.<sup>xxi</sup> Same-sex couples and people from LGBTQ communities have started approaching courts all over the country asking for protection. The courts have responded by directing the police – who a few years ago would have been enforcing 377<sup>xxii</sup> – to protect them. But these in the public domain only happen because of changes within us – as we learn to let go of fear and hesitation and embrace our ambitions and aspirations for a full life.<sup>xxiii</sup> The fact cannot be denied that the political landscape has changed remarkably over the last few years but still we require more social participations.

If we consider international contemplations, there are various international organizations like (ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP, and WHO) which have made a statement putting forward their intention to end violence and discriminatory practices against the LGBT community.<sup>xxiv</sup> Social prejudices are not concerns about a particular country or region they are global issues and should be acknowledged and worked upon globally.

India is a developing country and to boost the growth and development of the country there is a need of progressive society and progressive in which all citizens are equal and have equal opportunity to do some substantial efforts for the future of the Nation. Homosexuality will remain a stigma as long as people are willing to shove under the carpet of oblivion. The Government should make efforts to educate the public and raise public awareness about sexual minorities. The three organs of the State and the society must ensure that the morality and values emanated from the Constitution prevail and guide us towards a better tomorrow with dignity, sexual autonomy and individuality for the LGBT community in India.<sup>xxv</sup>

## **THE SUSTAINABLE DEVELOPMENT GOALS AND LGBTQ INCLUSION**

The Sustainable Development Goals (SDGs), was agreed in 2015 and signed onto by 193 governments on the basis that they apply to everyone, everywhere and will ‘leave no one behind’. Although at Stonewall we think the SDGs could have gone further by explicitly calling for LGBT equality, we recognise their exciting potential to advance equality for all. The ‘leave

no one behind' principle is especially relevant for LGBT people, who have been repeatedly left behind by national and international development initiatives.<sup>xxvi</sup>

*Sustainable Development Goal ("SDG-16") Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for all and Build Effective, Accountable and Effective Institutions at all Level.* In order to achieve this goal Criminal system in countries will have to make sure that all programmes working on policing, the criminal justice system and/or civil society actively address LGBT hate crime. Build the capacity of police and/or LGBT groups to document instances of hate crime against LGBT people. By slowly and gradually adhering to such normative actions we can create a holistic society where peace can be promoted and inclusion of people from all the sect of the society can be upheld. This only will make a society a just society as mentioned under Sustainable Development Goal-16.

## ENDNOTES

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<sup>i</sup> Quotes About Relationship: Keep Inspiring me (Last visited on October 10, 2021)

<sup>ii</sup> Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321 (India).

<sup>iii</sup> The Indian Penal Code, 1860

<sup>iv</sup> The Indian Penal Code, 1860

<sup>v</sup> *Supra.*

<sup>vi</sup> The World of Homosexuals, Shakuntala Devi, 1977

<sup>vii</sup> Maria Thomas, Timeline: The struggle against section 377 began over two decades ago' Quartz India (6 September 2018). Available at: <https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights/>.

<sup>viii</sup> Suresh Kumar Kousha and another vs Naz Foundation and others 20.

<sup>ix</sup> Indian Constitution.

<sup>x</sup> Constitutional Assembly Debates Vol. 7 (4<sup>th</sup> Nov 1948)

<sup>xi</sup> *Supra.*

<sup>xii</sup> Grote, A History of Greece. Routledge, London, 2000, p. 93.

<sup>xiii</sup> *Ibid.*

<sup>xiv</sup> The Buggery Act, 1533 (The Great Britain).

<sup>xv</sup> Offences Against the Persons Act, 1861 (The Great Britain).



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- <sup>xvi</sup> Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC OnLine Del 1762.
- <sup>xvii</sup> Suresh Kumar Koushal & Anr vs Naz Foundation & Ors, CIVIL APPEAL 10972 OF 2013.
- <sup>xviii</sup> Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321 (India).
- <sup>xix</sup> *Supra*.
- <sup>xx</sup> Indian Penal Code, 1860, Act No. 45 of 1860.
- <sup>xxi</sup> A. Katju, one year after freedom: How are LGBTs faring today, since Section 377 was struck down by the Supreme Court, T.O.I, September 5, 2019, at A2.
- <sup>xxii</sup> Indian Penal Code, 1860, Act No. 45 of 1860.
- <sup>xxiii</sup> *Ibid*.
- <sup>xxiv</sup> Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People (Joint UN Statement, 29 September 2015).
- <sup>xxv</sup> Fiza Khan & Dilsana Khan, LGBT Rights in India: The Status Quo, 3 IJLM 731, 744-45 (2020).
- <sup>xxvi</sup> Kit Dorey, The Sustainable Development Goals and LGBTQ Inclusion, Stonewall Int., Sept-Oct. 2019, at 91-92.
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