

**LAWFOYER INTERNATIONAL**  
**JOURNAL OF DOCTRINAL LEGAL**  
**RESEARCH**  
**(ISSN: 2583-7753)**

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Volume 2 | Issue 2

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2024

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# GENDER FLUIDITY VIS-À-VIS FUNDAMENTAL RIGHTS

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Arunima Bali<sup>1</sup>

## I. ABSTRACT

*Society is vulnerable to change. Any society resisting change is not amenable to development. A society comprises rational beings with a set of conscious values. Values are mind-dependent. The internalisation of values is an individualistic phenomenon. The institutionalisation of certain values is subjected to the whims of people. Institutions promote such values that they deem fit the needs and propensities of society. Whether we accept it or not sexuality of one is inextricably intertwined with the values and norms of society as a whole. None of either of the two can thrive in isolation. However, the tussle surfaces when the status quo of values and norms disdains the sexual orientation of the individuals posing a question mark on the individuality of beings itself. The article presented herein unfurls the numerous technicalities dealing with the sexuality of a person and how it is deeply integrated into the concept of self.*

*The recent impugned judgement – Supriya Chakraborty v Union of India – of the apex court wiggled our reasonability regarding the legitimacy of same-sex legislation. Are we evading our accountability of recognising the rights of a sphere of society relying on the premise of skewed and subjective values? Are non-conformed individuals not entitled to receive adequate and apt rights from the authorities? Is an unrecognition of rights an expected mechanism to deal with and pacify the rigidity of society? If the classification of one individual is a valid classification, then why is bestowing rights to a small section of society, not a valid concern? All these questions are answered in the presented article.*

## II. INTRODUCTION

### A. Research area

In the work of research, various Constitutional articles such as Articles 14, 15, 19 and 21 deliberated in a limpid manner. Article 14 of the Indian Constitution guarantees equal treatment before the law and prohibits discrimination based on religion, race, caste, sex, or place of birth. Article 15 prohibits discrimination based on these grounds and ensures equal access to public spaces and facilities. Article 19 guarantees freedom

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<sup>1</sup> Student.

of speech, assembly, association, and movement. Article 21 protects life and personal liberty, including the right to privacy, dignity, and individual liberty. Studies on gender fluidity and LGBTQIA+ rights are crucial for promoting inclusivity, combating discrimination, and addressing mental health challenges. Recognizing and respecting these rights promotes a more inclusive society, addressing systemic barriers, and fostering empathy. India is a signatory to international human rights treaties, and the Indian judiciary has progressively recognized the rights of LGBTQIA+ individuals. Studying these precedents helps in understanding the evolving legal landscape. Policy and legislative reforms should focus on creating effective policies that protect and promote the rights of these communities. Education and awareness about the challenges faced by LGBTQIA+ individuals can also be achieved through studying these issues. More weight has been designated to the baking done in history. The understanding of the present is entirely clouded without a lucid knowledge of the past. It is a cakewalk to comprehend the vagaries and dilemmas of our contemporary day topics after critically analysing the possible gaps and learnings of the past.

### **B. Research topic**

Gender theorist Kate Bornstein's 1994 book *Gender Outlaw: On Men, Women and the Rest of Us* mentioned gender fluidity for the very first time.<sup>2</sup> Time and again, the word has been endowed with multiple interpretations and connotations. Does our constitution allow the concept of gender fluidity? This is the moot question of the research work.

### **C. Research problem**

1. Our society is replete with fallacious notions, beliefs, outlooks and methodologies. The concrete and ultimate goal of research labour is to provide society with innovative, defined and progressive perspectives. The LGBTQIA+ community experiences inexplicable, heart-wrenching and mind-boggling hardships. Their lives are far away from a comparable

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<sup>2</sup> Zerriny, C. (2022) A brief history on gender fluidity, *Diversity Explained*. Available at: <https://www.diversityexplained.com/read/genderfluidity> (Accessed: 15 October 2023).

life of a “normal” individual. We, as a society, without even perusing the intricacies become judgmental of our homosexual neighbour.

2. Just because we do not feel the problem, the problem fails to even exist. Surprisingly, we lose the warmth of our blood when the blood is not ours. Ironically, we are humans living far away from our humanity. The problem faced by the LGBTQIA+ is the problem of the research work. Gauging the oceanic depths of law to scrape off the rights of homosexuals is the aim. How to understand the legitimacy of same-sex couples, why to accept them and how to accept them are the bones of contention.
3. Despite legislative achievements, the LGBTQIA+ population in India still faces enormous social, legal, and economic challenges. Discrimination, violence, legal recognition, and social exclusion are these issues. The study seeks to identify these difficulties and offer new legal and social frameworks for LGBTQIA+ people.

- **Context:** Our culture is filled with false ideas, beliefs, perspectives, and methods. The ultimate purpose of research is to provide society with new, defined, and advanced ideas. LGBTQIA+ people face unfathomable, heartbreaking, and mind-boggling challenges. They live quite differently from "normal" people. Society typically judges gay neighbours without knowing their lives. If we don't experience an issue, it doesn't exist. Research is necessary. A lack of compassion makes us lose pity for foreign blood. LGBTQIA+ people confront several challenges. This study will examine legislation and society to find the causes of discrimination and provide solutions to achieve equality. Specific Examples and Statistics:

- **Discrimination and Violence:** A 2018 International Commission of Jurists poll found that 92% of LGBTQIA+ Indians experienced harassment or violence related to their sexual orientation or gender identity.

- **Legal Issues:** Same-sex couples cannot marry, adopt, or have their relationships legally recognized despite the 2018 legalization of homosexuality (*Navtej Singh Johar v. Union of India*).
- **Mental Health:** Social stigma puts LGBTQIA+ people at risk of mental health difficulties, according to studies. The Humsafar Trust revealed that 52% of LGBTQIA+ Indians are depressed.
- **Economic Inequality:** LGBTQIA+ people face ongoing workplace discrimination in employment, promotions, and salary. Homophobia and transphobia cost India \$32 billion yearly, according to the World Bank.

This study is essential for promoting LGBTQIA+ rights and acceptance in India. A more inclusive and sympathetic society may be achieved by resolving their legal and social issues. The study will provide the groundwork for legislative and societal change to give LGBTQIA+ people equal rights and opportunities.

#### **D. Research objectives**

1. To deduce the legitimacy and credibility of LGBTQIA+ needs and wants:
  - Assess LGBTQIA+ needs such as legal recognition, social acceptance, and economic prospects.
  - Contact LGBTQIA+ people and advocacy groups for surveys, interviews, and focus groups.
  - This aim addresses the research challenge by legitimizing LGBTQIA+ needs and wants in legal and social contexts.
2. Analysis and explanation of LGBTQIA+ psychology and identity:
  - Study LGBTQIA+ people's psychological processes and identity creation, including self-acceptance, social pressures, and mental health issues.

- Collect data using psychological evaluation instruments, literature reviews, and case studies.
  - This purpose helps LGBTQIA+ people understand their psychological and identity concerns, which supports the research problem.
3. To discover legal judgment deficiencies and provide solutions:
- Assess LGBTQIA+ rights legal decisions for contradictions, omissions, and grounds for improvement.
  - List gaps and suggest legislative amendments to address them.
  - The research issue is aligned with this mission to strengthen LGBTQIA+ rights law via targeted suggestions.
4. To examine and evaluate Indian gay legal cases:
- Critically analyse important decisions like *Navtej Singh Johar v. Union of India* and *NALSA v. Union of India* that influenced Indian gay legislation.
  - Writing a detailed study of these instances and their effects on LGBTQIA+ rights.
  - This aim addresses the research challenge by giving a historical and legal framework for LGBTQIA+ rights.
5. To advocate a more inclusive, broad-minded, and accepting LGBTQIA+ approach:
- Create LGBTQIA+ inclusiveness and acceptance methods for education, employment, and healthcare.
  - Use research and case studies to develop practical recommendations and best practices.
  - This aim addresses the research issue by promoting LGBTQIA+ acceptance and social change.

## **E. Research questions**

1. Are homosexuals and LGBTQIA+ people safe in our society?
  - Examine LGBTQIA+ social acceptability, safety, and quality of life in diverse areas.
  - Answerable via surveys, interviews, and hate crime and discrimination records.
2. How can same-sex and LGBTQIA+ couples' rights be protected?
  - Find legal, social, and policy solutions to safeguard LGBTQIA+ people and couples.
  - Answerable by comparative legal study, policy assessment, and stakeholder interviews.
3. What do same-sex litigation precedents say about the judiciary's view?
  - Examine landmark LGBTQIA+ rights cases to grasp the judiciary's perspective.
  - Answerable by legal case studies, judgment analysis, and expert interviews.

Why do LGBTQIA+ concerns need legislative progress?
  - Evaluate legal gaps and the need for new LGBTQIA+ legislation. Policy analysis, legislative review, and expert consultations answer.
4. How do legal precedent gaps affect same-sex couples' rights?
  - Explain legal judgment flaws and their effects on same-sex couples.
  - Answerable by critical legal analysis, case studies, and lawyer debates.
5. Are court rulings constitutionally moral as articulated by Dr. B.R. Ambedkar?
  - Assess if LGBTQIA+ court rulings follow constitutional morals, including equality and non-discrimination.

- Comparative judgment analysis, constitutional interpretation, and expert views answer.

*Research questions in consonance with research objectives*

1. Legitimacy and credibility of LGBTQIA+ needs and wants:
  - Are homosexuals and LGBTQIA+ people safe in our society?
  - Analysis and explanation of LGBTQIA+ psychology and identity
2. How do legal precedent gaps affect same-sex couples' rights?
  - Are court rulings constitutionally moral as articulated by Dr. B.R. Ambedkar?
  - To examine and evaluate Indian gay legal cases
3. What do same-sex legal precedents say about the judiciary's mindset?
  - To advocate a more inclusive, broad-minded, and accepting LGBTQIA+ approach
4. How can same-sex and LGBTQIA+ couples' rights and freedoms be protected?<sup>3</sup>

### III. HISTORY AND GENDER ROLES

The notion of gender fluidity has extensive historical origins, intricately connected to the progression of societal standards, psychological insights, and sartorial trends. To comprehend this transformation, one must do a thorough analysis of gender roles across various historical periods and societies. Early Human civilizations: Gender roles in early human civilizations were primarily determined by biological functions and the need for survival. Men, who often had more physical strength, assumed responsibilities related to hunting and safeguarding society. Women, who are often connected with the biological ability to have children and the role of caring, are primarily focused on raising children and managing

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<sup>3</sup> Drishti IAS (2020a) *Constitutional morality*, Drishti IAS. Available at: <https://www.drishtias.com/to-the-points/Paper2/constitutional-morality#Introduction> (Accessed: 15 October 2023).



household affairs. During this era, clothing was characterized by its simplicity and practicality, serving largely as a means of safeguarding against the weather rather than as a means of expressing gender identity.<sup>4</sup> Ancient Civilizations: As civilizations developed a more organized structure, clothing started to mirror and reinforce the duties assigned to each gender. During the time of Ancient Egypt, males often wore loincloths and kilts, while women commonly wore sheath dresses. These divisions served not only practical purposes but also had symbolic significance, strengthening societal norms around gender conduct. During the Middle Ages and the Renaissance, clothes grew more intricate and tailored to individual genders. Men donned tunics, hose, and then pants, which enabled them to engage in physical work and military endeavours. Women wore gowns and dresses, which were often constricting yet served as a representation of their responsibilities within the household. The difference in dress styles was striking, and any departure from these conventions was often greeted with societal opposition.<sup>5</sup> The emergence of gender fluidity in fashion throughout the 19th century.

In the 19th century, there were first and noteworthy attempts to question and defy strict societal expectations on attire based on gender. In 1851, Elizabeth Smith Miller in the United States produced a garment for ladies that combined bloomers with a short dress, resembling trousers. This was a groundbreaking development, representing a departure from conventional gender norms and initiating early conversations on gender fluidity. Despite facing early scorn and rejection, this invention established the foundation for subsequent transformations in gender presentation via clothes. Early in the 20th century, there was a significant shift and uncertainty in gender roles. During the World Wars, there were substantial changes in gender roles, especially in the early 20th century. As the male population engaged in warfare, women made a

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<sup>4</sup> A simple way to understand the origin of gender roles (no date) *Psychology Today*. Available at: <https://www.psychologytoday.com/us/blog/theory-knowledge/201907/simple-way-understand-the-origin-gender-roles> (Accessed: 17 October 2023).

<sup>5</sup> When did women start wearing pants? (no date) *Encyclopædia Britannica*. Available at: <https://www.britannica.com/story/when-did-women-start-wearing-pants> (Accessed: 17 October 2023).

remarkable entrance into the workforce, assuming positions that were usually occupied by males. As a result, women had to make practical modifications to their dress, which included wearing pants and adopting more utilitarian outfits. In the 1920s, fashion luminaries such as Coco Chanel played a significant role in blurring gender boundaries by making pants fashionable for women.<sup>6</sup> The decades after the war saw ongoing shifts in gender standards, and the 1960s and 70s were characterized by substantial social unrest. The feminist and civil rights movements challenged conventional gender norms and campaigned for more parity. Apparel emerged as a vehicle for articulating these new beliefs. Women embraced androgynous fashion by donning pantsuits and jeans, while males ventured into avant-garde and unconventional fashions.

The modern era has seen a growing acceptance and embrace of gender fluidity. Gender fluidity in fashion has been widely accepted in modern culture. Renowned designers such as Jean-Paul Gaultier, as well as esteemed businesses like Gucci and Louis Vuitton, have enthusiastically adopted gender-neutral apparel, creating collections that challenge conventional gender expectations. The emergence of LGBTQIA+ rights groups has also accelerated the acceptance of gender fluidity, promoting a culture in which people are able to openly express their gender identity.

An analysis of the psychological viewpoints about gender and clothing: Historically, gender roles have been linked to distinct characteristics and actions from a psychological perspective. Males were often seen as being self-centered, with a primary emphasis on their job and the preservation of their community and family. Conversely, females were regarded as being more concerned with the well-being of others, emphasizing duties related to caring and nurturing. The psychological inclinations were reflected in the selection of clothing – men opted for functional and durable apparel for their professional endeavours, while women favoured gentler and more caring outfits.

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<sup>6</sup> Smith, J.S. and Smith, K.E. (2017) 'What it means to do gender differently: Understanding identity, perceptions and accomplishments in a gendered world', *Humboldt Journal of Social Relations*, 1(38). doi:10.55671/0160-4341.1034.

The role of clothing extends beyond its practical function, serving as a significant social construct that influences and mirrors our perception of gender. Clothing textures, colours, and styles have been used to symbolize and enforce gender norms and societal expectations. Lighter, delicate textiles were correlated with femininity, while darker, more robust materials were connected with masculinity. Elizabeth Smith Miller's introduction of trousers for women was a significant and transformative event, since it defied established conventions and represented the possibility of gender flexibility. The close relationship between clothing and our bodies implies that adjustments in fashion might result in changes in public attitudes and personal identity.

#### IV. THE IDEA OF SELF, PERSONAL IDENTITY AND SOCIETAL ROLES

Self is “the set of someone's characteristics, such as personality and ability, that are not physical and make that person different from other people.”<sup>7</sup> The self is an undoubtedly comprehensive and complicated notion, with multiple structures that mirror the multifaceted nature of the idea, personality and social reality of individual interactions. Self is an abstract concept upon which the entire materialistic and non-materialistic ideas and entities exist. The self is connected to other non-self-notions—like societal structure—through the concept of *identity*. A simple definition of identity would be the set of expectations and nuances an individual holds for oneself concerning roles that one plays in one’s life. Meaning thereby that one ‘self’ may hold several, simultaneous and mutually existing identities. One form of such an expectational identity is gender.

Gender is deeply intimate however has multiple social associations ranging from social interactions to the formation of social structures. Gender is called the *master identity* and the meaning that we ascribe to our ‘self’ becomes critical in determining

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<sup>7</sup> (No date) *Self* | *English meaning - Cambridge dictionary*. Available at: <<https://dictionary.cambridge.org/dictionary/english/self>> (Accessed: 17 October 2023).

the kind of situational interaction that the self will have with other disciplines of life.<sup>8</sup> Interspersing of gender roles gave rise to a new room for manoeuvre. Long ago, females got a hint of how masculinity felt when they entered the working space. The difference in the clothing that used to create a sense of otherness is now, absent. Psychologically and physically by engaging in the workspace, they could feel a sense of masculinity. Gender was solid with two sexes and thus two different categories of identical selves. Due to changes in society, gender becomes a feeling and feelings are not inflexible, thus comes gender fluidity. Gender fluidity *“denotes that a person is open about the gender they identify with. Their gender identification or expression is fluid and might include one, several, or no gender. Gender identity and expression may shift throughout time.”*<sup>9</sup> There can be manifold whys and wherefores for the headway and development of this phenomenon. Some of them include-

- **Non-conformity** to one's expected gender roles gives rise to a conflicting situation. When society around one does not conform to the expected gender roles then one becomes habituated to being in a gender which is not conformed as per society. It is a two-edged sword. A person reacts following the different stimuli. Reflected appraisal is the process of assuming the position of the other when it becomes essential to make a human connection.
- **Doing gender** means gender identity is performed, verified, invented, and embodied in a situated and organized reality. It entails a multi-layered and complicated collection of constant relationships, norms, guidelines, positions, and so on. They cover practically all contexts and circumstances. It is the task of preserving these identities. For, a female boxer with continuous practice would sooner or later delude some strands of her feminine qualities.

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<sup>8</sup> Smith JS and Smith KE, 'What It Means to Do Gender Differently: Understanding Identity, Perceptions and Accomplishments in a Gendered World' (2017) 1 Humboldt Journal of Social Relations

<sup>9</sup>Gould, W.R. (2023) *What does it mean to be gender fluid?* Very well Mind. Available at: <https://www.verywellmind.com/what-is-gender-fluid-5075600> (Accessed: 23 November 2023).

- **Inclusiveness and safety** make a person assume a gender which is different to one's expected gender. A male raised in a family of all females would be more comfortable and flexible in assuming the gender of a female. Boys with older sisters exhibited more feminine traits (i.e., kindness and cooperation).<sup>10</sup> This is due to the feeling of inclusivity and safety that they feel due to the opposite gender. Thus, they incorporate more of the other gender's characteristics.

## V. LAW AND GENDER FLUIDITY

The law is a set of laws developed by a community or government to deal with societal discrepancies and social interactions.<sup>11</sup> Laws reckon all the expected conduct of a community or society as a whole. It demarcates the acceptable gradations of one's self. For instance, the law may establish a rule that a self of one is not permissible to kill another self. Law makes rules for all selves. However, as of now, the laws were made in a compartmentalized structure for only two identities of self

1. A strictly male identity emanating from a male sex
2. A female identity of a female sex

All laws were made keeping these two genders in mind. Due to the dynamicity of this era of time, viewpoints began to change. Because of the above-mentioned reasons, people started exploring outside of those boxes. Now, the identities are intertwined. There is no set start or end point of identities. People want representations through law. Laws provide a mechanism through which we get rights and duties. A circle of obligations is created. A self cannot be protected without having adequate laws.

If an identity is not represented through laws, then it would not get any shield to protect itself from the aspersions of society. Laws give us belongingness and a name through which we can express our lives in society. An untiring debate has been going on concerning the validity of various rights of same-sex couples. These couple by

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<sup>10</sup>Author links open overlay panel Hiroko Okudaira a b *et al.* (2015) *Older sisters and younger brothers: The impact of siblings on preference for competition, Personality and Individual Differences*. Available at: <<https://www.sciencedirect.com/science/article/abs/pii/S0191886915001609>> (Accessed: 18 October 2023).

<sup>11</sup> Collins Dictionary, 'Law' <<https://www.collinsdictionary.com/us/dictionary/english/law>> accessed 18 October 2023

executing gender fluidity find their identities in a home of the opposite sex. Their gender identities and affection for another identity are contrary to what is affirmed by society. The ongoing tussle is all about getting a 'name', a legitimate 'name'. To understand the various nuances of this legal dichotomy, let us delve into the ocean of various established legal precedents to rummage and gather the shiny peals of erudition. The rough and meaningful chronology of cases is mentioned and discussed hereunder-

- *Naz Foundation v. Government of NCT of Delhi and Ors*<sup>12</sup>

The case found its roots and was decided in 2009. The story begins with this case. Section 377 of the Indian Penal Code, 1860 discusses about unnatural offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished.<sup>13</sup> Back then, to the degree that the aforementioned, law criminalises consenting sexual conduct between adults in private. The case is based on the argument that Section 377 IPC, by encompassing sexual conduct between consenting adults in private, violates the basic rights granted by Articles 14<sup>14</sup>, 15<sup>15</sup>, 19<sup>16</sup>, and 21<sup>17</sup> of the Indian Constitution. The petitioners argue that Section 377 IPC should only apply to non-consensual penile non-vaginal intercourse and penile non-vaginal sex with minors. It was the first spark that started claiming the decriminalisation of homosexual activities.

## VI. LEGISLATIVE BACKGROUND

The first recordings of sodomy as a felony under Common Law in England were written in the Fleta in 1290, and subsequently in the Britton in 1300. Sodomites were to be burned alive in both scriptures. Sodomy was later punished by hanging by the Buggery Act of 1533, which was re-enacted in 1563 by Queen Elizabeth I, and formed the charter for the future criminalization of sodomy in the British colonies. In 1817,

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<sup>12</sup> *Naz Foundation v. Government of NCT of Delhi and Ors*, [2009] SCC OnLine Del 1762

<sup>13</sup> *Indian Penal Code 1860*, s 377

<sup>14</sup> *India Const. art. 14*

<sup>15</sup> *India Const. art. 15*

<sup>16</sup> *India Const. art. 19*

<sup>17</sup> *India Const. art. 21*

oral-genital sexual activities were eliminated from the concept of buggery. In England and Wales, the death sentence for buggery was legally abolished in 1861. Sodomy or buggery, on the other hand, remained a felony "not to be mentioned by Christians." Lord Macaulay authored the Penal Code, 1860, which was implemented in British India in 1861. Section 377 of the IPC is found in Chapter XVI of the IPC, which is headed "Of Offenses Affecting the Human Body."

The laws were considered obsolete and amiss for today's society as the beliefs of Christianity—that was reflected in the bare texts of IPC—considered sexual intercourse a mere purpose for procreation. Section 377 was used as a damaging weapon by the police to harass people owing to their discriminatory and negative beliefs about same-sex couples. Nothing is more private or intimate than one's sexual life. Section 377 of the IPC unjustly restricts the right to privacy and dignity within the context of Article 21's right to life and liberty. Furthermore, it has been argued on behalf of the petitioner that Section 377 IPC's legislative goal of punishing "unnatural sexual acts" has no rational connection to the distinction made between procreative and nonprocreative sexual acts and thus violates Article 14 of the Indian Constitution.

The petitioner claims that criminalizing mostly homosexual activities under Section 377 IPC is discriminatory based on sexual orientation and hence violates Article 15. It is also the petitioner's case that the prohibition against homosexuality in Section 377 IPC restricts or infringes on the fundamental freedoms guaranteed under Article 19 (1) (a) (b) (c) & (d); in this regard, an individual's ability to make personal statements about one's sexual preferences, right of association/assembly, and right to move freely to engage in homosexual conduct are restricted and curtailed.

The court, in this case, declared that Section 377 of the IPC, since it criminalizes consensual sexual conduct between adults in private, violates Articles 21, 14, and 15 of the Constitution. The case relieved numerous homosexual people who were able to live without the forever tag of 'criminal' just for feeling their set sexual desires.

### **1. *Suresh Kumar Koushal v. Naz Foundation*<sup>18</sup>**

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<sup>18</sup> *Suresh Kumar Koushal v Naz Foundation* [2011] SCC OnLine SC 42.

The case was decided in 2013. This case overturned the judgement of our previously discussed case. It reinforced and further vivified section 377 of the IPC. This case debates an altogether incongruous perspective. The applicability of the section was imposed back again without even considering the matters of 'age' and 'consent'. Even consensual intercourse can be prosecuted. The nature of the act and the circumstances around which the act has to be approved or censured would be taken into account. Violation of the Protection of Human Rights Act, 1993.<sup>19</sup>

- **Issues**

- Are age-old Judeo-Christian morality and ethical principles pertinent in our contemporary de-colonised society?
- Does depriving the entire assemblage of homosexuals of their sexual desires and fantasies can be equated with the hazy connection between it and public health policies?
- Section 377 gives police forces and society at large a serrated knife to chop off the roots and fruits of a homosexual relationship.
- A discriminatory and damaging message is sent to society that one can be sidelined – because of one's sexual orientation – from various sectors of society like family, employment, leisure, sports, etc.
- Even the Law Commission of India is advocating for the effacement of section 377.
- Various sociological and anthropological case studies found that non-procreation activities cannot be termed unnatural.
- Absence of any reasonable nexus between an arbitrary classification between-
- Natural and procreative sexual activities
- Unnatural and non-procreative sexual acts

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<sup>19</sup> *The Protection of Human Rights Act 1993.*



- Whether Constitutional morality > popular morality?
  - Whether individual fundamental rights of privacy and dignity > moral revulsion of the majoritarian society?
  - Can the public health measures be solely raised by stripping minorities of their basic rights?
  - Is there any factual evidence proving that decriminalisation of sodomy laws would cause delinquent activities in society?
  - Is the constitutional right, the 'right to be let alone' in consonance with section 377?
  - Does all the essentials of the Article are fulfilled by section 377? The Article 14 demands a provision to be-
    - Just
    - Fair
    - Reasonable
    - Unarbitrary
  - Are religious, cultural and moral views enough a point for the marginalisation of homosexuals?
  - Is deviant, non-orthodox, iconoclast and non-conformist behaviourism justifiable for the prosecution of homosexuals?
  - Should the ideals of personal autonomy be replaced with the functions of strict scrutiny of the state and society?
  - Why homosexuals, categorised as a class, be separated from society even if they are separated from society then should we not be making more affirmative laws for their development and well-being in our society?
- **Arguments**

- Section 377 is vague and too broad. Moreover, it is highly variable as it is still undefined under a statute as what is considered “carnal intercourse against the order of nature”. It may be inferred as

Carnal intercourse between a man and a woman

Carnal intercourse using protection between a man and a woman

Carnal intercourse with consent between two men

Carnal intercourse without consent between two men

Carnal intercourse with a child with consent

Carnal intercourse with a child without consent

- No policies or guidelines for following set discretions—by society or police forces.
- The privity of home cannot be enjoyed
- Although not implying/reading about a particular sex, the provision is read mostly as against homosexuals.
- Non-availability of sexual partners is against the right to health for gay men.
- Criminalisation creates an environment of intolerance and social stigma against homosexuals.
- Equal protection of the law is not provided to homosexuals.

## VII. JUDGEMENT

The Supreme Court, cannot apply the doctrine of Severability in our present case because a mere dispute on a specific provision cannot make it unconstitutional. A change in society’s perception is not a valid ground for the unconstitutionality of section 377. For the applicability of this doctrine, it has to be proved that the separation of one specific clause should not invalidate the entire essence of the provision. The basic presumption of constitutionality also prevented the decriminalisation of

homosexuality. Moreover, the factual details that were provided in the writ petition were insufficient for the court to hold an otherwise decision. The foundational facts and statistics were entirely missing for pronouncing a judgement in favour of the petition. Reports based on academicians cannot be claimed to have caused a major constitutional ripple.

Anal intercourse poses a gigantic risk of HIV/ AIDS for homosexuals who are engaged in the activity. The right to privacy cannot be violated when due process is followed, through the Code of Criminal Procedure<sup>20</sup>, for incriminating the act. A right cannot be an excuse for committing a crime under a provision. No indirect violation of the constitution can be struck down section 377. Sexual acts – penetration into a body to satiate an unnatural lust – between homosexuals would endorse unmanliness and unusefulness in society. Section 377 applies to both men and women and thus it is non-violative of section 14. Social structure and an ordered institution of marriage would be hampered if homosexual activity were promoted in society. The role of organs is set by Mother Nature and thus, as humans, we are no one to revolt against the laws of Nature. Sexual orientation can be curtailed based on morality and public health.

## VIII. LEARNINGS

Now, this particular case raised some effective and futuristic questions. In the subsequent judgements, the interpretations were transformed and moulded. The case takes up the questions of homosexuality in a narrow and straitjacketed manner. Although we cannot sideline the fact that the absence of appropriate and abundant pieces of evidence to prove the contentions became a grave reason for the court to not pronounce the case in favour of homosexuals, the court was still expected to be more gentle, purposive and understanding while reading the grievances of homosexuals. Rather than reading a 'broader' provision for criminalising the sexual orientation of a being, the court could have criminalised the 'narrow' perspectives of society as a whole.

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<sup>20</sup> *The Code of Criminal Procedure 1908.*

### 1. *Navtej Singh Johar v. Union of India*<sup>21</sup>

Our first case i.e., *Naz Foundation v. Government of NCT of Delhi and Ors* was affirmed in our present case and the second case was consequentially reversed in *Navtej Singh Johar v. Union of India*.

- Dissection of the case
  - Articles 21,14,15 and 19 and the preamble of the Constitution withhold a transformative power, and constitutional morality is still under the microscope. More humane and compassionate emotions should deal with the question posed in front of the judiciary. The liberty of an individual is more paramount than stereotypes and subjective cultural beliefs.
  - Need for a vision that ascribes equitable importance to minorities as well. The right to love any person of one's choice cannot be limited due to the "disturbance" caused by homosexuals to society. The realisation of equal citizenship rights is bestowed on minorities as well.

For a personal dignified existence of self, destruction or unacceptance of identity proves to be an anathema to one's sexual orientation. The sexual identity of an individual is governed by sexual orientation and not entitling the individual with all the rights would be against a meaningful and dignified life.

- Articles 21, 19, 15 and 14 guarantee certain rights namely, the right to
  - Sexual identity
  - Sexual expression
  - Sexual orientation

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<sup>21</sup> *Navtej Singh Johar v. Union of India* [2018] 1 SCC 791.

- Sexual Health
  - Choice of a partner
  - Sexual freedom
  - Sexual autonomy
  - Sexual privacy
  - To dignity
- Through the passage of time, the values, needs and mindsets of the masses have been changed. In contemporary times, the principle of procreation is distinct from the idea of bodily eroticism. If sexual intercourse is performed without keeping in mind the goal of procreation, even then such an act cannot be backlashed. Coming together in a consensual relationship for emotional, mental and physical companionship should not be termed as “*against the law of nature.*”
  - Sexual orientation is a natural variant and neither a mental illness nor any form of impairment or disorder. The ideals of individual autonomy, liberty, privacy, dignity, equality and freedom of expression are essential for the wholesomeness of a being and thus cannot be put under the umbrella of any exceptions. Unique sexual orientation is natural, inherent and an expression of self and thus state should work to protect the fundamentals of homosexuals.
  - The definition of mental illness excludes homosexuality.<sup>22</sup> Differences or non-conformity with religious, cultural, moral, ethical, political or work principles cannot be termed a criminal. Section 377 violates Article 14 as it imposes a blanket ban on all

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<sup>22</sup> *The Mental Health Act 2017.*

homosexual activities irrespective of the consent of participating individuals.

- Natural and unnatural are subjective concepts and there is an absolute absence of a set definition explaining the two terms therefore, a reasonable and fair intelligible differentia does not exist. We express our sensitivity, sexual competency, awareness, will and affection through sexual intercourse in private and thus such an expression of warmth and love cannot be termed as against nature.
- Subjective moral notions of the public cannot be an objective criterion for judging the consensual physical activities of other people. Sexual orientations are not under people's control and arbitrary Section 377, harasses and chastises people for letting them be what they want to be. Capriciousness, arbitrariness, irrationality, excessiveness and disproportionality are compelling reasons for striking down the provision. The demands and situations, of the people whose rights are being damaged, should be considered before constraining and criminalising.
- Discrimination based on sexual expression or gender or sexual orientation violates Article 15 of the Constitution. Stereotypical thoughts regarding the roles of binary-gendered individuals would encourage homophobic activities. Sexual autonomy is inclusive of self-determination and bodily sovereignty. Autonomy lets our identity breathe and thus is an integral part of human dignity and thus cannot be curtailed.
- Article 32<sup>23</sup> and 226<sup>24</sup> gives scope for judicial review. Judicial review is applicable for minorities as well. Even if a single person's rights have been violated, it can be struck down by the competent

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<sup>23</sup> *India Const. art. 32.*

<sup>24</sup> *India Const. art. 226.*

- court. Majoritarianism is not followed for decriminalising a provision.
- The constitution has transformative power and hence it can have an inclusive spirit to produce a healthy homogenous concoction using heterogeneity of people. The case decriminalised homosexual relationships. The Constitution is an organic document so that it can infuse newer and fresh values of society.
  - For a reasonable classification, which is absent in Section 377, there should be the presence of
    - intelligible differentia
    - the object sought to be achieved through classification should be sound, logical, just and fair
- *Supriyo alias Supriya Chakraborty and Another v. Union of India*
    - Even after setting valuable precedents in the previous cases, the Supreme Court in its verdict of 3:2, gave numerous statements for the growth and upliftment of homosexuals but failed to recognize their rights in a materialistic form. The case of Navtej Singh Johar put the people of LGBTQIA+ in high hopes. However, all such hopes were heartlessly shattered in this case. Even the inevitable strength of a decade was unable to alter or mollify the rusted mindset of our Indian society.
    - The court's verdict was against legalising same-sex marriage, adoption rights by homosexuals and the right to form a civil union. There is no availability of the right to marry for homosexuals. Special Marriage Act<sup>25</sup>, the court opined, cannot be read in a way to include same-sex couples. The ineligibility of same-sex couples to adopt children emanates from the non-legitimacy of their relationship. Accordingly, a child raised with homosexual parents would lead to the

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<sup>25</sup> *The Special Marriage Act 1954.*

underdevelopment of a healthy psychological well-being. The custom that a marriage is only between two individuals of opposite genitals was not refuted in this case. The judgement was full of sound arguments however it failed to do any relief to the homosexuals.

- The court did ask for the formation of a high-panel committee for the determination of the rights of LGBTQIA+. The court believed that the legislation of same-sex marriage does not pertain to the powers and authorities of the realm of the judiciary. Only parliament can frame laws and thus proving legitimacy to same-sex couples would be considered judicial overreach.

## **IX. CONCLUSION**

In a nutshell, the trajectory presented above is not appreciated by homosexuals. We see ebbs and flows in the legal precedents. The recent case would have been celebrated if it interpreted the black-and-white texts for the rainbow community. The judgement merely passed the buck from the judiciary to the Parliament. After Navtej Singh's case, the minorities and people supporting them were expecting a room full of incandescent birthday balloons. However, everybody was soon deflated by the non-birth of homosexuals' rights. Now, the ball is in the Parliament's court. By doing alterations, the Parliament may break or make the lives of homosexuals. A community, that is so prevalent yet not identified due to the fear or unacceptance by society, deserves certain special and affirmed rights. Living without basic rights is living with a skeleton that is stripped of juicy flesh. A community that is ostracized by society and which is kept away from the mainstream is eligible for particular affirmative actions. If we generalise then reservations are reflected in our constitution because a said community was unheeded and overlooked for a period of time. Why cannot the LGBTQIA+, being a minority, ask for mere representation of their needs?

## **X. RECOMMENDATIONS**

1. The committee should be formed at a lightning bolt speed with the power of a shooting star. The committee should be formed with due ponderings of



competent people. It should happen within the required time but not with superfluous time.

2. Representation of members from the LGBTQIA+ community in the panel or committee formed for the negotiations of laws for the community.
3. The apex court should monitor the actions of the legislature and provide plenty of suggestions when and if needed.
4. The court should ask for timely, systematic and steady reports about the subject matter.
5. The legislature should also ensure that there are no violations of the set futuristic laws. If any defilements occur then the same should be met with unforgiving punitive actions.
6. The legislature should collect sufficient, reliable and effective data concerning the grievances of the community.
7. The apex court should ensure that there neither the legislature nor the execution is working lackadaisically. The fervour that has been rekindled due to this debate should not go unnoticed.
8. The country should become more gentle, compassionate and welcoming for the LGBTQIA+. A community cannot progress without adequate support from the rest of the incalculable communities. Working in isolation is a pure myth and no man is an island. The growth of one is by the many and the growth of one is the growth of many. It is acceptable that these many technicalities are hard to decipher but a step towards betterment and inclusion is what is needed. Our future generations would not live in haze if we were able to solve this maze.

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