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Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

NAZ TO NAVTEZ: TRANSFORMATIVE CONSTITUTIONALISM AND DECRIMINALISATION OF HOMOSEXUALITY IN INDIA

AUTHORED BY - DR. ATUL JAIN¹

ABSTRACT

Despite the fact that all are created equally, the history of LGBTQIA+ community always remains complicated as predominated heterosexual society gripped in invisible shackles of gender and sexuality refuses to perceive them as a part of them. Section 377 of Indian Penal Code, 1860 that criminalised homosexuality has always been under public discourse and discussion for being regressive and unjust law which curtails the fundamental rights and freedom of LGBTQIA+ community while some justified it for being deviant from natural order. India even after making the bold move from gender binary to gender spectrum, the LGBTQIA+ community is still discriminated, belittled and abused due to their different sexual orientation thus encouraging, sensitive and non-judgemental outlook will go a long way in relieving stress of this community and ensure more holistic care.

To get a better understanding of the law, this paper begins with briefly explaining about homosexuality and the provision in the Indian Penal Code that criminalises followed by its traces in history and how exactly the law came to be. The paper further examines the stance of judiciary through a timeline of various cases which ultimately led to decriminalisation of homosexuality by adopting a progressive approach of transformative constitutionalism. Lastly the paper attempts to analyse the stigma still attached to the LGBTQIA+ community and the need of a comprehensive legislation granting them civil rights of marriage, adoption and succession. The paper concludes with suggestions as our beloved LGBTQIA+ community is still to achieve dignity, freedom and inclusiveness in true sense.

KEYWORDS: Homosexuality, Transgender, Section 377, LGBTQIA+, Section 377, Stigma

¹ Associate Professor, Amity Law School, Amity University, Haryana

“I am what I am, so take me as I am”

- Johann Wolfgang von Goethe

INTRODUCTION

Recognition by society is an essential aspect of the life of every individual which is obtained only when the individual abides by the accepted standard norms entrenched in the society. But certain section that goes against these established rigid norms may have to face resistance from society as their behaviour conflicts with the set social order. Individual is recognised in society based on their caste, community, race, gender, sexual orientation, marital etc. but there has always been constant struggle to recognise certain communities and treat them equally.

Homosexuality which refers to sexual behaviour or attraction between people of same gender or to a sexual orientation has existed in society and civilisation has accepted this, but our culture faces various issues regarding sexuality. Looking back into history, LGBTQIA+ people have always been a part of Indian culture and have hugely suffered during colonial rules due to Victorian laws. Even after independence, while citizens of India celebrated a life of equality and dignity, people of LGBTQIA+ community were left vulnerable on the margins of society deprived of their basic rights and were discriminated and marginalised by majorities because of Section 377 of the Indian Penal Code that classified homosexuals intercourse as an unnatural offence with punishment of life imprisonment.

The roots of inequality and discrimination lie in the denial to LGBTQIA+ community of full inclusiveness and undermining human dignity. However, whenever there has been historic deep-rooted discrimination and injustice the State and judiciary has resorted to affirmative action. The 2018 Navtej Singh Johar judgment² opened a door that changed the way we looked at sex, gender and sexuality by decriminalising consensual same sex under Section 377 of the Indian Penal Code. The verdict marked the end of an era where discrimination based on gender identity and sexual orientation holds no place and has positively impacted the way one think about gender beyond the binary of male and female and beyond social stereotypes of gender roles but a lot of avenues still remain to be unexplored such as same-sex marriage, impact of homogeneous relations on succession laws, legitimacy and rights of their children and other ancillary civil rights. The dynamic stance of Indian judiciary has paved the way for

² Navtej Singh Johar & Ors. v. Union of India, (2018) 10 SCC 1.

revolutionary, visionary and reformatory India where LGBTQIA+ community have a voice that is strong and refuses to be silent any longer in their efforts to reclaim equality and dignity. **As Justice D.Y. Chandrachud said “It is difficult to right the wrongs of history but we can certainly set the course for the future.”**

UNDERSTANDING HOMOSEXUALITY AND SECTION 377 OF THE INDIAN PENAL CODE, 1860

The term homosexuality is a hybrid of Greek word ‘homo’ meaning same and Latin-based ‘sexual’ meaning sex. Homosexuality has been well documented across cultures and historical period but its meaning and acceptance in present times vary greatly with social context. It was the Victorian morality that people should have sex only with opposite gender since sex is only for procreation. Conventional wisdom in West held homosexuality as immoral behaviour and the influence of Victorian morality in India led to immorality being attached to homosexuality.

Homosexuality is the morbid sexual passion between people of same gender³. It talks about a pattern of behaviour or disposition to experience romantic feeling of attraction and affection from identical gender and a social identity based on fondness. The umbrella abbreviation of LGBTQIA+ community represents Lesbian, Gay, Bisexual, Transgender, Queer, Intersex or Asexual emphasises a diversity of sexuality and gender identity-based cultures. Basically, LGBTQIA+ are non-heterosexual people that face problems growing up in a society that often presents heterosexual as the only acceptable norm of sexuality and regard homosexuality as deviant from natural order. LGBTQIA+ share a common community where individuality is not discriminated on the basis of their biological sex or sexual orientation. Such community is a welcoming home for those millions of people who have constantly lived under the fear and pressure of their parents, relatives or society and is free from any kind of hatred, discrimination, impairment and restrictions. Section 377 of Indian Penal Code sought to maintain the structure of hetero-normativity thus criminalising and marginalising LGBTQIA+ community by denying them various civil rights. The provision allowed exploitation and harassment of the community to prevail and abridged both human dignity and fundamental right of choice and privacy.

³Available at: <http://www.legalserviceindia.com/legal/article-679-analysis-of-section-377-of-indian-penal-code-1860.html>. (last visited on May 20, 2025)

The most revolutionary and hovered Section 377 of Indian Penal Code states that *“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable for fine.”* This section criminalised all non-penal vaginal sex and even the private consensual sexual acts between adults of same sex thus making homosexuality unlawful and vaguely declaring it as an unnatural offence. The provision inserted in our statute by the British soon became a draconian law. This arbitrary law does not differentiate between public and private acts or consensual and non-consensual act thus give no regard to relevant factors such as age, consent, nature of act or scope of harm⁴. Not only this provision neglected homosexual intercourse and their sexual expression and identity but also contained penalties up to imprisonment for life for doing the same consensually. The community was shunned by the society for centuries, the prejudice and stigma perpetuated a culture of silence and discrimination around homosexuality and even the laws penalised them for their basic human nature. Though, the verdict of Navtej Singh Johar case decriminalised consensual homosexual intercourse but the provision continues to criminalise and penalise bestiality, carnal intercourse with minors and cases of no consent.

Despite major changes in laws surrounding homosexuality, public opinion on acceptance of homosexuality remains sharply divided by economic development, country and region. However, with time Indian society has moved from accepting and normalising to celebration and promotion of homosexuality.

SECTION 377 AND NEW CRIMINAL LAWS

The Bharatiya Nyaya Sanhita (BNS), 2023, which replaces the colonial-era Indian Penal Code, marks a conscious effort to restructure India’s criminal law in accordance with constitutional values and societal evolution. One of the most notable aspects of this reform is the complete exclusion of Section 377, which previously criminalized "unnatural offences." This omission reflects the legislative will to discard archaic and morally driven laws that had no place in a modern democracy. Importantly, the removal was not abrupt or isolated; it followed the Supreme Court's 2018 Navtej Johar decision, which decriminalized consensual homosexual relationships between adults. By omitting Section 377 entirely, the BNS sends a powerful

⁴ Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors. (2014) 1 SCC 1.

signal that consensual sexual conduct, irrespective of gender or orientation, should not be a matter of criminal law. Offences such as bestiality and non-consensual acts, which were previously clubbed under the ambiguous term "carnal intercourse against the order of nature," are now dealt with under specific and clearly defined provisions, ensuring better legal precision and protection.

The legislative choice to exclude Section 377 in the BNS has significant symbolic and practical implications. Symbolically, it marks the first time in Indian legislative history that consensual same-sex relations have been fully detached from criminal scrutiny. This not only aligns the law with constitutional principles of equality (Article 14), non-discrimination (Article 15), and personal liberty (Article 21) but also validates the dignity and identities of millions of LGBTQIA+ individuals. Practically, it removes a potential tool of harassment often used by authorities to intimidate or extort queer people, even after the judicial reading down of the law. However, while this exclusion is a significant leap, it is only the beginning of the journey toward full equality. Legal decriminalization must now be followed by affirmative legal protections, such as anti-discrimination laws, recognition of same-sex relationships, and equal access to civil rights like marriage, inheritance, and adoption. Moreover, sensitization of law enforcement and public awareness campaigns are essential to transform societal attitudes and prevent the marginalization of gender and sexual minorities. Thus, the BNS's progressive stance on Section 377 should be seen as a foundational step toward a broader movement for LGBTQIA+ justice and inclusion in India.

HISTORY OF LAW IN INDIA

Colonisation besides other negative impacts has a major part in taking away our true Indian culture. There was disapproval for homosexuality but homosexuals were not ostracised or hounded for their identity and the society was tolerant towards them which is evident from various Hindu literature, medieval history, mythology and depiction of homosexual couples in the temples of Khajuraho and Mughal chronicles. Introduction of the term 'homosexuality' and the laws prohibiting carnal intercourse against the order of nature was done by imperial might to maintain social order in society by introducing Section 377 in Indian Penal Code 1860. Even after a century, the law was still viewed as non-repressive.

Section 377 offered a legal basis to suppress alternate sexuality and was often used as an excuse

to impinge on freedom of expression and harass LGBTQIA+ community. The community felt inhibited to go for medical aid due to prejudices against them. An eerie silence and criminality surrounding homosexuality is one of the reason why modern institutions such as police and religious institutions responded with horror and even violence to union of LGBTQIA+ people.

For more than two decades LGBTQIA+ activists were challenging this provision for violating various fundamental rights and freedom of the community. 172nd Law Commission Report suggested abolishment of Section 377 but the suggestion was not acted upon. The movement began in November 1991 when an organisation named AIDS Bhedbhav Virodhi Andolan (ABVA) involved in fighting against discrimination faced by HIV/AIDS patients exposed the inhumane treatment and experiences of homosexual people in the country by publishing a lengthy document that revealed the horrific instances of blackmail, extortion, violence, harassment and discrimination suffered by homosexuals especially at the hands of authorities. The document also demanded repealing all provisions and legislations that aided in discriminating against the community including Section 377 of IPC. Major controversy arose when in May 1994 when ABVA attempted to distribute free condoms to inmates of Tihar Jail in order to check the rate at which HIV/AIDS spreads but the permission was denied on the pretext that it will promote homosexuality. This led to ABVA filing a petition in Delhi High Court arguing that all prisoners, homosexuals alike, have a right to health and equality and further challenged the constitutionality of Section 377 of IPC. However, the petition was dismissed by the court. In 2001 Naz Foundation an Indian NGO working for the people suffering from HIV/AIDS, filed a petition in Delhi High Court challenging the constitutional validity of Section 377 of IPC so as to legalise homosexual relations between consenting adults but in 2003 the High Court dismissed the case stating that the petition was without a cause of action and Naz Foundation had no locus standi in the matter. This dismissal by High Court was appealed by Naz Foundation in Supreme Court which concurred with them and reinstated the case to Delhi High Court stating that an issue of public health interest was involved.

JOURNEY FROM NAZ TO NAVTEJ

Indian judiciary time and again rises to the injustices suffered by the discriminated strata of the society. The stance of judiciary on Section 377 can be explained through a timeline of five landmark cases having same judicial backdrop which eventually help bring LGBTQIA+ community to justice and more than anything gives them identity.

NAZ FOUNDATION V. GOVERNMENT OF NCT DELHI (2007)⁵:

Naz Foundation filed a writ petition in Delhi High Court challenging the constitutional validity of Section 377 of IPC on the ground that it clearly violated fundamental rights guaranteed under Article 14, 15, 19 and 21 of the Constitution of India. The petition was filed on the pretext that its work of tackling the spread of HIV/AIDS was hindered due to discrimination against LGBTQIA+ community which prevented them from stepping forward for treatment. The community was assaulted, harassed, discriminated and abused by public authorities thus forcing them to live a life in fear without any dignity and rights. They further alleged that right not to be discriminated on the ground of sex under Article 15 should not be read restrictively but should also include sexual orientation.

Ministry of Home Affairs in its legal opinion stated that Section 377 criminalises sexual abuse against children, fills up gap in rape laws of country and in case it is removed it would favour such neglecting behaviour which is against morals and public interest of Indian society. Whereas Ministry of Health and Family Welfare argued in favour of Naz Foundation stating that Section 377 is against the prevention and treatment of HIV/AIDS.

In a landmark judgment Justice S Muralidhar and Justice Shah struck down Section 377 of IPC, insofar as it criminalises consensual sexual acts of adults in private, for it violates Article 14, 15, 19 and 21 of the Constitution and that the Section will be invoked only in the cases of non-consensual sex and sex with minor. The court further observed that any differentiation under Article 14 of Constitution must be just, fair and reasonable and have prudent relation with the objective sought but since Section 377 targeted a particular community and regarded homosexuals as criminals it was infringement of Article 14. This 2009 judgment emerged as a victory for equality and social justice and also in terms of its robust legal reasoning by Delhi High Court. It was a celebrated judgment all over the country and a catalyst for change on recognition of rights of LGBTQIA+ community. However, the celebration was short lived as the judgment was challenged by several parties before the Supreme Court.

SURESH KUMAR KOUSHAL V. NAZ FOUNDATION (2013)⁶:

Suresh Kumar Koushal was a Delhi based astrologer who challenged the re-criminalisation of sex between consenting adults of same sex by filing a petition in Supreme Court. Court held

⁵ Naz Foundation v. Government of NCT Delhi (2009) 3 SCR 1.

⁶ Supra Note 3.

the view that Naz Foundation case required re-consideration not only on the basis of constitutional morality but also social morality as social morality also changes from age to age.

Petitioner propounded that the statistics showing Section 377 severely affecting the spread of HIV/AIDS were inadequate and fraudulent and if permitted, the social structure and institution of marriage will be adversely affected. On the other hand respondent argued that the Indian Constitution is a living and breathing document hence it should take the evolving views of society in due consideration. Also that Section 377 has deprived LGBTQIA+ community of their complete moral citizenship.

In 2013, the two judges bench of Justice GS Singhvi and Justice SJ Mukhopadhaya overturned the decision of Delhi High Court by stating it to be 'legally unsustainable' thus concluding that Section 377 doesn't suffer from the vice of unconstitutionality and that unnatural sex between two consenting adults is an offence. Court rendered that there is presumption of constitutionality in favour of all laws and there is a presumption that the legislature will act in the best interest of public. Also that Article 14 or 15 of Constitution is not violated by Section 377 of IPC as it criminalises certain activities and not a class of persons. Court regarded LGBTQIA+ community as only a miniscule part of India and prosecution of a miniscule fraction of the population of country in 150 years can't be a sound basis for declaring Section 377 ultra vires the provisions of Article 14, 15 and 21 of Constitution. Naz Foundation argued that Section 377 of IPC violated right to privacy on which the Supreme Court after establishing the vital significance of the right went on to underestimate the right to privacy argument in the context of 377. The court acknowledged that there have been cases of misuse of Section 377 against LGBTQIA+ community putting their privacy and integrity at stake on the pretext of torture, blackmailing and harassing but the same has never been the purpose of this section as Section 377 itself neither condones nor authorises such treatment and thus is not reflective of the fact that such law is beyond the four corners of Constitution.⁷

NATIONAL LEGAL SERVICES AUTHORITY OF INDIA (NALSA) V. UNION OF INDIA AND ORS. (2014)⁸:

This case was a major step for transgender rights by Supreme Court in which for the first time

⁷Dr. Ajay Blog. Available at <https://medium.com/indrastra/an-analysis-of-puttaswamy-the-supreme-courts-privacy-verdict>.

⁸ National Legal Services Authority of India (NALSA) v. Union of India and Ors. AIR 2014 SC 1863.

transgender community was recognised as third gender. The court held that transgender people are entitled to enjoy all fundamental rights and provide them a society inclusive of all genders. It was further observed that the right to express identity of one in a non-binary gender was an important part of freedom of expression. Court was of the view that right to life, dignity and autonomy includes the right to one's sexual orientation and gender identity. It was ordered that transgenders right to decide self-identified gender should be acknowledged by central and state government along with classifying them as Other Backward Classes and granting them reservation in education and employment. Also insistence for sex reassignment surgery for determining gender of anyone was declared immoral and illegal. The court directed Centre and State government to promote health policies for transgender community, run social and welfare schemes for the betterment of the community as a whole, to give legal status to their gender in order to ensure equal protection of their legal rights and also create awareness among the masses to eventually eliminate any social stigma and bias against them. Court was of the opinion that ***"Recognition of transgenders as a third gender is not a social or medical issue but a human right issue. Transgenders are also citizens of India. The spirit of Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender."*** The Court also referred to an international human rights standard particularly Yogyakarta Principles which provides that ***"Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."***

This case brought huge excitement and gave momentum to transgender rights movement in India. It gave public recognition to the discrimination and violence faced by transgender community and unequivocally declared their entitlement to constitutional fundamental rights and freedom.

JUSTICE K.S. PUTTASWAMI (RETD.) AND ANR. V. UNION OF INDIA AND OTHERS (2017)⁹:

Famously known as the Adhaar Card case, the nine judges bench of Supreme Court, presided by Justice Chandrachud unanimously held that Constitution of India provide protection to an individual's right to privacy as it is deemed to be a crucial and intrinsic part of Article 21 which is right to life and personal liberty and guaranteed under its Part III. ***Thus, privacy attaches to the person as it is an essential facet of the dignity of human being.*** The court recognised its

⁹ Justice K.S. Puttaswami (Retd.) and Anr. v. Union of India and others (2017) 10 SCC 1.

liability to correct the wrong done earlier in Suresh Kumar Koushal Case and observed that minuscule population of LGBTQIA+ can't be the basis to deprive them of basic fundamental rights and freedom and such curtailment can't be tolerated even when a few as opposed to a large number of people are subjected to hostile treatment. Justice DY Chandrachud stating that guarantee of constitutional rights doesn't depend upon their exercise being favourable regarded by majoritarian opinion observed that *"The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."*

It was held that right to have intimate relations of one's choice and right to sexual orientation and gender identity is an indispensable attribute of privacy which is now guaranteed as a fundamental right under Article 21 thus the right to privacy of LGBTQIA+ community was being compromised by section 377 of Indian Penal Code.

NAVTEJ SINGH JOHAR & ORS. V. UNION OF INDIA (2018)¹⁰:

After the overruling of Delhi High Court judgment in 2013, homosexuals were considered as criminals again which sparked huge LGBTQIA+ rights protests. Some high profile name such as Ritu Dalmia, Keshav Suri and dancer Navtej Singh Johar etc. came forward and filed a petition before Supreme Court challenging the constitutional validity of Section 377. The supporters of the provision claimed spread of sexually transmitted diseases and disintegration of social fabric of India as reasons to retain it.

The petition was heard by five-judge bench of Supreme Court comprising of Chief Justice of India at the time, Dipak Misra along with Justice R F Nariman, Justice A M Khanwilkar, Justice Indu Malhotra and Justice D.Y. Chandrachud. On 6th September 2018, this case finally decriminalised homosexuality by reading Section 377 of the Indian Penal Code to exclude

¹⁰ Supra Note 1.

consensual sexual intercourse between adults of same sex by calling it to be unconstitutional, irrational and manifestly arbitrary thus reversing the decision by two judge bench in Suresh Kumar Koushal. This case marked a triumphant end to a lengthy struggle for justice as the constitutional values of dignity and liberty can accept nothing less.

Section 377 could not survive the trinity test of Article 14, 19 and 21 of the Indian Constitution. The court rationalised that Section 377 is vague and it is difficult to locate any intelligible differentia between indeterminate terms such as natural and unnatural. It is even trickier to say that the classification between individuals who engage in natural intercourse and those engaging in carnal intercourse against the order of nature can be legally valid. Right to privacy takes within its sweep the right of every individual including that of LGBTQIA+ to express their choices in terms of sexual orientation, sexual autonomy and gender identity which is a facet of human dignity and inseparable from their autonomy and liberty which can't be denied on the basis that it only affects a minuscule section of population.

The judges in the case were broad in their scope and exposition.

Justice Dipak Misra and Justice Khanwilkar relied on the principles of transformative constitutionalism and progressive realization of rights to hold that the constitution must guide the transformation of society from an archaic to a pragmatic society where fundamental rights are guarded fiercely. *“Ours is a transformative Constitution and it will become a dead testament without dynamic, vibrant and pragmatic interpretation.”* Also that constitutional morality would prevail over social morality to ensure that human rights of LGBTQIA+ individuals are protected irrespective of whether such rights have the approval of majoritarian government. It was categorically held that *“This Court being a constitutional Court is duty-bound to monitor and observe the Constitutional morality as well as the rights of citizens which are under threat only on account of sexual orientation, as such considering the facts and circumstances of the case. Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carried a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a*

vigilant safeguard against excesses of state power and democratic concentration of power.”

Thus constitutional morality embraces within itself virtues of ushering a pluralistic and inclusive society.

Justice Rohinton Nariman was of the view that since the Victorian morality was long gone there was no reason for the continuance of the law and that the present definition of mental illness in Mental Healthcare Act 2017 makes it clear that homosexuality is not considered a mental illness. He ordered the government to take measures to publicise the judgment on television, radio, print and online media at regular intervals and to initiate programs to eliminate the stigma related to LGBTQIA+ community and to conduct sensitisation programs on the community issues for government and police officials.

Justice Chandrachud was of the opinion that though Section 377 was facially neutral, its effect was to efface identities of LGBTQIA+ community and if the provision continues to prevail the community will be marginalized from health services and the prevalence of HIV will exacerbate. He further stated that not only must the law not discriminate against same-sex relationships but also take affirmative steps to attain equal protection and grant the community equal citizenship in all its manifestations.

Justice Indu Malhotra affirmed that homosexuality is not an aberration but a variation of sexuality. The right to privacy does not only include the right to be left alone but also extends to spatial and decisional privacy and that sexual expression and intimacy of consensual nature between adults in private cannot be treated as carnal intercourse against the order of nature. LGBTQIA+ are sexual minority and is equally entitled to protection under Article 15. She quoted that *“History owes an apology to members of LGBTQIA+ community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries.”*

The emphasis on transformative constitutionalism, constitutional morality, and culture of constitutionalism in the case lays down a solid foundation for future battles around LGBTQIA+ rights and for challenges to gender biased, hetero-normative laws and regulations more broadly.

INTERNATIONAL PERSPECTIVE

Around the world, homosexuality is still punishable by death in no less than ten countries and is illegal in countless others. In South America, Guyana is the only country where homosexuality is illegal but the same is not true for Africa and Middle East where most countries still criminalise it. Recently, Brunei introduced strict new Islamic laws to punish homosexual activities by stoning to death. In some countries where homosexuality has been legalised, progress can be witnessed in the form of same-sex marriage legislation thus empowering the community. Notable in 2015, US legalised same-sex marriage in all 50 states and at present same-sex marriage can be legally performed in 28 countries and 34 countries recognise some partnership rights for same-sex couples.

In the context of human dignity, the case of *Law v. Canada (Minister of Employment and Immigration)*¹¹ was referred. Canadian Supreme Court observed in the case that “Human dignity means people whether groups or individuals feel both self-worth and self-respect. Within Canadian Society, of all individuals and groups, the principles of human dignity are violated when a particular group or individual is ignored, marginalised and belittled and the same is upheld when such laws acknowledge full place of these people whether groups or individuals.” In *James Egan and John Norris Nesbit v. Her Majesty The Queen in Right of Canada and another*¹² Supreme Court of Canada explained the meaning of the term ‘sexual orientation’ as a deeply personal characteristic of an individual that it is either immutable or mutable at unacceptable personal costs and thus it falls within the protection of Constitution. In *Kimberly Hively v. Ivy Tech Community College of Indiana*¹³ the US Court of Appeal held that discrimination on grounds of sexual orientation is also sex discrimination because it is discrimination by association on the grounds of sex. It was also stated that sexual orientation discrimination is a form of discrimination based on gender roles and stereotypes and that courts have tried to distinguish between the terms “sexual orientation discrimination” and “sex discrimination” even while noting that the borders between the two terms were imprecise.

¹¹ *Law v. Canada (Minister of Employment and Immigration)* 1991 1 S.C.R. 497.

¹² *James Egan and John Norris Nesbit v. Her Majesty The Queen in Right of Canada and another* [1995] 2 S.C.R. 513.

¹³ *Kimberly Hively v. Ivy Tech Community College of Indiana* 830 F. 3d 698 (7th Cir. 2016)

LGBTQIA+ RIGHTS ACROSS THE WORLD

COLOMBIA

“Equality is unstoppable and equality will also come to Colombia,” said the interior minister, Juan Fernando Cristo, as he announced that his government was in favour of marriage equality. Same-sex couples are already allowed to enter into legal unions and a case deciding whether to have full marriage equality is currently held up in the country’s constitutional court. There was good news for the LGBT movement in Colombia late last year, when the constitutional court lifted restrictions on same-sex couples adopting children. The chief justice of the constitutional court, Maria Victoria Calle Correa, said: “Doubts and fears about whether society is ready to accept this decision won’t be dissipated by being blind to an irrefutable reality. A person’s sexual orientation or gender are not in and of themselves indicative of a lack of moral, physical or mental suitability to adopt.” But for all this progress, obstacles remain. A Pew Research survey from 2014 found 64% of Colombians oppose gay marriage, while significant opposition comes from conservative politicians and the Catholic Church.

JAMAICA

While Jamaica faces an ongoing battle to repeal the law that criminalizes gay sex, its justice minister, Mark Golding, and mayor of Kingston, Angela Brown Burke, have shown their support for a pride event. Newspaper editorials and even a few clergy have also called for equal rights – all milestones lawyer and gay rights activist Maurice Tomlinson says would have been inconceivable a few years ago. Tomlinson will challenge the country’s anti-sodomy law in court this month. The prime minister hinted at reviewing the law in 2011, but in 2014 stated it was no longer a priority. No one has been prosecuted under the law since 2005, but police allegedly use it to intimidate gay Jamaicans. Dane Lewis, executive director of J-Flag, believes more LGBT people have been coming out of the shadows over the last year to call for change, rather than relying on allies. “I think one of the big changes has been seeing more sub-groups standing up,” he says. “We’ve now got Transwave, for example.” LGBT people still face violence and discrimination in Jamaica. And the most powerful voice in opposition to LGBT rights is the church. “Almost everyone goes to church, so they have a captive audience and a lot of political influence,” explains Tomlinson. “Jamaica also had its largest anti-gay protest ever last year.”

This year, the LGBT community would like to see the police take hate crimes more seriously. “Their official line has changed – they say they are anti-homophobic, and more police are going

to workshops on LGBT issues, but at the same time no one has been arrested for the murder of Dwayne Jones in 2013,” says Tomlinson.

Lewis says a holistic approach is needed to change mindsets: “The law alone is not going to fix everything but it would send a significant message, our medium-term goal is to win over the hearts and minds of the wider community.”

MOZAMBIQUE

Mozambique’s gay community had a lot to celebrate in 2015, after their campaign to get homosexuality decriminalised succeeded last June. The revised penal code drops a colonial-era clause outlawing “vices against nature”. Mozambique is known for having a more relaxed attitude to homosexuality than some other African countries, with Joaquim Chissano, the former president, pointing to the social cost of homophobia in 2014: “We can no longer afford to discriminate against people on the basis of age, sex, ethnicity, migrant status, sexual orientation and gender identity, or any other basis – we need to unleash the full potential of everyone.”

However, Lambda, the country’s only gay rights organisation, which fought for the law change and provide counselling, legal assistance and health advice, is still waiting for official recognition from the government after lobbying them for seven years. “That is the battle we have next,” said Carina Capitine, spokesperson for Lambda. “A lot of people are asking about marriage or adoption but we can’t think about that yet. Our registration is the key thing for us. We are all pushing and believe we will have it soon.”

VIETNAM

Vietnam has some way to go before Ho Chi Minh City resembles Brighton seafront on an average weekend. In 2014, a report on LGBT rights in Vietnam found that conservative views on sexuality remained across the country, despite a plethora of LGBT support groups springing up in urban areas. The report states: “LGBT people are discriminated against, physically and psychologically assaulted, abandoned, and ‘cured’ by their family by many harmful methods that involve mental and physical abuse. They are forced to get married to those who they do not love, which can lead to the breakdown of marriages after a short period of time, further damaging the image of LGBT people.

On gay rights, Vietnam is now more progressive than America”, was the headline posted

by NBC News last January. While that sentiment may be a little premature, LGBT rights have certainly improved in the south-east Asian country in recent years

There were other signs too of Vietnam's increasingly liberal attitude to LGBT issues in 2015, particularly when the country passed a law in December which would allow individuals who have undergone reassignment surgery to register under a new gender.

NEPAL

Nepal has been on path to recognizing the rights of its LGBT community since the country's civil conflict ended in 2006. But last year, the Himalayan country made history when it joined only a handful of countries in recognising a third gender on passports. The landmark decision allowed transgender people to mark their passport with an O for indeterminate gender, instead of an M or F. It's important because it allows individuals to self-identify their gender rather than relying on what was put on their birth certificate, and it recognises the rights of *hijras*, a transgender community who have a long cultural history in Nepal. Even more significant than recent achievements for trans rights. Last September, the traditionally conservative nation enshrined protections for LGBT people in its constitution. The Human Rights Campaign in Asia called it "a historic first for a nation in Asia". Sunil Babu Pant, LGBT rights campaigner and Nepal's first openly gay MP, has been instrumental in making this progress.

Human Rights Watch researcher Kyle Knight points out, Nepal is in many ways a long way from realising many of its human rights obligations, but in the case of its LGBT citizens it appears to be on a path to progress.

TAIWAN

Activists in Taiwan are cautiously optimistic that the next few years will see further expansion of LGBT rights as the country. "It's hugely positive for us is that our newly-elected president personally supports same-sex marriage but it's still not clear whether the marriage equality bill will become law," adds Victoria Hsu, chief executive officer of the Taiwan Alliance to Promote Civil Partnership Rights. "This is because there are some small religious groups, that while only minorities, are very strong opponents with a lot of money and political influence." Hsu says the progress made at local government level is encouraging. Same-sex couples can now record their partnerships at household registration offices in Taipei. This gives gay couples the chance to assert their rights in some situations, such as being able to give consent if their partner

needs emergency surgery. Hsu is currently lobbying Taipei's politicians to go a step further, asking them to give same-sex couples the same social housing rights as straight couples and to open up equal opportunities for government employees. He acknowledges the community still faces significant challenges though: "Some people think because we've got the biggest gay pride event in Asia, Taiwan must be the most gay friendly place in Asia but that's an illusion in a sense – we've still got problems with the police, who traditionally link the gay community to drugs, some politicians, and a lot of people protesting against gay marriage."

Gay marriage is tolerated by the state, though same-sex couples don't enjoy the same rights as straight people. Last summer, a gay pride event in Nguyen Hue which attracted thousands of people was described Australian outlet ABC as feeling like a "LGBT Disneyland"; despite fears that the celebration would be repressed by the authoritarian government.

TRANSFORMATIVE CONSTITUTIONALISM

Courts in India being a custodian and interpreter of Constitution acknowledged the history of institutionalised inequalities prevalent in society and in response invoked the concept of transformative constitutionalism as an instrument to ensure a more equitable society. Though the term doesn't find express mention in the Constitution, the court took note of its transformative power in the judgment of NALSA case stating that ***"The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality."*** Later the idea got a huge fillip and was expressly commented in Navtej Singh Johar case by Justice AM Khanwilkar stating that ***"The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism."*** This 2018 judgment merits an ironic tribute for its transformative constitutionalism.

While interpreting the principle of transformative constitutionalism a case from Supreme Court of South Africa namely ***President of Republic of South Africa v. Hugo***¹⁴ was referred where

¹⁴ President of Republic of South Africa v. Hugo [1997] 6 B.C.L.R. 708 (CC).

it was observed that “Prohibition on unfair discrimination in the interim Constitution not only seeks to avoid discrimination of disadvantaged minorities but also that under that prohibition lies a purpose of the foundation of a society in which all human beings will be accorded equal respect and dignity irrespective of their membership of particular groups.” Transformative value of Constitution was appealed to recognise the wrongs and correct the course of future thus while decriminalising homosexuality in India court observed that ***“It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognised and protected by the Constitution. Section 377 of the Penal Code is unconstitutional in so far as it penalises a consensual relationship between adults of the same gender. The constitutional values of liberty and dignity can accept nothing less.”***¹⁵ While decriminalising adultery¹⁶ court acknowledged the error in treating women as chattel of men and observed that ***“The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens.”*** Justice Chandrachud noted that ***“Our conversations with the Constitution must be restructured to evolve both with the broadening of the content of liberty and dignity and the role of Court as an enforcer of constitutional doctrine. The basic principle which must guide any analysis in this area is the dominance of the values of liberty, equality and fraternity as instruments in achieving individual dignity. If we are truly to emerge out of the grim shadows of a society which has subjugated groups of our citizens under the weight of discrimination for centuries, it is time that the Constitution is allowed to speak as it can only do: in a forthright manner as a compact of governance, for today and the future.”***¹⁷

As former Chief Justice of South Africa appropriately noted ***“Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and***

¹⁵ Supra Note 1.

¹⁶ Joseph Shine v. Union of India AIR 2018 SC 4898.

¹⁷ India Young Lawyers Assn. v. State of Kerala, (2017) 10 SCC 689.

contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”

IS DECRIMINALISING HOMOSEXUALITY ENOUGH?

Navtej Singh Johar judgment marked a watershed moment in national conversations around LGBTQIA+ community rights and had an impact on multiple levels. It marked the journey of India to gender equality and social justice by emancipating the community from the shackles of gender inequality and given them much deserved right to autonomy, privacy, liberty, dignity, individuality and freedom of expression. However, even after a verdict of this magnitude there are still inadequacies in the free and fair rights of LGBTQIA+ community in a largely conservative society like India which is reluctant to accept new reality that appears to have far fetching implications. The community is attempting to shift the focus to inclusion, equality, dignity and complete citizenship and civil rights including marriage, adoption and succession.

In India marriage is more of a community matter than State which gives rise to a battle between religion, social norms and public policy every time a group of people is excluded or included from being able to marry.¹⁸ Since there is no uniform marriage law in India, no marriage law recognises same-sex marriage thus denying the community the right to equality and right to privacy to choose their family. The Supreme Court in *Shafin Jahan v. Ashok KM and others*¹⁹ observed that choice of a partner is a fundamental right of every person and it can be a same-sex partner. However, in February 2021, the Central Government in Delhi High Court opposed same-sex marriage stating that marriage in India can be recognised only if it is between a **biological man and biological female** capable of producing children. Non-recognition of same-sex marriage not only promotes the stigma attached but also deprives them of the rights enjoyed by heterosexual couples such as right to adoption, maintenance after divorce and compensation in case of death of partner at work.

¹⁸ Nancy D. Polikoff, “We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 VA Law Rev. 1535–1550 (1993).

¹⁹ *Shafin Jahan v. Ashok KM and others* (2018) 16 SCC 408.

India also curtails the right of gay couples to adopt children though several LGBTQIA+ couples have adopted children as a single parent but their partners have no legal right over the adopted child. India lacks LGBTQIA+ friendly hospitals as they struggle to function outside the binary framework health personnel and mostly untrained to provide appropriate services on HIV prevention and little information on sexual and reproductive healthcare of LGBTQIA+ community because of which many individuals from this community are unable receive proper healthcare services. Not much effort is visible on the attempt to undo the stigma and discrimination attached to the community and sensitise the government officials and institutions particularly police personnel and bring the community back into mainstreams because of which the community become victims of homophobic violence or hate crime. Lack of communication and misunderstanding between parents and LGBTQ children increases family conflict and disruption thus making them vulnerable with low self-esteem. Also members of community who are primarily rejected by family members are at high risk of mental and physical health. The Transgender Persons (Protection of Rights) Act, 2019 has been heavily criticised for its poor understanding of gender and sexual identity.

Thus, even though individuals of LGBTQIA+ community are getting legal recognitions, a lot needs to be done at socio-cultural aspect as the judgment has limitedly assisted LGBTQIA+ people and those targeted by police but families, workplace and social acceptance is still a pipe dream for many. It continues to be a constant struggle to freely express their gender preference and sexuality and many are still forced into heterosexual marriages or are ostracised. Lack of knowledge regarding sexual orientation is a big blow to the community thus social discussion and awareness needs to continue as we have a long way to go in terms of changing societal perception and behaviour towards sexual minority. We have to bid adieu to prejudices and empower all citizens

CONCLUSION

The decriminalisation of homosexuality, marked notably by the Supreme Court's landmark *Navtej Singh Johar v. Union of India* judgment, was a pivotal moment in the constitutional journey toward dignity, equality, and justice. The judgment rightly acknowledged the historical wrongs inflicted upon the LGBTQIA+ community and the urgent need for policy-level reforms. However, while legal decriminalisation symbolised an entry point into constitutional acceptance, the translation of this judgment into effective action remains a daunting challenge.

The new criminal law framework under the Bharatiya Nyaya Sanhita (BNS), 2023, Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, and Bharatiya Sakshya Adhiniyam (BSA), 2023, while replacing colonial vestiges like Section 377 IPC, must not merely rest on symbolic deletion but ensure these legal reforms are implemented with sensitivity, inclusivity, and accountability in practice.

India, like many other nations, must move beyond punitive laws targeting sexual orientation and move toward a rights-based, dignity-oriented legislative framework. It is imperative that personal laws governing marriage, inheritance, adoption, and guardianship be amended to give same-sex couples equal recognition. The LGBTQIA+ community still finds itself excluded from the institutional frameworks of family and kinship. Their inability to marry legally, adopt children, or inherit as a spouse or parent leaves them socio-legally vulnerable. The absence of such rights violates the principle of substantive equality guaranteed under Articles 14, 15, and 21 of the Constitution, which the judiciary has reaffirmed time and again.

Beyond legal recognition, a comprehensive anti-discrimination law must be enacted that expressly prohibits discrimination on the basis of sexual orientation and gender identity. This legislation must cover employment, education, healthcare, housing, and access to public goods and services. Such a law would shift the burden from the individual to the State and society, placing legal and moral responsibility on institutions to evolve and become inclusive. The BNS and related codes must also be implemented in a way that ensures protection from custodial violence, harassment, and victimisation of queer persons—especially by law enforcement authorities.

True empowerment of the LGBTQIA+ community requires meaningful social, political, and economic inclusion. Government schemes and welfare initiatives must be made accessible to queer individuals, including trans persons and other gender non-conforming identities. Public spaces—workplaces, educational institutions, healthcare centres, and domestic environments—must be sensitised through compulsory diversity training and policy implementation. Public employment, reservations, social security, and vocational training programs should explicitly include LGBTQIA+ individuals to foster upward mobility.

Parliament must assume its constitutional role in driving societal change by enacting progressive laws, institutionalising sensitisation programs, and monitoring compliance. Law

enforcement agencies and public service providers such as hospitals and clinics must be trained in queer-inclusive practices to prevent service denial or abuse. Clinical and psychological assessments must be holistic and recognise identity diversity rather than pathologising non-normative expressions of gender and sexuality. Medical institutions, in line with mental health reforms, should adopt affirmative models and eliminate conversion therapy practices entirely.

Most importantly, the government, civil society, and academic institutions must generate greater awareness and dialogue. Without public discourse, reforms risk becoming tokenistic. There is an urgent need to build platforms that allow the LGBTQIA+ community to voice concerns about mental health, workplace discrimination, violence, social isolation, and ridicule. Such platforms can generate data, guide policymaking, and humanise narratives. Inclusive media representation, community-led activism, and educational reforms are critical to nurturing social transformation.

The decriminalisation of homosexuality is not the culmination of a struggle but the commencement of a long journey toward comprehensive human rights protection. The Constitution has begun reflecting the aspirations and rights of the LGBTQIA+ community—so must society. As the *Bhagavad Gita* says, “*I’m equal toward all living beings, no one is hated by me and no one is beloved. Those who worship me with devotion, however, are in me, and I’m in them*” (9.29). This divine affirmation of equality must inspire legislative, social, and moral reform. It is not just a legal or political obligation but a collective ethical duty to ensure that no one is left behind in the pursuit of dignity and justice.

WHITE BLACK
LEGAL