

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

## **EDITORIAL TEAM**

### **EDITORS**

#### **Megha Middha**



*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



## **Dr. Namita Jain**



*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## **Mrs.S.Kalpana**

*Assistant professor of Law*

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## **Avinash Kumar**



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **THE HISTORY OF HOMOSEXUALITY IN INDIA AND THE NAVTEJ SINGH JOHAR CASE: NAVIGATING THE ROAD AHEAD**

AUTHORED BY - ANURAG NAIR

## **ABSTRACT:**

Homosexuality is a term used to describe a sexual relation wherein both the partners belong to the same gender or of same gender but different denominations. As, such they have faced legal proscription for hundreds of years for engaging in a so called “unnatural relationships”. The Abrahamic Faiths were particularly vicious in punishing instances of homosexuality, with the Torah, specifically prohibiting homosexual acts{Leviticus:18:22}[a man shall not lie with another man as he would with a woman<sup>1</sup>]. The Homosexuals Tthe traditions that preceded them., for example the English “*Acte for the vice of Buggerie*” of 1533<sup>2</sup> that laid the basis for all anti-homosexuality laws exported all over the world by British colonialism.

It was a British made law that forced Indian homosexual citizens to remain”in the closet “so as to speak. SECTION 377 of the INDIAN PENAL CODE describes Unnatural Offence:” Whoever, willingly has intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either period which may extend to ten years and shall also be liable to fine.<sup>3</sup>. The whole concept of homosexuality was considered sinful as it was an act in subversion to natural order and against Victorian Morality by the drafter of the code Lord Thomas Babbington Macaulay. It took until 2018, when the landmark case of Navtej Singh Johar V.S. Union Of India, for the Indian Supreme Court to unanimously overrule this section. .

This article seeks to explore the history of Homosexuality, Decriminalisation and the challenges that lie ahead for the LGBTQ community after the Navtej Singh Johar Case.<sup>1</sup>

---

<sup>1</sup> Torah[ Leviticus][18:22]

<sup>2</sup> Anti buggery laws of England, 1533

<sup>3</sup> Indian Penak Code, 1860

## LITERATURE REVIEW

[1] RITWIK .M.,[CASE COMMENT ON NAVTEJ SINGH JOHAR V.UNION OF INDIA, BLOG.IPLEADERS [2019]

This article talks about the general facts surrounding the case and its general analysis and how we can keep up the momentum.

[2] LGBT people and the law, Human Rights Watch[2023]

This website highlights the struggles of LGBTQ+ people in living a dignified life in more than 60+ constituencies around the world.

[3] Mehrotra D ,The precolonial history of homosexuality in India: why love is not western, Lawoctopus[2021]

This is one in a series of three articles that debunk the myth that homosexuality is a western import in India by citing examples from Indian mythology and literature to prove otherwise.

[3] Shaikh .L, Navtej Singh Johar V.S .Union of India ,Lawcian

This article is a legislative comment on the Navtej Singh Johar Case and its circumstances and the suggestions made for securing a dignified life for homosexuals.

[4] Bhatt.R., Re-imagining our futures four years after Navtej Singh Johar, Newsclick [2022]

This article chronicles the feelings and emotions of a queer lawyer Rohin Bhatt in the backdrop and aftermath of the famed 2018 case and what ambitions he holds for the future.

[5] Sarah, T. 'Gender fluidity will slowly dissolve the rigid opposition to it- an interview with transgender rights activist Vyjayanti Mogli, The Leaflet[2023]

This article deals with the realities on the ground even after 5 years of the Johar Case judgement and how the deepseated stigma has halted any significant developments.

[6]” Three years of Section 377 and it's impacts on deep rooted pockets of India,” CNBC TV18[2021]

This article talks about the impact of Navtej Singh Johar on the small villages and towns of India and how can we make a more secular India.

[7] “Everyone has the right to choose their gender says Rajasthan High Court,” CNBC T.V.18[2023]

This article talks about the Rajasthan high court judgement in the case of a sexually reoriented female constable , which said that gender identity is the most crucial aspect of anyone’s identity and that there were more than two types of sexes.

## **RESEARCH PROBLEMS FOUND**

*The existing policies regarding the treatment of homosexual individuals has not addressed their concerns of healthcare and amenities and also has done nothing to mitigate the decades ld stigma against the lgbtq community.*

## **QUESTIONS OF RESEARCH**

*[1] WHETHER HOMOSEXUALITY IS A WESTERN IMPORT OR NOT ?*

*[2] WHAT WAS THE EFFECT OF SECTION 377 ON THE LGBTQ COMMUNITY?*

*[3] WHAT WERE THE EFFORTS TOWARDS DE-CRIMINALISATION?*

*[4] WHAT IS THE PATH AHEAD?*

## **RESEARCH METHODOLOGY**

This Research is a Doctrinal and Exploratory research based on factfinding from various secondary data like case reports, articles etc. Mainly the information has been inferred from case reports and interviews with LGBTQ rights activists.

## **HISTORY OF HOMOSEXUALITY IN INDIA**

For many detractors of the decriminalisation of homosexuality, the concept of homosexual relations is decidedly a foreign export brought to India by the colonisers. But this notion is decidedly flawed.

On the contrary to many beliefs, the concept of homosexuality is not a western import as is believed by many people, but is also an indigenous trend that has found credence in many instances of Indian history. The fluidity of gender is an acknowledged concept in Ancient India, from ancient epics to scriptures and poetry, such as:

[1] In the Krittivasa Ramayana, the King Bhagiratha was said to be borne of two women.<sup>4</sup>

[2] Matsya Purana has an interesting tale of how Lord Vishnu transitioned into his “Mohini “avatar to trick the asuras into giving up their share of amruta derived from the Samudra Manthan.

[3] Kamasutra by Vatsyayana mentions oral sexual acts performed amongst transgender persons and also mentions svairini , self willed women that engage in sexual activities with other

women. Collectively, Vatsyayana termed such individuals as Tertiya Prakriti or third nature.<sup>52</sup>

[3] The Mughal Emperor Babur in his memoir "The Baburnama" enunciated his attraction to a boy named Baburi in Kabul and expresses his lament at his unfortunate condition " *May none be as I, humbled and wretched and lovesick; No beloved as thou art to me, cruel and careless.* "

[4] The Sufi Saint Bulleh Shah also portrayed the fluidity of sexuality and love for his murshid Shah Inayat in his works.

[5] The Khajuraho Temple built by the Chandela Dynasty depicts homoerotic sculptures on its walls.

[6] The Konark Sun Temple in Orissa also exhibits erotic scenes from the Kamasutra on its exterior.

[7] The Buddhist monastic caves at Ajanta and Ellora depict women and men making love to the same sex.

Such depictions were astounding for the colonisers who took measures to control such vivid eroticism by imposing Victorian Morality principles on the Indian Public.

Now that we have established that Homosexuality is not a western import but the repression of homosexuality is, we can safely set this misconception aside and focus on the real issues.

## **EFFECT OF SECTION 377 ON THE POPULACE**

The Section 377 was a draconian law imposed on the populace by the Colonising British to appease their notions of Victorian morality and fulfil a self imposed burden of civilising the so called inferior races. Armed with a pseudo scientific theory of race and Victorian morality, they released a draconian law so as to suppress "the inherent primitive and beastial"[ according to them]

tradition of public expression of homoeroticism and homosexuality. Before Navtej Singh Johar Judgement all homosexuals remained anonymous and sometimes unaccepting of their sexual orientation so as to not be labelled as anti-natural by their heterogenous peers and not suffer societal ostracization imposed by religious leaders and family members. Section 377 not only took away their freedoms but also restricted their bodily autonomy and effectively ostracised them from society. As such people were long protesting against this draconian provision that subjected a select community to human rights violations. The first known protest for LGBTQ rights in India took

<sup>4</sup> Mehrotra D, The Precolonial History of Homosexuality in India: Why love is not western [Part I/III] [2021] Acadamike by LawOctopus <https://www.lawoctopus.com/academike/history-of-homosexuality-in-india> accessed 25 September 2023.

<sup>5</sup> Vatsayana, The Kamasutra, [published by Hinoo Kama Shastra Society][1988]

place in 1992, led by the AIDS Bhedbhav Virodhi Andolan or ABVA in Connaught Place in Delhi. ABVA also file a PIL in Delhi High Court in 1994 against the Section 377, in the process giving India it's first ever gay-rights advocate Siddhartha Gautama. In furtherance of this agenda, the first ever PrideParade of India was held in Kolkata in 1999 with a message of taking pride in being gay. But while there was resistance against the law, we must remember that the apparatus of justice was itself biased against the homosexuals as illustrated in the Bharosa Trust scandal where the mere possession of homoerotic memorabilia by some members of the trust was construed to be, by the court" a curse on society".

### **EFFORTS TO DECRIMINALISE 377**

The Navatej Singh Johar case was not the first case to be filed that dealt with the circumstances of homosexuals in India , but it was the one that had the most definitive result.

#### **[1] NAZ FOUNDATION V.S. GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI, 2009**

The Naz Foundation<sup>6</sup> .a NGO committed to HIV-AIDS prevention and awareness , filed a lawsuit in the High Court of Delhi and sought to decriminalise homosexuality under Section 377 of the IPC as it led to hindrances in their initiatives with the belief that Aids only spread through the Homosexual community and that touching an AIDS patient is a taboo. The High Court dismissed their petitions citing lack of locus standi of the petitioner. An appeal was drafted to the Apex Court , which upon further examination , found section 377 to be creating an unreasonable classification in targeting homosexuals, Public disgust was not held to be a ground for criminalising homosexuality.. Section 377 was held unconstitutional as far as governing the consensual private acts of majors is concerned.

#### **[2] SURESH KUMAR KOUSHAL &ANR. V.S. NAZ FOUNDATION &ORS., 2013<sup>7</sup>**

The petitioner Suresh Koushal<sup>1</sup> challenged the decision of the Apex Court in the Naz Foundation Case wherein the court decriminalised homosexuality in a limited sense. The petitioner contended that[1] the court cannot usurp the Legislature;[2] Section 377 is gender neutral and thus non violative of Article 14; [3]If homosexuality is legalised, then the institution of marriage and the social order would breakdown. The Apex Court bench of Justice G.S. Singhvi and Justice S.J. Mukhopadhyaya over turned the Naz Foundation case remarking"the homosexuals are a miniscule minority in our country and laws need not be changed for their interests." And that if 377 was

violative of any provision ,it would have been struck down lomg ago.<sup>3</sup>

## **NAVTEJ SINGH JOHAR & ORS V.S. UNION OF INDIA THR.**

### **SECRETARY, MINISTRY OF LAW AND JUSTICE**

#### **FACTS IN BRIEF**

On April 27, 2016 a writ petition challenging the validity of Section 377 was filed in the Supreme Court by Petitioners Navtej Singh Johar<sup>8</sup>, Sunil Mehra Ritu Dalmia, Aman Nath, Keshav Suri and Ayesha Kapur. The petitioners argued for the first time that they have all been directly aggrieved by the section and alleged that it violates their fundamental rights. The petitioners sought the decreeing of Section 377 as unconstitutional and the inclusion of Right to sexual autonomy and Right to choose a sexual partner under Article 21 of the Constitution. Also contended were the facts that Section 377 has no intelligible differentia between natural and unnatural, furthermore it also has a “chilling effect on Right to Freedom and Expression by denying the expression of sexual identity. They also contended that it violated the Right to Privacy as laid down in the Puttaswamy Judgement by putting LGBTQ individuals at risk due to social ostracization due to their choice of partners. Opposing this petition were the Union of India and several organisations like the Apostolic churches.

#### **ISSUES TO BE DEALT WITH**

[A] Whether the rationale adopted in the Suresh Kumar Koushal case is sound or not?<sup>9</sup>

[B] Whether Section 377 is violative of Right to Equality and Right against Discrimination?

[C] Whether Section 377 is in violation of Right To Privacy as laid down in the case of Justice Puttaswamy v.s. Union Of India?

[D] Whether Section 377 adversely affect the Right to Free Speech and Expression by restricting gender expression of LGBTQ Community?

#### **JUDGEMENT**

The Indian Supreme Court ‘s Five Judge Bench unanimously held the Section 377 of the IPC to

---

<sup>6</sup> NAZ FOUNDATION VS UNION OF INDIA[2009] AIR 2009

<sup>7</sup> SURESH KUMAR KOUSHAL VS NAZ FOUNDATION[2013] CIVIL APPEAL NO.10972 OF 2013

<sup>8</sup> NAVTEJ SINGH JOHAR VS UNION OF INDIA THR.. SECRETARY FOR MINISTRY OF LAW AND JUSTICE

<sup>9</sup> Ritwik M,CASE COMMENT ON NAVTEJ SINGH JOHAR V.S. UNION OF INDIA[2019]

BLOG.IPLEADERS<<https://blog.ipleaders.in/case-comment—navtej-singh-johar-v-union-of-india/#Introduction>> accessed on 25September 2023.

be unconstitutional in relation to consensual ,private actions. The court overruled the Suresh Kumar Koushal V.S. Naz Foundation precedent which had previously upheld the constitutionality of Section 377. The court relied on the following judgements to decide this case :

[1] The judgement of ‘ NATIONAL LEGAL SERVICES AUTHORITY V.S. THE UNION OF INDIA[2014] to reiterate the inseparability of gender identity from one’s personality and to deny it would be violation of one’s dignity.

[2] The judgement of ‘K.S. PUTTASWAMY V.S. UNION OF INDIA[2017] to determine that Section 377 violated the right to privacy as it regulated private consensual carnal affairs between two consenting majors.

[3] The judgement of ‘SHAKTI VAHINI VS UNION OF INDIA’ to reaffirm the right of a person to choose their life partner.

The court was of the view that intimacy between same-sex partners is beyond the legitimate interests of states.

The opinions of individual judges were :

[1] CHIEF JUSTICE DIPAK MISHRA

Argued that constitution should steer the state of today from a patriarchal stste to a liberal one in which human rights are firmly protected. Also stated that constitutional morality will always prevail over public morality

[2] JUSTICE ROHINTON NARIMAN

Argued that the rationale behind Section 377, that of Victorian morality is long gone and there is no reason for it’s continuance.Indian government should take steps eradicate the stigma faced by LGBTQ+ people and sensitise Government personnel about them.

[3] JUSTICE D.Y. CHANDRACHUD

Argued that Section 377 basically erases the identity of homosexuals and impedes their rights and access to healthcare. Stressed to give the community equal protection of law and “equal citizenship” in all their manifestations.

[4] JUSTICE INDU MALHOTRA

Argued that homosexuality is a mutation in sexual orientation not a fata variance.’ History owes an apology to LGBT group leaders for the delay in redressing the ignominy and ostracism they have experienced over the years.

## **EFFECT OF THE JUDGEMENT ON THE SOCIETY**

The case was a landmark case in Indian jurisprudence. It garnered appreciation from civil society institutions around the world, like Amnesty International and Human Rights Watch. It overturned the earlier ruling of Suresh Kumar Koushal case, which was contemptuous at best and antagonistic at worst to the minority LGBT community. It held that naturalness of an act could not be used to determine legality and that constitutional morality always trumps public morality. The judgement brought great joy to many homosexual individuals who no longer felt like their whole lives were tightly regulated due to their sexual orientation. No more did they live in fear of being ostracised from family and society because of something they cannot control. They also did not have to suffer institutional violence anymore as 377 was rendered all but a black letter without any real tooth. But this alone is not enough to mitigate the centuries of stigma faced by such individuals because of their unnatural orientations.

### **OPINION OF AUTHOR**

The author is of the opinion that this judgement alone is not enough. As even a cursory glance at history will tell you, institutionalised oppression of so called unnatural practices has been prevalent for centuries.. This creates a milieu of fear for homosexual individuals that drives them to repress their true desires and do things that they would otherwise not do, there were some exceptions who proudly came out of the closet 'so as to speak' but they were either suppressed or silenced. Also such a milieu creates feelings of disgust within the individual due to the attached criminality. This judge did their work judiciously and courageously upheld the constitutional morality and indicated a pragmatic shift of Indian society towards a liberal one, as at the end of the day, judges are individuals that are influenced by their individual milieus and this influence more often than not colours their judgements, no matter how much one preaches the impartiality of law. But more work needs to be done to make India truly a place where the phrase "We the people" truly means each and every person of the country regardless of their differences. Till then this phrase remains as hollow as the phrase "We the people" in the U.S.A's Declaration of Independence, when chattel slavery was still not abolished and "we the people" only meant the people who are white. The contemporary issues are

[1] India still lacks any Anti-Discriminatory law and homosexuals are still discriminated against with no social security schemes targeted at them.

[2] There has still been no steps by the government to carry out sensitisation programmes and

welfare measures aimed at homosexual individuals.

[3] There is no unanimous assent on same sex marriage

[4] The access to healthcare for the homosexuals is shaky at best.

[5] While the case has brought the community to light, only a fraction of them have any credible support system.

While the case has brought the LGBTQ community and their struggles to the limelight and initiated conversations about them, it is still not enough.

We have a long way to go before any member of the LGBT community is treated like a bonafide citizen of India without having to resort to hiding away their true selves.

## **BIBLIOGRAPHY**

[1] TORAH [LEVITICUS 18:22]

[2] ENGLISH BUGGERIE ACT, 1533: REPRESSION OF HOMOSEXUALS IN HISTORY

[3] INDIAN PENAL CODE 1860 [45 OF 1860]

[4] Mehrotra D ,The precolonial history of homosexuality in India: why love is not western, Lawoctopus[2021]

[5] Shaikh .L, Navtej Singh Johar V.S .Union of India ,Lawcian

[6] Bhatt.R., Re-imagining our futures four years after Navtej Singh Johar, Newslick [2022]

[7] Sarah, T. 'Gender fluidity will slowly dissolve the rigid opposition to it- an interview with transgender rights activist Vyjayanti Mogli, The Leaflet[2023]

[8] ]" Three years of Section 377 and it's impacts on deep rooted pockets of India," CNBC TV18[2021]

[9] Everyone has the right to choose their gender says Rajasthan High Court," CNBC T.V.18[2023]

[10] NAZ FOUNDATION VS UNION OF INDIA[2009] AIR 2009

[11] SURESH KUMAR KOUSHAL VS NAZ FOUNDATION[2013] CIVIL APPEAL NO.10972 OF 2013

[12] NAVTEJ SINGH JOHAR VS UNION OF INDIA THR.. SECRETARY FOR MINISTRY OF LAW AND JUSTICE

[13] NATIONAL LEGAL SERVICES AUTHORITY V.S. UNION OF INDIA

[14] SHAKTI VAHINI V.S. UNION OF INDIA