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## Same-Sex Intimate Partnership and the Law in India

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### ABSTRACT

*An analysis through a timeline pertaining to the movement of Same Sex Intimacy in India. The paper focuses on the legal status of the small community often sidetracked – the LGBTQIA. The paper showcases the change and interpretation and reading down of law from the Naz Foundation judgement to the National Legal Services Authority to the present decade of Puttaswamy and Navej Singh Johar. The aim is to showcase the trend adopted by courts for legal recognition of same-sex partnerships and at the same time give an opinion as to the path that can be opted for such as changes in the Special Marriage Act and other legislative measures.*

**Keywords:** *same-sex partnership, nalsa, sma, section 377, ipc.*

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### INTRODUCTION

*“I am what I am, so take me as I am” - Goethe*

*This paper argues the importance of legal recognition of same-sex partnerships. India, like every other country, has a small proportion of men who fall in love with other men (gay) and women who fall in love with other women (lesbian). These 'same-sex' relationships are subject to frequent legal and social discrimination. "Sexual orientation" and "gender identity" are two different*

terms. Since they represent two long-buried aspects of human uniqueness, these trends have posed a challenge to societies and legal systems. They are attributes that all human beings exhibits, but manifest in distinctive ways. Society as fact has known there is a biological sex, age, nation, religion, and physical deformities that a person is born with. However, due to the nonexistence of concepts of sexual orientation and gender identity, it has always been presumed that people are heterosexual (attracted to the opposite sex) and non-transgender (physiology matching with physical sex). "Sexual orientation" refers to an individual's preference toward "choice of sex of partner" for physical intercourse and spiritual couple relationships. Sexual orientations include "heterosexual", "bisexual" (women and men attracted to both sexes), "lesbian" and "gay"<sup>1</sup>.

An individual's "gender identity" relates to if there is "cohesion or - anti" between their birth sex and their psychological sex and how they convey it through characteristics (including changes through hormonal therapy), hairstyle, clothing, makeup, voice, and mannerisms. Individuals born into a biological sex that does not conform to their psychological sex commonly identify as "transgender" or "transsexual." It is noteworthy how "sexual orientation" and "gender identity" are tied by the notion of "legal sex." A transgender or intersex person's sexual orientation cannot be ascertained legally unless they have been assigned a legal sex. This is a problem faced by the LGBT community, specifically the transgenders under Sec 377 of IPC. As, if they are legally male then their sexual acts with another male are considered sodomy, a criminal and punishable offence even though they consider themselves engaging in a female-male sexual activity.<sup>2</sup>

This raises a pertinent point as to how only decriminalization of same-sex acts is not sufficient rather, legal recognition of the same needs to be developed as well. With rapid cultural globalization, and India as an ally in it, there is a shift from conservative values governed by values and traditions to a more determined, liberal proposal. With the rollout of films like "Fire" and "Dostana," the dialogue has broadened, and Indian society can no longer dismiss its

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<sup>1</sup> Robert Wintemute, *Same-Sex Love And Indian Penal Code § 377:An Important Human Rights Issue For India* (4th edn, NUJS L Review 2011)

<sup>2</sup> *Ibid*

visibility. The aim is to enable this minority community in the same legal framework as the dominant culture, i.e., 'at par' treatment in general.

### INDIAN LAW AND HOMOSEXUALITY<sup>3</sup>

Section 377 of the Indian Penal Code (1860) deals with Unnatural Offenses, which include same-sex attraction. This homosexuality law in India was derived from 19th-century British statutes. Sections 292 and 294 of the IPC, which punish 'obscene public behaviour,' are used against gays. It is notable that in England, the crime of sexual acts between any individuals with due consent has been abolished, whereas, in India, consent does not succeed when falling under the purview of this law. The fight and recognition for the LGBT community in the Indian context can be broadly outlined in a timeline from 2009 to the present day.

#### 2009-2013:

*Naz Foundation v NCT of Delhi*<sup>4</sup>: Although provisions in Section 377 appear to be neutral upon that surface, they are discriminatory to LGBT people, particularly gay men. This undermined HIV/AIDS identification. The writ was dismissed by the Court in 2004 as it was academic in nature. However, in 2006, the same was overruled in a special leave petition, and a petition for a new decision was resented. This proves that a progressive interpretation can be obtained from the Supreme Court. Finally, in 2009 the HC ruled in favour of the NAZ Foundation.

This decision resulted in a dearth of police raids in their bedrooms, which was the basic respect they had received as citizens. The decision depicted the true picture of Indian democracy, how an NGO representing a minority can go to court and challenge the constitutionality of the laws and have them 'read down' to make them more consistent with the nation's democracy. A decision that could have a significant impact on forty-two Commonwealth nations that have similar laws.

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<sup>3</sup> Janees Rafiq, *Being Lgbt In India: Some Home Truths* (11th edn, International Journal of Scientific & Engineering Research 2020)

<sup>4</sup> *Naz Foundation v NCT of Delhi* 160 DLT 277

*Suresh Kumar Koushal v Naz Foundation*<sup>5</sup>: However, in 2013 the SC overturned the decision of the High Court. The court chose to overlook the fact that with modernization and liberalization, a valid law may become invalid at some point. Like the historical Hindu practice of Sati, where the widow sacrificed herself by burning herself with her husband's pyre, or the abolition of slavery. The court stated it is not discriminating against any minority because there is no recognition of classification to the person in law. The distinction was made on the basis of the acts conducted which applied even to heterosexuals, but what was ignored is how only a certain minority was targeted on the basis of their sexual orientation by the police. It chose to ignore the precedents requiring justification for the same argument. It went on to state that it did not affect Article 21 in any manner but the reasoning for the same was not given. Also, it stated the decision to repeal a section lies with the Parliament and not the court.

The problem I have with this reasoning is that in the original appeal, the Delhi High Court did not repeal the law, but rather read it down, reducing its interpretation that did not align with rationalizations of the constitution, within the scope of the judiciary's powers. It also coincided with the prosecution of those who did reveal their sexual orientation in the Naz Foundation judgment. SC gave the judgement without considering how people in the ambit of their sexual acts can be defined as criminals, and that wrong done to one is equivalent to the wrong done to many. The decision rejected LGBT rights rulings around the world<sup>6</sup>, which had overruled such regulations on the grounds of violating individuals' privacy, decency, and competence. It also ruled against international humanitarian law governing sexual orientation and gender identity. It reinstated the treatment of sexual orientation as a 'suspect ground' for discrimination. When courts take this presumption, they do realize the atrocities faced by gays or lesbians, however, they still choose to discriminate against them just as an individual is differentiated based on caste, race, or religion.

*National Legal Services Authority v Union of India*<sup>7</sup>: This case provided some optimism concerning transgenders. The court stepped up when the parliament did not, and it also upheld

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<sup>5</sup> *Suresh Kumar Koushal v Naz Foundation* Civil Appeal No 10972/2013

<sup>6</sup> Universal Declaration of Human Rights 1948, art 12; International Covenant on Civil and Political Rights 1966, art 17; European Conventions on Human Rights 1950

<sup>7</sup> *National Legal Services Authority v Union of India* Writ Petition (Civ) No 604/2013

various foreign judgements and international conventions. However, it did not overrule the judgement of Koushal.

**2017- Present:**

*Puttaswamy v Union of India*<sup>8</sup>: Although the main contention of this judgement was the overruling of Kharak Singh, Justice R.F. Nariman laid down three aspects of privacy in the Indian context.<sup>9</sup> The third point stresses the independence strand of privacy and asserts a link between privacy with one's right to choose and conform to whatever gender and sexual norms one considers fit. Recognizing that the majority of LGBT individuals do not have their own homes, the court ruled that privacy is not suspended if one is in a public setting, this applies to all types of couples who use public space for personal intimacy. Justice Chandrachud also referenced Koushal as saying that the LBGT community's rights are not "so-called rights." This statement gave the isolated and blinkered minorities new hope, stating that their rights are as sacred as anyone's.

*Navtej Singh Johar v Union of India*<sup>10</sup>: This decision<sup>11</sup> proved to be a key victory not just for the LGBT community, but also for Indian law. It finally decriminalised consensual sex between adults under Section 377 of the IPC. The court relied on all preceding decisions, as well as *Shakti Vahini v Union of India*, which held everyone had the right to choose a companion of his or her choice and that prior consent of family or community was not required. C.J. Misra stated that constitutional morality will uphold social morality even without the approval of a majority

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<sup>8</sup> *KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1

<sup>9</sup> Siddharth Narrain, 'From Aadhaar To The Closet: Impact Of Supreme Court's Privacy Judgment On Section 377 Litigation' (*The Wire*, 2017) <<https://thewire.in/gender/aadhaar-privacy-judgment-supreme-court-section-377>> accessed 01 January 2023

<sup>10</sup> *Navtej Singh Johar v Union of India* AIR 2018 SC 4321

<sup>11</sup> 'Navtej Singh Johar v Union Of India - Global Freedom Of Expression' (*Global Freedom Of Expression*, 2021) <<https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>> accessed 26 October 2022

government, demonstrating the power of the judiciary and reviving the numbing faith after the Koushal verdict.<sup>12</sup>

The judgement frowned upon the moral notion of Sec 377 of IPC.<sup>13</sup> The judges take accountability for the wrongs committed and make amends by outlining how things must improve for LGBT people both individually and collectively. The verdict is only applicable in India, but their words are universally appealing. Although Justice Malhotra stated that history owed the community an apology for the delay in providing redressal, this is insufficient. An invasion of that precinct is a violation of our anonymity if we express our sexuality consensually without harming anyone.

Nobody has the right to question the manner in wherein two adults exercise copulation or whether this intimacy is natural or unnatural.<sup>14</sup> The entire family law needs to be reformed, something which the courts have overlooked; it needs to articulate how to manifest the community's marriage need while also focusing on the adoption agency.<sup>15</sup> Special Marriage Act might be a move forward to legalise same-sex marriage in India. It also challenges our legislature to cope with cultural transitions in the queer community regarding polyamorous relationships, an idea that is fought against India's laws governing marriages.

## CONCLUSION

Decriminalization is the first step in the tricky journey that the Indian legislative and societal systems must take. Sanitizing and sensitising people will not succeed unless the structure and institutions change. Instead of frantically attempting to 'fix' things, it is time to interpret and comprehend what exactly needs fixing. Making statements and passing judgments is one thing

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<sup>12</sup> Vikram Kolmannskog, 'Love In Law – The Indian Supreme Court Decides In Favour Of LGBT Persons' (CMI - Chr. Michelsen Institute, 2018) <<https://www.cmi.no/publications/6678-love-in-law-the-indian-supreme-court-decides-in>> accessed 01 January 2023

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

<sup>14</sup> Ravichandran Nayantara, 'Legal Recognition of Same-sex relationships in India' (Manupatra, 2017) <<https://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf>> accessed 25 October 2022

<sup>15</sup> Anuradha Parasar, 'Homosexuality In India – The Invisible Conflict' (Delhi High Court, 2021) <<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>> accessed 26 October 2022

but showing quite another. The focus needs to shift even further now. Even though the repealing of Section 377 has allowed same-sex intimacy to sustain, it, however, fails to acknowledge the next step which is marriage. Even though constitutionally and vide any Statute marriage of same-sex partnership is not prohibited, no law or guidelines is accepting of such an arrangement either.