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Constitutional Morality and LGBTQ+ Rights: Analysing the Judicial Journey from Naz Foundation to Navtej Singh Johar

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Constitutional Morality and LGBTQ+ Rights: Analysing the Judicial Journey from Naz Foundation to Navtej Singh Johar

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Abstract

The recognition and protection of LGBTQ+ rights in India represent a significant constitutional and social transformation shaped largely through judicial interpretation and constitutional morality. The criminalization of consensual same-sex relationships under Section 377 of the Indian Penal Code, 1860 had long subjected LGBTQ+ individuals to discrimination, social exclusion, and denial of fundamental rights. The landmark decisions in Naz Foundation v. Government of NCT of Delhi and Navtej Singh Johar v. Union of India marked a historic shift in Indian constitutional jurisprudence by affirming the principles of dignity, equality, privacy, and individual autonomy. This paper critically analyses the judicial journey from Naz Foundation to Navtej Singh Johar with special emphasis on the evolving doctrine of constitutional morality. The study examines how the judiciary interpreted Articles 14, 15, 19, and 21 of the Constitution of India to challenge majoritarian morality and protect the rights of sexual minorities. It further explores the role of judicial activism in transforming constitutional values into instruments of social justice and inclusivity. The paper also analyses the legal and societal implications of decriminalizing consensual same-sex relations, including issues relating to discrimination, recognition of identity, and equal protection under the law. Additionally, the research highlights the continuing challenges faced by the LGBTQ+ community in achieving substantive equality despite progressive judicial pronouncements. The study concludes that constitutional morality has emerged as a powerful constitutional principle capable of advancing human rights and safeguarding marginalized communities, while emphasizing the need for comprehensive legislative reforms and greater societal acceptance to ensure full realization of LGBTQ+ rights in India.

Keywords: *Constitutional Morality; LGBTQ+ Rights; Section 377; Naz Foundation; Navtej Singh Johar; Judicial Activism; Equality; Privacy; Human Dignity; Fundamental Rights; Sexual Minorities; Indian Constitution.*

Constitutional Morality and Legal Framework

Concept and Evolution of Constitutional Morality in India

Constitutional morality is now a dominant idea in contemporary constitutional jurisprudence in India. It denotes the notion that the Constitution is not a simple legal document specifying the organization and authorities of the government, but also a moral system that determines how the state and society are going to operate. Constitutional morality follows the principle that the various institutions of government are supposed to be guided by the core values and principles contained in the constitution and be governed by the legislature, executive and judiciary. These principles are liberty, equality, and justice, dignity, secularism, and the respect to fundamental rights. The Indian judiciary has gradually come to bank on the doctrine of constitutional morality to safeguard the rights of the minorities and to make sure that the constitutional principles dominate the social biases and the majoritarianism. Constitutional morality as a concept dates back to the works of the British historian George Grote who applied the term to mean compliance to the norms and principles that support a constitutional regime. Dr. B. R. Ambedkar, the Chairman of the Drafting Committee of the Constitution, heavily stressed on the concept in the Indian context. Ambedkar emphasized constitutional morality in the discussions at the Constituent Assembly to make the democratic structure of India successful. He cautioned that besides writing a good constitution, it will not work without the respect of the values and principles by the citizens and public officials.¹

Constitutional morality according to Ambedkar is the responsibility towards the adherence to constitutional procedures, the safeguarding of basic rights, and the realization that power use should be within the provisions of the Constitution. The idea of constitutional morality was not a common use of law in judicial rulings in the first several decades of post-independent times. Nevertheless, the Supreme Court slowly started placing a significant emphasis on the importance of constitutional values when it interprets basic rights. The judiciary took a liberal and broad way of interpreting the Constitution by noting that the Constitution had to change with the needs of the society. It was based on this approach that the contemporary approach toward constitutional morality was established as a form of judicial decision making. The role of constitutional morality in protecting the rights of the marginal and minority groups is among one of the significant elements of constitutional morality. When living in a pluralistic community such as India with a wide range of social norms and traditional values, family life and customs can sometimes go against the principles of the constitution. This is where the doctrine of constitutional morality comes in where fundamental rights and democratic morality are put ahead of social or majoritarian morality.²The court

¹ Sonia Katyal, *Sexuality and Sovereignty: The Global Politics of LGBT Rights* (Oxford University Press, New York, 2018).

² Ibid

has reiterated that the Constitution guarantees personal liberties even when they are not popular or are against the popular societal moods. The doctrine was given new eminence in a number of constitutional landmark cases. The moral concern of the constitution has helped the Supreme court to oppose discrimination practices and to enhance equality and honor among all citizens. As an illustration, in the historic case of Justice K. S. Puttaswamy v. The Court accepted right to privacy as being a fundamental right in the constitution as outlined in Art 21.

In this instance, the Court stressed the fact that the Constitution safeguards personal autonomy, dignity, and individual choice, including the identity and sex issue. The ruling reiterated the fact that constitutional morality should inform the process of interpreting basic rights instead of societal ideals that have the potential of discriminating some quarters. Another important use of constitutional morality may be observed in another landmark case of Navtej Singh Johar v. In the case of Union of India, the Supreme Court decriminalized same-sex consensual relationships between adults by partially invalidating Section 377 of the Indian Penal Code. The Court ruled that criminalization of same sex relationships of consensual relationships was against the constitutional guarantees of equality, dignity, and personal liberty. The Court highlighted in its argument that constitutional morality has to take precedence over social morality.

3

The Court noted that the Constitution was a living document that had to be changed to reflect changing social realities. The judicial interpretation of the basic rights was progressive thus keeping the Constitution up to date and accountable to the demands of the modern society. The acknowledgment of the LGBTQ+ rights was, therefore, presented not only as a reform based on the legal regulation but as the realization of the promise made by the Constitution to all citizens to promote equality and dignity. Constitutional morality is also a key to ensuring the balance between the democracy and the minority rights protection.

In a democratic government, policies and laws usually are influenced by the desire of the majority. Nevertheless, the Constitution puts some restrictions on the use of the majoritarian power to avoid discrimination and safeguard the individual freedoms. Constitutional morality doctrine makes sure that democratic rule is run in constitutional values and rights. Moreover, constitutional morality promotes a purposive and revolutionary constitutional interpretation among the judiciary. Courts are not interested in a strict or literal interpretation of constitutional provisions, instead, they are aimed at promoting the larger goals of justice, equality, and social good. This perspective acknowledges that the Constitution is meant to transform society by eliminating the historical injustices as well as empowering the marginalized communities. Although its role has been increasing, the idea of constitutional morality has been one that has also been

³ Michael Kirby, *A Private Life: Fragments, Memories, Friends* (Allen & Unwin, Sydney, 2011).

debated and criticized. There is a view that too much use of constitutional morality can result in judicial activism to enable courts to make their own moral determination instead of a legislative one.⁴ Nevertheless, the advocates of the doctrine argue that the constitutional morality is needed to safeguard the basic rights and to maintain the work of the democratic institutions within the constitutional norms.⁵

Constitutional Provisions Protecting Lgbtq+ Rights in India

It is Constitution of India which is rooted in the principles of equality, liberty, dignity and justice. Even though the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons are not explicitly stated under the Constitution, the basic rights framework offers a high level of protection to the individuals regardless of their sexual preference or gender identity. The Indian judiciary has over time construed the provisions of the constitution in a wide sense so that the rights and protection of the members of the LGBTQ+ community can be equivalent to that of heterosexual members. The equality rights, non-discrimination rights, freedom of expression, and personal liberty guaranteed by the constitution have been very instrumental in the acknowledgment and safeguarding of LGBTQ+ rights in India. Article 14 of the Constitution is one of the most significant clauses of the Constitution that guarantees equality before the law and equal protection of the laws which safeguard the LGBTQ+ rights.

This has been incorporated to see that all people irrespective of their identity or background have a right to equal treatment by the state. The Supreme Court has always believed that Article 14 does not allow arbitrary and discriminatory laws. This principle was very much reaffirmed in the case of Navtej Singh Johar v. in the field of LGBTQ+ rights. Union of India, in which the Court overturned a conviction on the ground that the Indian Penal Code created by Section 377 of the Indian Penal Code contravened the equality clause due to its discriminatory treatment of persons based on their sexual preferences. The Court pointed out that laws that are discriminatory against a certain group of people unless they are being charged with a good reason are not in line with the constitutional promise of equality.⁶ In article 15 of the Constitution, the safeguard against discrimination is further enhanced. It forbids the state to discriminate any citizen basing on his or her religion, race, caste, sex, and place of birth. Though the sexual orientation is not directly stated in the article 15, the Supreme Court has construed the sexual orientation as the word sex and thus this implies that sexual orientation falls under the definition of sex. This is the interpretation that was initially conceded in the

⁴ Jeffrey Weeks, *Sexuality* (3rd edn., Routledge, London, 2010).

⁵ J. Drescher, *Out of DSM: Depathologizing Homosexuality*, 5(4) *Behav. Sci.* 565–75 (2015), <https://doi.org/10.3390/bs5040565>.

⁶ Ashley Tellis and Sruti Bala (eds.), *The Global Trajectories of Queerness: Re-thinking Same-Sex Politics in the Global South* (Rodopi, Amsterdam, 2015).

ground breaking verdict of National Legal Services Authority v. NALSA, as the name of the case is usually referred to, is Union of India. The Court acknowledged the existence of a third gender, transgender persons, in this ruling and supported the claim that any discrimination against them based on gender identity is inconsistent with Articles 14 and 15 of the Constitution. The verdict was a step in the right direction towards gender diversity in the constitution and the safeguarding of transgender rights in India. Article 19 is another significant constitutional clause that applies to the LGBTQ+ rights by guaranteeing some of the fundamental freedoms, among them being the freedom of movement, freedom of expression, and freedom of association. These rights are necessary in expression of identity and individuality. The LGBTQ + community, more frequently than not, is stigmatized and discriminated against, which makes it difficult to freely identify. The judiciary has realized that the right to freedom of expression is the freedom to exercise freedom of sexual orientation and gender identity.

In Navtej Singh Johar case, the Supreme Court underlined that sexual orientation is an inherent component in the identity of a person and the repression of the identity contravenes the freedom of a person as stipulated in Article 19. Article 21 of the Constitution that addresses the right to life and personal liberty has also been significant in defending the rights of the LGBTQ+. The Supreme Court has over the years interpreted Article 21 liberally and in a broad statement to encompass a variety of rights required to live with dignity. These are the right to privacy, the right to autonomy, and the right to personal choice. Privacy as a right is acknowledged as such in Justice K. S. Puttaswamy v. The case of Union of India was especially important to LGBTQ+ rights. The Court ruled that privacy covers the right to intimate choices of personal aspect concerning family life, relations and sexual orientation. This ruling provided the constitutional basis on the grounds that consensual same sex relations would eventually be decriminalized. Following the foundations of the case of Puttaswamy, the Supreme Court in Navtej Singh Johar v. Union of India was of the view that consensual same sex relations were criminalized contrary to the right to dignity, privacy and individual autonomy demands under Article 21. The Court has highlighted that the Constitution guarantees the right of all people to take decisions that relate to their identity and relations with others without fear of discrimination and criminal charges. Overturning Section 377 to the degree that it made consensual same-sex relationships between adults illegal affirmed the constitutional promise of equality and human dignity. Besides these basic rights, the Indian constitution also advances the wider principles of social justice and inclusivity through principles of directives of social justice and constitutional philosophy. The Constitution aims at establishing a society in which all people will be in a position to live dignified lives in a free society. This transformative vision of the Constitution is manifested in the acknowledgment of the rights of

LGBTQ+ people by the interpretation of the Constitution. The judiciary has played an especially important role in the development of LGBTQ+ rights in India. The courts have managed to do this through the gradual interpretation of the provisions in the constitution and this has ensured that the fundamental rights are not obsolete when dealing with any modern day social problem. Cases in the courts have also pointed out that constitutional morality in defending the rights of the marginalized communities should take precedence over social morality. Nevertheless, even with such significant constitutional safeguards, there are a number of legal and social issues. Marriage equality, right to adopt, right to inheritance and protection against discrimination in employment and housing are still the spheres of uninterrupted discussion and change. Although the decriminalization of same-sex relations is a significant step, gay people still need additional legal and social acceptance to be considered full-fledged. To sum up, the constitutional provisions of India are an excellent basis of protection of LGBTQ+ rights, as the guarantees of equality, non-discrimination, freedom of expression, and personal liberty are included in the constitutional provisions of India. In a combination, Articles 14, 15, 19, and 21 guarantee that all people are entitled to live dignified lives free of discrimination. Discriminatory legislation has undergone judicial interpretations through progressive interpretation to seek to enlighten the rights of sexual and gender minorities. The evolution of LGBTQ+ rights is an indication of the evolutionary character of the Indian Constitution and its permanent dedication to justice, equality, and human dignity of all citizens.⁷

Legal Transformation: From Criminalization to Recognition of LGBTQ+ Rights

The situation of LGBTQ+ people in India has dramatically changed during the last twenty years. The same sex relationships were previously classified as criminalized in Section 377 of the Indian Penal Code (IPC), which was a colonial law that was introduced by the British in 1860. It was a provision which criminalized sex against the order of nature, which was construed to mean a same sex sexual relationship between consenting adults. This law stigmatized LGBTQ+ people over the course of a century, in addition to subjecting them to discrimination, harassment, and social rejection. Nevertheless, with several court actions and constitutional readings, India has been slowly shifting away from being criminalized to eventually acknowledging and defending LGBTQ+ rights. Section 377 dates its origin to the Victorian moral values that were practiced in the British colonial rule. It was a conservative view of sexuality in the law which was meant to control sexual activity based on colonial morality. Even though the prosecutions in accordance with Section 377 were quite minimal, the clause established an aura of fear and harassment to the LGBTQ+ people. The presence

⁷ Ashley Tellis and Sruti Bala (eds.), *The Global Trajectories of Queerness: Re-thinking Same-Sex Politics in the Global South* (Rodopi, Amsterdam, 2015).

of such a law strengthened societal stigma and tended to promote the law enforcement authorities to abuse it. The legal battle against Section 377 began in the early 2000s as civil society groups and organizations began to agitate the rights of sex minorities. The main breakthrough was the ruling of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*. In a landmark case, the Delhi High Court ruled that this was unconstitutional in that Section 377 criminalized the consensual sexual acts between adults in the privacy of their homes. The Court held that the law contravened the Articles 14, 15 and 21 of the Constitution of India that ensure the equality before the law, safeguard against discrimination and the right to live and enjoy personal liberty. The court ruled that sexual orientation is a vital part of personal identity and dignity. Another principle that the Court brought forward was that the constitutional morale should overrule the prejudice in society. The Naz foundation case was highly acclaimed as a progressive move towards the realization of LGBTQ+ rights in India.⁸

Nevertheless, the ruling was heavily opposed by some religious and social organizations and appealed to the Supreme Court. The Supreme Court gave its judgment in the case of *Suresh Kumar Koushal v. Naz Foundation* in 2013. The decision of the Delhi high court to strike down the criminalization of same sex relations under the act of 377 was reversed by Naz Foundation which restored the criminalization of same sex relations. The Court believed that the LGBTQ+ community was a tiny minority and that it was Parliament that had to amend or repeal the law and not the judiciary. Legal scholars, human rights activists, and LGBTQ+ people are among those who strongly criticized the Koushal judgment. Critics claimed that the ruling did not attribute the inherent rights of sexual minorities and did not tap into the larger constitutional principles of equality, dignity and liberty.

The decision also triggered a wave of protests across the country and the renaissance of the demands to reform the law. This failure notwithstanding, the constitutional rhetoric of LGBTQ+ rights kept on developing. One of the greatest advances came in 2014 when the Supreme Court made a historic ruling in *National Legal Services Authority v. Union of India*. In this instance, what is commonly referred to as the NALSA judgment, the Court established transgender persons as a third gender and confirmed their right to equality, dignity and non-discriminatory treatment. The ruling underlined the fact that gender identity is a core of individual identity and it is safeguarded in Articles 14, 15, 19, and 21 of the Constitution. The acknowledgment of transgender rights was a major move in the direction of accepting the difference in gender orientations in the constitution. The other significant development was made in the year 2017 by the Supreme Court with its historical verdict in *Justice K. S. Puttaswamy v. Union of*

⁸ Ruth Vanita and Saleem Kidwai (eds.), *Same-Sex Love in India: Readings from Literature and History* (St. Martin's Press, New York, 2000).

India. Here we have a case of a unanimous decision by a nine-judge constitutional bench that the right to privacy is a fundamental right in the Constitution in Article 21. The Court decided that the privacy is the right to the autonomy of personal life, the integrity of the body and the sexual orientation. Notably, the ruling also condemned the rationale that was followed in the Koushal case and reiterated that basic rights cannot be sacrificed based on the fact that a certain group of people represents a minority. With these constitutional premises, the Supreme Court re-examined the same case of the Section 377 in the historic case of Navtej Singh Johar v. Union of India. The constitutional bench of five judges in this historic ruling gave a unanimous judgment that consider Section 377 as unconstitutional in the sense that it made the consensual sexual relationship between same sex adult individuals a criminal offense.⁹

The Court reiterated that sexual orientation is an inherent aspect of any person and that LGBTQ+ people should be provided with the same constitutional protections as any other citizen. The case of Navtej Singh Johar was a groundbreaking case in the Indian constitutional history. The Court believed that the criminalization of same-sex relationships with the consent of the parties was against the basic right to equality, freedom of expression, privacy, and dignity. It also pointed out that constitutional morality should dominate over social morality and that the Constitution should be used as a protection of the marginalized group. With its ruling, the Court realized that the LGBTQ+ people were wronged in the past and provided them with a reference back to the historical facts of the LGBTQ+ cases being morally incorrect.

Despite the fact that the decriminalization of same-sex relations is a significant step, the LGBTQ + rights in India is a process underway. Among the aspects of same-sex marriage, right to adopt children, right to inherit, and discrimination protection during employment and housing, there are still some legal arguments under debate. The fight against the full legalization of LGBTQ + relationships has been ongoing in the last several years, with petitions on the legal status of marriage equality being presented to the Supreme Court. To sum up, the legal shift in the countries of the Indian subcontinent of criminalizing to legalizing LGBTQ+ rights is the manifestation of the dynamism and adjustability of the constitutional law. The Indian judicial system has played a significant role in eliminating discriminatory laws and advancing equality and dignity to sexual minorities through progressive judicial interpretation and using constitutional principles.

⁹ Supra note 34.

3.4. Status of Same-Sex Couples In India

There have been several instances wherein the status of same-sex couples in India has changed. The status of same-sex couples has been influenced by societal norms, legislation, and judicial interventions in India. In light of an increased acceptance and recognition of gay, lesbian, transgender, queer communities and their relationship across the globe, India still finds itself to be on the cusp of accepting these sexual minorities within its socio-cultural landscape.

Historically, the status of same-sex couples in Indian society has remained unfavorable owing to the prevailing religious beliefs and conservatism of society. For instance, Section 377 of IPC, a relic from the colonial era, deemed homosexuality illegal. It was not until 2009 when the Delhi High Court in the case of *Naz Foundation v. Government of NCT of Delhi* made a judgment to decriminalize consensual homosexual acts. The above decision by the court was overturned by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation* where the judgment sought to restore Section 377 and referred to the LGBTQ+ community as comprising "minuscule minorities".

A turning point in the rights of same-sex couples in India came in the form of the judgment by the Supreme Court in *Navtej Singh Johar* case. There was an important milestone when the apex court in *Navtej Singh Johar v. Union of India* (2018) decriminalized consensual homosexual intercourse by deleting the unconstitutional portion of Section 377. The verdict upheld the equality of LGBTQ+ people and affirmed their dignity under Article 14, 15, and 21 of the Constitution. Even though the judgment was a crucial step towards ensuring the rights of homosexuals, it failed to provide them with the legal and social recognition enjoyed by heterosexuals through marriage or civil union.

Same-sex couples in India face several hurdles while trying to get equal rights in comparison with heterosexual couples. They cannot exercise their right to marry since neither Indian personal laws nor the Special Marriage Act, 1954 (SMA) provides for a legal relationship between the same-sex partners. In addition, there is a lack of provisions allowing for inheritance, adoption, and other benefits of marriage in the SMA because the law pertains to marriages outside the scope of personal laws, and same-sex couples cannot marry within any personal law. The importance of the role played by the judiciary in advocating for the LGBTQ+ community should not be overlooked.¹⁰

¹⁰ Arvind Narrain and Gautam Bhan (eds.), *Because I Have a Voice: Queer Politics in India* (Yoda Press, 2005).

Matrimonial Rights of Same-Sex Couples

The question of recognition of same-sex marriage in India continues to be one of the most contested issues of constitutional jurisprudence. While consented gay sex relations were made legal by the judgment of the Supreme Court in *Navtej Singh Johar v. Union of India* (2018), there is no recognition of such sexual relationships under marriage laws in India. Therefore, same-sex couples remain socially marginalised and subject to discrimination in relation to marital and family matters. Indian matrimonial laws are built upon an assumption of a heterosexual union. Personal and secular laws on marriage in India uniformly define marriage as a union of a man and a woman. In this way, same-sex couples are deprived of recognition under existing laws in India.

For instance, the Hindu Marriage Act, 1955 provides only for heterosexual marriage. The language of the Act envisages a union of husband and wife, thus implicitly excluding same-sex couples. Likewise, Muslim personal law recognises a heterosexual union of a husband and wife as a form of marriage, which precludes any recognition of gay marriage under Muslim law. Christian matrimonial law, comprising the Indian Christian Marriage Act, 1872, among others, operates on the assumption of heterosexual union. However, the Special Marriage Act, 1954, which provides for secular laws relating to marriages between people of different religions and also civil marriages between individuals, is again framed in a gender-oriented manner. In spite of being a modern law that caters to interfaith and civil marriages, this law too cannot extend its scope of marriage to same-sex couples since it only talks about heterosexual marriages. Hence, even the otherwise secular system of marriage laws in India does not cover same-sex marriages.¹¹

Failure to recognize same-sex marriages is a serious matter in itself. When a couple's relationship lacks any legal sanction whatsoever, they will not be able to enjoy certain rights that heterosexual marriages can avail of. One of the most critical problems arising in regard to same-sex marriages is that of separation through divorce. There are many laws that exist in India regarding marriage, but none of these applies to same-sex marriages. The non-recognition also has an impact on the financial and social rights associated with the concept of marriage. Rights related to inheritance, maintenance, pension benefits, insurance claims, succession, and rights to next-of-kinship are denied to such couples. They may not be considered a family for the purpose of taking decisions in emergencies. Hence, denial of legal status makes them vulnerable from a social and economic point of view.

¹¹ Ruth Vanita and Saleem Kidwai, *Same-Sex Love in India: Readings from Literature and History* (Palgrave Macmillan, 2000).

An equally significant issue that must be mentioned here is that of adoption rights. It is possible for single members of the LGBTQ+ community to adopt children as per the legal provisions that may be applicable at a particular time. Nevertheless, adoption as a couple is impossible for same-sex couples since the relationship of such people is not legally recognized in India.

The Indian judicial system has contributed a great deal to the development of LGBTQ+ rights, although cautiously with respect to the right to same-sex marriage. In its decision in *Navtej Singh Johar v. Union of India* (2018), the Supreme Court de-criminalized homosexual relationships through partial invalidation of Section 377 of the IPC. It was observed by the Court that sexual orientation is an integral component of identity and dignity. Nonetheless, The court acknowledged that sexual orientation is an integral aspect of dignity and identity. The case did not make any specific comments on the question of same-sex marriage or the legality of same-sex unions. Previously, in the case of *Suresh Kumar Koushal v. Naz Foundation*, the Supreme Court upheld Section 377 as homosexuality was decriminalised by the High Court of Delhi. Even though this decision was later quashed by the court in the *Navtej Singh Johar* case, this indicated the hesitation of the court to interfere in a matter regarded as legislative in nature. Matters pertaining to marriage and family law could not be dealt with by the judiciary but had to be done so by the legislature.

Another similar instance would be the judgment rendered in the *National Legal Services Authority (NALSA) v. Union of India* (2014) where the Supreme Court accepted the constitutional rights of transgender people and established the right to self-identification of gender. Nonetheless, there was no mention of same-sex marriage and the issue remained unclear.¹²

Internationally, several states have recognised the principle of marriage equality and provided for it. In the United States, the Supreme Court, in *Obergefell v. Hodges*, 2015 recognised the right to The recognition of same-sex marriage took place in South Africa via the Civil Union Act, 2006, as it was the earliest country to recognise same-sex marriage on constitutional grounds of equality and dignity. In Taiwan, 2019 marked the first time any Asian country legalised same-sex marriage. Such international developments make it easier to compare and contrast the status quo with regard to same-sex marriage in India. Another important hurdle standing against marriage equality is the reluctance of the government to take any legislative action. Attempts at amending or creating new laws for marriages are met with opposition from conservative forces. Similarly, political hesitance to amend legislation based on cultural considerations is another reason which prevents marriage equality in India.

¹² William N. Eskridge Jr., *The Case for Same-Sex Marriage* (Free Press, 1996).

Judicial interpretation can be a useful way forward for granting marriage equality to same-sex couples in India. The courts might interpret the constitutional principles of equality, dignity, and liberty in such a way that it results in the gender-neutral application of marriage laws. There are also arguments that the Special Marriage Act, 1954 could also be applied or amended to allow same-sex marriage while preserving religious laws. Thus, in conclusion, the lack of legal recognition for same-sex marriages in India keeps denying LGBTQ individuals the right to equal treatment as compared to heterosexual people. Despite the fact that much progress has been achieved due to judicial pronouncements in cases like Navtej Singh Johar, the matter of equality concerning marriage still needs to be addressed. Legal recognition of same-sex relationships is directly related to the constitutional concepts of equality, dignity, privacy, and personal liberty. In light of global acceptance of marriage equality, India has to face a serious constitutional challenge about granting equality to same-sex partners.¹³

Measures to Defend the Rights of Same-Sex Couples

The safeguarding of rights of same-sex couples in India would need to address all aspects, including judicial activism, legislation, administration, and societal acceptance of their status. The decriminalisation of consensual gay relationships by the Supreme Court of India in Navtej Singh Johar v. Union of India, 2018 has made an improvement in the law in that regard. But the existing legal provisions do not provide any equal rights and recognition to same-sex couples in crucial matters like marriage, adoption, inheritance, maintenance, and social security benefits. There is thus a need to bring necessary reforms to end discrimination against LGBTQ persons and give them equal rights.

Judicial activism has already been seen in the direction of ensuring rights of LGBTQ persons in India. Courts are bound to give a progressive interpretation of any statute in the light of the basic structure of the Constitution. This would include equality, dignity, liberty, and privacy of LGBTQ persons. A progressive construction of the Special Marriage Act, 1954 would make it possible for same-sex couples to enjoy the benefit under it. In other countries, judicial activism helped in broadening the scope of marriage in spite of lack of legislative amendments in that regard. It is equally essential that the principles of constitution enshrined in the cases of Navtej Singh Johar and NALSA v. Union of India (2014) be consistently applied when family and marriage issues arise. The previous judicial decisions favoring discriminatory treatment of the LGBTQ+ community led to weaker constitutional standards, thus hindering the achievement of equality. This is why the judiciary must continue following the principle of inclusiveness and rights-based justice when addressing same-sex relationship and gender identity matters.

¹³ Alfred C. Kinsey, *Sexual Behavior in the Human Female* (W.B. Saunders Company, 1953).

Law-making is among the most potent strategies for protecting the interests of same-sex couples. The current marriage legislation in India, including the Special Marriage Act of 1954, is built upon the premise of heterosexuality. It is necessary to amend it so that same-sex marriages can be legally acknowledged. Considering that it is a secular law, the Special Marriage Act is the best possible choice for same-sex relationship recognition.

Apart from the recognition of same-sex marriages, there are many other connected areas which would require legislative amendments. These are adoption, inheritance, maintenance, pension, insurance, and healthcare benefits that need to recognize same-sex couples as legal family unions. Such an amendment to the law is absolutely necessary for same-sex couples, since recognition of their union by law goes beyond just the ceremony of a traditional marriage. Same-sex couples, not recognized by law, are subject to vulnerability and discrimination from heterosexual couples when it comes to legal benefits.

It is also necessary for governments to have policies to promote equality and anti-discrimination practices. In terms of administrative measures, equality and tolerance towards LGBTQ+ people should be encouraged in workplaces, educational institutions, medical establishments, and government authorities. The government should include same-sex partners in employment benefits, housing programs, medical insurance, and other social welfare benefits. The process of designing such welfare policies can also be undertaken in collaboration with civil society organizations.¹⁴

The other primary challenge in ensuring the protection of the rights of same-sex couples is the issue of social stigmatisation and propaganda. In many segments of society, same-sex unions are viewed through a lens of misunderstanding owing to cultural conservatism, stereotyping, and lack of knowledge on sexual orientation and gender identification. Thus, public awareness programmes and educational initiatives are required to ensure societal acceptance of same-sex unions by creating awareness about constitutional values of equality and human dignity.

Furthermore, positive portrayals of LGBTQ people in movies, literary works, and television shows go a long way in helping change public attitudes. Positive representation ensures that there are no negative stereotypes regarding same-sex couples, thus normalising their existence in society. Support from well-known personalities, activists, and jurists will further facilitate healthy public discourse and acceptance.

¹⁴ Ruth Vanita and Saleem Kidwai, *Same-Sex Love in India: Readings from Literature and History* (Palgrave Macmillan, 2000).

Community empowerment is also a significant step in protecting same-sex rights. LGBTQ people face the problem of discrimination, harassment, family disapproval, mental health concerns, and social isolation. Access to legal assistance, counselling centres, support groups, and community networks is vital for members of the LGBTQ community who have to overcome several obstacles. The conduct of pride parades and awareness seminars provides visibility and promotes community cohesion among There is also a possibility for India to learn from international trends related to same-sex rights. For example, many countries around the world have accepted the concept of same-sex marriage due to judicial orders or changes in laws. Such practices indicate the fact that a constitutional state is able to provide equal rights for its sexual minorities without compromising social stability or democratic principles. It can be helpful for India to adopt international constitutional experiences in order to find an appropriate solution to its problems.

Principles of human rights can also be used to justify same-sex rights in India. Documents such as ICCPR and UDHR underline the importance of equality, dignity, non-discrimination, and individual freedom. As India is a democratic country that observes principles of its constitution and international law, it should be concerned about protecting its citizens' equality before the law regardless of their sexual preferences.¹⁵

Introduction

One of the most important human rights controversies under the modern Indian constitutional law has been the constitutionality under the Indian constitution of Section 377 of the Indian Penal Code (IPC), criminalizing a carnal intercourse which is contrary to the order of nature. It is more than a century of the colonial-era benefits to stigmatize, harass, and criminalize those members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ+) community. The court process since the history of the landmark case in *Naz foundation v. Government of NCT of Delhi* to the historic decision in *Navtej Singh Johar v. Union of India* is a revolutionary constitutional movement in India towards acknowledging of dignity, privacy, equality and autonomy of individuals in sexual minorities.¹⁶

Section 377 of the IPC was added in the British colonial rule in 1860 and was based on Victorian virtue as opposed to the local Indian cultural practices. The act made same sex sexual intercourse among adults a criminal offense that was labeled as unnatural. This was a law that was not subject to much questioning in the legal system, despite having dire effects on the LGBTQ+ people, and this was over a period of decades. It promoted social stigma, discrimination, and violence as well as preventing people to pursue the healthcare services of sexual health

¹⁵ David M. Halperin, *One Hundred Years of Homosexuality and Other Essays on Greek Love* (Routledge, 1990).

¹⁶ Alok Gupta (ed.), *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (Human Rights Watch, New York, 2008)

and HIV prevention. The constitutional obstacle to Section 377 had started getting steam in the early 2000s amid the civil society groups and human rights activists initiating the questioning of compatibility between the Section and fundamental rights that had been assured by the Constitution of India.

Among the first and the greatest obstacles was posed by NGO Naz Foundation which operated in the areas of HIV/AIDS prevention and the sexual health awareness. According to the argument of the organization, criminalization of consensual same-sex relations impeded the efforts to promote the well-being of the population and infringed upon the fundamental rights of LGBTQ+ individuals.

The Delhi High court in *Naz Foundation v.* passed the historic judgment in 2009. Section 377 was partially overruled by the Government of NCT of Delhi who considered that the clause was unconstitutional to the extent it criminalized consensual sex between adults in the privacy. The court justified that the law contravened the Articles 14, 15 and 21 of the Constitution which ensures equality before the law, protection against discrimination and rights to life and personal liberty. The ruling underlined that sexual orientation is a part and parcel of the identity and dignity and the constitutional morality should supersede the social prejudice. Another fact acknowledged by the court is that the law continued to discriminate against members of LGBTQ+ groups and hinder the process of containing HIV/AIDS.

The ruling in progressive Delhi High Court was however a momentary success. In 2013, *Suresh Kumar Koushal v.* in the Supreme Court of India. The Delhi High Court decision was overruled and the criminalization of same-sex relations under Section 377 was restored by Naz Foundation. The Supreme Court believed that the LGBTQ+ was only a small faction (minority) and that the issue to change or repeal the law belonged to the legislature and not to the court. The decision received many criticisms within the country and internationally due to its failure to address the basic rights of the sexual minorities of the country and its failure to embrace a progressive understanding of the constitutional doctrines.¹⁷

The Koushal judgment created a rage and controversies throughout India. The activists, scholars and the LGBTQ+ community members claimed that decision weakened the constitutional principles of equality, dignity and liberty. The decision also heightened the fight against LGBTQ+ rights and prompted more legal actions against Section 377. One of the best milestones in this constitutional journey was made in 2017 when the Supreme Court had passed its historic judgment in the *Justice K. S. Puttaswamy v. In India*, the right to privacy has been

¹⁷ Arvind Narrain and Gautam Bhan (eds.), *Because I Have a Voice: Queer Politics in India* (Yoda Press, New Delhi, 2005).

acknowledged to be a fundamental right and thus established under Article 21 of the constitution by the Union of India. The case ruled that privacy encompasses the right to personal autonomy and sexual orientation, thus bringing an oblique objection to the rationale used in the case of Koushal. This ruling placed a stress on the fact that constitutional rights were not to be denied solely because a group of people was a minority and it also established that the dignity and personal choice played the key role in constitutional liberty. Based on the foundations of the Puttaswamy judgment, a team of major petitioners, led by dancer Navtej Singh Johar and other activists of the LGBTQ+ community, turned to the Supreme Court to have Section 377 reconsidered in terms of its constitutionality.

A five-judge constitutional court came up with a historic and unanimous decision in the year 2018 in the case of Navtej Singh Johar vs. Union Of India, decriminalizing consensual sex relationships between adults. To the extent that it criminalized consensual sex between adults, the Supreme Court said that Section 377 contravened the principles of Articles 14, 15, 19, and 21 of the Constitution. The court highlighted the fact that sexual orientation is innate and inherent to human beings and that LGBTQ+ people have their equal share of constitutional protection just like any other citizen.

The decision also expressly reversed the reasoning of Koushal case and reiterated that the judicial interpretation needs to be guided by constitutional morality, as opposed to the social or majoritarian morality. The Navtej Singh Johar case was a turning point in the history of the Indian constitution. The court appreciated dignity, individuality, and personal autonomy in the democratic society. It also recognized the historical injustice and discrimination that LGBTQ+ community has experienced and gave the community their right to live with dignity and free of fear of being criminals.

Hence, the court path of Naz Foundation to Navtej Singh Johar becomes the symbol of the changing vision of the constitutional values in India. It shows how the judiciary was slowly shifting towards a more conservative view of morality and legislative reference to a more progressive view of morality and rights based approach where human dignity and rights of individuals take precedence. It is not only that this trip changed the legal position of LGBTQ+ people, but it strengthened the position of the judiciary as the protector of basic rights. Making consensual same-sex relations a decriminal offense in 2018 is not only the abolition of an archaic colonial statute. It is a sign of a larger constitutional promise of equality, inclusion, and diversity respect in the Indian society. The intellectual conclusions made in this legal road trip all point to the significance

of constitutional morality, transformative constitutionalism and safeguarding minority rights as means of fortifying the pillars of Indian democracy.¹⁸

Judicial Pronouncements on Same-Sex Marriages

As a consequence of landmark judicial decisions, LGBTQ+ rights have seen a significant evolution in India. In particular, some of these landmark decisions have helped interpret the principles of equality, dignity, privacy, and personal liberty enshrined in the constitution of India. The most groundbreaking of all these judicial decisions has been *Navtej Singh Johar v. Union of India*. In this case, a Constitution Bench of five judges of the Supreme Court has declared homosexual conduct between consenting adults legal by partially overturning Section 377 of the Indian Penal Code. According to the court, criminalization of homosexuality amounted to violation of the fundamental rights to equality, non-discrimination, freedom of expression, and right to life and personal liberty as guaranteed in Article 14, 15, 19, and 21 of the Indian Constitution.

The court emphasized the supremacy of constitutional morality over societal morality and acknowledged that sexual orientation is an essential aspect of human personality. Further, it recognized the stigma and discrimination that LGBTQ+ people suffer due to the section. Notably, the court also overruled its own earlier decision made in *Suresh Kumar Koushal v. Naz Foundation* which maintained the constitutionality of Section 377 and notoriously termed LGBTQ+ persons as "minuscule minorities." Before *Navtej*, the foundation had already been set in *Naz Foundation v. Government of NCT of Delhi*, where the Delhi High Court first legalized homosexual relations between consenting adults by reading down Section 377. This was because the law was found to violate the constitutional rights of equality, dignity, and privacy.¹⁹ Though this judgement was subsequently overruled in *Koushal*, it nevertheless provided the intellectual and constitutional basis of the subsequent acceptance of LGBTI rights.

Another significant constitutional development in relation to Section 377 has been in *Justice K.S. Puttaswamy v. Union of India*, which unanimously upheld the right to privacy as a fundamental right enshrined in Article 21. In this landmark judgement, the court recognized sexual orientation as an essential part of one's privacy. In another case, *NALSA v. Union of India* is considered to be a major milestone for transgender persons as they were granted recognition as a 'third gender'. The movement then progressed from a call for decriminalization to a demand for equal recognition for LGBTQ+ couples. It took this form when the issue reached the Supreme Court in the case of *Supriyo v. Union of India*. The

¹⁸ Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press, New Delhi, 2011)

¹⁹ Alok Gupta (ed.), *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (Human Rights Watch, New York, 2008)

petitioners in this case contested the denial of marriage to LGBTQ+ individuals despite being covered by legislation like the Special Marriage Act, 1954. While the court accepted the right of LGBTQ+ persons to form relationships and live together with dignity, it denied them equal marriage because it was not within the purview of the court, but the legislature. This decision received strong criticism, as it seemed to go against the progressive constitutional framework followed in *Navtej Singh Johar* and *Puttaswamy*. Scholars have argued that such a denial was contrary to the principles of equality and dignity laid down in the Constitution and even the universal declarations like the UDHR and ICCPR. A few other legal precedents have played a role in shaping the larger debate surrounding the question of autonomy and rights within the family unit.

The first one is *Shakti Vahini v. Union of India*, in which the Supreme Court held that the right to select one's own life partner is a basic right under the Constitution. Likewise, in *Deepika Singh v. Central Administrative Tribunal*, the court expanded its definition of family to go beyond the concept of marriage, thus implicitly acknowledging the legality of same-sex unions. In *Arun Kumar v. Inspector General of Registration*, the Madras High Court extended the meaning of the word "bride" to include transgender women in the context of the Hindu Marriage Act.

Impact of Judicial Decisions on Society and Lawmakers

The judicial decisions regarding the LGBTQ+ community in India, especially those regarding homosexuality, have been instrumental not only for society but also for the legal system itself. The Indian judiciary has been an active participant in the transformation of the country through the recognition of the constitutional rights of the LGBTQ+ community and promoting debates around issues of equality, dignity, and freedom of expression. Judicial interpretations of the constitution have resulted in addressing previously disregarded or marginalized concerns, resulting in a shift in perception and discourse.²⁰

Perhaps one of the most significant contributions of judicial decisions in India was to raise awareness and debate surrounding LGBTQ+ issues. Judgments such as *Navtej Singh Johar v. Union of India* (2018) made sure that the concerns of the LGBTQ+ community were addressed and highlighted at a national level. By legalizing homosexuality, the Supreme Court acknowledged the identity and dignity of millions of Indians who had been facing discrimination and ostracization since decades. The development of the judiciary has also been responsible for bringing LGBTQ+ identities into mainstream discourse. Media houses, academic institutions, civil society groups and others have become more

²⁰ Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press, New Delhi, 2011)

progressive in their language when talking about gender and sexual orientations. In addition to this, the representation of LGBTQ+ people in films, literature and other forms of media and academia has gained momentum. The above judgements have played an active role in challenging negative social and cultural norms related to homosexuality. Though opposition from conservative elements remained, courts have succeeded in triggering a change towards acceptance.

The above-mentioned judicial actions have had an impact on legislative discussions by pointing out the deficiencies in law. Though the Indian Parliament has not yet legislated for same-sex marriages or family laws, there has been increasing pressure on legislators to do something about it in view of the above judgements. After the judgment in the case of Navtej Singh Johar, the demand for anti-discrimination laws and recognition of same-sex couples gained momentum. The courts found the existence of fundamental rights of privacy, dignity and equality and therefore exposed the deficiency in marriage laws. An important part of the development of Indian constitutional law concerning issues relating to the LGBTQ+ community is the focus on constitutional morality rather than the social morality of the society. The court decisions in *Naz Foundation v. Government of NCT of Delhi* (2009) and *Navtej Singh Johar* have established that constitutionally guaranteed rights cannot be denied to a group just because of the disapproval of that particular identity by a segment of the society. The concept has been used as a tool for protecting minority rights and ensuring equality and dignity in their interpretation.

This judicial recognition of constitutional morality has emboldened activists, organisations, and individuals representing the LGBTQ+ community to fight for their equal rights. Judicial affirmation has added legitimacy to their demands that were being ignored for a long time in society. Other contributions made by the judiciary include the setting of precedents that could serve as foundations for subsequent cases. For example, in *NALSA v. Union of India*, the court acknowledged the rights of transgender individuals and their right to self-identify themselves based on their chosen gender. Also, in *Justice K.S. Puttaswamy v. Union of India*, privacy was established as a fundamental right under the Constitution. These rulings formed the constitutional basis for other cases regarding LGBTQ+ issues and rights in the country. This is because the decisions affirmed that rights like autonomy, privacy, and equality were essential.²¹

Additionally, interpretation from the bench has allowed for a changing understanding of families and relations. The past decade has seen an expansion in judicial recognition that not all families come in the conventional form of a

²¹ Alok Gupta (ed.), *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (Human Rights Watch, New York, 2008)

husband and wife relationship. In cases such as *Deepika Singh v. Central Administrative Tribunal*, the court demonstrated an understanding of families in its ruling, which would allow for future recognition of same-sex unions in the nation. Notwithstanding all these positive developments, however, judicial pronouncements regarding LGBTQ+ rights have received resistance from conservative forces in society and politics. In particular, conservative groups and religious associations have opposed judicial validation of same-sex relationships because they believe that such decisions are against their cultural or religious traditions. This resistance stems from the ongoing clash between the Constitution and entrenched social beliefs.

Finally, the failure of legislative action is yet another issue. While courts have constantly invoked equality and dignity principles in the Constitution, legislatures have failed to enact legislation covering LGBTQ+ rights related to marriage, inheritance, adoption, and discrimination. For instance, the lack of political will, public perception, and cultural conservatism may have led to delayed legislative actions in support of these rights.

Comparative Study of International Judicial Approaches

The controversy over the legality of same-sex marriage around the globe shows how diverse judicial and legislative mechanisms are utilised by various nations in order to secure the rights of the LGBTQ+ community. Constitutional values such as equality, dignity, liberty, and privacy have been construed differently while dealing with the concept of marriage equality all across the globe. Therefore, a comparative analysis of various judicial interventions pertaining to the same can help us understand how constitutional democracies have handled cases relating to marriage equality and how their experiences can be taken into consideration by India.²²

An important example of judicial intervention in this regard is *Obergefell v. Hodges* which was heard in the Supreme Court of the United States in 2015. In this case, the Court held that there exists a fundamental right in favour of same-sex couples to marry each other which emanates from the Due Process and Equal Protection clauses of the Fourteenth Amendment. As per the judgement, marriage is a basic right that is directly related to dignity, liberty, and equality. The denial of the right to same-sex couples is discriminatory in nature since it amounts to reinforcing social stigma against them. Similarly, in *Minister of Home Affairs v. Fourie* (2005), South Africa opted for a similarly progressive path by declaring unconstitutional discrimination against homosexuals who wished to marry. In this case, the Constitutional Court of South Africa declared that denying same-sex

²² Carlos A. Ball, "The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men," 38 *Loyola University Chicago Law Journal* 379 (2007)

couples access to marriage was unconstitutional since it denied their rights to human dignity and equality before law. The Court acknowledged the significance of protecting the rights of minorities in a democratic state, as constitutional morality should prevail over societal prejudices. Subsequently, the South African Parliament promulgated the Civil Union Act, 2006, making South Africa the first African country that allowed gay marriages.

Finally, Canada played a significant role in furthering marriage equality by means of judicial review of statutes. Thus, in *Halpern v. Canada* (2003), the Ontario Court of Appeal concluded that denying same-sex couples the right to marry constituted discrimination on the ground of sexual orientation and contravened provisions related to equality before law and equal protection guaranteed by the Canadian Charter of Rights and Freedoms. The Court highlighted that marriage in contemporary society was based on love and mutual commitments between spouses, rather than physical differences between males and females. In Europe, the European Court of Human Rights (ECHR) has been concerned with same-sex couples' rights through protecting private and family life.

In the case *Oliari and Others v. Italy* (2015), the Court concluded that lack of legislation recognizing same-sex partnerships breached the provisions of Article 8 of the European Convention on Human Rights, which ensures the right to private and family life. Despite the fact that the ECHR did not demand any particular measure from member states and failed to order them to legalize homosexual marriages, the Court acknowledged the positive duty of governments to afford legal recognition and protection of same-sex relationships. Many countries of Europe subsequently introduced the notion of a civil partnership or civil union to comply with changing human rights.²³

In its turn, the United Kingdom took the phased way to introduce marriage equality. At first, same-sex couples obtained civil recognition through the Civil Partnership Act 2004 providing same-sex couples with almost equal rights as heterosexual married couples except for marriage itself. Subsequently, the Marriage (Same Sex Couples) Act 2013 legalized gay marriage. The UK's experience proves the usefulness of such phased introduction of gay marriage. Taiwan was the first country in Asia to legalize same-sex marriage due to Constitutional Interpretation No. 748 released by its Constitutional Court in 2017. According to the ruling, failure to grant same-sex individuals the opportunity to get married contravened the provisions of equality and marriage freedom guaranteed in the constitution. In this regard, the judiciary called upon the legislative arm of government to ensure the passage of legislation granting equal

²³ Ashley Tellis, "Disrupting the Dinner Table: Re-thinking the 'Coming Out' Narrative in India," 22 *Journal of Commonwealth Literature* 95 (2012).

marriage rights to all citizens, regardless of their sexual orientation, within a set period. Consequently, Taiwan legalized same-sex marriage in 2019, representing a significant achievement for the LGBTQ+ community in Asia.

Similarly, in Brazil, judicial activism ensured the advancement of gay rights. In 2011, the Supreme Federal Court of Brazil declared that homosexuals had the right to enjoy similar benefits as heterosexual individuals. The basis of this decision was constitutional principles of equality, dignity, and nondiscrimination. Additionally, the Court relied on international human rights instruments. Judicial action in this case facilitated the enactment of administrative policies ensuring equal marriage rights for homosexuals in the country.²⁴

Transformative Constitutionalism and the Decriminalization of Same-Sex Relations in India

Transformative constitutionalism has become one of the most influential methods of interpretation of the modern constitutional law. It is the notion that a constitution is not a documentary act that simply defines the institutions of government but rather a flexible tool that is supposed to change the society by bringing justice, equality, liberty, and dignity to society. The Constitution in the Indian context is also said to be a transitional document that seeks to break the historical inequalities and establish a more inclusive democratic order. The breakthrough of same-sex relations in India as the ground-breaking decision in *Navtej Singh Johar v. Union of India* is a great example of transformative constitutionalism at work. This ruling was a clear cut off of colonial ethics to constitutional values of equality, dignity, privacy and personal independence.

Transformative constitutionalism is based on the idea that the interpretation of the constitution has to be modified in accordance with the societal needs. The Constitution of India was designed by the framers as a living document that could react to the social development and safeguard the disadvantaged groups. The basic rights that are in Part III of the Constitution are not fixed guarantees but they are tools of social change. Through the years, the judiciary has construed these rights broadly to deal with matters of discrimination, inequality and social exclusion. This is a larger constitutional development that includes the legalization of LGBTQ+ rights. Section 377 of the Indian Penal Code (IPC) was a section in a colonial era law of 1860 that introduced the criminalization of same-sex relations in India. This legislation made it a crime to engage in carnal intercourse that was not within the order of nature and it was commonly applied to the LGBTQ+ community. Though the clause did not specifically mention homosexuality it was generally understood to criminalize consensual sex between adults of the same sex. Consequently, gay, lesbian, transgender, and queer

²⁴ Gautam Bhan, "The Limits of Law: Queer Politics and Social Change in India," 41 *Economic and Political Weekly* 4815 (2006).

(LGBTQ+) people were stigmatized and discriminated against and always had to fear the threat of prosecution. The further existence of this law caused some severe doubts regarding its compatibility with the fundamental rights that were provided to people by the Constitution. Civil society organizations and activists who promoted the rights of sexual minorities initiated the movement to challenge the Section 377. One of these turning points was the ruling of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*. Here, the court ruled that section 377 was unconstitutional in a way that it criminalized intercourse between consenting adults in the privacy.²⁵ The court ruling highlighted the fact that the Constitution safeguards the dignity and equality of all people, irrespective of their sexual orientation. The Delhi high court acknowledged that any form of discrimination against sexual orientation is against Articles 14, 15 and 21 of the Constitution. Critically, the court brought the concept of constitutional morality to dominate social morality in the interpretation of fundamental rights. The rationalistic thinking of the Delhi High Court was however reversed by the Supreme Court through the case of *Suresh Kumar Koushal v. Naz Foundation*.

The supreme court reinstated the criminalisation of same sex relations basing on the idea that the LGBTQ+ community was a tiny minority and that it was upon parliament to determine whether the legislation would be amended. This ruling was greatly denounced as it did not safeguard the basic rights of sexual minorities and had a limited view of the constitutional doctrines. Critics said that the ruling disregarded the transformative nature of the Constitution and did not acknowledge the lived experiences of people of the LGBTQ+ community. However, the constitutional discussion on privacy, dignity, and individual autonomy did not end here but kept on developing. One of the greatest can be found in 2017, when the Supreme Court made its landmark decision in the case *Justice K. S. Puttaswamy v. Union of India*.

This ruling is among others where a bench of nine judges unanimously accepted that the right to privacy is a fundamental right guaranteed in Article 21 of the Constitution. The court believed that privacy embraced the right to personal autonomy, bodily integrity and sexual orientation. Notably, the ruling accepted that discrimination of anyone on basis of sexual orientation infringes constitutional rights of equality and dignity. It was also an implicit criticism on the rationale taken in the *Koushal* decision. The establishment of privacy as a fundamental right gave good constitutional grounds to attack Section 377 again. The Supreme Court reenacted the matter in a landmark case referred to as *Navtej Singh Johar v. Union of India* in 2018. A constitutional bench of five judges unanimously determined that Title 377 offense made unconsensual sexual

²⁵ Ruth Vanita, "Same-Sex Weddings, Hindu Traditions and Modern India," 38 *Economic and Political Weekly* 2835 (2003).

activities between adults illegal, insofar as possible. The court underlined the fact that the sexual orientation is an inseparable part of identity and that LGBTQ+ people deserve equal constitutional protection as any other citizens of the country. The Navtej Singh Johar case is generally considered to be a victory of transformative constitutionalism. The court took a liberal reading of basic rights and stressed the significance of dignity, equality, and liberty. It believed that the constitutional morality should dictate judicial interpretation and not social bias or the majority morality. The court additionally saw the historical discrimination of LGBTQ+ people and a necessity to reverse this injustice with the help of the constitutional interpretation. The focus on the dignity and individuality was one of the most important elements of the judgment.

The court noted that the Constitution is a guaranty of the right of any person to determine his or her identity and make an individual decision concerning the relationships and intimacy. Making same-sex relationships consensual was thus contrary to the constitutional right of freedom and autonomy of individuals. The decision of the Supreme Court to overturn the provision of Section 377 in its use regarding consensual and adult relationships established a precedent that LGBTQ+ people deserve dignity and to live their lives without the threat of being convicted of criminal offenses. The ruling was also an expression of the larger philosophy of transformative constitutionalism in that the Constitution should be used as an instrument of social change. The judiciary recognised that the law needs to undergo changes in order to break down systems of discrimination as well as to enhance inclusivity in society. The decriminalization of same sex relations in the middle of these laws not only eliminated an act that existed during the colonial era but also restated the responsiveness of the Constitution to safeguard the rights of the minority. However, the Navtej Singh Johar ruling was a historic event; the fight against LGBTQ equal rights in India is not over yet.²⁶

²⁶ Arvind Narrain, "The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva," 7 *Health and Human Rights* 142 (2004).

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