



**FREEDOM OF RELIGION V.  
INDIVIDUAL RIGHTS: STRIKING A  
BALANCE BETWEEN RELIGIOUS  
RIGHTS AND RIGHTS OF LGBT  
COMMUNITY IN A  
CONSTITUTIONAL STATE**

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**ABSTRACT**

Social morality has always dominated individual morality all throughout the history. The rights of the minority are not a matter of concern for a majority ruled state. However in a constitutional state the constitutional morality should be the supreme and the social morality should always be in tune with it. The morality of the Indian Constitution lies in four major provisions. The trio being commonly called as the Golden Triangle which includes Article 14, Article 19 and Article 32 and Article 32 which is known as the heart and soul of the constitution.

When there is a conflict between the majority and minority, a matter of doubt arises in the minds of everyone as to whose rights and interests are to be protected. Some scholars opine that the morality envisaged in the religion is the morality of the majority and hence that should be the law. Even though this logic may hold true for a primitive state, it doesn't have any relevance in a constitutional state where the rights and liberties of the minorities are no less important.

Thus a provision or any law which perpetuates subordinate status to the sexual is something that has to be immediately reconsidered. Applying the rule laid down by the Honorable Supreme Court in Justice Puttuswamy<sup>1</sup>, the law has no right to enter into the bedroom of an individual, and such an act of the state affects dignity and sexual autonomy of an individual. One has to realize that such laws are based on the gender stereotypes which was brought into our nation through the Victorian laws.

The recent judgment of Supreme Court in *Navjet Singh Johar v. Union of India*<sup>2</sup> is a great appreciable step to free the Indian laws from the influences of Canon laws. The laws against the LGBT community has its roots in the biblical laws, however it is interesting to note that the Great Britian who was the author of this law did away with it long before India. On contrast in India, all the religious group stood together and opposed the removal the archaic law against the sexual minorities on the basis of conjectures. The India Supreme Court however rightly showed to the world and reminded each of Indian citizens that the state has no business to put itself into the personal affairs of an individual. Homophobic attitudes imparted into the social morality by various religious groups from time immemorial have made it impossible for the victims to access justice. It is the duty of the constitution to transform the society in accordance with its moral values of justice, liberty, equality and fraternity. If not, the state can no longer be a constitutional state. In a constitutional state

<sup>1</sup> Justice K S Puttuswamy v. Union of India, 2017 (10) SCC 1.

<sup>2</sup> *Navjet Singh Johar and Others v. Union of India*, 2018 Indlaw SC 786.



the rights of the LGBT community should be defended by the state. India has always tried to correct itself and move away from the earlier wrongs that it had committed. Since the main agenda of the constitutional state is to inculcate constitutional values, the religious interference with the rights of LGBT community will be a huge violation of the supreme constitutional morality. This paper addresses this conflict between constitutional morality and social morality and attempts to find a balance between religious freedom and individual rights of LGBT community.

**Keywords:** Morality, LGBT, Constitution, Rights, Judiciary, Society, State, Minority, Gender.

### **Evolution of Sexual Rights of LGBT Community: A Tussle between Constitutional Morality and Social Morality**

Even when the society is becoming more and more aware about the human rights, the rights of the sexual minorities namely the LGBT community are still been neglected. This was the situation even in past, it will be highly paradoxical to view that the democratic societies even now follow the same attitude. Penal law criminalizing homosexual activity even between consenting adults was one of the best example to prove the above argument. However the recent efforts made from the part of the Honorable Supreme Court interfered with this generally observed pattern. To understand the high influence of morality which interfered with the sexual rights of LGBT community, it is necessary to look into the history of the penal law which criminalized the same.

### ***History: Section 377 an Sodomy Law***

Same sex loving men and women are sexual minorities around the world, they are commonly referred to as LGBT community. The condition of this community was really bad; they faced huge discrimination from society and also from the part of law. Section 377 which is also commonly called as the sodomy law had its origin from the old testament of the Holy Bible which is considered to be the spiritual text of Christians. Leviticus Chapter 20 verse 13 provides the basis and punishment for the same. It provides that any person who engages in a sexual activity against the order of the nature shall be punished with death penalty. Thus Section 377 found its way into IPC through British imposition of Victorian morality way back during 1880's.

### ***Religious majority v. Sexual minority***

Thus India was following a law that took away the basic human rights of LGBT community, for about two centuries on the basis of religious morality. The democratic values and the basic freedoms guaranteed under the Indian Constitution however comfortably closed its eyes towards them. When the issue was brought before the Court various religious groups joined their hands against the decriminalization of Section 377. The only major argument of all these groups where that the decriminalization of Section 377 would affect the morality of the society. This argument was based on the narrow concept that sexual union between two individuals is only for the purpose of procreation as observed by most of the religions.

This raises a major question as to the extent to which morality can be allowed to



interfere with the rights of the individual<sup>3</sup>. As observed by the famous philosopher John Stuart Mill “an individual must be sovereign over his own body and mind”.<sup>4</sup>The famous Jurist Bentham observes that “if a punishment does more harm than good, then the matter should be left to individual ethics”.<sup>5</sup>Thus there exist as jurisprudential wrestle with regard to Section 377, one contestant being social morality influenced by religion and other being Constitutional morality.

The International Convention on Civil and Political Rights recognized the need for abolition of sodomy laws, interestingly India is a signatory to this convention. Article 21 of the Indian Constitution guarantees one the right to life and personal liberty and as stated by Supreme Court right to life does not mean mere animal existence but it means the right to live with dignity. The addition made to Article 21 through Justice Puttuswamy case<sup>6</sup> further strengthen the constitutional morality that stand as a strong advocate against Section 377.

#### ***The wakeup call***

It is highly possible for one to think that political and civil rights are more important than the sexual rights of an individual. The critics should realize that right against discrimination is a civil and political right, and it is also the very foundation of our democracy. However it will be interesting to observe that the legislature in India have not made a single attempt at least to discuss the

grievances of LGBT community, due to which the court was forced to step into and strike down the law.<sup>7</sup>

The recent judgment of the Supreme Court in Navjet Singh Johar overruled its own previous judgment that struck down the Delhi High Court Judgment in Naz Foundation v. Govt. of NCT of Delhi.<sup>8</sup> Honorable Justice D.Y Chandrachud have rightly observed that “the choice of a partner, the desire for personal intimacy and the yearning to find love and fulfillment in human life have a universal application”.

Regardless of the huge opposition from the religious majority the Supreme Court finally did justice to the LGBT community. Borrowing T.S Elliot’s words “if we can never be right, it is better that we should from time to time, change our way of being wrong”. Thus one’s right to sexual choice cannot be subjected to conjectures. As said by Honorable Justice D.Y Chandrachud in the recent case of Joseph Shine v. Union of India<sup>9</sup> “to be human involves the ability to sexual intercourse in pursuit of happiness”.

#### **Constitutional Morality in Indian Constitution**

The term ‘Constitutional morality’ is a term that attempts to immortalize the very ideals, aspirations, and visions of the future that

<sup>3</sup> Animesh Sharma, Section 377: No Jurisprudential Basis (Oct 6, 2018, 6:46PM), <http://www.jstor.org/stable/40278169>.

<sup>4</sup> *ibid.*

<sup>5</sup> *Supra* note 6.

<sup>6</sup> *Supra* note 4.

<sup>7</sup> Robert Wintemute, Same-Sex Love and Indian Penal Code 377: An Important Human Rights Issue For India (Jun 25, 2014, 12:52 PM), [www.westlaw.com](http://www.westlaw.com).

<sup>8</sup> Naz Foundation v. Govt. of NCT of Delhi, 2009 (160) DLT 277.

<sup>9</sup> Joseph Shine v. Union of India, 2018 Indlaw SC 899.



were held dear and immutable by the Constituent Assembly.<sup>10</sup>

Constitutional morality, apart from its own intrinsic importance, is a subject on which B R Ambedkar spoke with insight and eloquence in the Constituent Assembly.<sup>11</sup> Rightly or wrongly, he felt the lack of a living democratic tradition in India. Indian society was a society of castes and communities. It was not a society of citizens based on the equal consideration of individuals without regard for caste, creed or gender. To transform a society of castes and communities into one of citizens would be no easy task. The Constitution would at best provide a legal framework, a necessary but not sufficient condition for such a transformation. It could not by itself conjure into existence the attitudes, dispositions and sentiments without which the transformation could hardly be effective.

To be effective, constitutional laws have to rest on a substratum of constitutional morality. Could the presence of such a morality be taken for granted in our country? Ambedkar was deeply concerned over the question.<sup>12</sup> ‘Constitutional morality’. He said, “is not a natural sentiment. It has to be cultivated. We must realize that people are yet to learn it. Democracy in India is only a top dressing on

an Indian soil, which is essentially undemocratic”<sup>13</sup>

### *Defining constitutional morality while determining the rights of sexual minorities*

The judgment delivered by the Delhi High Court in *Naz Foundation* case has sought to provide a legal right not to be unfairly criminalized by invoking the notion of constitutional morality. The policy of criminalization, according to this judgment, has to conform to constitutional morality. No conduct can be made/ or remain criminal if it is not wrongfully harmful—wrongful harm defined in consonance with the spirit of constitutional principles, guided by the norms of constitutional morality. This re-formulation of policy of criminalization by reading into it the constitutional norms introduced a new form of judicial activism. Naz has completely transformed the concept of constitutional morality in an adept fashion by de-historicizing the same in order to serve a larger social purpose. By the scheme of this judgment, “harm” has to be conceptualized in accordance with the normative framework of constitutional morality (which includes specific rights and their interpretations) rather than public morality.

In Naz, the court draws on the notion of constitutional morality and in the context of sexual orientation rights affirms:

*The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by*

<sup>10</sup>Gopal Subramaniam, Constitutional Morality- Is it a dilemma for the court, state and citizens , (Oct 8,2018, 6:09 PM), <http://www.aprasannakumar.org/pdf%20files/Constitutional-Morality.pdf>.

<sup>11</sup> Andre Béteille ,Constitutional Morality,(Oct 6, 2018, 14:37) <https://www.jstor.org/stable/40278025>.,

<sup>12</sup>*ibid.*

<sup>13</sup>Constituent assembly Debates 1989: VII, 38.



*society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality. Interestingly the court juxtaposes the idea of respect for and celebration of diversity with the notion of constitutional morality.*

Here the court relates the claim of decriminalization of homosexuality with constitutional value of diversity. It questions the hetero-normative foundations of the penalization of homosexuality and introduces the idea of different sexual orientation as a value which strengthens the diversity of Indian society and thereby fosters constitutional morality.

The Judges go on to state, *Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality.*<sup>14</sup>

The five-judge bench of the Supreme Court of India, in *Navtej Singh Johar*<sup>15</sup>, deployed this framework of constitutional morality to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

<sup>14</sup>*Supra* note 11.

<sup>15</sup>*Supra* note 5.

One of the central themes of the court's decision in *Johar* is that the aim of the Constitution is to transform society, not to entrench and preserve the pre-existing values of the majority. In other words, though a majority of people in India may be heterosexuals, though the prevalent "social morality" in India might even dictate sexual intercourse only between a man and a woman, it is "constitutional morality" which must prevail.<sup>16</sup>

The Court also observed that, *"...the interpretation of the Constitution needs to be pragmatic, because of the the dynamic nature of a Constitution, and also the legal policy of a particular epoch must be in consonance with the current and the present needs of the society, which are sensible in the prevalent times and at the same time easy to apply.*

*This also gives birth to an equally important role of the State to implement the constitutional rights effectively. It includes all the three organs, that is, the legislature, the executive as well as the judiciary. The State has to show concerned commitment which would result in concrete action. The State has an obligation to take appropriate measures for the progressive realization of economic, social and cultural rights.*

*The doctrine of progressive realization of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. The doctrine of non-retrogression sets forth that the State should not take measures or steps*

<sup>16</sup>Dr. Abhinav Chandrachud, *Navtej Johar v Union of India – Key Highlights*, (Oct 8, 2018, 19:39), <https://indconlawphil.wordpress.com/2018/09/09/guest-post-navtej-johar-v-union-of-india-key-highlights/>.



*that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.*

*The aforesaid two doctrines leads to the irresistible conclusion that if we were to accept the law enunciated in Suresh Koushal's<sup>17</sup>, it would definitely tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.”<sup>18</sup>*

Finally the Court came to the conclusion that,

*Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.<sup>19</sup>*

The concept of constitutional morality will aid judges in the search for constitutional

meaning and in cases wherein the words of the constitutional clause can be read in different ways, this concept can help in the meaningful interpretation of the clause. Constitutional laws should always rest on the substratum of constitutional morality to be effective. It is only then every single person could thrive in a pluralistic country like India and contribute to the development of the nation as envisaged by the Constitution.

### **Imbibition of Minority Rights in the Society**

As India has come up with a new phase of liberal thinking by partial striking down of Sec 377 IPC, the question which comes next is how the society reacts to this ideology proposed by the judgment. By the latest judgment of Navtej Singh Johar, we can see mixed reaction and criticism among the people. But how long the country had to travel to accept the LGBT rights has to be understood by analyzing the cases from Naz foundation to Navtej Singh Johar.

### **Societal approach to sexual minorities; from Naz Foundation to Navtej Singh Johar**

There was inhibition by some sections of the society which shows why India had to wait to get a liberal platform and have a transformative constitutionalism, 71 years after independence when the Supreme Court had thought of accepting these sexual minorities as part of the society. Sec 377 IPC being incorporated by Lord Macaulay in the year 1861 has criminalized sexual activities against the order of the nature. [In 2001](#), Delhi based non- profit Naz foundation, with the support of The Lawyers Collective, challenged [section 377](#) in the

<sup>17</sup> Suresh Kumar Koushal and another v NAZ Foundation and others , (2014) 1 SCC 1.

<sup>18</sup>Supra note 5.

<sup>19</sup>Supra note 5.



Delhi high court. This was among the first few petitions in India's fight to decriminalise homosexuality. The NGO was later supported by a strong coalition. But in 2003, the Indian Government said that legalising homosexuality would "open the floodgates of delinquent behavior". Since the government represents the will of the people in India, holistically it can be said that at that time, the nature of the society was not broad enough to accept this liberal ideology. The court also feared that accepting the sexual minority would not be in par with the constitutional and social morality and also the religious groups will create havoc if the sexual minorities were given an acceptance in the country. However, it took another six years before the Delhi high court, in 2009, to go with the changing notions of the world, stating that consensual and private sex between two adults will not be prosecuted.

But later on 23 February 2012, the [Ministry of Home Affairs](#) expressed its opposition to the decriminalization of homosexual activity, stating that in India, homosexuality is seen as immoral.<sup>20</sup> Later, in 28 February 2012, Central Government reversed its stance asserting that there was no legal error in decriminalizing homosexual activity. This shift in stance resulted in two judges of the Supreme Court reprimanding the Central Government for frequently changing its approach to the issue. Thus in 2013, the country's LGBTQ [community was taken aback when](#) the Supreme Court overturned this 2009 order by Delhi high court that sought to legalize gay sex.

<sup>20</sup> [Supreme Court pulls up Centre for flip-flop on Homosexuality, The Indian Express](#), 28 February 2012.

Later, on 28 January 2014, the [Supreme Court of India](#) dismissed the review petition filed by the [Central Government](#), the [Naz Foundation](#) and several others against its verdict on Section 377.<sup>21</sup> The bench explained the ruling by claiming that: "... the High Court overlooked that a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender people... less than 200 persons have been prosecuted for committing offence under Section 377, and this cannot be made a sound basis for declaring that section ultra vires Articles 14, 15 and 21."<sup>22</sup> On February 2016, the Supreme Court decided to review the criminalization of homosexual activity. The next year, the Supreme Court made its historic verdict that the right to individual privacy is an intrinsic and fundamental right under the Indian Constitution.<sup>23</sup> The Court also ruled that a person's sexual orientation is a privacy issue, giving hopes to LGBT activists.<sup>24</sup>

In January 2018, the Supreme Court agreed to refer the question of the provision's validity to a large bench,<sup>25</sup> and heard several

<sup>21</sup> [Supreme Court refuses overruling its Verdict on Section 377 and Homosexuality](#), Biharprabha News, 28 January 2014.

<sup>22</sup> J Venkatesan, [Supreme Court sets aside Delhi HC verdict decriminalising gay sex](#), The Hindu, December 12, 2013.

<sup>23</sup> *Supra* note 4.

<sup>24</sup> Meenakshi Ganguly, [India's Supreme Court Upholds Right to Privacy](#), (Oct 8, 2018, 6:15 PM), <https://www.hrw.org/news/2017/08/24/indias-supreme-court-upholds-right-privacy>.

<sup>25</sup> Caroline Mortimer, [India's supreme court could be about to decriminalise gay sex in major victory for LGBT rights](#), (Oct 8, 2018, 6:00PM), <https://www.independent.co.uk/news/world/asia/india-homosexuality-legalise-law-gay-lgbt-couples-supreme-court-ruling-a8148896.html>.



petitions. In response to the court's request for its position on the petitions, the Government announced that it would leave the case "to the wisdom of the court".<sup>26</sup> Activists view the case as the most significant and "greatest breakthrough for gay rights since the country's independence".<sup>27</sup>

Finally on September 2018, the Supreme Court issued its verdict overturning the 2013 judgment unanimously viewing that Section 377 is unconstitutional as it infringed the fundamental rights of autonomy, intimacy and identity, thus legalizing homosexuality in India.

### ***Recognizing the rights of minority in a majoritarian society***

It can be said that by decriminalizing section 377 the ideals of a Utilitarian Approach is been ensured in the country. In order to get completeness to this judgment, it must be also accepted by all sects of people. But, in reality, even when people say that they are whole heartedly accepting the verdict it doesn't turn out to be so. A law is made for the peaceful conduct and living of the people and to ensure justice in the society. For this, the law must be dynamic, understanding the needs and necessities of the people and this cannot be limited to a section of people whether minority or majority. With this approach of ensuring justice as embodied in the preamble of the

constitution, and to ensure like, liberty equality and fraternity, the verdict stands right and with this approach the people have to look forward to the verdict. Moreover, the society is taken with a feeling that the rights are imposed upon them by the judiciary rather that adopting them. With this idea a society can't develop in its true sense. the recent verdict of 377 was wholeheartedly welcomed by only certain section of the society. The majority is still reluctant to accept the far reaching consequences of this judgment. Most took a stand that partial decriminalization of Sec 377 IPC will interfere with their basic rights and personal autonomy. "I am what I am, so take me as I am";<sup>28</sup> people are with this notion, the verdict gets full acceptance in the country.

### **Conclusion**

The society has gone through major changes by the various judgments on Mutalaq<sup>29</sup>, privacy<sup>30</sup>, adultery<sup>31</sup> and the recent Shabarimala Shrine verdict.<sup>32</sup> The people has to start thinking that the morality aspect has to be perceived in a wider approach were people of any race, "sex", caste or creed can be incorporated with the ideas and morals of the value system wherein, the people have to open up for a new age of societal revolution whereby the concept of Utilitarianism and Social Engineering theory will get the right interpretation.

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<sup>26</sup>Adam Withhall, [India on brink of biggest gay rights victory as Supreme Court prepares to rule on gay sex ban](https://www.independent.co.uk/news/world/asia/india-gay-rights-lgbt-homosexuality-supreme-court-decision-section-377-a8447361.html), (Oct 8, 2018, 6:00 PM), <https://www.independent.co.uk/news/world/asia/india-gay-rights-lgbt-homosexuality-supreme-court-decision-section-377-a8447361.html>.

<sup>27</sup> *ibid.*

<sup>28</sup> *Supra* note 5.

<sup>29</sup> Shayara Bano v. Union Of India, (2017) 9 SCC 1.

<sup>30</sup> *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union Of India And Ors.*, (2017) 10 SCC 1.

<sup>31</sup> *Supra* note 12.

<sup>32</sup> Indian Young Lawyers Association & Ors. v. State of Kerala & Ors., 2018 Indlaw SC 905.