

FREEDOM TO LOVE: THE QUEER SAGA IN INDIA

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1. INTRODUCTION

An equal love

“Through Love's Great Power

Through love's great power to be made whole (in mind and body, heart and soul –

Through freedom to find joy, or be By dint of joy itself set free

In love and in companion hood: This is the true and natural good. To undo justice, and to seek

To quash the rights that guard the weak –To sneer at love, and wrench apart

The bonds of body, mind and heart With specious reason and no rhyme: This is the true unnatural crime.”¹

On 16th September 2006, the following open letter for over -turning of section 377 of the Indian penal code’, addressed to ‘The government of India, members of the judiciary and all citizens’, was released at a press conference in New Delhi:

The letter went under the name of Vikram Seth, among the most famous Indian authors in the English language, himself openly bisexual (or ‘partially gay’ as he called himself in interviews to the mass media around the release of this letter); swami Agnivesh, a well-known social activist to the ‘Arya samaj’ and most famous for his role in movements against bonded labor and caste- based violence; Siddharth Dube, a public health specialist consultant to the world bank and the united nations; Nitin Desai, a former UN undersecretary General; Aditi Desai, a sociologist; a captain Lakshmi Sahgal, described as a freedom fighter and recipient of the Padma Vibhushan². In addition, the letter was signed by more than 150 ‘eminent’ personalities, including the likes of anthropologist Veena Das, activist and writer Arundhati Roy, professor of Law, Upendra Baxi, film director Shyam Benegal, and an impressive assortment of actors, academicians, high level public servants, TV personalities, journalist, lawyers, pulp fiction writers, film makers, artists, doctors, designers, musicians etc. In short, this was a rather top-heavy list, featuring some of the biggest names in elite India. The cherry on the top was a separate letter by Nobel laureate Amartya Sen in support of the Seth letter.

“Words are magic things often enough, but even the magic of words sometimes Cannot convey the magic of the human spirit and of a nation’s passion.”

-Nehru

1.1 WHO ARE HOMOSEXUALS?

Homosexuality is a sexual orientation characterized by attraction to individuals of the same gender. It encompasses various terms and identities, including gay, lesbian, and bisexual, among others. Some individuals may also identify with broader terms like queer or pansexual to describe their attractions.

Here’s a breakdown of common terms **LGBT++**

- **Gay:** Typically used to describe men attracted to other men, but can also be used as an umbrella term for same-sex attraction in general.
- **Lesbian:** Specifically refers to women attracted to other women.
- **Bisexual:** Attraction to both men and women.
- **Pansexual:** Attraction to individuals regardless of their gender identity.
- **Queer:** A broad term used by some who feel their sexual orientation doesn't fit neatly into other categories, or as an umbrella term for LGBTQ+ identities.
- **Asexual:** Attraction to no one, or experiencing little to no sexual attraction.
- **Demisexual:** Attraction only develops after forming a strong emotional bond.
- **Polysexual:** Attraction to multiple, but not all, genders.

Homosexuals are defined as people who are sexually attracted by other persons of the same sex. The words "gays" or "gay people" are also common synonyms used instead of "homosexuals", whereas "lesbians" are only used to describe female homosexuals. These

fundamental definitions of homosexuals already indicate that this minority group is evenly distributed throughout the entire society. Homosexuals can be both men and women. They exist in all classes, social groups, races, positions, and countries, regardless of their age or origin.

From colonial times (with the enactment of criminal tribes Act, by which it was a crime for a man to dress up as a woman) to the contemporary (when hijras are talked about as the third sex and we celebrated the inclusion of ‘T’ box next to the ‘M’ and ‘F’ boxes on election commission identity cards or passport forms), the hijra appears as that which is always already and only gendered. Under the provisions of this statute, a eunuch was ‘deemed to include all members of the male sex who admit themselves, or in medical inspection clearly appear, to be impotent. Hijra emerges immediately gendered as the third alternative to being either man or woman. In Indian society, gays are considered as older men who liked ‘chikna’ boys. A ‘chikna’ boy is smart or ‘smooth’ teenager, one who is thought to cultivate the gaze of older interested men for both pleasure and personal advancement. ‘Lesbians’ are biologically females with mannish mannerism, tomboy look, and are believed to be sexually driven towards womenfolk.

From “The Ashes of the Gay”

“Democracy

It's coming through a hole in the air,

It's coming from the feel that this isn't exactly real,

or it's real, but it isn't exactly there.

From the wars against disorder, from the siren's night and day, from the fires of the homeless, from the ashes of the gay: Democracy is coming...”³

2. LITERATURE REVIEW AND METHOD OF STUDY

2.1 INTRODUCTION:

Review articles or literature reviews are a critical part of scientific research. While numerous guides on literature reviews exist, these are often limited to the philosophy of review procedures, protocols, and nomenclatures, triggering non-parsimonious reporting and confusion due to overlapping similarities. To address the aforementioned limitations, the scholar has adopted a pragmatic approach to demystify and shape the academic practice of conducting literature reviews. The scholar concentrates on the types, focuses, considerations, methods, and contributions of literature reviews as independent, standalone studies. As such, our article serves as an overview that scholars can rely upon to navigate the fundamental elements of literature reviews as standalone and independent studies, without getting entangled in the complexities of review procedures, protocols, and nomenclatures.

2.2 METHOD OF STUDY

2.2.1 Objectives of the Study

The objective of writing this article is:

There has not been enough understanding of the LGBT men and girls or their lives. The LGBT population has still been mostly invisible not solely because of disregard by a dominant patriarchal society however conjointly of concern of teasing and stigma and so, following are the objectives of this research of the author:

I. To make case for the conception of LGBT.

II. To analyze Legal provisions.

III. To discuss Constitutional protection to LGBT Minority folks in Republic of India.

IV. To highlight their problems and challenges within the society.

V. To give recommendations for the welfare of LGBT community

2.2.2 Research Methodology

Methods adopted were both doctrinal method as well as empirical method. Therefore, data has been collected from various articles and newspapers etc.

Questionnaires were used to collect on field data from various LGBT people. Methods which include collection of data also include review of literature, history of homosexuals etc. The work involves study of the existing Regulation/Guidelines/Laws and its impact on LGBT/QUEER community of the society. The researcher uses both doctrinal legal research and non-doctrinal legal research type for his research work. In addition, he uses qualitative legal research which encompasses both doctrinal legal research and non-doctrinal legal research. The present article also depended upon the secondary data sources that includes

- a. Authoritative Books, Journals, Commentaries
- b. Policy, Regulation, Bare Acts, Laws, Charters and Covenants
- c. Law Reporters and Periodicals
- d. E- Repositories, Legal Case databases

3. HOMOSEXUALITY IN INDIA

3.1 HISTORY OF HOMOSEXUALITY IN INDIA

History of gender and sexuality in the pre-colonial period has to take into account the specify locality of strictures as well as their absence *vis-à-vis* factors like, caste, gender and community. Indeed, Ruth Vanita's analysis of legal, religious and medical treatises in ancient and early medieval India seems to support these preliminary assumptions. Before the advent of Islam, the clearest examples of *sexo-moral* codes are to be found in the shastras and sutras, manuals and treatises falling between the last centuries BC and the 4th century AD. In her assessment of three texts, Vanita notes that while most of them 'certainly subordinate non-penetrative' as well as non- heterosexual sex to 'penetrative heterosexual sex', there is no uniform category of forbidden sex. (such as, sodomy) nor any uniform punishment. Rather, the penalty varies considerably between different acts and persons (*acts involving the 'defilement' of virgins generally invite far more censure than that involving non-virgins; and many acts of heterosexual sex like adultery invite much more severe punishment than those between persons of the same sex*). The 'Artha shastra', for instance, prescribes the same grade of fine for sex acts between two men as that for robberies of not very high value; a higher amount is demanded of a woman who forces sex on an unwilling woman. The Manu smriti prescribes a minor penance for a man having sex with a man, the same as that for a man who has a sex with non- human females, a menstruating woman etc., while a woman, 'deflowering' a virgin maiden is heavily penalized, sex between two non- virgin woman invites a minor fine. The punishment for acts is thus highly contextualized and corresponds to intricate rules of patriarchal and caste- based kinship- such that the 'defilement' of marriageable virgins of the same caste often attracts the highest censure. Rather than any separate categorization of non-heterosexual acts or persons punishable as such, penances are likely to have been dependent on caste and have no clear correspondence to codified juridical penalties.

3.2 HOMOSEXUALS IN INDIA

Male to female transgender people of India have traditionally organized themselves in communities, usually called Jamaat. A unit of matriarchal structure features an older Hijra or aravani as a 'guru' (*or motherly figure with several chelas*), younger, newly initiated Hijras/ aravani and her acolytes. There are elaborate rituals that mark one's entry into a jamaat and acceptance as a chela. These rituals with their mytho-religious underpinnings bind them to a structure of kinship in which relationships, roles and duties are both implicitly suggested and explicitly performed. Among these duties include the tribute of money by chelas to gurus from begging, sex work, or other forms of employment, obedience to community norms which regards to behaviors and dress, and affectionate devotion. Gurus are expected to provide guidance, emotional support for the young chelas and advice about undergoing castration. This community structure, while looser and less binding in south India rather than northern regions of the country, nevertheless provides one of the few real-world models for aravani, as how to organize as a family and community after establishing a public transgender identity.

Below are some of the most common third-gender sects found in Hinduism. There are an estimated half million cross dressing "eunuchs" in modern-day India, associated with various sects, temples and Hindu deities. Despite being called "eunuchs", the majorities of these persons do not practice castration but are more accurately associated with transgender. Homosexuality exist in India from the ancient times, which can be seen in various sculptures and drawings of ancient period as given below.

3.2.1 The Aravani or Ali. The most numerous third-gender sects are the *aravani* or *ali* of Tamil Nadu in southern India. The *aravani* are typically transgender and their main festival, the popular 'Koovagam' or Aravan Festival celebrated in late April/early May, is attended by thousands – including many transgenders and homosexuals. The *aravani* worship the Hindu god, 'Aravan', and do not practice any system of castration.

Transgender woman of Tamil Nadu also known as 'Aravanis'⁴¹ have become the most public of sexual minorities in the state. A group of aravani activists have forged a social movement in this decade that has successfully procured certain civil rights such as the possession of ration cards, passport, voter identity cards, and the constitution of a special welfare board with the specific task of addressing their community's social exclusion at the state and local level.

3.2.2 The Hijra. The most well-known third-gender group in India is perhaps the *Hijra* of northern India. The *Hijra* is the only sect that practices castration, a custom introduced during Muslim rule around the tenth century A.D. Male castration is not recommended in the Vedas and is not a traditional Hindu practice. There are an estimated 50,000 *hijra* in northern India. After interviewing and studying the *hijra* for many years, Serena Nanda writes in her book, *Neither Man Nor Woman: The hijras of India*, as follows: "There is a widespread belief in India that hijras are born hermaphrodites [intersex] and are taken away by the Hijra community at birth or in childhood, but I found no evidence to support this belief among the hijras I met, all of whom joined the community voluntarily, often in their teens." Nanda also states: "There is absolutely no question that at least some *hijras* – perhaps even the majority – are homosexual prostitutes. Sinha's (1967) study of *hijras* in Lucknow, in North India, acknowledges the *Hijra* role as performers, but views the major motivation for recruitment to the *Hijra* community as the satisfaction of the individual's homosexual urges..." The *hijras* especially worship Bahu Chara-devi, the Hindu demigoddess presiding over trans- sexuality.

3.2.3 The Jogappa. A lesser-known third-gender sect in India is the *Jogappa* of South India (Karnataka and Andhra Pradesh), a group similarly associated with prostitution. The *Jogappa* are connected with 'Yellamma-devi', a popular Hindu deity of Durga, and include both transgender and homosexuals. Both serve as dancers and prostitutes, and they are usually in charge of the temple *devadasis* (maidservants of the goddess who similarly serve as dancers and female courtesans). Large festivals are celebrated at these temples wherein hundreds of scantily-clad *devadasis* and *Jogappas* parade through the streets. The *Jogappa* do not practice castration. Behavioral disorder makes them behave like girls. Most of the aravanis left their home and after joining their community live miserable lives, seeking out al living by begging, dancing and prostitution; thus, becoming vulnerable to diseases like HIV/AIDS. Even the name 'aravani', though of recent usage, bears permanent reference to the story of Aravan to the Mahabharata. Aravanis see themselves as that transgendered aspect that Krishna assumed for a right to marry Aravan, to fulfill his wish for conjugal union before his sacrifice to the gods the next morning...even today, at koothandavar Temple in Villupuram district, Aravanis congregates every year to commemorate the narrative. Ecstatic celebrations of their marriage to Aravan

3.2.4 The Sakhi-Bekhi. The *sakhi-bekhis* are prominent throughout Bengal, Bihar, Orissa and Uttar Pradesh although their numbers have diminished in recent years. Members of this sect typically dress themselves as women in order to reinforce their identity as *sakhis* or girlfriends of Krishna and to attain the esteemed spiritual emotion known as *sakhi-bhava*. Such people are not always transgender or homosexual but in many cases they are. In modern times, the *sakhi-bekhi* sect was condemned as *sahajiya* (unauthentic) when some members began making public shows of their romantic feelings for Krishna while at the same time having illicit relations with *cudadharis* (men dressed up as Krishna with a crown of peacock feathers). Nowadays, most *sakhi-bekhis* cross-dress in private and are less conspicuous. They generally worship Sri Radha, the consort of Lord Krishna, although some specifically worship Lord Caitanya (the incarnation of Radha and Krishna combined) and are known as *gauranga-nagaris*. Neither group practices castration. Thus, very personification of homosexuals is popular in India.

4. JUDICIAL REMEDIES IN INDIA

In *Navej Singh Johar v. Union of India 2018*, the apex Court read down Section 377 of the IPC criminalising "unnatural sex" as being unconstitutional. The Court upheld the right to equal citizenship of all members of the LGBTQ community in India. Thus, it read down Section 377 to exclude consensual sexual relationships between adults, whether between same-sex individuals or otherwise. The Court decided that Section 377 constituted a violation of the right to dignity, privacy and sexual autonomy under Article 21, freedom of expression under Article 19, the right to equality under Article 14, and non-discrimination under Article 15 of the Constitution. Section 377 will continue to apply to non-consensual sexual activity against adults, sexual acts against minors and bestiality. The five-judge bench of the Supreme Court overruled the Kaushal decision (*Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*). It unanimously read down Section 377 and decriminalised same-sex relations between consenting adults. It applies to all citizens, and not just to the LGBT

community. This judgment holds immense persuasive value for other nations which continue to criminalise homosexuality. (<https://privacylibrary.ccgulud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-woi-and-ors>, <https://indiankanoon.org/doc/168671544/>)

The Constitution entrusts the function of making laws to Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. Parliament and the State Legislatures are empowered to create offences against laws with respect to the heads of legislation, falling within the purview of their legislative authority. (See Entry 93 of List I and Entry 64 of List II of the Seventh Schedule). Criminal law is a subject which falls within the Concurrent List. Entry I of List III provides thus:

“1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.”⁵

LGBT Act, 2019

The "LGBT Act 2019" refers to The Transgender Persons (Protection of Rights) Act, 2019, enacted in India to safeguard the rights and welfare of transgender individuals. This comprehensive legislation was passed by both the Lok Sabha and Rajya Sabha and received Presidential assent in 2019, coming into effect in January 2020.

Key provisions and aspects of the Act include:

- **Definition of a Transgender Person:** It defines a transgender person as someone whose gender does not match the gender assigned at birth, encompassing various identities like trans-men, trans-women, intersex persons, gender-queers, and socio-cultural identities such as kinnar and hijra.

- **Prohibition of Discrimination:** The Act prohibits discrimination against transgender persons in areas such as education, employment, healthcare, access to public goods and facilities, housing, and holding public or private office.

- **Recognition of Identity:**

It grants transgender individuals the right to self-perceived gender identity and provides for the process of obtaining a certificate of identity, including a revised certificate if their gender is changed.

- **Welfare and Inclusion:** The Act mandates the appropriate government to take steps for the inclusion of transgender persons in society, formulate welfare schemes, and provide for their rescue, protection, and rehabilitation.

- **Establishment of Institutions:** It includes provisions for setting up a National Council for Transgender Persons (NCTP) to advise on policies and programs, and for the establishment of Transgender Protection Cells (TPC) and Transgender Welfare Boards (TWB) in states.

- **Health Care:** The Act addresses health-related aspects, including the provision of medical care, sex reassignment surgery, hormonal therapy, and counseling, and emphasizes the importance of transgender-sensitive and non-stigmatizing healthcare services.

- **Penal Provisions:** The Act also includes penal provisions for offenses committed against transgender persons.

Transgender Persons (Protection of Rights) Amendment Act, 2026

The Transgender Persons (Protection of Rights) Amendment Bill, 2026, passed by the Lok Sabha in March 2026, amends the 2019 Act to tighten the definition of transgender identity, requiring medical or formal verification over self-identification. It introduces stricter penalties (up to life imprisonment) for forced conversion, mutilation, or sexual abuse.

- **Identity Verification:** Replaces self-perceived gender identity with a process requiring verification, potentially by a district magistrate or medical board, focusing on biological markers rather than self-identification.

- **Criminalization of Abuse:** The Bill introduces rigorous imprisonment of 10 years to life for acts involving involuntary castration, mutilation, or causing severe injury to force a person to assume a transgender identity.

- **Forced Labour & Eviction:** Penalizes forcing a transgender person into begging, bonded labour, or evicting them from their home.

- **Medical Surveillance Concerns:** Section 7(1A) mandates medical institutions to report gender-affirming surgeries to the District Magistrate, creating concerns regarding privacy.

- **Critique:** Critics argue the bill restricts the definition of gender, excludes gender-fluid individuals, and ignores the Supreme Court's *NALSA* judgment on self-identification.

5. THE SAGA OF JUDICIAL PRONOUNCEMENTS IN INDIA

5.1 The NAZ FOUNDATION Case⁶

The Naz Foundation v. Govt. of NCT of Delhi case was a milestone in the decriminalization of Section 377 and the protection of the rights of the LGBTQ community in India. In 2009, the Naz Foundation filed a writ petition in the Delhi High Court to challenge the constitutionality of Section 377, which criminalized consensual sexual acts between adults in private. The Delhi High Court ruled that Section 377 violated Articles 14, 15, and 21 of the Constitution. The court held that the law was unconstitutional because it interfered with the right to express one's sexuality. The judges who heard the Naz Foundation v. Govt. of NCT of Delhi case were Chief Justice Ajit Prakash Shah and Justice S. Muralidhar. They delivered the judgment on July 2, 2009

5.2 THE KOUSHAL JUDGMENT⁷

On December 11, 2013, the Supreme Court of India comprising Justice G.S. Singhvi and Justice S. J. Mukhopadhyay overturned the Delhi High Court's ruling and upheld the validity of Section 377. The Supreme Court's judges reasoned that the law did not target a specific group of people, and that the mere fact that the law may have been misused did not make it unconstitutional. The judges also stated that the High Court had relied too much on international precedents.

While parting with the case, the Apex Court made it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.

5.3 THE NALSA CASE⁸

The landmark judgment in this case was delivered on April 15, 2014. The court's decision recognized that people who fall outside the male/female gender binary are entitled to fundamental rights under the Constitution of India. The court also ordered the government to take steps to remove social stigma, promote transgender-specific health programs, and grant them equal legal protection. The case was heard before a two-judge bench of the Supreme Court, composed of Justice K.S. Panicker Radhakrishnan and Justice Arjan Kumar Sikri.

We, therefore, declare:

i. Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

ii. Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

iii. We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

5.4 THE PUTTASWAMY DOCTRINE (PRIVACY JUDGMENT)⁹

The case, Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors., was heard from July 19–August 2, 2017, and the unanimous decision was delivered by the 9-judge bench¹⁰ on August 24, 2017. The case established that the right to privacy is a fundamental right in the Constitution of India. The judges unanimously overturned the previous decisions in *M.P. Sharma vs. Union of India* and *Kharak Singh vs. State of UP*, which had held that the right to privacy was not guaranteed by the Constitution. Discordant note which directly bears upon the evolution of the constitutional jurisprudence on the right to privacy finds reflection in a two judge Bench decision of this Court in *Suresh Kumar Koushal v NAZ foundation*¹¹ (“*Koushal*”). The proceedings before this Court arose from a judgment¹² of the Delhi High Court holding that Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution. The Delhi High Court, however, clarified that Section 377 will continue to govern

non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors. Among the grounds of challenge was that the statutory provision constituted an infringement of the rights to dignity and privacy.

5.5 *NAVTEJ JOHAR JUDGMENT (Unconstitutional of Sec 377 IPC, 1860)*

The case was decided on September 6, 2018. The court unanimously ruled that Section 377 of the Indian Penal Code was unconstitutional, decriminalizing consensual sexual conduct between adults in private. The court's decision was based on several arguments, including:

The court upheld provisions in Section 377 that criminalize non-consensual acts or sexual acts performed on animals. The judges who heard the Navtej Singh Johar v. Union of India case were: Chief Justice Dipak Misra, Justice Dhananjaya Y. Chandrachud, Justice Ajay Manikrao Khanwilkar, Justice Indu Malhotra, and Justice Rohinton Fali Nariman. **Justice Indu Malhotra** held that:

History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognize that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article. The LGBT persons deserve to live a life unshackled from the shadow of being 'apprehended felons.'

5.6 *The Supriyo @ Supriya Chakraborty Judgment (Right to Same Sex Marriage).* *Supriyo@Supriya Chakraborty & Abhay*

Dang v. Union of India thr. Its Secretary, Ministry of Law and Justice & other connected cases (2023)¹³ are a collection of landmark cases of the Supreme Court of India, which were filed to consider whether to extend right to marry and establish a family to sexual and gender minority individuals in India. A five-judge Constitution Bench, consisting of **Chief Justice of India D.Y. Chandrachud, Justice S.K. Kaul, Justice S.R Bhat, Justice Hima Kohli and Justice P.S. Narasimha**, heard 20 connected cases brought by 52 petitioners¹⁴.

Story of the Same Sex Senior Advocates of the Apex Court of India

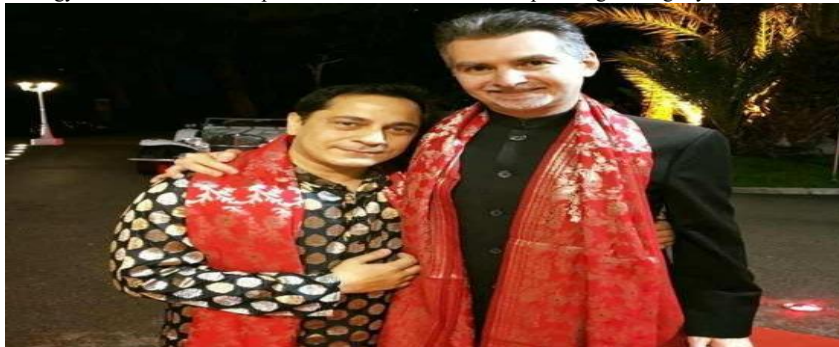
❖ **THE SOURABH KRIPAL STORY**

Saurabh Kirpal (born 18 April 1972) is an Indian lawyer, author and a senior advocate at the Delhi High Court. He is also an LGBTQ rights activist. Saurabh Kirpal was born to B N Kirpal, former Chief Justice of India and Aruna Kirpal (née Sachdev). He has 2 siblings.

Kirpal graduated with a degree in Physics from the St. Stephen's College, Delhi. He then went to the Oxford University to get an undergraduate degree in law. He has also earned a master's degree from Cambridge University.

Kirpal has been in a relationship with his partner Nicolas Germain Bachmann for the past 20 years. Nicolas is a European and works at the Swiss Federal Department of Foreign Affairs in New Delhi. He is also a Swiss human rights activist. Kirpal briefly worked at

the United Nations in Geneva before returning to India. Since then, he has been practicing at the Supreme Court for more than two decades. He was also the counsel for *Navtej Singh Johar & Ors. v. Union of India* that led to the landmark reading down of Section 377 of the Indian Penal Code in 2018, thus decriminalizing homosexual acts. He is also a board member of the Naz Foundation Trust, a Delhi-based NGO which is opposed to Section 377. He has also worked under former Attorney General Mukul Rohatgi. He was elevated as a senior advocate in March 2021. Additionally, Kirpal is also a board member of the Naz Foundation (India) Trust. He has written an anthology titled "Sex and the Supreme Court: How the Law is Upholding the Dignity of the Indian Citizen" (2020) and "Fifteen Judgments:



Cases that Shaped India's Financial Landscape" (2022). Kirpal is had recommended to be elevated to High Court judge in Delhi, which will make him the first openly gay judge in India. However, his nomination has been continually delayed by the Ministry of Law and Justice since his name was given in 2017¹⁵, despite the Supreme Court of India having held four debates on the matter and recommending him in November 2021. In January 2023, the Supreme Court of India confirmed previous reporting that the ministry had stalled his nomination on the basis of his sexual orientation and relationship with Bachmann, claiming that it would make him "biased" when ruling on cases related to LGBT rights and that his partnership with a foreign national was a security threat, despite India's Research and Analysis Wing (R&AW) having investigated him twice and found no such evidence. The court again recommended that Kirpal be nominated, stating that Kirpal's openness about his sexuality was a "credit" and would promote diversity, calling his conduct "above board", and stating that his partner would not inhibit Kirpal's loyalty, pointing out that other high officials had married foreign nationals. The statement was hailed by LGBT rights activists, who criticized the central government for holding back Kirpal's nomination. Manish Tewari, a Congress MP, also questioned why R&AW was investigating Kirpal and his partner, stating that it was outside their "external remit" to investigate residents of India and their sexual orientation. Unfortunately, till date he could not be appointed as Judge, though the collegium has reiterated his name in different times.

❖ *Menaka Guruswamy (44) and Arundhati Katju (36)*



Menaka Guruswamy (born 27 November 1974) is a Senior Advocate at the Supreme Court of India. She was the B.R. Ambedkar Research Scholar and Lecturer at Columbia Law School, New York from 2017 to 2019. Guruswamy has been visiting faculty at Yale Law School, New York University School of Law and University of Toronto Faculty of Law. She is known for having played a significant role in many landmark cases before the Supreme Court, including the Section 377 case, the bureaucratic reforms case, the Augusta Westland bribery case, the Salwa Judum case, and the Right to Education case. She is assisting the Supreme Court as Amicus Curie in the case pertaining to the alleged extrajudicial killings of 1,528 persons in Manipur.

Guruswamy is the daughter of Mohan Guruswamy, a former Bharatiya Janata Party strategist and Special Advisor to Union Finance Minister Yashwant Sinha, and Meera Guruswamy. Guruswamy has advanced degrees in law from the University of Oxford, Harvard Law School and the National Law School of India University. Her primary education was Hyderabad Public School, after which she finished High School at Sardar Patel Vidyalaya, New Delhi. This was followed by B.A.LL.B. (Hons) from National Law School of India University, Bangalore (1997). Subsequently, she was awarded a Rhodes Scholarship to read for the BCL at the University of Oxford (2000) and the Gammon Fellowship to pursue the LL.M at Harvard Law School (2001). She obtained her D. Phil from the University of Oxford in 2015 with a thesis on 'Constitutionalism in India, Pakistan and Nepal'.

In the year 2019, in an interview with CNN Fareed Zakaria, Guruswamy revealed that she was in a relationship with lawyer Arundhati Katju, with whom she convinced the Supreme Court in 2018 to decriminalise Section 377, saying that the victory was not just a professional benchmark but also a personal win.

➤ Arundhati Katju (born August 19, 1982) is a lawyer qualified to practice in India and New York. She has litigated many notable cases at the Supreme Court of India and the Delhi High Court, including the Section 377 case, the case of a trans man being illegally confined by his parents, the Augusta Westland bribery case, the 2G spectrum corruption case and the Jessica Lal murder case. Her law practice encompasses white-collar defence, general civil litigation, and public interest cases. Katju obtained a B.A.LL.B. (Hons.) degree from the National Law School of India University, Bangalore (2005). After practising at the Indian bar for 11 years, she enrolled in the LL.M. program (2017) at Columbia University, New York, where she was a Human Rights Fellow, James Kent Scholar, and Public Interest Honoree.^[1]

CONCLUSION

Constitutions are not merely charters of governance; they are also ethical documents that lay down a collective commitment that members of a community make to set principles and to each other about the kind of life they would wish to pursue. Thus, the political form that we choose to govern our societies is not separable from the way in which we choose to govern ourselves as individuals and in our relations to each other. Who or how I choose to love is, then, both an individual choice and a question of political form and expression. Following Jawaharlal Nehru's Quote included in the court's judgment of words being 'magical things', one way of reading the constitution is to see it as a city of words built on the foundation promise made in its preamble- towards securing for its citizen Justice, Liberty, Equality, and Fraternity. It is important to recall that these are virtues that justify why we give ourselves a constitution. The Navtej Singh Johar judgment of Supreme Court with decriminalization of consensual sodomy by the reading down of Section 377 is a huge step forward not just for India, but for the global battle against anti- sodomy laws. Countries like Hong Kong, South Africa and Fiji in Asia and Africa have already shown us the way by decriminalizing consensual sex, in lieu of their commitment to human rights for all. A similar step is required to be undertaken by us in order to fulfill our commitments to constitutional values. The divergent views of Supreme court of India in Suprio Chakroborti verdict, has clearly established the SC intention of putting the ball in the court of parliament for civil union among the LGBT community. Therefore, the assumptions made in the hypotheses that there is no effect of homosexual activities on the health of person & society at large is also found incorrect. The assumption that there will be no effect of legalization of homosexuality in Indian legal, social & political system is also found to be non-convincing.

SUGGESTIONS:

In Navtej Singh Johar, the Supreme Court declared Sec 377 IPC as Unconstitutional to the extent it criminalizes the consensual sexual acts between the LGBT individuals. Further the Union of India through the Parliament replaced the Indian Penal Code ,1860 and brought new criminal law named as " Bharatiya Nyaya Sanhita-2023". But the plight of the LGBT community has not been fully addressed till now. There are so many other problems faced by the community, which is to be addressed by new law to be passed by the Parliament of India. Police reforms must be introduced & implemented. Police at all levels should undergo sensitization workshops to break down their social prejudices and to train them to accord sexual minorities, the same courteous & humane treatment, as they give towards general public. Also, transparency should be adopted in dealing with sexual minorities.

- I. Govt. should make an Endeavour to end violence against the LGBT community; both from the police & anti-social elements, and also from within the family.
- II. Govt. should enact an anti-discrimination law that addresses sexual orientation and gender identity issues and protect LGBT persons by ending discrimination at educational institutions, workplaces, hospitals, clubs, other public & privately run institutions etc.
- III. Govt. should forbid surgical & psychiatric medical interventions to alter sex, gender or sexual orientation; unless the person's complete & free legal consent is obtained.
- IV. Setting up of transgender boards on the lines of the Tamilnadu government & Karnataka government's initiatives. Separate public toilets for third gender, sensitization work conducted by social workers etc. must also be adopted by other states.
- V. The LGBT community has to spread awareness about their identity & rights from grass-root level by organizing more seminars, workshops & awareness drives in schools, colleges & Universities in collaborations with various Government & NGOs.
- VI. The LGBT people must also educate themselves more, as it has been observed during visits to NGOs etc. that many of them leave schools in between, are not educated enough, or lack seriousness towards their studies. Many of them are engaged in typical work of barber, fashion designing, & other such vocational jobs. Few of them pick up prostitution as easy way to make money. All this leads to failure to influence mindset of general public, and ultimately leads to hatred, disrespect, non-acceptance on part of society.

Foot Notes

- ¹ Vikram Seth wrote this poem the morning after the Supreme Court refused to review its decision in Kaushal.
- ² The second highest civilian award bestowed by the Indian state on its citizens.
- ³ Lyrics from Leonard Cohen's song "Democracy" (1992).
- ⁴ 'Aravanis' are biologically born male who define themselves as 'a woman trapped in man's body'.
- ⁵ Vinay Chandran, "From judgement to practice: Section 377 and the medical sector", Indian Journal of Medical Ethics, Vol. 4 (2009).
- ⁶ 111 DRJ 4 (2009)
- ⁷ (2014) 1 SCC 1
- ⁸ (2014) 5 SCC 438
- ⁹ (2017) 10 SCC 1
- ¹⁰ Justice J.S Khehar (CJ), Justice Jasti Chelameswar, Justice D Y Chandrachud, Justice Rohinton Nariman, Justice R K Agarwal, Justice Sanjay Kishan Kaul, Justice A Nazer, Justice SA Bobde, Justice A M Sapre.
- ¹¹ (2014) 1 SCC 1
- ¹² Naz Foundation v Government of NCT, 2010 Cri LJ 94
- ¹³ https://en.wikipedia.org/wiki/Supriyo_v._Union_of_India#
- ¹⁴ Supreme Court Order: W.P.(C) No. 1011/2022 (13 Mar 2023)
- ¹⁵ https://en.wikipedia.org/wiki/Saurabh_Kiirpal

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