

# RIGHT TO LOVE



## **NAVTEJ SINGH JOHAR v. UNION OF INDIA: A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT+ PERSONS**

*Second Edition, September 2021*

**Published by Alternative Law Forum, Bangalore, India**



# RIGHT TO LOVE



## **NAVTEJ SINGH JOHAR v. UNION OF INDIA: A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT+ PERSONS**

*Second Edition, September 2021*

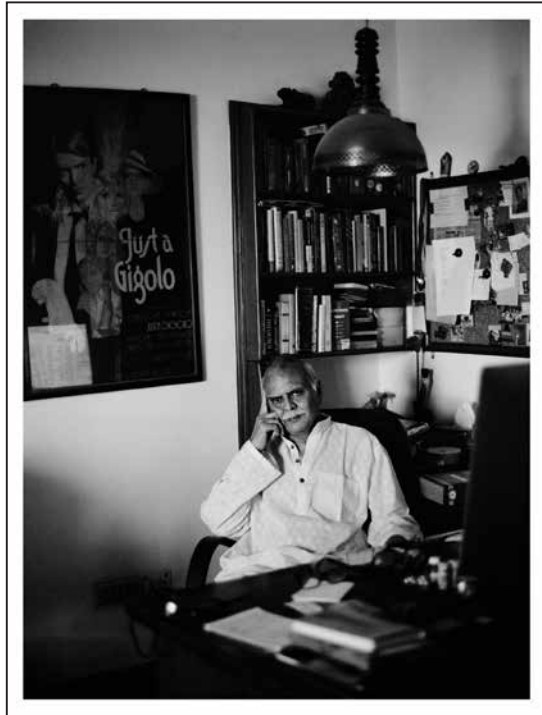
**Published by Alternative Law Forum, Bangalore, India**

# RIGHT TO LOVE

## NAVTEJ SINGH JOHAR v. UNION OF INDIA: A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT+ PERSONS

Published by:	Alternative Law Forum, Bangalore, India altlawforum.org contact@altlawforum.org +91-80-22865757
First Edition:	September, 2018
Second Edition:	September, 2021
Foreword to Second Edition by:	Arvind Narrain, Manavi Atri, and Rahul Garg
Edited by:	Arvind Narrain
Design and Editorial Assistance:	Vinay C
English Edition:	500 copies
Suggested Contribution:	Rs. 100/-
Printing:	National Printing Press, Bangalore
Facing Page Photo:	Saleem Kidwai, Lucknow 2017 Marc Ohrem-Leclef / From the body of work: 'Zameen Asmaan Ka Farq' (As far apart as the Earth is from the Sky) @marclelef

*This monograph has been published for the purpose of promoting a better understanding of the Supreme Court of India's Navtej Singh Johar v. Union of India decision delivered by a 5-Judge bench on 6th September 2018. It is solely intended for non-commercial purposes and to enable further research, criticism, and review of the judgment. All materials extracted and reprinted are consistent with fair dealing principles. This volume may be distributed and republished for non-commercial or educational purposes with due attribution.*



*Saleem Kidwai (1951-2021)*

This edition of “Right to Love” is dedicated to Saleem Kidwai, a pioneering scholar of LGBT+ rights in India. Saleem’s contributions to the judgment in *Navtej Singh Johar v. Union of India* are immeasurable. His book with Ruth Vanita, “Same-Sex Love in India: Readings from Literature and History”, documented same-sex love and traditions covering more than two thousand years in the Indian subcontinent. The anthology was an important submission in the case against Section 377 of Indian Penal Code. The book proved the most effective foil to right-wing efforts at denying the very existence of queer people. It gave Indian LGBT+ communities a sense of belonging in time and history. Saleem’s work, his humility, and his kindness remain in our memories and we deeply mourn his loss.

We also mourn the loss of many friends, activists, and those among us who, through their daily struggles against social pressures, inspired quiet revolutions for social change. We remember Reginald Watts (Rex), Shalini Muthukumar Natesan, Anjana Hareesh, Ananya Kumari Alex, Sajeev Kumar (Saju), and the countless others who have crossed the rainbow bridge too soon. We miss them all and dedicate our work to their memory.



# CONTENTS

Foreword .....	7
1. Section 377 Timeline (1994-2018) .....	19
2. Introduction.....	23
3. Key Aspects of the Judgment .....	27
3.1 Tonality of the Judgment .....	27
3.2 Apology.....	28
3.3 Emphasis on Freedom to Choose in the Intimate Sphere .....	30
3.4 Expansive Interpretation of Privacy and Dignity.....	30
3.5 Recognition of the Right to Love.....	31
3.6 Stereotypical Perceptions of LGBT+ persons Violates the Right to Equality and Non-Discrimination.....	32
3.7 Constitutional Morality .....	33
3.8 Idea of Transformative Constitutionalism.....	34
3.9 Doctrine of Non-Retrogression.....	36
3.10 Combating Discrimination in Existing Laws including Relationship Recognition .....	36
3.11 Reading Down of Section 377 .....	36
3.12 Responsibilities of different actors .....	37
3.12.1 The Union of India .....	37
3.12.2 State Governments .....	38
3.12.3 Mental health and medical professionals .....	38
3.12.4 Citizens Activists.....	39
4. Judgment by Dipak Misra C.J. and Khanwilkar J. ....	41
5. Judgment by R.F. Nariman J. ....	51

6. Judgment by Dr. Dhananjaya Y. Chandrachud J. ....	57
7. Judgment by Indu Malhotra J. ....	77
8. Conclusion .....	83
9. APPENDICES	
Appendix A: The Law .....	89
Section 377 of the Indian Penal Code, 1860.....	89
Relevant Constitutional Provisions .....	89
Appendix B: The Judges .....	91
Appendix C: The Parties .....	93
Petitioners .....	93
Impleadment Applications .....	93
Respondent .....	94
Intervenors arguing for Retention of Section 377 .....	94
Appendix D: Summary of Arguments .....	95
Arguments by the Petitioners and Intervenors against Section 377 .....	95
Arguments by the Respondent: The Union of India .....	98
Arguments by Intervenors arguing for the Retention of Section 377 .....	99
Appendix E: Transcript of Hearings in Navtej Singh Johar v. Union of India .....	101
Appendix F: Timeline (2018-2021) — Impact Of Navtej Singh Johar v. Union of India .....	135
10. Acknowledgements.....	159
11. Bio.....	160



## FOREWORD

The 6th of September, 2018 marked a historic moment in queer rights discourse in India, when the Supreme Court in its decision of *Navtej Singh Johar v. Union of India*,<sup>1</sup> decriminalized ‘carnal intercourse against the order of nature between two consenting adults.’ The provision, which had been in place in the penal code for over a century and a half, was used against the queer community with the words ‘carnal intercourse against the order of nature’ being interpreted to cover consensual same-sex sexual conduct. This made Section 377 of the Indian Penal Code, 1860<sup>2</sup> a status-based criminal offence and every person having non-heterosexual or non-heteronormative sexual orientation was presumptively a criminal.

The decision though in a technical sense only read down Section 377 of the IPC, through its use of the concepts of dignity, equality, privacy and constitutional morality opened the key to constitutional rights, as far as the queer community was concerned. Seeing the potential of the judgment, immediately after the decision was pronounced, Alternative Law Forum published 500 copies of a booklet, “*Right to Love*” to ‘provide a road map to the judgment’ and to popularize the key aspects of it. Copies of the first edition were distributed widely among law students, representatives of political parties, students, teachers, members of the queer community, parents of queer people

---

1 *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

2 § 377, Indian Penal Code, 1860. See Appendix A for the text of the provision.

as well as the general public. By all accounts, the booklet was well received.

To commemorate the third anniversary of the decision, we are printing its second edition. The inevitable question we were faced with was whether the judgment was still relevant and whether the judgment had indeed produced any change as far as queer persons were concerned. There were some who argued that *Navtej* was merely a decorative judgment, with uplifting constitutional language but no real implications for the lives of queer persons. An analogy to the reading down of a statute is *Kedar Nath Singh v. State of Bihar*,<sup>3</sup> where the Supreme Court read down Section 124A of the IPC, so the acts which were deemed seditious were only those which incited violence. However, as we know, the sedition law is widely misused and the Supreme Court judgment which enjoins the State to only prosecute speech which incites violence is more observed in the breach. Is *Navtej*, like *Kedar Nath* a judgment of no impact whatsoever?

To investigate this question of the impact of *Navtej*, we looked through reported judicial decisions to see where *Navtej* had been cited. What we found astounded us! In the three years since *Navtej*, we were able to find 41 reported decisions which were impacted by *Navtej*. There were decisions which recognized the right to love and the right to partnership of same-sex couples and transgender people, decisions on equality and non-discrimination in employment as well as petitions on same-sex marriage. The decision has also contributed to courtroom sensitivity in some sense by bringing about a change in the language, the attitudes and feelings of judiciary towards the community, has inspired a new wave of activism, renewed a progressive judicial culture and has given hope to millions of non-heteronormative, non-binary and queer persons around the globe. However, *Navtej* has also had an impact on minorities other than queer people right from women who choose to worship at Sabarimala to people who choose to

engage in the act of begging to older persons. The principle that constitutional morality overrides social morality, the idea that the Indian Constitution is a transformative constitutionalism, the development of the idea of indirect discrimination<sup>4</sup> and the development of jurisprudence on discrimination based on stereotypes and generalizations<sup>5</sup> are all judicial offshoots of *Navtej* (a brief summary of these decisions are annexed as Appendix F).

The decision in *Navtej* played a monumental role in extension of the right to stay in live-in relationships to non-heterosexual and queer partners. Of the 41 decisions, 20 related to the right to stay in a live-in relationship, out of which fourteen decisions were with respect to lesbian women or same-sex desiring women and five of them were with respect to transgender persons. There was one case of a gay man subject to discrimination on account of his sexuality. With respect to the same-sex marriage petitions filed which also cited *Navtej*, four were by gay couples, one by a lesbian couples and one jointly by three men and a woman having non-heterosexual sexual orientations. *Navtej* has positively affirmed that live-in relationships of same-sex couples cannot be subject to any criminal sanction. This affirmation has been taken forward by numerous high court decisions on same-sex live-in relationships.

In *Sreeja S. v. Commissioner of Police*,<sup>6</sup> the first decision pertaining to the rights of queer persons after *Navtej*, the Kerala High Court in a *habeas corpus* petition where two adult women were not allowed to stay together as life partners, by placing reliance on *Navtej*, observed that being majors, they were free to exercise their independent choice of where they wanted to live, who they wanted to live with and how they wanted to lead their lives. The impact of *Navtej*, for a progressive ruling such as *Sreeja*, can be seen in the fact that the decision highlights that an adult person is free to choose the person they wish to enter into a live-in

---

4 *Nitisha v. Union of India*, 2021 SCC OnLine SC 261.

5 *Indian Young Lawyers Association v. Union of India*, (2019) 11 SCC 1.

6 *Sreeja v. Commissioner of Police*, 2018 SCC OnLine Ker 3578.

relationship with, provided that their choice does not violate a valid legal framework, which *Sreeja* specifically highlighted same-sex relationships to not. The court observed that ‘live-in relationships’ between two adult persons of the same-sex do not in any manner offend any provision of any law or do not become a crime in any manner, hence ruling on their validity, and clearly exhibiting how *Navtej* removed what was a hindrance for queer partners to validly and legally stay together.

Ever since, we have seen a number of similar *habeas corpus* petitions seeking protection from various high courts. The decisions in *Shampa Singha v. State of West Bengal*<sup>7</sup> in the Calcutta High Court, *Chinmayee Jena v. State of Odisha*<sup>8</sup> in the Orissa High Court, *Sultana Mirza v. State of Uttar Pradesh*<sup>9</sup> in the Allahabad High Court, *Madhu Bala v. State of Uttarakhand*<sup>10</sup> filed in the Uttarakhand High Court, *Manjinder Kaur v. State of Punjab*<sup>11</sup> in the Punjab and Haryana High Court, *Ramya v. State of Tamil Nadu*<sup>12</sup> in the Madras High Court, and *Bhawna v. State*<sup>13</sup> and *Monu Rajput v. State*<sup>14</sup> both in the Delhi High Court and many others have continued to carry this legacy forward.

Another remarkable and distinctive feature of the decisions on same-sex live-in relationships after *Navtej* needs a specific mention. Prior to *Navtej*, in *habeas corpus* petitions seeking protection of one’s same-sex partner, courts had at best an indifferent approach to one’s sexual orientation and the matter was almost always disposed-off by stating that one was free to make life choices such as who to stay with, on account of one’s

---

7 *Shampa Singha v. State of West Bengal*, 2019 SCC OnLine Cal 153.

8 *Chinmayee Jena v. State of Odisha*, 2020 SCC OnLine Ori 602.

9 *Sultana Mirza v. State of Uttar Pradesh*, Writ C. No. 17394 of 2020.

10 *Madhu Bala v. State of Uttarakhand*, HCP No. 8 of 2020.

11 *Manjinder Kaur v. State of Punjab*, Writ Cr. No. 5669 of 2020.

12 *Ramya v. State of Tamil Nadu*, CRL OP No. 10880 of 2021.

13 *Bhawna v. State*, Writ Cr. No. 1075 of 2019.

14 *Monu Rajput v. State*, 2019 SCC OnLine Del 9154.

status as a major—the ‘*adulthood defense*.’ However, after *Navtej*, the aforementioned decisions have been able to visibilize queer sexualities, queer romantic partnerships and non-heterosexual sexual orientations as valid means of expression, by actively synchronizing the classic ‘*adulthood defense*’ with the newer judicial understanding of ‘*sexual orientation*.’ In other words, courts have now synchronized ‘*choice and autonomy*’ with ‘*sexual orientation*.’ For instance, the court in *Shampa Singha* held that the petitioner was free to choose *a partner of any gender without any influence by any person or authority*.

These decisions have successfully taken the decision in *Navtej* to its logical extension by interpreting the ratio in *Navtej*, not merely in what it said, but also in terms of its logical and practical implications, which is clear from the fact that they interpreted *Navtej* to not only have decriminalized ‘*carnal intercourse*’ between two consenting adults of the same-sex, but also to have decriminalized ‘*consensual cohabitation*.’ Therefore, the decisions post *Navtej* have built upon the base provided by *Navtej* and have taken significant steps of functionalizing and realizing its ratio in its true spirit.

Other resultant developments of *Navtej*, include various petitions: five before the Delhi High Court and one before the Kerala High Court, challenging the provisions of the *Hindu Marriage Act, 1955*, the *Foreign Marriage Act, 1969* read with the *Special Marriage Act, 1954*, and the *Special Marriage Act, 1954*, on grounds that denial of the right to marry to same-sex and queer partners goes against various constitutional guarantees such as Articles 14, 15, 19 and 21. Some petitions have also asked for declaration from the courts praying for orders declaring and acknowledging the right to marry a person of the same-sex as a fundamental right, especially within the secular laws of *Foreign Marriage Act, 1969* and the *Special Marriage Act, 1954*.

The decision in *Navtej* and its ideals of constitutional morality and transformative constitutionalism have transcended its

immediate beneficiary, the queer community, and impacted other marginalized constituencies. The decision of *Suhail Rashid Bhat v. State of Jammu and Kashmir*<sup>15</sup> illustrates this point beautifully, where a petition challenging the constitutionality of the *Jammu & Kashmir Prevention of Beggary Act, 1960* and the *Jammu & Kashmir Prevention of Beggary Rules, 1964* made in exercise of powers under Section 9 of the Act was filed, in so far as it criminalized the act of begging. The act was also challenged, as the preamble of the act, while stating as its objectives, read: ‘an act for preventing beggary and for making beggars good citizens.’ The court employed the principle of constitutional morality and cited *Navtej*, to hold that the guarantee of constitutional rights could not be made dependent upon, the ‘perceptions of conduct considered deviant by the majority’ and the test of popular acceptance could not in any way furnish a valid basis to disregard rights which were otherwise conferred with the sanctity of constitutional protection.

In another decision, a woman who was a senior citizen had effectuated a transfer of her property in the name of her son, who later excluded and deprived her of benefits from the property, while also refusing to look after her.<sup>16</sup> Even though there was no condition in the deed which could have brought into effect the transfer only on condition of the transferee providing basic amenities and basic physical needs to the transferor, it was argued by her that the mere expectation of such a reciprocal understanding would suffice, her (the transferor) being a senior citizen. The court relied on the understanding in *Navtej*, first justifying their reliance on *Navtej*, stating that the underlying principles of inclusiveness and the need to uphold individual dignity of people, made them do so. The court, while quoting *Navtej*, drew a parallel between the LGBT+ community and senior citizens, and observed that just like in *Navtej*, the issue considered was that of inclusiveness in society, of a minority that is the LGBT+ community, so as to uphold

---

15 *Suhail Rashid Bhat v. State of Jammu and Kashmir*, 2019 SCC OnLine J&K 869.

16 *Subhashini v. District Collector*, 2020 SCC OnLine Ker 4080.

their individual dignity unaffected by their sexual orientation, in the present case too, the issue dealt with inclusiveness for the community of senior citizens ensuring their care and welfare and their dignified life in their twilight years.

The decision in *Navtej* has also played a significant role in the transformative approach in the interpretation of the right to equality. The concept of indirect discrimination covers instances that may seem neutral on face value, but are actually discriminatory, when looked at more closely and seen through. The decision in *Navtej*, by stating that although Section 377 may seem to be a neutral provision applicable to both heterosexual persons and non-heterosexual persons alike, the provision had a disproportionate, direct, and inherent impact on non-heterosexual persons, has given way to a broader interpretation of equality.

These decisions demonstrate how the ratio in *Navtej*, has led courts to rule in favor of various ‘discrete and insular minorities’ who face grave dangers of discrimination, merely because their views, beliefs or way of life do not accord with the ‘mainstream.’ The decisions make clear that a constitutional interpretation requires that constitutional morality must prevail over obscure notions of social morality.

The decision in *Navtej* has also impacted the judicial culture in India through increased judicial sensitization, empathy and understanding by the judiciary towards the LGBT+ community. The impact of *Navtej* is visible in the visibilization of distinct sexual orientations and queer identities in various courtrooms. Through their usage of terms such as ‘*queer*’ and ‘*lesbian*,’ decisions of various high courts have carved out space for lesbian and queer couples, ensuring an explicit and more direct acknowledgement of diverse orientations. The acknowledgment and usage of these terms by the judiciary and their preference over terms such as ‘*homosexual women*’ or ‘*homosexuality*’ is also significant in marking an emphatic departure from the pathological and criminal

undertones associated with the latter terms which have been linked with criminality, mental illness and disease in the past.

Another significant and powerful expression of this increased judicial sensitization can be seen in the recent Madras High Court order delivered by Justice Anand Venkatesh in the case of *S. Sushma v. State of Madras*,<sup>17</sup> which gives a deeper meaning and takes forward the ‘apology’ dimension of Navtej. The facts of the case pertain to Sushma (aged 22) and Seema (aged 20) who ran away from their home in Madurai and chose to live their lives anew in Chennai with each other as partners. The families of both the girls filed FIR’s at the local police station. Sushma and Seema with the support of the local LGBT+ community then filed a petition before the High Court to prevent any coercive action by the police and to allow both of them to lead their lives, as adults are constitutionally entitled in India.

Justice Venkatesh’s order went beyond merely protecting the right of the two women to be with each other and marks a milestone in Indian legal history in terms of both the reliefs as well as the method adopted by the judge in arriving at the reliefs.

One of the unique features of the *Navtej* judgment was the fact that the judgment acknowledged that ‘civilization had been brutal’ as far as LGBT persons were concerned and that ‘history owed an apology to LGBT persons and their families’. The ‘apology’ of *Navtej* is taken forward in unprecedented ways by Justice Anand Venkatesh.

Justice Venkatesh’s order states that the law was clear and that he could have recognised the right of Sushma and Seema to be with each other, but that would have been ‘hypocritical’, as he would not have dealt with his own ‘true and honest feeling’ about this issue. Justice Venkatesh goes on to say that he is trying to ‘break his ‘own notions’ and is in the ‘process of evolving’ and attempting to ‘understand the feelings of the petitioners.’



The judge's search for true understanding leads him to undergo a session with a psychologist and he reproduces the documentation of the session in the order. One of the key misconceptions 'that came to the forefront was how homosexuality is very often viewed only with a sexual connotation'. During the session the 'client', namely the judge expressed how after 'listening to the petitioners', he realised that 'two women' together can be 'seen as a couple'. Since one does not think of 'two heterosexuals in a relationship' as being in it 'only for sex' it 'should be no different' for persons of 'other orientation'.

Justice Venkatesh vests the reason for the discrimination faced by Sushma and Seema in structures and institutions and passes a slew of orders which begin to address heteronormativity in institutions such as police stations, prisons, judiciary, educational institutions, workplaces and among mental health professionals, health workers and parents.

Finally, what is of great significance, is the impact that the decision in *Navtej* has had in foreign jurisdictions, by creating momentum and renewing the fight against similar penal provisions. The recent Botswana High Court decision of 11th June, 2019,<sup>18</sup> while decriminalizing same-sex sexual conduct which was criminalized under Section 164 of the *Botswana Penal Code*, placed significant reliance on *Navtej*, importing the understanding that minority communities could not be marginalized at the behest of the majorities, also citing paragraphs on the right to privacy and the right to dignity from *Navtej*. In other jurisdictions such as Kenya<sup>19</sup> and Singapore,<sup>20</sup> despite the failed attempts to decriminalize same-sex sexual conduct, the decision in *Navtej* has regardless generated hope and has driven exemplary activism. In Singapore, for instance, the decision in *Navtej* led to an immediate filing of a

---

18 *Letsweletse Motshidiemang v. Attorney General*, [2019] MAHGB-000591-16.

19 *EG v. Attorney General*, Petition Nos. 150 and 234 of 2016.

20 *Ong Ming Johnson v. Attorney General*, [2020] SGHC 63.

petition challenging Section 377A of the *Penal Code of Singapore*. (A brief summary of these decisions is annexed as Appendix F.)

These judicial decisions give hope to many that *Navtej* was not just a flicker in the wind and that the judiciary will stand by the queer community in its struggle for justice. However, the Union Government has still been stubbornly immune to the influence of *Navtej*. It has still not seen fit to implement J. Nariman's directive to 'give wide publicity to the judgment' and conduct 'sensitization and awareness training for government officials and in particular police officials in the light of the observations contained in the judgment'.

Going beyond non-implementation, the passing of the *Transgender Persons (Protection of Rights) Act* in December 2019 in spite of opposition by the trans community, undid gains of *NALSA v. Union of India*. The stated object of the Act is to curb discrimination by protecting the rights of the transgender person but is in fact far away from it. One of the most crucial rights of self-identification laid down in *NALSA*, as well as affirmed in *Navtej*, is denuded by the provisions of the Act.

Immediately after its signing into the law, the constitutionality of the *Transgender Persons (Protection of Rights) Act, 2019* was challenged on various grounds. Amongst these, one of the most critical challenges was with regard to the right of self-identification or self-determination of one's gender identity as was laid down in the 2014 Supreme Court verdict of *NALSA v. Union of India*.<sup>21</sup>

The Act requires an application to be made before the District Magistrate for a certificate identifying them as transgender. The rules that were notified in the peak of the pandemic require a psychologist's report along with an application to the District Magistrate.

On one hand, the law requires surgical intervention to be able to get male/female binary recognition as per Section 7(1),<sup>22</sup> while on the other; the rules simply require medical intervention<sup>23</sup>—which as per the understanding of the rules is defined as any intervention including a medical document certifying gender incongruence, hormone therapy or surgical intervention. Apart from the inconsistency, both the law and the rules undermine the right to self-identification of the transgender community members by giving a third party—the district administrator—the power to decide on whether the submitted documentation qualifies a person as transgender or not.

As a whole, the *Transgender Persons (Protection of Rights) Act, 2019* does not take into account transgender community's basic rights, bodily autonomy, dignity and goes against the very crux of both *NALSA* and *Navtej*. In the course of the litigation against it in the Supreme Court we only hope that the promise of the law in *Navtej* and *NALSA* is upheld and that the Supreme Court upholds the right to self-determination of gender.

Apart from the work of the courts in the last three years, the judgment has the potential to change a deep rooted social morality into an Ambedkarite constitutional morality. There has been a quiet empowerment of the queer community as it asserts its fundamental rights more fearlessly than ever before. During the COVID-19 pandemic, we saw how the transgender community in Bengaluru internalized the ideal of the right to dignity in *Navtej*, with community organizations and leaders not only taking up relief work to support the community, but also asserted their right to dignity at every step of this relief work.<sup>24</sup> This is the potential of the *Navtej* decision in the sphere of advocacy—to change a societal morality into a constitutional morality.

---

22 § 7(1), *Transgender Persons Act, 2019*.

23 Rule 2(i), *Transgender Persons Rules, 2020*.

24 *Asserting Dignity in Times of Covid*, Alternative Law Forum, 2021.

We believe that there are unexplored possibilities of utilizing the decision that we can unravel by continuing to engage with the text of this decision with its emphasis on dignity, privacy, equality, non-discrimination, the right to an apology, constitutional morality as well as the idea of a transformative constitution.

It is to this end that we are publishing this edition.

# 1. SECTION 377 TIMELINE (1994-2018)

1994	ABVA files petition in Delhi High Court challenging Section 377, which was dismissed for non prosecution as the group had become defunct.
2001	Naz files petition in Delhi High Court challenging Section 377.
2002	Joint Action Council Kannur (JACK) files an intervention on grounds that the law is required to prevent HIV from spreading.
2003	Government of India files affidavit (Ministry of Home) supporting retention of law on grounds that criminal law must reflect public morality and that Indian society disapproved of homosexuality.
2004	The Delhi High Court dismisses petition stating that Naz Foundation was not affected by Section 377 and had no “locus standi” to challenge the law.
2004	The Delhi High Court rejects a review petition filed which challenged the above mentioned order.
2006	Naz Foundation files appeal and the Supreme Court passes order remanding the case back to the Delhi High Court for the matter to be heard on merits.
2006	National Aids Control Organisation (NACO) files an affidavit stating that the enforcement of Section 377 is a hindrance to HIV prevention efforts.
2006	B.P. Singhal files an intervention stating that homosexuality is against Indian culture and that the law needs to be retained.
2006	Voices Against 377 files an intervention supporting the petitioner and stating that

	Section 377 is violative of the fundamental rights of LGBT+ persons.
18.09.2008	The matter is posted for final arguments before A.P. Shah C.J. and S. Muralidhar J.
7.11.2008	The matter is reserved for judgment after 12 days of arguments.
2.07.2009	Judgment in <i>Naz Foundation v. NCT Delhi</i> delivered reading down Section 377 of the IPC to exclude sexual conduct between consenting adults in private.
7.07.2009	First Special Leave Petition (SLP) filed in the Supreme Court by Suresh Kumar Koushal challenging the Naz Foundation judgment.
2009	<p>Fifteen other SLPs are filed, challenging the Naz Foundation judgment by:</p> <ol style="list-style-type: none"> <li>1. Apostolic Churches Alliance v. Naz Foundation &amp; Others.</li> <li>2. S.K.Tijarawala v. Naz Foundation &amp; Others.</li> <li>3. Bhim Singh v. Naz Foundation &amp; Others.</li> <li>4. B. Krishna Bhat v. Naz Foundation &amp; Others.</li> <li>5. B.P. Singhal v. Naz Foundation &amp; Others.</li> <li>6. S.D. Pratinidhi Sabha &amp; Another v. Naz Foundation &amp; Others.</li> <li>7. Delhi Commission for Protection of Child Rights v. Naz Foundation &amp; Others.</li> <li>8. Ram Murti v. Government of NCT of Delhi &amp; Others.</li> <li>9. Krantikari Manuvadi Morcha Party v. Naz Foundation &amp; Others.</li> <li>10. Raza Academy v. Naz Foundation &amp; Others.</li> </ol>

	<p>11. Tamil Nadu Muslim Munnetra Kazhagam v. Naz Foundation &amp; Others.</p> <p>12. Utkal Christian Council v. Naz Foundation &amp; Others.</p> <p>13. Joint Action Council Kannur v. Naz Foundation &amp; Others.</p> <p>14. All India Muslim Personal Law Board v. Naz Foundation &amp; Others.</p> <p>15. Trust God's Ministry v. Naz Foundation &amp; Others.</p>
2009-2011	<p>Interventions filed supporting the Naz judgment by:</p> <ol style="list-style-type: none"> <li>1. Minna Saran and 18 other parents of LGBT+ persons.</li> <li>2. Dr. Shekhar Seshadri and 12 other mental health professionals.</li> <li>3. Nivedita Menon and fifteen other academics.</li> <li>4. Shyam Benegal (Film Director).</li> <li>5. Ratna Kapur and other legal academics.</li> </ol>
13.02.2012	Final Arguments before the Supreme Court commence.
27.03.2012	Reserved for judgment after 15 days of arguments over 6 weeks.
11.12.2013	Supreme Court in Suresh Kumar Koushal reverses Naz and upholds constitutionality of Section 377 thereby recriminalizing LGBT+ lives.
28.01.2014	Review petitions filed by the Union of India, Naz Foundation, Voices Against 377 and other petitioners rejected.
03.03.2014	Curative Petitions filed.

15.04.2014	In <i>NALSA v. Union of India</i> , the Court recognises the constitutional rights of transgender persons.
22.04.2014	Supreme Court agrees to hear curative petitions in open court.
02.02.2016	Curative petitions referred to be heard by larger bench.
29.06.2016	Article 32 petition filed by Navtej Singh Johar arguing that Section 377 violated the right to equality, non-discrimination, privacy and dignity.
24.08.2017	In <i>Puttaswamy v. Union of India</i> it was decided that privacy is a fundamental right and it was held that Koushal was a 'discordant note' in the rights jurisprudence of the Supreme Court.
08.01.2018	Supreme Court lists Navtej Singh Johar as a matter to be heard by a five judge constitutional bench.
2018	Additional Article 32 petitions challenging Section 377 filed by Keshav Suri, Avinash Pokkaluri and others (IIT students and alumni), Ashok Row Kavi and others, Arif Jafar and Dr. Akkai Padmashali and others (from transgender communities). Interventions were also filed by Voices Against 377, Minna Saran (representing parents of LGBT+ persons), Alok Sarin (representing mental health professionals), Nivedita Menon and other academics (representing teachers) and Naz Foundation.
17.07.2018	Final arguments commence in <i>Navtej Singh Johar v. Union of India</i> and after four days of arguments the case is reserved for judgment.
6.09.2018	Judgment is pronounced in <i>Navtej Singh Johar v. Union of India</i> reading down Section 377 of the IPC.



## 2. INTRODUCTION

The 6th of September 2018 marked a historic victory for a vibrant and vociferous LGBT<sup>1</sup> movement, which for over seventeen years had been demanding the repeal of Section 377 of the Indian Penal Code (see Appendix A for full text). The Supreme Court in its decision in *Navtej Singh Johar v. Union of India*, struck down the 1860 law criminalising the lives of LGBT persons.

The decision itself built upon a history of struggle carried out relentlessly across the country which involved pride marches, protests, demonstrations as well as courageous individual acts of LGBT persons coming out in their workplaces, families as well as in the media. It is also important to remember those who contributed so much to the LGBT movement but are no more with us. Our collective efforts have opened up in ways small and big, a space in Indian society for tolerance and acceptance of sexual and gender diversity. The struggle of the last quarter century waged by thousands of people across the country has succeeded in creating a space of visibility and acceptance in Indian society around the loves and lives of the LGBT community.

To recapitulate briefly on some of the legal high points in the struggle against a law of colonial vintage. In 1950, the Indian

---

<sup>1</sup> LGBT and LGBT+ are short-hand for Lesbian, Gay, Bisexual and Transgender and others. In this book, we have used the terminology adopted by the judges (“LGBT”) in the operative part of the judgment, while cognisant that there are a range of identities in the Indian context including Queer, Intersex, Asexual, Hijra, Kothi, Jogappa, and many more.

Constitution came into force with the recognition that all persons had the right to equality, non-discrimination, life and personal liberty (see Appendix A for relevant provisions of the Indian Constitution). The significance of the Constitutional framework was that it gave the community the language of universal human rights, which would apply to all persons without discrimination.

However the Courts never saw fit to apply the constitutional framework to LGBT persons till the ground breaking decision in 2009 by the Delhi High Court in *Naz Foundation v. NCT Delhi*. For the first time, in Indian judicial history, Section 377 was judged against the parameters of the Constitution to find that the provision violated the right to equality, non-discrimination, dignity and privacy of LGBT persons and found Section 377 unconstitutional. In 2013, in *Suresh Kumar Koushal v. Naz Foundation*, in a widely criticised judgment, appositely captured by Vikram Seth as a “bad day for law and love”, a two-judge bench of the Supreme Court recriminalised LGBT lives.

In 2014, the Supreme Court in *NALSA v. Union of India* found that transgender persons were entitled to full rights under the Indian Constitution. In 2017, in *Puttaswamy v. Union of India*, a nine-judge bench’s decision of the Supreme Court found that that the right to privacy was a part of the fundamental rights chapter and that *Suresh Kumar Koushal* was one of the “discordant notes” in the rights jurisprudence of the Supreme Court.

Thus, both legal developments and social developments had made *Suresh Kumar Koushal* increasingly unviable. There was a sea change in the social and public perception of LGBT lives which was perhaps best captured in the contrast between the empathy that the judges who heard *Navtej Singh Johar* showed towards LGBT persons compared to the cruel indifference of the *Koushal* Court. In *Suresh Kumar Koushal*, the judges were adamant that the law criminalised sexual acts and not identities. The judges had contemptuously observed that LGBT persons were anyway a “minuscule minority” whose rights they referred to dismissively as

“so-called rights”. The judges who heard *Navtej Singh Johar* were clear that Section 377 affected not only sexual acts but LGBT persons, that the right to privacy and dignity were real rights which applied to LGBT persons and that constitutional morality mandated that the rights of every minuscule minority were deserving of constitutional protection (see Appendix C for the parties who appeared before the Court, Appendix D for Summary of Arguments made during the proceedings, and Appendix E for transcript of the proceedings before the Supreme Court).

After four days of hearing, the judgment was delivered on the 6th September 2018.

This short booklet aims to provide a roadmap to this judgment so that its implications can be better understood by LGBT persons as well as all those who are interested in the future of human rights.

The judgment itself is an acknowledgment of the breadth and depth of the LGBT movement and references fact-finding reports, narratives of persecution, academic writing, poetry, literature, philosophy, law, and jurisprudence, weaving these diverse sources together to make an argument that Section 377 is violative of the promise of the Indian Constitution.

We hope to pique the curiosity of the readers so that they read the full judgment, which is available at the following web address:

**[https://main.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)**

For a detailed history of the case, including legal documents, analysis, and media coverage, also visit:

**<http://orinam.net/377/> (or) [377.orinam.net](http://377.orinam.net)**



## 3. KEY ASPECTS OF THE JUDGMENT

The judgment in *Navtej Singh Johar*, delivered on 6th September 2018, spanned 493 pages and had four concurring judgments authored by Misra C.J.<sup>2</sup> speaking for himself and Khanwilkar J. with concurring judgments by Justices Nariman, Chandrachud and Malhotra (see Appendix B for a brief about the Judges). The Court traversed the fundamental rights protections of the Constitution to find that Section 377 of the Indian Penal Code (IPC) violated LGBT persons rights to dignity, equality, privacy and expression. The judgment itself was widely welcomed both by the LGBT community as well as other social movements not just for the result, which was a decriminalisation of the intimate lives of LGBT persons, but also for the way the judges reached their conclusion. This section will highlight some of the key aspects of the judgment.

### 3.1 TONALITY OF THE JUDGMENT

---

What is most remarkable about the judgment is its tonality. It is not written in the register of cold logic, but with the emotional force of someone who is very moved by witnessing the unconscionable suffering inflicted on LGBT communities. The judges refer to the suffering of Oscar Wilde, Alan Turing, Khairati (the first reported decision on Section 377 which is of the arrest and torture of a transgender person singing in the streets), Nowshirwan (a Parsi

---

2 C.J.: Chief Justice;  
J.: Justice

shopkeeper arrested under Section 377), the poetry of Vikram Seth and the agony of his mother Leila Seth.

Chandrachud J. characterizes Section 377 as a “colonial legislation” which has made it criminal for “consenting adults for the same gender to find fulfillment in love”. Chandrachud J. notes that, “the offence under Section 377 of the Penal Code – has continued to exist for nearly sixty eight years after we gave ourselves a liberal constitution. Gays and Lesbians, Transgenders and Bisexuals continue to be denied a truly equal citizenship seven decades after independence”. The effect of legislations such as Section 377 on LGBT lives led him to observe that “civilization has been brutal”.

### **3.2 APOLOGY**

---

This extended meditation on the suffering imposed upon LGBT persons results in a judicial apology. An apology in essence has two dimensions, namely the acknowledgment of having done a wrong and the expression of a willingness to atone for it. *Navtej Singh Johar* takes responsibility for having inflicted wrongs and seeks to atone for it.

This sentiment is best captured by Malhotra J. who says, “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”.

This is important in the LGBT context, because the response to the unconscionable suffering which has been imposed upon LGBT persons is usually either indifference or pity. Rarely does one come across a judicial response which acknowledges complicity in such oppression and then promises atonement for having caused such suffering.

In *NALSA v. Union of India*, the Supreme Court noted the forms of suffering of the transgender community, but did not go so far as to acknowledge its role in perpetuating the suffering. This resulted in an important judgment, but motivated by pity for the transgender

community. However in *Navtej Singh Johar* when the Supreme Court acknowledged the harm that its own historic indifference to the plight of the LGBT community had caused, it set the stage for a different kind of judgment.

The judgment broadened the ambit of its decision beyond individual petitioners to encompass the suffering of the entire LGBT community. The apology tendered in *Navtej Singh Johar* draws its strength and force from the other important apologies made for causing historic injustice; be it by the German nation to the Jews, by the Canadian government to their indigenous inhabitants, by South African apartheid enforcers to those who suffered under their rule, and by the “regret” expressed by Britain for the spread of anti-sodomy laws in the Commonwealth.

However, an apology only has meaning if one wants to atone for the wrongdoing of the past. An apology is not only about the past but should really provide a pathway to the future. *Navtej Singh Johar* is rooted in a deep sense of responsibility for having been complicit in an egregious form of violation and then seeks to redress the wrong.

As Chandrachud J. puts it, “It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations”.

This judgment can be seen as taking four different paths to “right the wrongs of history”. Misra C.J. wrote for himself and Khanwilkar J. Justices Nariman, Chandrachud and Indu Malhotra wrote separate concurring opinions. All justices agreed with the conclusion that Suresh Kumar Koushal was overruled and that Section 377 should be struck down insofar as it criminalised consenting sex between adults. However, they took different routes to arrive at their conclusion and in the process highlighted different aspects of the Constitution and how it applied to the lives of LGBT persons.

### **3.3 EMPHASIS ON FREEDOM TO CHOOSE IN THE INTIMATE SPHERE**

---

The judges were unequivocal that Section 377 brutally intruded into a zone of intimate decision which is entitled to constitutional protection. As Chandrachud J. put it, “The choice of partner, the desire for personal intimacy and the yearning to find love and fulfillment in human relationships have a universal appeal” and “the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation”.

The opinion of Misra C.J. invokes Johann Wolfgang von Goethe, who had said “I am what I am, so take me as I am” – to stress the right to develop one’s individuality against the demands of social conformity. Particularly in the context of LGBT persons, where the struggle is often to assert one’s personhood, in an isolating, ostracising environment in which heterosexuality is the norm, this constitutional protection given to intimate choices against the dictates of societal conformity cannot be overstated.

### **3.4 EXPANSIVE INTERPRETATION OF PRIVACY AND DIGNITY**

---

The judges followed the ruling in *Puttaswamy v. Union of India*, which gave an expansive interpretation of privacy as not just meaning the right to do what one wants in the privacy of one’s home but also encompassing the right to make decisions about who one chooses to be intimate with. As Malhotra J. put it, “the right to privacy is not simply the ‘right to be let alone’, and has travelled far beyond the initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice”. Chandrachud J. addresses the concern that privacy is only about granting protection to acts behind closed doors, by stating that, “It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces. The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons



of the community to navigate public places on their own terms, free from state interference”.

The question of privacy of choice was closely linked to the question of dignity. The sphere of dignity includes, “the right to carry such function and activities as would constitute the meaningful expression of the human self”. As per Misra C.J. if the freedom to exercise one’s choice of partner is curtailed, it impacts an individual’s sense of dignity. Since Section 377 chills one’s ability to express oneself, especially in matters so integral to selfhood, it impinges upon the sense of dignity of LGBT persons.

### **3.5 RECOGNITION OF THE RIGHT TO LOVE**

---

In an evocative section, Chandrachud J. quotes Leila Seth C.J. to make the point that “what makes life meaningful is love”. The right to love emerges as a key aspect of the judgment with Chandrachud J. recognizing that, “the right to love and to find a partner, to find fulfilment in a same-sex relationship is essential to a society which believes in freedom under the constitutional order based on rights”. The right to love has elements of autonomy and dignity and the defence of the right to love is rooted in the notion of constitutional morality and the idea of a transformative constitution. When we say “constitutional morality” we mean that the values of the Constitution committed to protecting the dignity and autonomy of the individual should prevail over “social morality”, which in this context is essentially public disapproval or disgust of individual choices or identities. Further, our Constitution mandates that society must transform in the direction of greater respect for autonomy, dignity and choice of the individual, including in matters of whom one chooses to love.

Thus, the right to love has profound implications in a society in which love across lines of caste and religion are deeply transgressive. “The right to love” has the potential to disturb rigid social moralities and helps us to begin questioning the structures which keep in place the rigid hierarchies of Indian society be it on the lines of caste, religion,

gender or sex. In fact Chandrachud J. appositely called “the right to love not just a separate battle for LGBT individuals but a battle for us all”.

### **3.6 STEREOTYPICAL PERCEPTIONS OF THE LGBT PERSON VIOLATES THE RIGHT TO EQUALITY AND NON-DISCRIMINATION**

---

The judges were also clear that the guarantee of equality at its heart was the guarantee of equal citizenship. The criminalising ambit of Section 377 violated this guarantee as it “singles out people, by their private choices and marks them as ‘less than citizens – or less than human’”.

The harm of Section 377 is not just that it prohibits a form of intimate and personal choice but that it encodes a stereotypical morality which has deep ranging social effects. As Chandrachud J. put it, Section 377 “perpetuates a certain culture” based on “homophobic attitudes”, which makes “it impossible for victims to access justice”. Stereotypes about the LGBT community are widespread and pervasive and it is these stereotypical perceptions that are responsible for the hatred, violence and discrimination faced by LGBT persons on a day-to-day basis.

One of the reasons for Section 377 being declared as unconstitutional is that it fosters prejudice against LGBT persons. This argument expands the scope of the anti-discrimination provision in Article 15 of the Constitution (see Appendix A for the text of Article 15).

The analysis of the equality guarantee is very important as while *Navtej Singh Johar* sees decriminalisation as an important assertion of “full moral citizenship”, it is the first step in the journey towards full equality of LGBT persons. As Chandrachud J. put it, “Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is a first step. The constitutional principles on which it is based have application to a broader range of entitlements”.

### 3.7 CONSTITUTIONAL MORALITY

---

The constitutional guarantee of the right to develop one's personhood and the right to equal citizenship is firmly anchored in the notion of constitutional morality as referenced by Justices Misra, Nariman and Chandrachud. The denial of the right to dignity of LGBT persons is incompatible with the morality of the Constitution. As Chandrachud J. put it, "there is an unbridgeable divide between the moral values on which it [Section 377] is based and the values of the Constitution".

The idea of "constitutional morality", the judges derive from Ambedkar. In the Constituent Assembly, Ambedkar famously said that, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it". The fact that "our people" have yet to imbibe constitutional morality leads Ambedkar to the conclusion that, "Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic".

Constitutional morality is thus an ideal, rooted in the Constitution and Indian society must transform to bring social morality into conformity with the constitutional ideals of respect for the dignity and autonomy of all its citizens. The judiciary, the executive, the legislature, and the citizens must all work towards achieving this ideal of "constitutional morality". The judgment in *Navtej Singh Johar* is one step in this journey of ensuring that social morality conforms to constitutional morality.

The idea that the majority opinion should prevail over the right to dignity and liberty of the minority is explicitly rejected. As Nariman J. put it, "It is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality".

By explicitly setting out the Court as a guarantor of minority rights, regardless of the opinion of "popular or legislative majorities", the Court signals its determination to defend the Constitution. In a

time when lynchings have become the order of the day and the government remains a mute spectator, the role that the Courts have to play in safeguarding the right to life of minorities of all stripes and hues cannot be overstated.

It should be noted that citizens too have a role to play in achieving a society based on constitutional morality. As Chandrachud J. put it, “Constitutional morality requires that all the citizens need to understand and imbibe the broad values of the Constitution”. The role of the Constitution is to produce “a social catharsis” and that “the ability of a society to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time”.

### **3.8 IDEA OF TRANSFORMATIVE CONSTITUTIONALISM**

---

The logic of *Navtej Singh Johar* is anchored within what both Misra C.J. and Chandrachud J. call ‘a transformative constitution’. According to Misra C.J., “the purpose of having a constitution is to transform society’ to ‘embrace therein”, the “ideals of justice, liberty, equality and fraternity”. The mandate to transform society in allegiance to the constitution is a task vested in the state, the judiciary, and in the citizen.

The mandate of a “transformative constitution” vested in the state, civil society, and the judiciary—as Misra C.J. put it—is to make Indian society “more pluralistic and inclusive”. The Indian Constitution is not a status quoist document, but rather in Chandrachud J.’s words, “an essay in the acceptance of diversity” and “founded on a vision of an inclusive society which accommodates plural ways of life”.

The fact that the Constitution must transform and democratise relations in society, be it between dominant caste and oppressed caste, man and woman, as well as majorities and minorities of every stripe and hue is key to any understanding of the Constitution. If the deeply hierarchical relationships in society are not challenged

and transformed, democracy would be meaningless and the Constitution would be mere words on paper.

This insight flows from Ambedkar who (cited by Chandrachud J.) famously said that, “Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to enforce them...Without fraternity equality and liberty will be no deeper than coats of paint”.

Unless one builds a society based on fraternal and egalitarian relations by combatting the divisions of caste, religion, gender and sexuality, the Constitutional promise of equal citizenship will remain a mirage. The Constitution mandates that we collectively build such a society.

If the idea of a “transformative constitution” is applied to the challenge to Section 377, then there is still a lot of work to be done post this remarkable judgment. If a law has taken root in our social, cultural, and legal consciousness, the challenge of eliminating the prejudice which the law has fostered is still immense. One has to only think of the prejudice and violence still being faced at the hands of the state and society by “denotified” tribes even post the repeal of the colonial era *Criminal Tribes Act* in 1948.

It is this immense task of combatting the prejudicial attitudes which were encoded in Section 377 which has to continue. Nariman J. was cognisant of this challenge and mandated the Union of India to give “wide publicity to the judgment” and conduct “sensitization and awareness training for government officials and in particular police officials in the light of observations contained in the judgment”.

While Nariman J. emphasises the role of the Union government in combatting prejudice and stereotypes in accordance with the principles of the judgment, Chandrachud J. issues an important plea to civil society to continue to work to combat prejudices and realise full equality for LGBT persons in line with the mandate of a transformative Constitution.

### 3.9 DOCTRINE OF NON-RETROGRESSION

---

As a pre-emptive warning to the forces which may seek to overturn the judgment, Misra C.J. outlines the doctrine of non-retrogression according to which, “the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise”. In simple terms, the principle of non-retrogression means that rights once recognised cannot be taken away. The Court is asserting that *Suresh Kumar Koushal* was wrong because it took away a right which had been recognized by the Delhi High Court’s *Naz Foundation* judgment and implicitly stating that if one were to apply the principle of non-retrogression, *Navtej Singh Johar* cannot be reversed.

### 3.10 COMBATTING DISCRIMINATION IN EXISTING LAWS INCLUDING RELATIONSHIP RECOGNITION

---

One of the pathways to the future lies in the findings that discrimination against LGBT persons is a violation of the Constitutional guarantee of equality of all persons and non-discrimination on grounds of sex. On the question of recognition of same-sex partnerships and marriage, Chandrachud J. is clear that the direction of comparative law leads to the conclusion that, “the law cannot discriminate against same- sex relationships. It must also take positive steps to achieve equal protection”. Chandrachud J. indicates that the court may be “inclined to concur with the accumulated wisdom reflected in these judgments”.

### 3.11 READING DOWN SECTION 377

---

It is important to note that the judges did not strike down Section 377 in its entirety but rather noted that it would no more apply to “consenting sex between adults”. This means that Section 377 will continue to apply with respect to non-consensual sex between adults as well as any sex between an adult and a child regardless of consent.

With respect to the declaration of reading down as Malhotra J. observes:

The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

## **3.12 RESPONSIBILITIES OF DIFFERENT ACTORS**

---

### **3.12.1 THE UNION OF INDIA**

The Union of India took the position that it would leave the matter of the “constitutional validity [of] Section 377 to the extent it applies to ‘consensual acts of adults in private’ to the wisdom of the Court”. The position of the Union of India was castigated by Chandrachud J. who noted that, “we would have appreciated a categorical statement of position by the government, setting out its views on the validity of Section 377 and on the correctness of Koushal...The statement of the Union government does not concede to the contention of the petitioners that the statutory provision is invalid”.

The point being made by Chandrachud J. is that in a matter involving the constitutional rights of a section of the population, no government bound by the Constitution should have taken the position of “leaving matters to the wisdom of the court”.

The Union Government has not shown that it is open to being educated by the Court. Even though the Indian National Congress, CPM, and CPI(ML) have welcomed the judgment, the Union Government has maintained a stony silence. This is particularly troubling as the Union Government has a heavy responsibility in taking forward the mandate of the judgment to educate both its officers as

well as the general public in the principles of constitutional morality and the rights to equality, privacy and dignity as it applies to LGBT persons.

As a necessary first step, Nariman J. ordered, the “Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment”.

### **3.12.2 STATE GOVERNMENTS**

While the responsibilities of the state government are not specifically addressed, one can note that the Constitutional responsibility to combat violence and discrimination against LGBT persons vests also in State Governments. The State Governments too must undertake dissemination of the judgment in all media and also ensure that circulars are issued by their respective Director Generals of Police (DGPs) to ensure that no cases are registered under Section 377 against consenting adults.

### **3.12.3 MENTAL HEALTH AND MEDICAL PROFESSIONALS**

Three out of the five judges systematically reference the role of the medical profession in addressing the rights of the LGBT population. Chandrachud J. notes that “mental health professionals can take this change in the law as an opportunity to re-examine their own views of homosexuality”. He notes that, “medical practice must share the responsibility to help individuals, families, workplaces and educational and other institutions to



understand sexuality completely in order to facilitate the creation of a society free from discrimination where LGBT individuals like all other citizens are treated with equal standards of respect and value for human rights”.

Mental health practitioners should also ensure that their practice is in conformity with the law as laid down by the Supreme Court judgment.

### **3.12.4 CITIZEN ACTIVISTS**

Citizen activists also have a role to play in the transformation of Indian society in line with the concepts of “constitutional morality”. As Chandrachud J. notes, “Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which above all, the Constitution seeks to achieve”.



## 4. JUDGMENT BY DIPAK MISRA, C.J. AND KHANWILKAR, J.

The judgment began by quoting the great German thinker, Johann Wolfgang von Goethe who had said, “*I am what I am, so take me as I am*”. The judgment also quoted Arthur Schopenhauer who had said “*No one can escape from their individuality.*” (para 1)

The judges go on to emphasise the importance of individuality:

The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realization is one’s signature and self-determined design. One defines oneself. That is the glorious form of individuality. (para 1)

A person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed with a stigma. The impact of sexual orientation on an individual’s life is not limited to their intimate lives but also impacts their family, professional, social and educational life. (para 16)

Referring to the Indian Constitution, under a sub-heading titled “The Constitution – an organic charter of progressive rights”, the judges note:

A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a

manner that it can adapt to the needs and developments taking place in the society. (para 83)

This guarantee of recognition of individuality runs through the entire length and breadth of this dynamic instrument. (para 86)

Under a sub-heading titled, “Transformative constitutionalism and the rights of LGBT community”, the judges note:

The ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of Constitution.....Therefore the purpose of having a constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism. (para 95)

The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. (para 96)

The society has changed much now, not just from the year 1860 when the Indian Penal Code was brought into force but there has also been continuous progressive change. In many spheres, the sexual minorities have been accepted. They have been given space after the NALSA judgment but the offence punishable under Section 377 IPC, as submitted, creates a chilling effect. The freedom that is required to be attached to sexuality still remains in the pavilion with no nerves to move. The immobility due to fear corrodes the desire to express one’s own sexual orientation as a consequence of which the body with flesh and bones feels itself caged and a sense of fear gradually converts itself into a skeleton sans spirit. (para 106)

through its decisions such as *NALSA v. Union of India*, implying that the removal of Section 377 would be in line with this vision.

In a section titled, “Constitutional morality and Section 377 IPC” the judges note:

The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State. (para 111)

The society as a whole or even a minuscule part of the society may aspire and prefer different things for themselves. They are perfectly competent to have such a freedom to be different, like different things, so on and so forth, provided that their different tastes and liking remain within their legal framework and neither violates any statute nor results in the abridgement of fundamental rights of any other citizen. (para 115)

It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time. (para 116)

Any asymmetrical attitude in the society, so long as it is within the legal and constitutional framework, must at least be provided an environment in which it could be sustained, if not fostered. It is only when such an approach is adopted that the freedom of expression including that of choice would be allowed to prosper and flourish and if that is achieved, freedom and liberty, which is the quintessence of constitutional morality, will be allowed to survive. (para 117)

We may hasten to add here that in the context of the issue at hand, when a penal provision is challenged as being violative of the fundamental rights of a section of the society, notwithstanding the fact whether the said section of the society is a minority or a majority, the magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability. The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number. (para 120)

In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher. (para 122)

We must not forget that the founding fathers adopted an inclusive Constitution with provisions that not only allowed the State, but also, at times, directed the State, to undertake affirmative action to eradicate the systematic discrimination against the backward sections of the society and the expulsion and censure of the vulnerable communities by the so-called upper caste/sections of the society that existed on a massive scale prior to coming into existence of the Constituent Assembly. These were nothing but facets of the majoritarian social morality which were sought to be rectified by bringing into force the Constitution of India. Thus, the adoption of Constitution, was, in a way, an instrument or agency for achieving constitutional morality and means to discourage the prevalent social morality at that time. A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness. (para 123)

In a section titled, “Perspective of human dignity”, the judges note:

When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual’s natural and constitutional right is denied. Such a situation urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals. This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary pre-requisite that consent is the real fulcrum of any sexual relationship. (para 132)

In a section titled, “Privacy and its concomitant aspects”, the judges overrule *Suresh Kumar Koushal v. Naz Foundation* citing *Puttaswamy v. Union of India*:

Regarding the view in *Suresh Koushal*’s case to the effect that the Delhi High Court in *Naz Foundation* case had erroneously relied upon international precedents in its anxiety to protect the so-called rights of LGBT persons, the nine-Judge Bench [in *Puttaswamy*] was of the opinion that the aforesaid view in *Suresh Koushal* (supra) was unsustainable. The rights of the lesbian, gay, bisexual and transgender population, as per the decision in *Puttaswamy* (supra), cannot be construed to be "so-called rights" as the expression "so-called" seems to suggest the exercise of liberty in the garb of a right which is illusory. (para 164)

The judges went on to expressly overrule *Suresh Kumar Koushal*:

The observation made in *Suresh Koushal* (supra) that gays, lesbians, bisexuals and transgenders constitute a very minuscule part of the population is perverse due to the very reason that such an approach would be violative of the equality principle enshrined under Article 14 of the Constitution. The mere fact that the percentage of population whose fundamental right to privacy is being abridged by the existence of Section 377 in its present form is low does not impose a limitation upon this Court from protecting the fundamental rights of those who are so affected by the present Section 377 IPC. (para 169)

In a section titled, “Progressive realization of rights” the judges note:

The doctrine of progressive realization of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving



society, there is no place for retreat. The society has to march ahead. (para 188)

The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise. (para 189)

The aforesaid two doctrines lead us to the irresistible conclusion that if we were to accept the law enunciated in Suresh Koushal's case, it would definitely tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and progressive realization of rights. It is because Suresh Koushal's view gets wrongly embedded with the minuscule facet and assumes criminality on the bedrock being guided by a sense of social morality. It discusses about health which is no more a phobia and is further moved by the popular morality while totally ignoring the concepts of privacy, individual choice and the orientation. Orientation, in certain senses, does get the neuro-impulse to express while seeing the other gender. That apart, swayed by data, Suresh Koushal fails to appreciate that the sustenance of fundamental rights does not require majoritarian sanction. Thus, the ruling becomes sensitively susceptible. (para 190)

In a section titled, "The litmus test for survival of Section 377", the judges note:

In view of the above authorities, we have no hesitation to say that Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution. (para 229)

Further, Section 377 IPC fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction. Needless to say, the Section also interferes with consensual acts of competent adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, Section 377 IPC, so long as it criminalises consensual sexual acts of whatever nature between competent adults, is manifestly arbitrary. (para 239)

That apart, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception. Section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is manifestly not only overboard and vague but also has a chilling effect on an individual's freedom of choice. (para 246)

In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus,

an archaic law which is incompatible with constitutional values cannot be allowed to be preserved. (para 247)

In a section titled “Conclusions”, the judges note:

(xiii) Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in Maneka Gandhi (supra) and other later authorities.

...

(xvi) An examination of Section 377 IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, tfor public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution. (para 253)



## 5. JUDGMENT BY R.F. NARIMAN J.

Nariman J. began by remembering Oscar Wilde:

“The love that dare not speak its name” is how the love that exists between same-sex couples was described by Lord Alfred Douglas, the lover of Oscar Wilde, in his poem *Two Loves* published in 1894 in Victorian England. (para 1)

Then Nariman J. goes into the history of Section 377, tracing its origins from the *Buggery Act* of 1533 in England to the *Draft Penal Code* by Lord Macaulay to Section 377 of the *Indian Penal Code*.

Nariman J. then referenced the process of decriminalisation in Britain with the important landmark being the Wolfenden Committee Report in 1957 which recommended decriminalisation for the following reasons:

But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual’s privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind. (para 24)

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business. (para 27)

It was only ten years after the Wolfenden Committee Report that, through the *Sexual Offences Act, 1967*, penal offences involving consenting adults were finally abolished. Nariman J. went on to trace the legal developments resulting in decriminalisation both in Europe and the USA. He then referenced the striking down of the sodomy law in Trinidad, Fiji, Australia and South Africa.

Nariman J. referred in detail to the following cases of the Supreme Court of India, all of which are the building blocks on which the edifice of *Navtej Singh Johar* was erected:

***National Legal Services Authority v. Union of India***, which dealt with the ‘trauma, agony and pain of the transgender community’ and Nariman J. specifically referred to the ‘unusual final order’ of the Court.

***Puttaswamy v. Union of India***, which declared privacy to be a fundamental right and the opinion of Chandrachud J. who had noted that Suresh Kumar Koushal was ‘another discordant note’ which impinges on the idea that ‘privacy is intrinsic to freedom and liberty’.

***Shafin Jahan v. Asokan***, which dealt with the right of an adult to make her own marital choice as well as to choose her own religion. The Court in this case held that, ‘choosing a faith is the substratum of individuality and sans it, the right to choice becomes a shadow’ and went on to note that ‘social values and morals have their space but they are not above the constitutionally guaranteed freedom’.

***Shakti Vahini v. Union of India***, which dealt with honour killing and in which the court held that, ‘honour killings guillotines individual liberty, freedom of choice and ones one perception of choice. It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice, which is recognized under Article 19 and 21 of the Constitution.’

Nariman J. then referenced the enactment of the Mental Healthcare Act, 2017 to indicate that parliament is also alive to “privacy interests and the fact that persons of the same sex who cohabit with each other are entitled to equal treatment”. (para 66)

A recent enactment, namely the Mental Healthcare Act, 2017, throws a great deal of light on recent parliamentary legislative understanding and acceptance of constitutional values as reflected by this Court’s judgments. Section 2(s) of the Act defines mental illness, which reads as under: “2(s) “mental illness” means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;” (para 67)

This definition throws to the winds all earlier misconceptions of mental illness including the fact that same- sex couples who indulge in anal sex are persons with mental illness. At one point of time, the thinking in Victorian England and early on in America was that homosexuality was to be considered as a mental disorder. (para 68)

Nariman J. refers to the Indian Psychiatric Society’s statement of 2nd July, 2018 where it recognizes same-sex sexuality as a normal variant of human sexuality and states that there is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempt may in fact lead to low self-esteem and stigmatization of the person.

Nariman J. concludes that:

The present definition of mental illness in the 2017 Parliamentary statute makes it clear that homosexuality is not considered to be a mental illness. This is a major advance in our law which has been recognized by the Parliament itself. (para 72)

More importantly, mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community. It is thus clear that Parliament has unequivocally declared that the earlier stigma attached to same-sex couples, as persons who are regarded as mentally ill, has gone for good. This is another very important step forward taken by the legislature itself which has undermined one of the basic underpinnings of the judgment in Suresh Kumar Koushal. (para 73)

Nariman J. states that Section 377 is capricious and irrational as modern psychiatric studies show that LGBT persons are normal and should not be penalised. Nariman J. relies on the Supreme Court's decision in Shayara Bano v. Union of India in 2017 where it held that a statutory provision could be struck down on the ground of manifest arbitrariness when the provision is capricious, irrational or without adequate determining principle, as also if it was excessive or disproportionate.

Nariman J. quotes from *S. Khushboo v. Kanniammal*, a 2010 decision of the Supreme Court that quashed multiple criminal charges against the Tamil actress Khushboo for making a statement that Tamil women have pre-marital sex. Nariman J. relies on the Khushboo decision to state that notions of societal morality are inherently subjective and that the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy.

Morality and criminality are not co-extensive - sin is not punishable on earth by Courts set up by the State but elsewhere; crime alone is punishable on earth. To confuse the one with the other is what causes the death knell of



Section 377, insofar as it applies to consenting homosexual adults. (para 80)

Nariman J. then references the notion of constitutional morality. This is again a key element common to three out of four judgments. Constitutional morality dictates that majority opinion cannot be the basis for deciding on whether minorities are entitled to enjoy constitutional rights:

Victorian morality must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. The rationale for Section 377, namely Victorian morality, has long gone and there is no reason to continue with a law merely for the sake of continuing with the law when the rationale of the law has long since disappeared. (para 78)

The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities. One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India. Constitutional morality always trumps any imposition of a particular view

of social morality by shifting and different majoritarian regimes. (para 81)

Nariman J. expressly overrules Suresh Kumar Koushal after critiquing its logic:

The fact that only a minuscule fraction of the country's population constitutes lesbians and gays or transgenders, and that in the last 150 years less than 200 persons have been prosecuted for committing the offence under Section 377, is neither here nor there. When it is found that privacy interests come in and the State has no compelling reason to continue an existing law which penalizes same-sex couples who cause no harm to others, on an application of the recent judgments delivered by this Court after Suresh Kumar Koushal (*supra*), it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate state rationale to uphold such provision. (para 95)

For all these reasons therefore, we are of the view that, Suresh Kumar Koushal needs to be and is hereby overruled. (para 96)

Nariman J. concludes with a series of directions to the Union Government:

We are also of the view that the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment. (para 98)

## 6. JUDGMENT BY DR. DHANANJAYA Y. CHANDRACHUD, J.

Chandrachud J. begins his judgment by quoting Leila Seth C.J. (retired) who penned a heartfelt critique of the harm of Suresh Kumar Koushal on the same day that the review petition was rejected:

What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization, or worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter. (para 1)

Chandrachud J. in a section titled, “From denial to freedom” outlines the harm that Section 377 has done, the “wrong” of allowing the law to stand on the statute books even after independence and then asserts that while it may be difficult to “right the wrongs of history”, this judgment should begin the process:

A hundred and fifty eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfillment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them. The human instinct to love

was caged by constraining the physical manifestation of their sexuality. Gays and lesbians were made subordinate to the authority of a coercive state. A charter of morality made their relationships hateful. The criminal law became a willing instrument of repression. To engage in ‘carnal intercourse’ against ‘the order of nature’ risked being tucked away for ten years in a jail. The offence would be investigated by searching the most intimate of spaces to find tell-tale signs of intercourse. Civilization had been brutal. (para 2)

Section 377 exacts conformity backed by the fear of penal reprisal. There is an unbridgeable divide between the moral values on which it is based and the values of the Constitution. What separates them is liberty and dignity. (para 4)

The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril. (para 5)

It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognized and protected by the Constitution. Section 377 of the Penal Code is unconstitutional in so far as it penalise a consensual relationship between adults of the

same gender. The constitutional values of liberty and dignity can accept nothing else. (para7)

Forming a holistic perspective requires the court to dwell on, but not confine itself, to sexuality. Sexual orientation creates an identity on which there is a constitutional claim to the entitlement of a dignified life. It is from that broad perspective that the constitutional right needs to be adjudicated. (para 13)

In a section titled, “Arc of the moral universe” Chandrachud J. pens a brief history of the struggle of the LGBT community, noting that “the 20 century, however saw the LGBT community emerge from the shadows worldwide, poised to agitate and demand equal civil rights”.

Chandrachud J. states:

But this case involves much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship. Above all, our decision will speak to the transformative power of the Constitution. For it is in the transformation of society that the Constitution seeks to assure the values of a just, humane and compassionate existence to all her citizens. (para 24)

In a section titled, “An Equal love”, Chandrachud J. begins by quoting a poem written by Vikram Seth on the wrong perpetrated by Suresh Kumar Koushal:

**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 companionhood:  
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.

Chandrachud J. concludes that Section 377 violates Article 14 of the Constitution. He relies on the Human Rights Watch Report, “This Alien Legacy: The origins of Sodomy Laws in British Colonialism” to state:

Section 377 reveals only the hatred, revulsion and disgust of the draftsmen towards certain intimate choices of fellow human beings. The criminalization of acts in Section 377 is not based on a legally valid distinction, “but on broad moral proclamations that certain kinds of people, singled out by their private choices, are less than citizens – or less than human. (para 30)

In Chandrachud J.’s invocation, the right to equality is part of a wider struggle for equality across many groups and communities:

The struggle of citizens belonging to sexual minorities is located within the larger history of the struggles against various forms of social subordination in India. The order of nature that Section 377 speaks of is not just about non-procreative sex but is about forms of intimacy which the social order finds “disturbing”. This includes various forms of transgression such as inter-caste and inter-community relationships which are sought to be curbed by society. What links LGBT individuals to couples who

love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority. Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all. (para 32)

In a section titled, “Beyond physicality: Sex, identity and stereotypes”, Chandrachud J. makes the point about how stereotypes perpetrated by Section 377 violate the non-discrimination provision under Article 15 of the Constitution:

A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination. (para 41)

A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. (para 41)

In a section titled, “Facial neutrality: through the looking glass”, Chanchrachud J. analyses the disproportionate impact that laws which seem to be neutral have on certain groups, thereby rendering them unconstitutional:

Jurisprudence across national frontiers support the principle that facially neutral action by the state may have a disproportionate impact upon a particular class. (para 43)

In *Griggs v. Duke Power Co.*, the US Supreme Court, whilst recognizing that African Americans received sub-standard education due to segregated schools, opined that the requirement of an aptitude/intelligence test disproportionately affected African-American candidates. The Court held that, “The Civil Rights Act” proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. (para 43)

Thus when an action has “the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society, it would be suspect. (para 43)

If individuals as well as society hold strong beliefs about gender roles – that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are



attracted to women and women are emotional, socially submissive, caretakers that are attracted to men – it is unlikely that such persons or society at large will accept that the idea that two men or two women could maintain a relationship. If such a denial is further grounded in a law, such as Article 377 the effect is to entrench the belief that homosexuality is an aberration that falls outside the ‘normal way of life.’ (para 44)

In the sense that the prohibition of miscegenation was aimed to preserve and perpetuate the polarities of race to protect white supremacy, the prohibition of homosexuality serves to ensure a larger system of social control based on gender and sex. (para 47)

A Report prepared by the International Commission of Jurists has documented the persecution faced by the affected community due to the operation of Section 377...The Report documents instances of abuse from law enforcement agencies and how the possibility of persecution under Section 377 prevents redress. Even though acts such as blackmail, assault, and bodily crimes are punishable under penal laws, such methods of seeking redress are not accessed by those communities given the fear of retaliation of prosecution (para 48)

Apart from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture. The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access

to public spaces and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship. (para 51)

The Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. In *K S Puttaswamy v. Union of India*, this Court affirmed the individual as the bearer of the constitutional guarantee of rights. Such rights are devoid of their guarantee when despite legal recognition, the social, economic and political context enables an atmosphere of continued discrimination. The Constitution enjoins upon every individual a commitment to a constitutional democracy characterized by the principles of equality and inclusion. In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values. (para 52)

By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community, Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature'. A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and

violates the guarantee of non-discrimination in Article 15(1). (para 52)

In a section titled “Confronting the Closet”, Chandrachud J. notes that, “citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation”. To ensure to sexual and gender minorities the fulfilment of their fundamental rights, it’s imperative to confront the closet and as a necessary consequence, confront “compulsory heterosexuality”:

Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation. In order to ensure to sexual and gender minorities the fulfilment of their fundamental rights, it is imperative to ‘confront the closet’ and, as a necessary consequence, confront ‘compulsory heterosexuality.’ Confronting the closet would entail ensuring that individuals belonging to sexual minorities have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognise that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms. (para 60)

Privacy creates “tiers of ‘reputable’ and ‘disreputable’ sex”, only granting protection to acts behind closed doors. Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance. If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating ‘homosexual’ acts into the private sphere, would in effect reiterate the “ambient heterosexism of the public space.” It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public

spaces. The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference. (para 62)

An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities. The self-determination of sexual orientation is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual. Such an interpretation of autonomy has implications for the widening application of human rights to sexuality. Sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex. Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives. Human sexuality cannot be reduced to a binary formulation. Nor can it be defined narrowly in terms of its function as a means to procreation. To confine it to closed categories would result in denuding human liberty of its full content as a constitutional right. The Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing. (para 66)

In a section titled "Section 377 and the right to health", Chandrachud J. notes how, "individuals belonging to sexual and gender minorities experience discrimination, stigmatization, and in some cases, denial of healthcare on account of their sexual orientation and gender identity":

The operation of Section 377 denies consenting adults the full realization of their right to health, as well as their sexual rights. It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by them and particularly by members of sexual and gender minorities, in relation to the rest of society. (para 76)

Under our constitutional scheme, no minority group must suffer deprivation of a constitutional right because they do not adhere to the majoritarian way of life. By the application of Section 377 of the Indian Penal Code, MSM and transgender persons are excluded from access to healthcare due to the societal stigma attached to their sexual identity. Being particularly vulnerable to contraction of HIV, this deprivation can only be described as cruel and debilitating. The indignity suffered by the sexual minority cannot, by any means, stand the test of constitutional validity. (para 92)

Counselling practices will have to focus on providing support to homosexual clients to become comfortable with who they are and get on with their lives, rather than motivating them for change. Instead of trying to cure something that isn't even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and changing societal values. There is not only a need for special skills of counsellors but also heightened sensitivity and understanding of LGBT lives. The medical practice must share the responsibility to help individuals, families, workplaces and educational and other institutions to understand sexuality completely in order to facilitate the creation of a society free from discrimination where LGBT individuals like all other citizens are treated with equal standards of respect and value for human rights. (para 96)

In a section titled, “India’s commitments at international law”, Chandrachud J. outlines how “International law today has evolved toward establishing that the criminalization of consensual same sexual acts between same-sex adults in private contravenes the rights to equality, privacy, and freedom from discrimination”. Chandrachud J. then goes on to note that:

In NALSA the Court recognized the ‘Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity’-which outlines the rights that sexual minorities enjoy as human persons under the protection of international law-and held that they should be applicable as a part of international law.

Principle 33 provides thus:

“Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.”

While the Yogyakarta Principles are not legally binding, NALSA nevertheless signifies an affirmation of the right to non-discrimination on the grounds of gender identity, as well as the relevance of international human rights norms in addressing violations of these rights. (para 103)

There is a contradiction between India’s international obligations and Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts between same-sex adults in private. In adjudicating the validity of this provision, the Indian Penal Code must be brought into conformity with both the Indian Constitution and the rules and principles of international law that India has recognized. Both make a crucial contribution towards recognizing the human rights of sexual and gender minorities. (para 104)

In a section titled, “Transcending borders – comparative law”, Chandrachud J. surveys the state of comparative law on the question of rights of LGBT persons and concludes that:

Courts around the world have not stopped at decriminalizing sodomy laws; they have gone a step further and developed a catena of broader rights and protections for homosexuals. These rights go beyond the mere freedom to engage in consensual sexual activity in private, and include the right to full citizenship, the right to form unions and the right to family life. (para 115)

From an analysis of comparative jurisprudence from across the world, the following principles emerge:

1. Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality;
2. Intimacy between consenting adults of the same-sex is beyond the legitimate interests of the state;
3. Sodomy laws violate equality by targeting a segment of the population for their sexual orientation;
4. Such a law perpetrates stereotypes, lends authority of the state to societal stereotypes and has a chilling effect on the exercise of freedom;
5. The right to love and to a partner, to find fulfillment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;
6. Sexual orientation implicates negative and positive obligations on the state. It not only requires the state not to discriminate, but also calls for the state to recognise rights which bring true fulfillment to same-sex relationships; and
7. The constitutional principles which have led to decriminalization must continuously engage in a rights

discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection. (para 125)

We are aware that socio-historical contexts differ from one jurisdiction to another and that we must therefore look at comparative law – making allowances for them. However, the overwhelming weight of international opinion and the dramatic increase in the pace of recognition of fundamental rights for same-sex couples reflects a growing consensus towards sexual orientation equality. We feel inclined to concur with the accumulated wisdom reflected in these judgments, not to determine the meaning of the guarantees contained within the Indian Constitution, but to provide a sound and appreciable confirmation of our conclusions about those guarantees. (para 126)

In a section titled, “Constitutional morality”, Chandrachud J. expounded on the importance of constitutional morality by referencing the key work of Dr. Ambedkar:

During the framing of the Constitution, it was realized by the members of the Constituent Assembly that there was a wide gap between constitutional precept and reality. The draftspersons were clear that the imbibing of new constitutional values by the population at large would take some time. Society was not going to change overnight. Dr Ambedkar remarked in the Constituent Assembly:

“Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.” (para 140)

The values of a democracy require years of practice, effort, and experience to make the society work with those values. Similar is the position of non-discrimination, equality, fraternity and secularism. While the Constitution



guarantees equality before the law and equal protection of the law, it was felt that the realization of the constitutional vision requires the existence of a commitment to that vision. Dr Ambedkar described this commitment to be the presence of constitutional morality among the members of the society. The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of society is determined by popular perceptions existent in society... Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. ...

...Constitutional morality has to be imbibed by the citizens consistently and continuously. Society must always bear in mind what Dr. Ambedkar observed before the Constituent Assembly:

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. (Para 141)”

In the decision in *Government of NCT of Delhi v. Union of India*, the Constitution Bench of this Court dealt with the constitutive elements of constitutional morality which govern the working of a democratic system and representative form of government. Constitutional morality was described as founded on a “constitutional culture”, which requires the “existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain.” This Court held thus:

“If the moral values of our Constitution were not upheld at every stage, the text of the Constitution may not be enough to protect its democratic values.”

This Court held that constitutional morality acts a check against the “tyranny of the majority” and as a “threshold against an upsurge in mob rule.” It was held to be a balance against popular public morality. (para 142)

Constitutional morality requires in a democracy the assurance of certain minimum rights, which are essential for free existence to every member of society. The Preamble to the Constitution recognises these rights as “Liberty of thought, expression, belief, faith and worship” and “Equality of status and of opportunity.” Constitutional morality is the guarantee which seeks that all inequality is eliminated from the social structure and each individual is assured of the means for the enforcement of the rights guaranteed. Constitutional morality leans towards making Indian democracy vibrant by infusing a spirit of brotherhood amongst a heterogeneous population, belonging to different classes, races, religions, cultures, castes and sections. Constitutional morality cannot, however, be nurtured unless, as recognised by the Preamble, there exists fraternity, which assures and maintains the dignity of each individual. In his famous, yet undelivered speech titled “Annihilation of Caste” (which has been later published as a book), Dr. Ambedkar described ‘fraternity’ as “primarily a mode of associated living, of conjoint communicated experience” and “essentially an attitude of respect and reverence towards fellow men.” He remarked:

“An ideal society should be mobile, should be full of channels for conveying a change taking place in one part to other parts. In an ideal society there should be many interests consciously communicated and shared. There should be varied and free points of contact with other modes of association. In other words there must be social endosmosis. This is fraternity, which is only another name for democracy.”

In his last address to the Constituent Assembly, he defined fraternity as “a sense of common brotherhood of all Indians.” As on the social and economic plane, Indian society was based on graded inequality, Dr. Ambedkar had warned in clear terms:

“Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to enforce them... Without fraternity equality and liberty will be no deeper than coats of paint.” (para 143)

Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carries a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a vigilant safeguard against excesses of state power and democratic concentration of power. This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court. (para 144)

The invocation of constitutional morality must be seen as an extension of Dr. Ambedkar’s formulation of social reform and constitutional transformation. Highlighting the significance of individual rights in social transformation, he had observed:

“The assertion by the individual of his own opinions and beliefs, his own independence and interest—over

and against group standards, group authority, and group interests—is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion.” (para 145)

LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe. Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution. (para 146)

In a section titled, “In Summation: Transformative Constitutionalism”, Chandrachud J. pointed to the importance of the Indian Constitution as a document, which mandates that societal morality should conform to constitutional morality:

Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life. (para 148)

The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution

has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain. (para 149)

Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices. (para 150)

The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation. (para 151)

Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks – as well – to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time. (para 153)

The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process

of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored. (para 155)

In the conclusion, Chandrachud J. proclaims:

We hold and declare that:

- (i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;
- (ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;
- (iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;
- (iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and
- (v) The decision in Koushal stands overruled. (para 156)

## 7. JUDGMENT BY INDU MALHOTRA J.

Malhotra J. after referencing the colonial history of Section 377 observed that Prime Minister Theresa May of the United Kingdom in a speech at a Commonwealth Summit of 2018 had expressed regret for Britain's role in introducing such laws. The speech was extracted by Malhotra J. in her judgment:

“Across the world, discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations and failing to protect women and girls. I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today.” (para 10)

Malhotra J., citing the fact that the WHO had removed homosexuality from its list of diseases in the International Classification of Diseases (ICD-10), as well as the position of the Indian Psychiatric Society that, “there is no scientific evidence that sexual orientation can be altered by any treatment”, concluded that:

Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle, since the basis of criminalisation is the “sexual orientation” of a person over which one has “little or no choice”. (para 14.9)

Section 377 is also manifestly arbitrary, and hence violative of Article 14 of the Constitution. (para 14.9)

Malhotra J. with respect to the non-discrimination guarantee on the grounds of “sex” under Article 15, concluded that the word sex included the concept of “sexual orientation”. For this finding, Malhotra J. referenced NALSA v. Union of India as well as the Verma Committee Recommendations where the court concluded that sex included sexual orientation. Based on this Malhotra J. concluded that:

Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their ‘sexual identity and character’...The prohibition against discrimination under Article 15 on the ground of ‘sex’ should therefore encompass instances where such discrimination takes place on the basis of one’s sexual orientation. (para 15.1)

Malhotra J. then referenced the decision of the Canadian Supreme Court where the concept of sexual orientation was read into the Canadian Charter of Human Rights:

Section 15(1), of the Canadian Charter like Article 15 of our Constitution, does not include “sexual orientation” as a prohibited ground of discrimination. Notwithstanding that, the Canadian Supreme Court in the aforesaid decisions has held that sexual orientation is a “ground analogous” to the other grounds specified under Section 15(1). Discrimination based on any of these grounds has adverse impact on an individual’s personal autonomy, and is undermining of his personality. A similar conclusion can be reached in the Indian context as well in light of the underlying aspects of immutability and fundamental choice. The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile



discrimination, and is equally entitled to the protection afforded by Article 15. (para 15.2)

Malhotra J. concluded that Section 377 violates the right to personal liberty and the right to live with dignity guaranteed to all citizens under Article 21:

Section 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without companion, or lead a closeted life as “unapprehended felons”. (para 16.1)

Malhotra J. found that Section 377 violated the right to privacy:

The right to privacy is not simply the “right to be let alone”, and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one’s existence. (para 16.2)

Malhotra J. highlighted the fact that LGBT persons are entitled to the right to health:

LGBT persons being a sexual minority have been subjected to societal prejudice, discrimination and violence

on account of their sexual orientation. Since Section 377 criminalises “carnal intercourse against the order of nature”, it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community. (para 16.3)

Malhotra J. then pointed out the fact that Section 377 violates the right to freedom of speech and expression under Article 19(1)(a):

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377. Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay ‘in the closet’. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence. It also has an impact on their mental well-being. (para 17.1)

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377. Therefore, Section 377 cannot be justified as a reasonable restriction under Article 19(2) on the basis of public or societal morality, since it is inherently subjective. ( para 17.2)

Malhotra J. concluded 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 recognise 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 21. The LGBT persons deserve to live a life unshackled from the shadow of being ‘unapprehended felons’. (para 20)

Malhotra J. then overruled Suresh Kumar Koushal and declared:

- (i) In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.  
  
It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.
- (ii) The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.
- (iii) The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality. (para 21)



## 8. CONCLUSIONS

While the judgment in *Navtej Singh Johar* is extraordinarily powerful in terms of the way it develops the rights to equality, non-discrimination, privacy, dignity and expression, we need to ensure that it transforms realities at the grassroots level. However good the judgment, it will not be a magic wand making the lives of LGBT persons better. We have to see the judgment as a tool, an instrument of struggle which we must bend to our purpose of making the world more fair and just as far as LGBT people are concerned. The judgment itself outlines some of the responsibilities of key actors which have been adverted to earlier. It is necessary to ensure that these responsibilities are fulfilled.

### **THE UNION OF INDIA**

The Union of India must break its silence, welcome the judgment and fulfil its responsibility of taking the judgment to the public using all means of communication at its disposal. The Union Government must give “periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment” to its employees.

### **STATE GOVERNMENTS**

The constitutional responsibility to combat violence and discrimination against LGBT persons vests also in State Governments. The State Governments too must undertake popularisation of the judgment in all media, and since law and

order is a state subject, must ensure that circulars are issued by the respective DGPs to ensure that no cases are registered under Section 377 against consenting adults.

## **HEALTH CARE AND MENTAL HEALTH PROFESSIONALS**

Since bias and prejudice fostered by the law still have to be combatted, mental health professionals have the responsibility of ensuring that medical treatment does not continue to see LGBT persons as “abnormal” but begins to view them as expressing what is merely a variant of human gender and sexuality.

## **CITIZEN ACTIVISTS**

The judges in *Navtej Singh Johar* have vested the responsibility of nurturing democracy in citizens as well. Since as Ambedkar put it, democracy in India is a “top dressing on a soil which is essentially undemocratic”, it is our responsibility to deepen the roots of democracy. Part of the project of deepening of democracy is to foster a greater understanding of how LGBT persons are full citizens entitled to all the constitutional rights.

Since there is still a great deal of public ignorance, prejudice, myths and misconceptions around the lives and loves of LGBT persons, there is a pressing need for a wider public campaign which can strive to popularise the key idea that what should prevail is not popular morality but constitutional morality and that we need to think about sexual orientation and gender identity through the constitutional lens of the right to privacy, dignity, equality, and non-discrimination.

The judgment in *Navej Singh Johar* discusses a range of concepts, be it privacy, dignity, constitutional morality, or equality, all of which should be become a part of everyday life. In Ambedkar’s words, we need to cultivate constitutional morality.

## USING THE JUDGMENT

The judgment is of potential value in a range of scenarios.

- To take a recent example where post the delivery of the judgment, a representative of the Cubbon Park Walkers Association in Bangalore, filed a complaint to the Cubbon Park police alleging that “homosexuals were indulging in illegal activities and instigating others to take part in immoral activities”. The Coalition of Sex Workers and Sexual Minorities Rights (CSMR), met and submitted a representation to the Commissioner of Police, Bangalore, which asserted LGBT persons’ rights to use public spaces as anyone else. In particular the representation cited Chandrachud J.’s powerful invocation that, “It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces. The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference”. This becomes a way of promoting constitutional literacy both among the police as well as the general public.
- In a scenario of a mental health professional continuing to treat homosexuality as a disorder with drugs and aversion therapy, a representation to the concerned professional association could highlight the judgment in *Navtej Singh Johar* and in particular quote Chandrachud J. as saying, “Instead of trying to cure something that isn’t even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and changing societal values”.

These are just two examples but there are many settings in which reliance can be placed on operative parts of the judgment to combat homophobic prejudice and violence.

## THE WAY FORWARD

To take forward a constitutional education on LGBT rights we should:

- Launch a media campaign on the judgment.
- Translate a summary of the judgment into as many Indian languages as possible.
- Create posters, leaflets, memes with quotes from the judgment in as many languages as possible.
- Produce short video clips on key concepts in the judgment in as many languages as possible.
- Ensure that activists, intellectuals, writers, teachers, actors, media personalities comment on key passages in the judgment and ensure dissemination of the same in different languages.
- Hold seminars and discussions on the judgment in colleges, universities, workplaces, etc.
- Ensure that police stations, schools, colleges, workplaces have informational material which explains the *Navtej Singh Johar* judgment.

## LARGER IMPLICATIONS

However, the implications of *Navtej Singh Johar* are not only restricted to the LGBT community. It has unleashed hope among all those working to deepen the values of the Constitution that there are institutions which can stand up to majoritarian pressure. The apology to the LGBT community has triggered the demand that the systemic injustice caused to other “minorities” should also be acknowledged, be it manual scavengers, adivasis, sex workers or religious minorities.

The implications of a transformative constitution are wide ranging and its power can be mobilized by all those combatting a majoritarian state. We live in a time where vigilante elements and mobs feel empowered to harass and intimidate inter-caste,



inter-religious and same-sex couples. The right to eat the food of your choice or the right to dress the way you want is also under threat. In this context, the Section 377 judgment has important implications. This judgment means something for all those who are battling a form of social morality which is at odds with the Constitution. As Chandrachud J. states “the right to love not just a separate battle for LGBT individuals but a battle for us all”.

The Court through this decision has harnessed the transformative power of the Constitution and amplified a way of thinking rooted in the values of respect for dignity, equality and fraternity. If this way of thinking, rooted as it in the struggle against the forms of discrimination perpetrated by a conservative social morality, becomes more widely accepted, India will be less of a majoritarian democracy and more of a constitutional democracy.



# 9. APPENDICES

## APPENDIX A: THE LAW

### SECTION 377 OF THE INDIAN PENAL CODE, 1860

Section 377 IPC is found in the Chapter titled “Offences Against the Body” and part of a sub-chapter titled “Of Unnatural Offences”.

It reads:

377. Unnatural Offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

*Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

### RELEVANT CONSTITUTIONAL PROVISIONS

Article 14. The States shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be

subject to any disability, liability, restriction or condition with regard to—

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Article 19. (1) All citizens shall have the right—

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions  
[or co-operative societies];
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;

[and]

\* \* \* \*

- (g) to practise any profession, or to carry on any occupation, trade or business
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

## APPENDIX B: THE JUDGES

**DIPAK MISRA C.J.** : Practiced in Constitutional, Civil, Criminal, Revenue, Service and Sales Tax matters in the Orissa High Court and the Service Tribunal. He was appointed as an Additional Judge of the Orissa High Court on 17th January, 1996 and transferred to the Madhya Pradesh High Court on 3rd March, 1997. He became a permanent Judge on 19th December, 1997. Justice Misra assumed charge of the office of Chief Justice, Patna High Court on 23rd December, 2009 and charge of the office of the Chief Justice of Delhi High Court on 24th May, 2010. Elevated as a Judge, Supreme Court of India with effect from 10.10.2011 to 02.10.2018.

**R.F. NARIMAN J.** : Practised as Senior Counsel, Supreme Court of India, before his elevation as a Judge to the Supreme Court. He has over 500 Reported Supreme Court Judgments to his credit and is an expert in Comparative Constitutional Law and Civil Law. He is also a specialist in comparative religious studies and was ordained a priest by Bandra Agiary. Apart from the law, he has a passion for and deep knowledge about western classical music, has a great interest in and is an avid reader of history, philosophy, literature and science and enjoys nature walks. He was appointed to the Supreme Court on 07.07.2014 to 12.08.2021.

**KHANWILKAR J.** : He was enrolled as an Advocate in Bombay on 10th February, 1982 and was appointed as Additional Judge of

the Bombay High Court on 29th March, 2000 and confirmed as permanent Judge on 8th April, 2002. He was appointed as Chief Justice of the High Court of Himachal Pradesh on 4th April, 2013. Thereafter, he was appointed as Chief Justice of Madhya Pradesh High Court on 24th November, 2013. He was elevated as the Judge of Supreme Court of India and assumed charge on May 13, 2016 and his tenure expires on 29-07-2022.

**DR. D.Y. CHANDRACHUD J. :** He obtained his LL.M degree and a Doctorate in Juridical Sciences (SJD) from Harvard Law School, USA. He was a Visiting Professor of Comparative Constitutional Law at the University of Mumbai and Visiting Professor at Oklahoma University School of Law, USA. He practiced law at the Supreme Court of India and the Bombay High Court. He was appointed an Additional Solicitor General of India from 1998 until appointment as a Judge of the Bombay High Court from 29th March, 2000. He was then appointed as the Chief Justice of the Allahabad High Court from 31st October, 2013. He was Appointed Judge of the Supreme Court of India on 13th May, 2016 and will serve till 10.11.2024.

**INDU MALHOTRA J. :** She enrolled as an Advocate on 12th January, 1983 at the Bar Council of Delhi and was the second woman to be designated as a Senior Advocate by the Supreme Court in 2007. She was a Trustee of Save Life Foundation from its inception till March 2018. Save Life Foundation is an independent, non-governmental organisation committed to taking various initiatives to prevent fatalities in road accidents, which include training of police personnel, framing of guidelines by the Supreme Court for protection of good Samaritans, etc. throughout the country. She was appointed to the National Legal Services Authority, constituted under the Legal Services Authorities Act, 1987. She was a member of the Supreme Court Gender Sensitization and Internal Complaints Committee from November 2013 to 2017. She was appointed a Judge of the Supreme Court on 27.04.2018 and will serve until 13.03.2021.

## **APPENDIX C: THE PARTIES**

### **PETITIONERS**

- A. Navtej Singh Johar & Others (Navtej Johar is a classical dancer)
- B. Dr. Akkai Padmasali & Others (Transgender activists)
- C. Keshav Suri (Hotelier)
- D. Arif Jafar (Activist who was arrested under Section 377)
- E. Ashok Row Kavi & Others (Ashok Row Kavi is India's first out gay rights activist)
- F. Anwesh Pokkuluri & Others (IIT students from different batches with the youngest being 19 years old)

### **IMPLEADMENT APPLICATIONS**

- 1. Voices Against 377 (Coalition of child rights, women's rights, and LGBT groups)
- 2. Minna Saran (Mother of Nishit Saran, gay film maker)
- 3. Alok Sarin (Psychiatrist based in Delhi)
- 4. Nivedita Menon & Others (Academicians from Central Universities based in Delhi)
- 5. Naz Foundation (Original petitioner before the Delhi High Court)

## **RESPONDENT**

Union of India

## **INTERVENORS ARGUING FOR RETENTION OF SECTION 377**

- i. Suresh Kumar Koushal
- ii. Utkal Christian Foundation
- iii. Apostolic Churches Alliance
- iv. Trust God's Ministry
- v. H. P. Sharma



## **APPENDIX D: SUMMARY OF ARGUMENTS**

### **ARGUMENTS BY THE PETITIONERS AND INTERVENORS AGAINST SECTION 377**

- A. Right to Protection of Life and Personal Liberty (Article 21)– Sexual orientation is an essential component of identity and dignity and is embedded in the right to life. The Puttaswamy decision read the right to privacy into Article 21 and noted that it included the right to form intimate associations with persons of one’s choice. By criminalizing this aspect of ‘choice’ Section 377 violated the right to decisional privacy. The fact that Puttaswamy was a decision by a nine judge bench which recognized sexual orientation as an integral part of privacy, made this argument the strongest one for the reading down of Section 377.
- B. Right to Equality (Article 14)– Section 377 violates LGBT persons’ “right to equality before the law” and “equal protection of the laws”. There are two tests for Article 14 that have to be satisfied to demonstrate that a law is valid.

The first test is to show that the classification in the legislation is based on intelligible differentia, there is a rational nexus to a legitimate objective. In this case, it was argued that the classification of ‘against the order of nature’ and ‘within the order of nature’ was not based on any intelligible differentia

and the objective of criminalisation was to preserve morality which was not a legitimate objective.

As per the second test for Article 14, when the provision is manifestly arbitrary it is liable to be struck down. The terms used in the provision, “carnal intercourse” and “order of nature” are undefined and vague, which prevent State and non-State actors from knowing when their conduct is in violation of the provision. As such, it was argued that the provision was arbitrary and liable to be struck down.

Finally, while the language of Section 377 may be facially neutral, in effect, it impacts the LGBT community disproportionately and to that extent it was unconstitutional. It was argued that any classification which seeks to discriminate on the basis of personal characteristics that are intimately connected with individuality, choice and personhood, violates Article 14.

- C. Prohibition of discrimination on grounds of sex (Article 15)– Since sex includes sexual orientation and gender identity, any discrimination against an LGBT person by State or non-State actors, based on sexual orientation, is a violation of Article 15. As Section 377 effectively criminalizes the daily lives of LGBT persons, it has a chilling effect on their ability to exercise their rights, as they are always fearful of societal or State persecution. Section 377 assumes that people should only have sexual intercourse with persons from the opposite sex and sexual intercourse is acceptable only when it is procreative, and thus, discriminates against people based on gender stereotypes. Section 377 denies an individual the fundamental right to choose a partner.
- D. Right to Freedom of Speech and Expression (Article 19(1(a))– Section 377 by criminalizing one’s sexual orientation and gender identity has a chilling effect on the individuals’ freedom of speech and expression, as ‘expression’ includes expression of sexual orientation and gender identity.

- E. Right to Form Associations or Unions (Article 19(1)(c))– Section 377 violates the rights of LGBT persons to form personal and professional associations. For instance, corporations that promote the interests of minority communities can avail of tax exemptions, but this tax benefit is not available to organizations that promote the interests of sexual minorities. On the contrary, LGBT peer support groups risk being criminalized due to Section 377.
- F. Right to practice any profession or to carry on any occupation, trade, or business (Article 19(1)(g))– Section 377 forces LGBT individuals to hide their identities in workplaces and this impacts their self esteem and affects their rights under Article 19(1)(g).
- G. Right to Health (Article 21)– Right to health is a fundamental part of the right to life under Article 21. Currently, Section 377 criminalizes even health workers who assist HIV prevention by providing condoms to MSM. Further, Section 377 increases the risk of depression and other mental health issues among the LGBT community by criminalizing their identity.
- H. Right to freedom of conscience (Article 25)– The freedom of conscience guaranteed under Article 25 extends to the entire consciousness of a human, including sexual identity, which, in fact, goes to the core of each individual’s sense of self, as well as the intensely personal nature of sexual orientation. In this regard, conscience refers to the liberty and autonomy that inheres in each individual, and the ability to take decisions on matters that are central to the pursuit of happiness. Section 377 violates the freedom of conscience.<sup>3</sup>

---

3 This section builds upon the excellent analysis made by the ICJ in its Briefing Paper on *Navej Singh Johar v. Union of India*, <https://www.icj.org/wp-content/uploads/2018/07/India-Briefing-Paper-Navej-Singh-Advocacy-Analysis-Brief-2018-ENG.pdf>

## **ARGUMENTS BY THE RESPONDENT: THE UNION OF INDIA**

While the petitioners advanced strong arguments for reading down Section 377, the Union of India took the position that it would leave the matter of the “constitutional validity of Section 377 to the extent it applies to “consensual acts of adults in private” to the wisdom of the Court.” The Union of India also submitted that, “If this Hon’ble Court is pleased to decide to examine any other question other than the constitutional validity of Section 377 of the Indian Penal Code, or to construe any other right in favour of or in respect of LGBTQ, the Union of India would like to file its detailed affidavit in reply as consideration of other issues would have far reaching and wide ramifications under various other laws”.

The position of the Union of India was commented upon in the judgment. Chandrachud J. characterised the position of the Union of India thus:

We would have appreciated a categorical statement of position by the government, setting out its views on the validity of Section 377 and on the correctness of Koushal. The ambivalence of the government does not obviate the necessity for a judgment on the issues raised. The challenge to the constitutional validity of Section 377 must squarely be addressed in this proceeding. That is plainly the duty of the Court. Constitutional issues are not decided on concession. The statement of the Union government does not concede to the contention of the petitioners that the statutory provision is invalid. Even if a concession were to be made, that would not conclude the matter for this Court. All that the stand of the government indicates is that it is to the ‘wisdom’ of this Court that the matter is left. In reflecting upon this appeal to our wisdom, it is just as well that we as judges remind ourselves of a truth which can unwittingly be forgotten: flattery is a graveyard for the gullible. (para 9 )

Nariman J. noted:

The Union of India, seeing the writing on the wall, has filed an affidavit in which it has not opposed the Petitioners but left the matter to be considered by the wisdom of this Court. (para 80)

### **ARGUMENTS BY INTERVENORS ARGUING FOR THE RETENTION OF SECTION 377**

There were also submissions by Suresh Kumar Koushal, Utkal Christian Foundation, Apostolic Churches Alliance, Trust God's Ministry and H.P. Sharma, among others, who made submissions such as "there is no personal liberty to abuse one's organ", "that the offensive act in Section 377 is an undignified act" and that "there is no definition of sexual orientation with the definition being borrowed from Yogyakarta Principles".



# **APPENDIX E: TRANSCRIPT OF HEARINGS IN NAVTEJ SINGH JOHAR v. UNION OF INDIA**

## **INTRODUCTION**

The hearings were conducted over four days from 10th July, 2018 to 17th July, 2018 when the matter was reserved for judgment.

The following transcript is based upon the tweets put out by #LiveLawIndia ([livelaw.in](http://livelaw.in)) and the report by Centre for Law and Policy Research ([clpr.org.in](http://clpr.org.in)).

In certain places, we have supplemented with recollections of the proceedings at the Supreme Court by advocates who were present in the Court and who felt that certain points were not covered in the transcript.

This transcript does not cover all aspects of the hearings and is not a verbatim recording of the proceedings. It is based partly on contemporaneous records through tweets (as mentioned above) as well as recollections of numerous persons present in court.

# DAY 1

JULY 10, 2018

---

The historic hearing commences in the Supreme Court of India at 11:30 am, before a bench of Chief Justice Dipak Misra and Justices Rohinton Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra.

Adv. Manoj George seeks listing of curative petition along with the current writ petitions. Sr. Adv. Mukul Rohatgi, appearing on behalf of Navtej Singh Johar, opposes this. He says that the scope and even the bench is different. The Court says that the curative petition cannot be listed along with the current petitions, but the litigants who mentioned for listing of the curative petition can file intervention in the current matter. The CJI says to Adv. Manoj George, that the curative has limitations, which a writ petition does not.

Mukul Rohatgi opens his arguments by submitting that the ramifications of this case are not just on sexuality. It will have an impact on how the society looks at these people. Thus it is about the perception of, and about livelihood and jobs for such people. He says that the client is entitled to a declaration that their rights are also protected under Article 21. The first question is the correction of the judgment in the Suresh Kumar Koushal case. His argument is that Suresh Kumar Kaushal is wrong. Rohatgi says that he will take the Court through the Naz Foundation judgment of the Delhi high court, and the NALSA and the privacy judgments of the Supreme Court.

Mukul Rohatgi says that if the provision is bad, it does not matter what the perception of the society is. He points out that Justice Chandrachud observed that the Koushal judgment is wrong—in his privacy judgment—with the concurrence of Justice Kaul. Rohatgi says that his case is strongly made out by the privacy judgment of the Supreme Court. He also places reliance on



certain US precedents, aside from the Indian judgments. He refers to the Hadiya, Shakti Vahini, Common Cause, and Independent Thought judgments. He says that the Supreme Court, being the protector of fundamental rights, has the duty to protect the LGBT community.

Justice Nariman states that European judgments are important and must be cited, to which Arvind Datar says that he will be citing European judgments.

Mukul Rohatgi reads out the reference order dated 4th January, 2018, subsequent to which the present five judge constitutional bench was constituted. He emphasises that constitutional morality overtakes societal mores. He says that the issue of sexual orientation and gender are different. This case deals only with sexual orientation and has nothing to do with gender. He says that what they are saying is that this is not a matter of choice, but is something innate and that we are born with it.

Mukul Rohatgi reiterates that gender and sexual orientation should not be mixed, and says that the petitioner is not asking for a separate gender. It is a matter of choice whether one identifies as gay or otherwise. Even western research shows that it is inborn. Section 377 used the words “order of nature”. Rohatgi says that this is the Victorian morals of the 1860s. Thus Section 377 is based on Victorian morality. Ancient India was different.

Mukul Rohatgi says that our order is much older and points out to Shikhandi in Mahabharata. Justice Nariman asks if his point is that this order itself is natural, to which Rohatgi responds in the affirmative. Research says that it is at an adolescent stage that it manifests itself.

Justice Nariman says that sexual minority is also in the order of nature. Mukul Rohatgi submits a written note to the bench which is read out. He cites the judgment in the Anuj Garg case. He asks whether a pre-constitutional law, which has not been framed by

our Parliament and does not recognise the needs of our people, should remain.

Mukul Rohatgi says that the effect of Section 377 in our country is mostly on men, even though it appears to be sex-neutral. He says that the section is contrary to the effect test, and is manifestly arbitrary. He says that the term “order of nature” is not defined, and is too broad. As society changes, the values change. What was moral 160 years ago might not be moral today. Even a law valid only 50 years ago may not be valid after 50 years because of the changes in society.

Mukul Rohatgi reads out the text of Section 377 of the IPC. He then explains the provision. Even those acts of sexual intercourse which are not peno-vaginal are hit by the provision.

Mukul Rohatgi, while dealing with the Naz Foundation judgment of the Delhi HC, says that it is a well-researched judgment by the then Chief Justice. He says that the Union of India did not file an appeal against the Delhi HC judgment, to which ASG Tushar Mehta responds by saying that their stand is yet to be made, but then Rohatgi says that their stand is clear as daylight since they (Union of India) filed a review petition against the SC judgment of 2013.

Rohatgi reads out paragraphs 24, 25, and 26 of the Naz Foundation judgment by the Delhi HC. He refers to paragraph 34 of the same, which mentions the abortion case. He says that time shows that the dissent was the correct view. Rohatgi further reads paragraph 41 of the verdict which mentions the Yogyakarta Principles.

Mukul Rohatgi refers to the Maneka Gandhi, Kharak Singh, M.P. Sharma, and Lawrence v. Texas cases. He says that they are not talking about gender, and that gay men and women do not call themselves something else. The issue is of sexual orientation. Justice Chandrachud says that the right to sexual orientation is a part of larger rights.

Mukul Rohatgi says that the question arises on the legal status of same sex relationships and such couples. ASG Tushar Mehta says hearing should be confined to Section 377, to which Rohatgi retorts by asking who he is to say what they should confine themselves to, claiming that his petition is based upon larger grounds. ASG Tushar Mehta says that it is unfair that no time was given to the Union of India to take a stand, and that in such a case they should be allowed to file their response.

Rohatgi asks not to restrict the hearing to Section 377, and that further directions are needed for the protection of life and property. CJI responds by saying that first they should get out of the mess of the Naz Foundation/Koushal judgment. Rohatgi quips that that is easy for him to do that after the decision of nine judges in Puttaswamy.

CJI Misra says that Section 377 is about sex. Whether Section 377 is ultra vires the constitution will be the first chapter. The rest will follow after ruling upon the validity of the section. He says that issues like marriage and inheritance will be discussed in an appropriate list. Rohatgi again submits vehemently to the Court that the hearing should not be restricted to Section 377 alone, but the bench convinces him to argue on that section alone for now.

Mukul Rohatgi says that it is not a medical condition but merely an order of nature. Section 377 violates right to life, which also includes the right to dignity and sexual orientation and choice of partner.

The bench rises for lunch.

The constitution bench reassembles, and the hearing resumes.

Senior Adv. Arvind Datar to commence arguments on behalf of petitioner Keshav Suri, as Mukul Rohatgi is unwell. Datar submits a written note to the bench. He then begins his arguments for the petitioner. He traces the history of how laws relating to homosexuality have changed across the world. He says that in the

Koushal case the Supreme Court held Section 377 to be reflective of the will of the Parliament, which in fact it is not, as it is a pre-constitutional law. The 1860 Code was simply imposed on India and it did not represent even the will of the British Parliament. Datar refers to Lawrence v. Texas, where the amicus brief referred to the entire history.

CJI Misra asks whether there is any case law holding that pre-constitutional laws do not enjoy the presumption of constitutionality. He says that the issue is whether Section 377 is in conformity with Articles 21 and 14 or not. Arvind Datar says no, but refers to page number 4 of his note. He asks whether the legislature could draft a provision like Section 377 today. Justice Chandrachud quizzes Datar on the impact of the President's adaption orders on the constitutionality of laws.

Arvind Datar reads out Article 13(2) of the Constitution. He explains the scope of Article 13. Datar refers to paragraph 45 of the Koushal judgment which dealt with the presumption of constitutionality. CJI Misra says that Section 377 can only be attacked if it is not in conformity with Part III of the Constitution. He asks to satisfy the Court that Section 377 does not conform with Part III of the Constitution, and to leave aside the presumption of constitutionality.

Justice Chandrachud explains why the presumption of constitutionality is attached with a statute, referring to democratically elected governments. He says that Courts might not have the same deference for pre-constitutional laws which they have for post-constitutional laws, due to absence of Parliamentary will.

Arvind Datar refers to the 172nd Law Commission Report that recommended that there is no need for Section 377. The fact that Union of India chose not to appeal against the Delhi HC judgment is all the more reason for it to be struck down. Datar says that Section 377 penalises a class of people, and thus to say that it is criminalising an act and not a class of people is not correct.

Justice Chandrachud says that Section 377 applies to everybody. Men or women engaging in anal intercourse will be violative of Section 377. In that respect there is no strict classification. CJI Misra says that nature and choice are different concepts.

Arvind Datar proceeds to read out the text of Section 377. He says that the purpose of a penal code is to punish a crime and create deterrence. He asks when it is a natural orientation, then how can it be an offence? A person cannot be punished for exercising their sexual orientation. Same sex orientation can never be against nature as it is natural.

Arvind Datar cites the privacy judgment of the Supreme Court, which held gender and sexual orientation as facets of Article 21. Transgenders have been granted the protection of Article 14. There is no reason not to extend the same to those having a different sexual orientation. Datar cites the SC verdict on the Triple Talaq issue to make arguments with respect to manifest arbitrariness to declare a statute unconstitutional.

Arvind Datar says that the right to sexual orientation is part of Article 21. Justice Chandrachud says that the right to choose a partner comes under Article 21, as held in the Hadiya judgment. Datar says the rights of the LGBT community cannot be considered “so called” rights. Regarding Article 21, he argues that the Puttaswamy judgment says that privacy encompasses decisional autonomy. It is a natural corollary that sexual orientation is also covered by that. Section 377 is eclipsed post the privacy judgment, and needs to be struck down. If the foundation of the law exists no more, there is no reason to continue with it.

Arvind Datar refers to judgments from the European Court of Human Rights and other jurisdictions. He places reliance on a judgment from Trinidad and Tobago, Jason Jones v. Attorney General of Trinidad and Tobago which had relied on the Puttaswamy judgment of the Indian Supreme Court to strike down laws criminalising consensual sex between men. Datar reads paragraph 108 from the privacy judgment, which emphasises the importance

of dignity, and says that it should be read with paragraphs 118 and 119. He further refers to paragraphs 144, 145, 248, and 250 of the judgment. He also refers to paragraph 490 of Justice Nariman's opinion in that matter. Once a right is established, a duty is cast upon the Court to protect it. Datar further refers to relevant paragraphs from the concurring opinion of Justice Kaul from the privacy judgment.

Arvind Datar refers to the last paragraph of the Delhi HC judgment in the Naz Foundation case, Datar submitted that there is nothing such as the order of nature running in Section 377 of the IPC. Datar concludes his arguments by asking the Court to declare that there is nothing against the order of nature. Adv. Saurabh Kripal begins his arguments by reading from *Lawrence v. Texas*.

Hearing concludes for the day.

# DAY 2

JULY 11, 2018

---

Hearing commences.

ASG Tushar Mehta submits affidavit on behalf of the Union of India. He says that whatever is not under question may not be touched upon. Mehta says that somebody accused of bestiality may say that it is his sexual orientation. He says he will not contest the provision as regards consensual sex between adults, and leave it to the bench, but seeks clarification on bestiality.

Justice Chandrachud says that the right to sexual orientation is not a fundamental right, but the right to choose one's sexual partner is. He asks, what if two homosexuals are not indulging in sex but they are still being subject to moral policing.

Adv. Sourabh Kirpal resumes his arguments.

ASG Tushar Mehta also says Union of India will have to file detailed reply if the Court goes into other aspects like civil rights and liabilities. He requests the Supreme Court not to say anything which can be construed as affecting civil rights, inheritance, marriage rights, etc. CJI clarifies that the scope of this hearing does not cover marriage, adoption, maintenance, etc. He says that whether civil rights would follow would be decided in another lis.

Sourabh Kirpal cites Hadiya judgment to state that there exists the right to have a sexual partner of choice. He submits that consensual sexual relationships between persons of the same sex is protected under Articles 14, 19, and 21. He leaves it to the bench to define the contents of the same.

Sourabh Kirpal refers to the Shakti Vahini judgment of the Supreme Court. He reads out extracts from the judgment. He now refers to the Supreme Court judgment in the NALSA case. He concludes by citing the privacy judgment.

Menaka Guruswamy commences arguments. She is appearing on behalf of Anwesh Pokkuluri and others who are IIT students and alumni. She says their prayer is limited to consensual sex between adults and is not about incest, etc. She says that Section 377 violates Articles 14, 15, 19, and 21. She hands over a written submission to the bench. She says that the section is arbitrary and unconstitutional. She says she will answer the question of Justice Nariman on proportionality. Section 377 violates Article 15 because it discriminates on the basis of sex of the partners.

Menaka Guruswamy says that Section 377 is a colonial legacy. She says that the Supreme Court has always stepped in when the legislature has been inactive. While dealing with the question of proportionality, she refers to the judgment in the Triple Talaq case wherein Justice Nariman propounded the doctrine of manifest arbitrariness to strike down a statute.

On the question of violation of Article 15, Menaka Guruswamy says that Articles 15 and 16 are the teeth of equal protection envisaged by the Constitution. She says that stereotyping is impermissible within the Constitution. Section 377 is based on Victorian morality that people should have sex only with the opposite gender since sex is only for procreation.

Menaka Guruswamy refers to the Justice J.S. Verma Committee report in 2013 on the Criminal Law Amendment Act. Relying on that report, she says that sex under Article 15 includes sexual orientation too. She also refers to the notification by the Indian Psychiatric Society which states homosexuality is not a psychiatric disorder. The Society has favoured decriminalisation of Section 377.

Menaka Guruswamy says that when the IIT students and alumni came to her with the case, she was struck by how Section 377 had affected many of their lives. She states that the section is affecting the lives of LGBT people, and is making their lives miserable. These people deserve to be protected by their Court, their Constitution, and their country. She seeks reading down of Section 377.



Menaka Guruswamy submits that the business of life is protected under Articles 14, 15, 19, and 21 of the Constitution. She then refers to the Canadian Supreme Court's decisions and also that of the South African Supreme Court. The Canadian decision was relied upon by the Court of South Africa in the National Coalition for Gay and Lesbian Equality case to recognise the vulnerability of people due to pre-constitutional morality. Guruswamy submits that this is love that must be constitutionally recognised. It isn't just sex. She makes a passionate plea – How strongly must we love to withstand the terrible wrongs of Suresh Kumar Koushal?

Menaka Guruswamy says that Section 377 denies equal participation to LGBT community in professions. CJI Misra asks if there are any rules that prevent homosexuals from availing equal opportunity. Guruswamy says that it has a chilling effect. It violates their right to seek employment including State employment and Constitutional offices. Guruswamy says that the immediate aftermath of NALSA judgment was the extra ordinary number of transgenders who ran for public offices.

Bench rises for lunch.

Bench re-assembles and the hearing resumes.

Menaka Guruswamy says that Section 377 violates the right to form an association under Article 19. ASG Tushar Mehta objects to this, saying that this is beyond the scope of this hearing. Justice Nariman says that she has a right to argue, and that he can respond if he wants.

CJI Misra says that any disqualification linked to Section 377 will be automatically lifted if the provision is struck down. Menaka Guruswamy continuing with her argument says that Section 377 violates the right to form associations. The LGBT community is afraid of forming associations due to fear of police persecution. They are unable to form an association as they have to identify themselves as LGBT. This means they are denied many benefits which they can otherwise avail as an association. Guruswamy says

that there is a group of 350 persons who are unable to register their association.

Menaka Guruswamy says that the Court should examine constitutional issues within the ambit of Part III. Prayers are wide under writ petitions. It is not just simply reading down, or simply a reference to a larger bench. This is for constitutional interpretation under Article 145(3). She says that Section 377 has the potential to destroy lives of the LGBT community. This case is about how this Court can change social morality to constitutional morality. This case is about our humanity. Menaka Guruswamy concludes her arguments.

Anand Grover commences arguments. He is arguing for Arif Jafar. He submits that the time has come to go by time management in Court. This case is not only about decriminalisation of 377. It is about constitutional values. It is about what the Preamble to the Constitution says. He says that the history of Section 377 is very long.

Anand Grover refers to paragraph 10 of his written submissions. He says that the IPC is known to be very precise but Section 377 is different because it is not so. He reads the provision, and says that nobody can understand the scope of the section. He deals with how courts have interpreted carnal intercourse against order of nature. The orifice for penetration was interpreted to mean that insertion even between the thighs of another person came to be penalised.

Anand Grover submits that the transgender community treats the NALSA judgment as its Bible. There is need for dialogue between the Court and civil society. Talking about the petitioner on whose behalf he is arguing this case, he says that Arif Jafar was caught by the police for distributing condoms to men. A criminal case against him is still going on, and no lawyer appeared for Jafar. Fundamental rights have to be given expansive interpretation. They cannot be given restrictive interpretation. They have to be read in the context of the Preamble. Section 377 is completely vague.

Anand Grover submits that order of nature is not defined. Section 377 is overbroad. Grover refers to Justice Nariman's exposition of arbitrariness in the Triple Talaq case. He says that if the object is not fair, the statute is not sustainable. Grover then relies on Section 375 of the IPC to attack Section 377. The expression "carnal intercourse" in Section 377 is distinct from the expression "sexual intercourse", which appears in Sections 375 (Rape) and 497 (Adultery) of the IPC. The expression carnal intercourse is broader than sexual intercourse.

Anand Grover submits that Section 377 per se, as well as when read with section 375, of the IPC as amended, discriminates against similarly situated persons on the basis of their sexual orientation in contravention of Articles 14 and 15 of the Constitution. Grover submits that Article 14 should be read with Article 15. He refers to *Toonen v. Australia*, where the Human Rights Committee held that the reference to sex in Articles 2(1), and 26 of the ICCPR, is to be taken as including sexual orientation.

Anand Grover refers to the right to health. He also says that the choice of partner, whether within or outside marriage, lies within the exclusive domain of each individual (*Shafin Jahan* case). He says that the *NALSA* Judgment recognises the right of an individual to self-identify their gender.

Grover deals with the impact of the provision on transgenders in the context of gender identity. He explains the impact of Section 377 on transgender persons. He says that criminalization of LGBT persons violates the fundamental right of access to justice. He relies upon *Anita Kushwaha v. Pushpa Sadan*.

Anand Grover says that the LGBT community is suffering from blackmail and extortion. One of the major issues is that there is denial of access to justice. A lot of gay men suffer from extortion and blackmail, especially in cases where people use dating apps. He says that they have dealt with a large number of such cases.

Anand Grover explains how the Supreme Court judgment in the Koushal case is wrong. CJI Misra says that the “consensual” part is a facet of choice. He also says that criminality cannot be imposed on natural aspects.

Anand Grover submits that today we have a happy situation where the LGBT community is coming out and is present in the Court. The core issues in this case are values like liberty, equality, and dignity. He speaks about the case of Dr. Ramchandra Siras of Aligarh Muslim University, who was gay and how his privacy was invaded. The professor later committed suicide. He reads out from the Allahabad High Court Judgment quashing suspension of the professor.

Anand Grover says that after the Koushal Judgment, extortion and harassment of the LGBT community has gone up. Some communities, including the LGBT community, did not get independence. They are being oppressed even after independence. Anand Grover concludes his arguments.

Jayna Kothari commences her submissions.

Jayna Kothari refers to the NALSA judgment and makes submissions on gender identity. CJI Misra quizzes her on the relevance of gender identity. Kothari says that transgenders are suspected of unnatural offences under Section 377. Gender identity was for the first time guaranteed as a right in the NALSA judgment.

Jayna Kothari referenced discriminatory State statutes against transgenders such as the *Andhra Pradesh (Telangana Area) Eunuchs Act*, Section 36A of the *Karnataka Police Act, 1963*, which was amended only in 2016, all of which referenced Section 377 and saw transgender persons as a criminal class. She made the point that the use of the word “Eunuch” is derogatory. These Acts were identical to the notorious *Criminal Tribes Act, 1871*, which branded a number of marginalised groups like transgenders as “innately criminal”. The *Criminal Tribes Act* was repealed in 1949 but Section

377 continues to survive in the statute book in the above forms, Ms. Kothari argued.

In order to answer the question as to why Section 377, which on the face of it applies to both males and females, is discriminatory under Article 14, Ms. Kothari takes the case of her client who was born male but identifies as female. She is married, but any sexual interaction with her husband will be hit by section 377. Thus gender identity is hit by Section 377.

CJI Misra says that if Section 377 goes, then many rights may also follow. Ms. Kothari refers to the Yogyakarta Principles. She also refers to two European court judgments on privacy and dignity. She also makes submissions on Articles 19 and 21. Jayna Kothari concludes her arguments.

Sr. Adv. Shyam Divan commences his arguments. He is representing the intervener Voices Against 377.

Shyam Divan says that Article 21 includes the right to intimacy. Time has come to declare a right to intimacy. Divan reads out his prayers. The LGBT community is facing day to day problems in their life. Divan seeks declaration that no person can be discriminated on the basis of sexual orientation and gender identity. He says that sexuality and sexual rights are part of human rights. Homosexual conduct between two consenting adults is not against the order of nature.

Shyam Divan says that technically Section 377 criminalises certain acts only but in its application, it is not used against consenting sexual acts between heterosexual adults but is used against the LGBT community. With the mere existence of Section 377, the entire LGBT community is stigmatised even if they do not indulge in sex. Divan reads out from the NALSA Judgment.

Bench rises for the day.

# DAY 3

JULY 12, 2018

---

The bench assembles and hearing commences.

Shyam Divan resumes his submissions, arguing on the positive dimension of Article 14. He reads out the concurring opinion of Justice Vivian Bose in *State of West Bengal v. Anwar Ali Sarkar*, to ask the question as to ‘whether the collective conscience of a sovereign democratic republic can regard the impugned law... as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be’. Positive content in Article 14 requires declaration that no person may be discriminated against with respect to education, housing, employment, health care, all facilities, and utilities under Article 15(2), the basis of sexual orientation or gender identity.

Shyam Divan places reliance on Justice Nariman’s judgment in the Triple Talaq case. He refers to paragraph 62 of the judgment, which states that equality before law in Article 14 is derived from the UK while equal protection of law is from the 14th amendment of the US Constitution. He says that Mr. Gautam Bhan testifies to the fact that section 377 makes him feel “like a second class citizen in my own country”. Divan reads out from *National Coalition for Gay and Lesbian Equality v. Ministry for Justice*. He then reads out from *Lawrence v. Texas* – “The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons”.

Shyam Divan says that equality before law is the negative content while equal protection of law connotes the positive content of Article 14. He argues for the necessity of positive action on the part of the State for protecting homosexual persons. This is an

opportune moment for the Court to issue additional declarations (aside from striking down Section 377).

Shyam Divan refers to the Supreme Court judgment in the Hadiya case. He urges the Court to read the right to intimacy into Article 21 of the Constitution. Section 377 has a chilling effect on the freedom of expression under Article 19. Divan relies on the *Puttaswamy* judgment and *Lawrence v. Texas*. The Supreme Court, as the protector of fundamental rights, should not have re-criminalized Section 377 (after Delhi HC struck it down) because of the tremendous adverse impact it has.

Shyam Divan concludes his arguments.

C.U. Singh commences his arguments. He is representing the mental health petitioner, Alok Sarin. He hands over his written submissions to the bench.

C.U. Singh says that he will argue on the medical health aspect. Justice Indu Malhotra remarks that this (LGBT) community feels inhibited to go for medical aid due to prejudices against them. She says that because of societal and family pressure, the LGBT community is finding it difficult to come out. This gives rise to bisexuality and other mental trauma.

CJI Misra, after reading the note of C.U. Singh, says that he understands homosexuality is not a mental disorder, but a natural orientation. Justice Indu Malhotra says that even medical professionals did not maintain confidentiality. She says that it is not human beings alone who indulge in homosexual acts, many animals also show homosexual behaviour. It is not an aberration but a variation. Justice Indu Malhotra thus makes a strong case against Section 377.

C.U. Singh reads out from the *Mental Healthcare Act 2017*. CJI Misra asks Singh to show any rules and regulations that deprive the LGBT community from availing jobs, to which Singh responds in the negative. Justice Chandrachud refers to Section 21(1)(a) of Mental Healthcare Act which expressly prohibits discrimination

on the ground of sexual orientation. He says that Parliament itself now recognises them. CJI Misra observes that the LGBT community face stigma because of criminality attached to their sexual orientation.

C.U. Singh says that if the Parliament recognises that sexual orientation cannot be a ground for discrimination for mental health treatment, then can it be any different when it comes to other issues? CJI Misra asks if there is any provision in any other statute in this country wherein sexual orientation has been considered not normal, or a mental disorder. He also again asks whether there is any law, regulation or bye-law that disqualifies homosexuals.

Menaka Guruswamy says that while the Supreme Court has recognised live-in relationships and its jurisprudence has been that of substantive equality, there is discrimination (towards homosexual persons) in the application of law like domestic violence laws. Guruswamy says that the Domestic Violence Act applies only in case of a heterosexual marriage/relationship.

Justice Chandrachud says that we created a society that discriminates against the LGBT community. Justice Nariman asks C.U. Singh to refer to Section 30 of the Mental Healthcare Act. Justice Nariman terms this section as a very innovative step on the part of the Parliament.

C.U. Singh says that the Court needs to take affirmative action to undo the discrimination faced by the LGBT community. Singh refers to Section 120 of the *Mental Healthcare Act*, which provides for overriding effect on other statutes. Singh submits that having faced criminalisation for over 160 years, it is a huge step to strike Section 377 down, but whenever there has been historical deep-rooted discrimination, then the State has resorted to affirmative action. He says that it is a declaration against such discrimination that they are seeking. He says that the Court should do something positive to prohibit discrimination against the LGBT community.

C.U. Singh concludes his arguments.



Senior Advocate Ashok Desai commences his arguments.

Ashok Desai refers to a book (*Same Sex Love in India*) and a few articles. He speaks about fraternity and how it is developing continuously as a concept. Desai uses the words “utter chaos created by this law”. He speaks on the LGBT community in the context of different religions. He says that even England has abolished Section 377, and in fact they apologised for it.

Ashok Desai traces the treatment of homosexuals by various ancient civilisations. He talks about how the perception towards homosexuality changed with the coming of Abrahamic faiths. He also refers to the privacy and the NALSA judgments. On the issue of fraternity, he refers to the Supreme Court judgment in the Subramanian Swamy case. He says that the whole problem before the judges is a human condition.

Ashok Desai says that just because only a few people are convicted under Section 377, it is no ground to retain this law. The Court needs to recognise the concept of fraternity. The LGBT community is terribly humiliated. He cites various judgments dealing with the value of fraternity. Desai reads from the book “*Same Sex Love in India*”. He hands over a book “*I am Divine*” to the bench. Desai also refers to an article on gay rights and human rights published by *The Hindu*.

Ashok Desai concludes his arguments.

Krishnan Venugopal representing Nivedita Menon and other academics begins his submissions. He says that the right to freedom of speech and expression, and also the right to conscience, are being offended by Section 377.

The bench rises for lunch.

The bench re-assembles after lunch.

Krishnan Venugopal says that Section 377 actually targets the identity of LGBT persons. He says that their expression is protected under Article 19(1)(a). Venugopal says that the fear

of law is used to harass the LGBT community. This prevents these persons from approaching the police for protection. One should not be forced to hide one's identity. He submits that the provision is used to harass LGBT persons who do not speak up due to stigma and societal perceptions. He then talks about how Lord Macaulay introduced the provision. Lord Macaulay had said that the provision was about a 'revolting matter' and should not be discussed.

Krishnan Venugopal submits that the section has a chilling effect on the freedom of expression. He next refers to the Shafin Jahan judgment. Morality has to be constitutional morality and not social sense. He refers to the Naz foundation judgment to emphasize the distinction between constitutional and public morality. He says that Section 377 offers a legal basis to suppress alternate sexuality and that Section 377 is used as an excuse to impinge on the freedom of expression. Freedom of association of LGBT persons has been recognised in many countries. Section 377 prevents the LGBT community from exercising their freedom of association and hence violates Article 19.

Krishnan Venugopal talks about the fundamental right to freedom of conscience under Article 25 as also being violated by Section 377. He also reads Article I of the Universal Declaration of Human Rights. He points out that the expression "unapprehended felon" fails to capture the impact on the rights of LGBT persons. He cites *Lawrence v. Texas*.

Krishnan Venugopal concludes his arguments.

ASG Tushar Mehta now makes submissions on behalf of the Central Government. He says that every act other than Section 377 has its objectives. He refers to problematic parts of Devdutt Pattnaik's book, "*Shikhandi*", which was given to the court by Sr. Adv. Ashok Desai, and asks the Court to go through it. Mehta urges the Court to stick to the constitutionality of the provision. He hands over a document to the Court saying that persons with different perceptions look at things differently. One

of the counsels, for the intervenors appearing for the retention of Section 377, says that what is prohibited under Section 377 is sexual intercourse.

Tushar Mehta says that the *Puttaswamy* judgment cannot be interpreted to mean that Section 377 should exclude bestiality. Another intervenor says that using the reproductive system for carnal intercourse is against the order of nature. One more intervenor argued that public opinion should be sought.

CJI Misra says that the Court does not follow majoritarian morality but constitutional morality to another lawyer who tried to make arguments based on “popular opinion”. He adds that they do not decide constitutional issues by referendum.

Advocate Manoj George makes submissions for intervenors in support of Section 377. He is appearing for two Christian associations supporting Section 377. He says that there is no senior to hold a brief for his side, maybe because of the issue involved. George says that the term “whoever” in Section 377 is gender neutral. He also says that carnal intercourse means it need not be performed with reproductive organs, and that carnal intercourse is against the order of nature. This is why the legislature used the term carnal and not sexual intercourse. He says that another vital component of Section 377 is penetration. He adds that Section 377 does not stop people from enjoying personal relationships.

Manoj George says that Koushal’s judgment was not dealt with by the petitioners. He also says that the amicus brief in *Lawrence v. Texas* has a different facet. He says that the Christian world view has been attacked in this petition. The CJI says that no petitioners attacked any views, and that they only argued on fundamental rights. George says that the U-turn of the government on this issue is of concern to several parties. Justice Khanwilkar says that it is not a U-turn, pointing out that the Delhi HC judgment was not challenged. George reads former ASG P.P. Mehta’s submissions in the Koushal case to prove his point that the government has taken a U-Turn. He says that three private member’s bills moved

in the Parliament to strike down Section 377 were defeated. He says that IPC falls in the concurrent list, and that if the states wanted to amend the section, they could have. CJI Misra says that that does not mean that its constitutionality cannot be challenged.

Manoj George tries to counter the reliance by petitioners on the Yogyakarta Principles. Hearing concludes for the day. Intervenors will be heard for an hour on Tuesday next week.

# DAY 4

JULY 17, 2018

---

Adv. Manoj George for Apostolic Churches Alliance and Utkal Christian Association continues his arguments. He submits that courts should not add or delete words to the statute that are not expressly provided therein. He submits that consent between two adults is the subject matter to be looked into while analyzing Section 377. He says that the section penalizes carnal intercourse. The carnal intercourse that is criminalized can be between man and man, between woman and woman, between man and animal or between woman and animal.

Manoj George takes the Court through the text of Section 377. It makes the following classification: carnal intercourse within the order of nature and carnal intercourse against order of nature. This is a reasonable classification with an intelligible differentia. He says that if the Court says that there is nothing called order of nature with or without consent, then the entire Section will go.

Manoj George submits that there is a differential between acts against the order of nature and those that are natural. Justice Chandrachud says that it strikes at the ground of Article 14, and asks whether there is an order of nature. George says that Section 375 may also have situations where consent is obtained by putting the person in fear of death. Justice Nariman says that these are categories of what would constitute consent which is not free. George says that Section 377 does not take into account consent. Consent is a word which is absolutely absent in Section 377. He says that the petitioners are saying this word has to be imported into the provision.

Justice Nariman says that the original Act included consent, even though it incurred lesser punishment. Later the provision including consent was dropped. Justice Nariman asks Manoj George what is order of nature? Justice Chandrachud asks what is carnal, and

George notes that carnal means lust. Manoj George concedes that there should be lust even between heterosexual partners for sex.

George responds that per se the order of nature has not been defined. Justice Nariman says that simply put, any sexual act which results in reproduction would be in the order of nature. Justice Chandrachud also questions what would constitute carnal intercourse. George reads out Article 15 and says that it prohibits discrimination on the ground of sex and not sexual orientation. Justice Nariman says that this is where the Yogyakarta principles have to be read to include sexual orientation within the ambit of sex.

Manoj George says that there are many types of orientations and that it is not as simple as LGBT. Justice Nariman says that in the NALSA judgment the Court has read sex to include transgender. George submits that the Yogyakarta Principles were drafted where an assembly of NGOs said that these principles have to be looked into. CJI Misra says that whatever the principles stated in the Yogyakarta Principles are, if they fit into our constitutional framework, they may be referred as well.

CJI Misra says that Article 15 covers not only gender but sexual orientation. George says that sexual orientation is of an abstract nature and such an abstract concept cannot be read into Article 15. He adds that sexual orientation has not been defined in the Constitution or any other statute. He submits that reading sex to include sexual orientation would leave space for uncertainty. CJI Misra says that traditionally man and woman come together to continue the human race.

Justice Chandrachud says that the website references made in Manoj George's written submissions clearly appear to have hate speech content vis-a-vis LGBT persons. He reads out a portion from the submission which seemingly indicates that a person would be attracted to someone who reciprocates that attraction. He says this clearly is not sexual orientation. CJI Misra says that George should read the poetry of John Donne to understand metaphysical love.

Manoj George responds that he would want to propose a solution to deal with Section 377. He reads out portions from a study saying that persons showing same sex attraction in adolescence do not show same sex attraction as adults. Manoj George relies on a study by a Washington based organisation on sexual orientation, which states that the idea that people are born with a sexual orientation is not supported by scientific evidence. So it is not innate, and the idea that they are born that way is not supported by science. George now comes to the NALSA judgment. George reads paragraph 85 from the NALSA judgment. It relates to the part where the Court says that recognition of gender rights is important to enjoy civil rights. George next submits that petitioners are asking to introduce new words in the statute.

Justice Nariman refers to the case of Alan Turing and he committed suicide after he was chemically castrated. George submits that while interpreting a penal statute, attention has to be paid to what has been said and what has not been said in the statute. Words cannot be imported into a statute and it is the job of the Parliament to re-draft, re-draw, or enact provisions. George submits that it is a settled principle of law that courts cannot legislate. He further submits that petitioners argued right to intimacy as right to marriage. He submits that the European Human Rights Court has held that the right to marry is not a conventional right.

Manoj George submits that if such unnatural offences, as under Section 377, is allowed with consent, it would have a cascading effect on many other legislations. Justice Nariman says that nothing would cascade as the provision could be read as holding bestiality as an unnatural offence, and sexual acts with persons under 18 years of age as an offence. George says that the judgment in the Koushal case, the Supreme Court had stated that it is for the legislature to amend the IPC and remove Section 377 from the statute book. Justice Nariman says that the moment any provision violates any of the fundamental rights, it is the duty of the Court to strike it down.

Justice Nariman says that Justice Jackson, in the case of *West Virginia v. Board of Education*, had said that the whole object of the fundamental rights chapter is to empower the Court to strike down a law which otherwise may be allowed by a majoritarian government. Manoj George says that anything which needs to be done to Section 377 in the manner sought by the petitioners should be left to the Parliament. Justice Nariman responds by saying that the moment they are convinced that there is a violation of fundamental rights, they will strike it down and not leave it to the legislature.

Manoj George states that Section 377 is not based on Victorian era morality, as claimed by the petitioners, but comes from the Bible. George says that there will be an effect on religious freedom. George argues on the right to family under the Yogyakarta Principles. He submits that the Yogyakarta Principles talk not just about family, but also many other rights regardless of sexual orientation. Justice Nariman says that the principles state that a family may exist regardless of marriage. CJI Misra says that George is slightly wrong in reading the principles. The CJI says that the principles state that they may live and stay together as family but does not talk about marriage. George says that the Court should not rely on the Yogyakarta Principles as though they are the Magna Carta. He further relies on the amicus brief in *Lawrence v. Texas*. He says that it details how homosexual relations would lead to STDs.

Justice Chandrachud says that in his privacy judgement he noted that acceptance and information are what ensure that health and related diseases are kept in check. He refers to the policy in South Africa vis-a-vis AIDS. Justice Nariman says the the same would apply to prostitution. If it is legalized and regulated it would ensure the sex workers' right to health. He says that absolute prohibition must be questioned.

Manoj George submits that the only reading down of Section 377 could be to make the offences under the section bailable and



non-cognizable. The entire Koushal judgment was based on AIDS/HIV issues. He says that the petitioners have not talked a single word about it. If anything needs to be done, it should be done by the legislature.

Adv. Manoj George concludes his arguments.

Sr. Adv. K.S. Radhakrishnan commences arguments on behalf of another intervenor. He says that he will refer to the NCT judgment in the context of constitutional morality. Gender identity and sexual orientation are not criminalised by Section 377. It criminalises certain acts and whoever commits those acts will be liable.

Bench rises for lunch.

Bench re-assembles after lunch.

K.S. Radhakrishnan says that what is criminalised is only the act. There is a mere regulation. This is regardless of gender identity. Radhakrishnan reads out portions from the recent *Government of NCT Delhi v. UOI* about constitutional morality. He submits that the problem begins when petitioners argue on the chilling effect on exercise of sexual orientation as part of privacy and dignity. He says that he has no issue with the NALSA judgment, and that it is a perfectly fine judgment. He submits that the observations made in the Puttaswamy judgment against the Koushal case prejudiced the intervenors in the Koushal matter. The observations in paragraph 146 of the Puttaswamy judgment on Section 377 were made without hearing the intervenors here, and hence is a violation of principles of natural justice.

K.S. Radhakrishnan submits that the acts mentioned in Section 377 are undignified acts derogatory to the constitutional concept of dignity, and do not target LGBT communities. Justice Chandrachud says that spread of HIV is also because men going to work outside villages have unsafe sex and when they return they spread it to their spouse. The problem is not intercourse but unsafe intercourse. While Radhakrishnan insists that homosexuals were responsible

for spreading AIDS in the US, Justice Indu Malhotra comments that STDs are also prevalent in heterosexuals.

K.S. Radhakrishnan reads provisions from the IPC that relate to punishing spread of infection or diseases dangerous to life. He further submits that Manusmriti prohibits such sexual acts. Radhakrishnan relies on a report as per which homosexuality has led to the spread of HIV in USA. Section 377 is a modern medico-legal necessity to counter AIDS. Maneka Guruswamy points out that K.S. Radhakrishnan has been reading incorrect content citing it to be DSM-5. Radhakrishnan says regardless, the content he has been reading exists somewhere. The bench questions whether it can rely on such documents.

K.S. Radhakrishnan continues. He says that there is a need to uphold public morality, and that right to privacy should not be extended to indulge in unnatural offences and become carriers of HIV. He says that rampant homosexual activities for money will tempt and corrupt the young generation. He says that the fall out of Section 377 will be on the family system which is the bulwark of Indian social structure since Rig Vedic times will be in shambles.

Justice Nariman says that the Supreme Court has inverted what Bentham said about choosing lesser of the two evils. Radhakrishnan says that he will read the judgement and adds that privacy right cannot be allowed to be an unruly horse. He says that despite the assigned function, the sexual organs are being abused, and that this is undignified. He says that the right to privacy placed in every person also vests in them to uphold certain morality, which they should not abuse. He urges the Court to look at the extent to which right to privacy may be extended. He asks, can the state not interfere if terrorists are holed up in a flat? If Section 377 is struck down, HIV/AIDS will spread rapidly, and India will lose nobility, character, and virtuousness.

K.S. Radhakrishnan concludes his arguments.

Another intervenor says that in the event of striking down Section 377, for non-consensual acts, the aggrieved persons would be left without any remedy.

H.P. Sharma commences submissions. He submits that reading down Section 377 would affect the institution of marriage. He submits that Section 377 needs to be retained as is. He says there is no law to save marriage if a husband wants to indulge in homosexual acts. He submits that on reading IPC, the assumption is that married men would not indulge in homosexual acts, but once they do, how does one define the extent of liberty they claim. Sharma says that there is something which is natural, and that which is unnatural. He says there is no data to suggest that lives of the LGBT community improved till the Naz Foundation judgment was set aside.

He says that Section 376 does not use the word carnal. He says that the word carnal in Section 377 does not give any added meaning. He says that the section does not cover lesbians or female bisexuals and hence women are not affected by this provision. CJI Misra says that the word intercourse has a broad meaning. He submits that transsexuals are attracted to men for the purpose of fulfilling their carnal needs. He says that Section 377 only affects men having sex with men and bisexual men. The NACO program lists, identifies, and sensitizes the MSM community. Crores of public funds have been spent on them and there is no case where they have been harassed. He says that there is no data that homosexuals have been criminalised using Section 377 in the last 30 years, and that the provision is no sleeping giant. Reading down Section 377 will lead to the rise of a new breed of sex workers.

H.P. Sharma compares Section 377 with corruption and police. He says that just because there is corruption, one cannot abolish the body of police. He says that we know there is corruption everywhere, and asks if we abolish police because it is corrupt. Likewise, he asks, whether we should strike down a law because it affects a few. He refers to the Directive Principles of State

Policy. He says that the interest of the LGBT community has to be balanced against interest of the society. He reads Article 39A. He says that there are disabilities in the society to a great extent, but the answer is not to abolish certain acts.

H.P. Sharma says that the petitioners have not shown a single instance of any harm to members of the LGBT community after the Naz Foundation judgment was set aside. He says that when persons indulge in unnatural acts, they are bound to have injuries. Legalizing unnatural acts would violate Section 322 of the IPC (voluntarily causing grievous hurt). He submits that the societal interest is to be taken as the interest of the individual. He says that the Court has to balance fundamental rights of citizens and social and public interests. He says that after live-in relationships, rapes have increased manifold.

H.P. Sharma asks what happens if two consenting men live together and one of them falls sick, and the partner abandons him. CJI Misra says that there are cases where children leave their ailing parents at hospitals. Sharma says that merely striking down Section 377 would not remove the stigma attached to homosexual acts. Advocate H.P. Sharma concludes his submissions.

Anand Grover gives a brief rejoinder. He submits that the submission by the respondent on line listing is incomplete. Not only MSM, but also female sex workers, and vulnerable communities, are provided with condoms.

The hearings on Section 377 conclude. Supreme Court reserves judgment.

At 11.30am on 6th September, 2018, the five-judge Constitution bench assembles to pronounce the judgment on the Constitutional validity of Section 377 of the IPC. CJI Dipak Misra says that all opinions are concurring.

CJI Misra reads the judgment on behalf of Justice Khanwilkar and himself. He says that no one can escape from their individuality. Citing Mill, he says that one defines oneself. Respect for individual choice is the essence of liberty. The LGBT community possesses equal rights under the Constitution. Prejudiced notions and social exclusion are still faced by individuals. The LGBT community possesses the same human rights and Constitutional rights like any other individual. Section 377 is irrational, manifestly arbitrary and indefensible. Equality is the edifice on which the entire non-discrimination jurisprudence exists. The concept of identity cannot be a prison-hold. It cannot be only one identity. The primary objective of having a Constitutional society is to transform the society progressively. The Constitutional provisions should not be interpreted in a literal sense. The sexual orientation of an individual is natural and discrimination on the basis of sexual orientation is a violation of freedom of expression. The view taken by the Court in the Suresh Koushal case is impermissible under the Constitution.

It can be concluded that self-determination is in tandem with the NALSA judgment; it is line with the Naz Foundation judgment; the Constitution is capable of extension to include expansion of laws in keeping with the changing times. The role of the courts becomes more important when a group has been deprived since time immemorial; words ought to be interpreted; Constitutional mortality is to preserve the heterogeneous nature of a society. Social morality cannot be used as an index of measurement; there is a right to live to with dignity, without which other rights can be trumped; sexual orientation is one of the many biological phenomena which is natural and is controlled by biological and

neurological phenomena. An individual has sovereignty over his/her body. Holding otherwise is in violation of fundamental rights; rights evolve with the evolution of the society.

This provision of the IPC has resulted in a collateral effect in that even consensual sex between LGBT persons is criminalised and is thus violative of Article 14. Autonomy is individualistic. One can submit one's autonomy to one another with choice. There is unreasonable classification with no nexus with the object. Section 377 insofar as it criminalises consensual sexual acts between man and man, man and woman or woman and woman is unconstitutional and is struck down. Sex with animals will however remain a criminal act. The judgment in Suresh Kumar Koushal case is thus overruled.

Justice Rohinton Fali Nariman reads from his judgment. He cites the poem "The Love that Dares not Speak its Name" written by Lord Alfred Douglas to Oscar Wilde and mentions the fact of Wilde's imprisonment under the law. He then said that the only good thing to come of this conviction was that one of the most beautiful poems in the English language was written by Oscar Wilde when he was in prison, namely "The Ballad of Reading Gaol". He gives the historical context of Section 377. He then goes on to say that the Yogyakarta Principles directly apply. He says that Homosexuals have right to live with dignity. He places extensive reliance on foreign jurisprudence including the recent judgment from Trinidad and Tobago. He says that one feature of his judgment is reliance on Mental Healthcare Act as per which Parliament has recognised that homosexuality is not a mental disorder. On why the Suresh Kumar Koushal case cannot stay, he says that homosexuals are entitled to Constitutional rights. The Union of India should take all measures to broadcast the judgment in regular intervals to reduce and eliminate stigma. Police be given be periodic sensitisation lessons. Justice Nariman concurs with the CJI and signs off his opinion.

Next Justice D.Y. Chandrachud reads his opinion. He says that gays, lesbians, bisexuals, and transgenders have equal rights as other citizens. Section 377 denies equal participation. He says that individual liberty is the soul of the Constitution. He says that the lethargy of law is manifest again in the 157-year-old colonial law. Macaulay's legacy has existed despite us having our own Constitution. He says that we must as a society ask certain questions. We become the cause and not just the inheritors. Our Constitution does not ask us to conform. Dissent is the safety valve of democracy. Section 377 has been destructive of identity. Sexual orientation has become a cause of blackmail in the time of technology. This case is much more than just decriminalising a provision. It is about an aspiration to realise Constitutional rights and equal existence of the LGBT community as other citizens. Section 377 provides rule by law instead of rule of law. It encourages discrimination and stereotyping. LGBT persons have rights to be equal citizens in all manifestations. Section 377 is deeply rooted in majoritarian standards. To deny LGBT persons their right to sexual orientation is a denial of their citizenship and a violation of their privacy. They cannot be pushed into obscurity by an oppressive colonial legislation.

Treatment of homosexuality as a disorder/disease has a severe impact on the mental health of such persons. Human sexuality cannot be defined narrowly. LGBT persons have a right to equality of protection under the Constitution. Discrimination against LGBT is unconstitutional.

Justice Chandrachud reads a poem by Leonard Cohen from his judgment in court titled, 'Democracy' in court. He says that decriminalisation of Section 377 is of course necessary, but is just the first step. The Constitution envisages much more. LGBT persons are victims of Victorian morality. Saying that the LGBT community is entitled to equal citizenship and equal rights under the Constitution, Justice Chandrachud overrules the Suresh Kumar Koushal case. Constitutional morality will prevail and the society cannot dictate the sexuality of an individual. The state has

no business to intrude into these personal matters. Section 377 is unconstitutional to the extent that it penalises consensual sex between two adults. Justice Chandrachud signs off, concurring with the CJI.

Justice Indu Malhotra concurs with the CJI's opinion. History owes an apology to LGBT persons for ostracisation, discrimination. Reading down of Section 377 shall not lead to reopening of any concluded prosecutions but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

Section 377 stands decriminalised to the extent it criminalises consensual sexual acts of adults in private.



# APPENDIX F: TIMELINE (2018-2021) — IMPACT OF NAVTEJ SINGH JOHAR

## I. IMPACT OF NAVTEJ JOHAR v. UNION OF INDIA ON THE RIGHTS OF THE LGBT COMMUNITY

### A. DECISIONS ON THE RIGHT TO LOVE AND PARTNERSHIP

#### *SREEJA S. v. COMMISSIONER OF POLICE*

Court: Kerala High Court

Date: 24 September, 2018

Decision: The petitioner, a woman, filed a writ of habeas corpus alleging that her partner, another woman, with whom she had been in a close relationship with, was illegally confined against her will by her parents and that the couple had been intending to live together as life partners. The court relied on Navtej and other cases on the adulthood defence to hold that the validity of marriage or competency to enter into a wedlock are immaterial in habeas corpus petitions and that being majors, the petitioner and her partner were free to choose who they wanted to live with, how they wanted to live or where they wanted to live.

*Citation: 2018 SCC OnLine Ker 3578*

## **SADHANA SINSINWAR v. STATE**

Court: Delhi High Court

Date: 1 October, 2018

Decision: The petitioners, two legal adults who had been living together of their own free choice, filed a petition alleging that they feared for their life, limb and liberty from their families who apparently did not approve of the petitioners' cohabitation. The court relied on Navtej and held that the petitioners had a right to live their lives in terms of the constitutional freedom recognized by the Supreme Court in Navtej.

*Citation: Writ Cr. No. 3005 of 2018*

## **MANN @ MANJUSHA YADAV v. STATE**

Court: Delhi High Court

Date: 15 November, 2018

Decision: The petition was filed by a transgender man, praying for the issuance of a writ of habeas corpus alleging that their partner had been illegally confined and for seeking protection for the petitioner and their partner and friend, a woman. The court observed that being an adult, the choice of the petitioner's partner in whoever she wished to reside with had to be respected, upon which right; no fetters could be imposed by anyone. The court observed this right to be inalienable.

*Citation: 2018 SCC OnLine Del 12479*

## **SHAMPA SINGHA v. STATE OF WEST BENGAL**

Court: Calcutta High Court

Date: 29 January, 2019

Decision: The case concerned a major lady, a lesbian, who was staying with her partner, that is, the petitioner in question, and who later mentioned that she was inclined to live with her mother. The court held that being major; she was free to choose her partner of any

gender without any influence by any person or authority. The court placed reliance on the decision in Navtej.

*Citation: 2019 SCC OnLine Cal 153*

### **BHAWNA v. STATE**

Court: Delhi High Court

Date: 12 April, 2019

Decision: The petitioners, two major women, filed the petition praying for protection and stating that they were in a live-in relationship which was contrary to the wishes of the family of one of the petitioners. Protection was granted by the court to the couple.

*Citation: Writ Cr. No. 1075 of 2019*

### **MONU RAJPUT v. STATE**

Court: Delhi High Court

Date: 12 July, 2019

Decision: The petitioner, a transgender man, filed a habeas corpus petition alleging that their partner, a woman who they had been in a romantic relationship with and who they had stayed with for a short while in Delhi, had been illegally detained by the aunt and uncle of the latter. The court held that the wishes and choice of the detinue in wherever she wished to stay had to be respected.

*Citation: 2019 SCC OnLine Del 9154*

### **PARVEEN DAYAL v. STATE**

Court: Delhi High Court

Date: 6 September, 2019

Decision: The petitioner, a woman, filed the present petition seeking protection from the court in favour of herself and her friend, another woman. The court considered and gave way to the free will of the petitioner's partner, who expressed her intention to stay with

her friend. Accordingly, the court passed the order for protection, safety and security of the petitioner's friend.

*Citation: Writ Cr. No. 2384 of 2019*

### **MADHU BALA v. STATE OF UTTARAKHAND**

Court: Uttarakhand High Court

Date: 12 June, 2020

Decision: The petitioner, a woman, filed a habeas corpus petition alleging that her partner, another woman, with whom she had been in a consensual relationship with, had been wrongfully confined by her mother and brother against her wishes. The court held that being adults, they had free choice of who they wished to partner with, and even though they were not competent to enter into wedlock, the same was immaterial for their liberty protection in this case. The court also held that consensual cohabitation between two adults of the same sex was a fundamental right which was guaranteed to every person under Article 21 of the Constitution of India.

*Citation: HCP No. 8 of 2020*

### **NISHANT v. STATE (NCT OF DELHI)**

Court: Delhi High Court

Date: 15 July, 2020

Decision: The petitioners, a transgender woman and her partner, another woman, filed the petition praying for issuance of directions to ensure their protection alleging that they feared for their lives and liberty at the behest of their families on account of their consensual relationship. The court ordered for relevant protection to be provided to the petitioners based on their threat perception.

*Citation: Writ Cr. No. 1071 of 2020*

### **PARAMJIT KAUR v. STATE OF PUNJAB**

Court: Punjab and Haryana High Court

Date: 20 July, 2020

Decision: The petitioners, both major females, approached the court seeking protection of their life and liberty on account of opposition and threats from their families to their liking for each other and their live-in relationship and cohabitation. The court observed that the petitioners are entitled to their right to lives and liberties under Article 21, regardless of the nature of their relationship, and were therefore free to lead their lives in any manner they so desired.

*Citation: 2020 SCC OnLine P&H 994*

### **VANITABEN DAMJIBHAI SOLANKI v. STATE OF GUJARAT**

Court: Gujarat High Court

Date: 23 July, 2020

Decision: The petitioners, two women, filed the petition praying for the issuance of writ of mandamus or any other order providing protection to the petitioners from their relatives who they alleged were threatening and tormenting them. The court ordered the District Superintendent of Police to take immediate steps and to provide protection to the petitioners, if so required.

*Citation: Special Criminal Application No. 3011 of 2020*

### **MANJINDER KAUR v. STATE OF PUNJAB**

Court: Punjab and Haryana High Court

Date: 7 August, 2020

Decision: The petitioners in the case were two major women, who had known each other, had a liking for each other and who intended to stay in a live-in relationship with each other. They filed a petition for protection of their life and liberty alleging that there were serious threats that they had from their family members who were

in opposition of the aforesaid relationship. The court held that the petitioners had a right to protection of their life and liberty regardless of social unacceptability and that being majors, they had every right to lead their lives the way they wished to within the four corners of law.

*Citation: Writ Cr. No. 5669 of 2020*

### **CHINMAYEE JENA v. STATE OF ODISHA**

Court: Orissa High Court

Date: 24 August, 2020

Decision: The petitioner, a transgender man, filed the writ of habeas corpus alleging that his life partner had been detained by her mother and uncle since they had fallen in love with each other after which both of them were staying together in a live-in relationship. The court held that the choice of whom to partner, the right not to be subjected to discriminatory behaviour, and the ability to find fulfilment in sexual intimacies were intrinsic to the constitutional protection of sexual orientation as per Navtej and that the petitioner was free to stay in a live-in relationship with a person of the same gender.

*Citation: 2020 SCC OnLine Ori 602*

### **SULTANA MIRZA v. STATE OF UTTAR PRADESH**

Court: Allahabad High Court

Date: 2 November, 2020

Decision: The petitioners, two major women, who had been living in a live-in-relationship voluntarily on account of their sexual orientation, filed a petition praying to the court to issue a writ, order, or direction in the nature of mandamus directing the respondents not to adopt any coercive process or interfere in the live-in relationship of both the petitioners. The court held that intimacy between consenting adults of the same-sex was beyond the

legitimate interests of the state since they had the right to love, partner and find fulfilment in a same-sex relationship.

*Citation: Writ C. No. 17394 of 2020*

### **POONAM RANI v. STATE OF UTTAR PRADESH**

Court: Allahabad High Court

Date: 20 January, 2021

Decision: The petitioners, two major women who had been living in a live-in-relationship voluntarily on account of their sexual orientation filed a petition seeking protection against the respondents to not interfere in their peaceful living. The court held that the choice of whom to partner, the right not to be subjected to discriminatory behaviour and the ability to find fulfilment in sexual intimacies was intrinsic to the constitutional protection of sexual orientation as per Navtej and that the petitioner was free to stay in a live-in relationship with a person of the same gender.

*Citation: Writ C. No. 1213 of 2021*

### **MANSI SRIVASTAV v. GOVERNMENT OF NCT OF DELHI**

Court: Delhi High Court

Date: 4 February, 2021

Decision: The court granted protection to the petitioners, two women, who were in a voluntary relationship contrary to the liking of their parents.

*Citation: Writ Cr. No. 219 of 2021*

### **S. SUSHMA v. COMMISSIONER OF POLICE**

Court: Madras High Court

Date: 7 June, 2021

Decision: The case involved a lesbian couple who had been staying together and whose relationship was opposed by their families. The court, while extending protection to the couple, issued guidelines for the sensitization of judiciary,

healthcare workers, educational institutions, workplaces and parents, to ensure inclusivity in all these spaces. The decision marks a significant point for LGBT rights and the instance of Justice Venkatesh undergoing counselling sessions to understand sexual orientation before disposing the matter demonstrates a more sensitive, empathetic and humane approach to LGBT rights.

*Citation: 2021 SCC OnLine Mad 2096*

### **RAMYA v. STATE OF TAMIL NADU**

Court: Madras High Court

Date: 25 June, 2021

Decision: The petitioner stated that she was a queer person belonging to the LGBT community, who was forcibly married into a heterosexual marriage and who was now staying with her friend in a lesbian relationship. The court, by relying on *S. Sushma v. State of Tamil Nadu*, extended protection to the petitioner and her partner.

*Citation: CRL OP No. 10880 of 2021*

### **ANITA KUMARI v. GOVERNMENT OF NCT OF DELHI**

Court: Delhi High Court

Date: 7 July, 2021

Decision: The petitioner, a major woman, alleged that she was assaulted and abused by her family, in particular by her mother, after she disclosed that she was lesbian and was in relationship with someone. She was also told that she had no choice but to marry a man, and was therefore confined in her home, under the surveillance of two of her cousins who started sexually assaulting and abusing her. Court stated that being a major, the petitioner was at liberty to live in the manner she wished to live in, even if she had a different sexual orientation.

*Citation: Writ Cr. No. 1060 of 2021*



## **M. KAVIN THAMIZH v. INSPECTOR OF POLICE**

Court: Madras High Court

Date: 13 August, 2021

Decision: The petitioner, a transgender man, filed a petition of habeas corpus alleging that his partner, a woman he had been in love and in a consensual relationship with, had been illegally detained by her father.

The court considered the free will of the petitioner's partner, and ruled that being a major, since she intended to stay with the petitioner; she was free to do so, irrespective of whether her parents supported her in her decision.

*Citation: H.C.P. (MD) No.1082 of 2021*

## **B. DECISION ON EQUALITY AND NON-DISCRIMINATION IN EMPLOYMENT**

### **PRAMOD KUMAR SHARMA v. STATE OF UTTAR PRADESH**

Court: Allahabad High Court

Date: 2 February, 2021

Decision: The case involved the cancellation of appointment of the petitioner on account of a video of his which was circulated and made viral, which according to the authorities was depicting indulgence in untoward activity. The court held that one's sexual orientation cannot be tagged as 'indulgence in untoward activity' and that any display of affection amongst the members of the LGBT community towards their partners, even in public, cannot be bogged down by the public opinion. The court relied on Navtej and quashed the order of cancellation of appointment.

*Citation: 2021 SCC OnLine All 145*

## **C. PETITIONS FILED FOR SAME-SEX MARRIAGE RIGHTS**

### **NIKESH P.P. v. UNION OF INDIA**

Court: Kerala High Court

Date filed: 24 January, 2020

Challenge: The petitioners, two gay men, filed this petition challenging the provisions of the Special Marriage Act, 1954 on grounds that the Act does not permit non-heterosexual couples to marry and in doing so denies them equal access to the institution of marriage. Various provisions of the act were challenged on grounds that they do not allow solemnization or registration of gay marriages and that the usage of terms such as ‘widow-widower’, ‘male-female’ and ‘bride-bridegroom’ in the act operated in favour of heterosexual couples only, which was argued to be non-inclusive. They stated that this was a violation of the principles of equality, non-arbitrariness, non-discrimination, individual dignity and personal autonomy under Articles 14, 15(1), 19(1)(a) and 21 of the Constitution of India and the petition cited and heavily relied on Navtej.

*Citation: Writ C. No. 2186 of 2020*

### **ABHIJIT IYER MITRA v. UNION OF INDIA**

Court: Delhi High Court

Date filed: 7 September, 2020

Challenge: The petition was filed in public interest stating that the usage of the terms ‘any two Hindus’ in the Hindu Marriage Act, 1955, meant that a marriage between any two Hindus could be solemnized regardless of their individual sexes, making same-sex marriage valid under the Hindu Marriage Act, 1955. The petitioners stated that the act does not discriminate between homosexuals and heterosexuals, and therefore the right for homosexual couples to marry under the Act should be recognized

by the Court. It was stated that a denial of the right to marry encroached upon fundamental rights of LGBT people enshrined in the Constitution. Furthermore, right to marry was also petitioned to be a part of the right to life under Article 21 of the Constitution. The petitioners cited Navtej, among other authorities.

*Citation: Writ C. No. 6371 of 2020*

### **VAIBHAV JAIN v. UNION OF INDIA**

Court: Delhi High Court

Date filed: N/A

Challenge: The petition was filed by two married gay men challenging the Foreign Marriage Act, 1969 for its exclusion of same-sex marriages and the resultant violation of Articles 14, 15, 19 and 21 of the Constitution of India. The petitioners prayed before the court to declare the Act unconstitutional to that extent and to read the Foreign Marriage Act, 1969 to recognize marriages between consenting adults irrespective of their gender and sexual orientation. The petitioners placed reliance on the verdict in Navtej.

*Citation: Writ C. No. 7657 of 2020*

### **DR. KAVITA ARORA v. UNION OF INDIA**

Court: Delhi High Court

Date filed: 5 October, 2020

Challenge: The petitioners, two women, who are a same-sex couple, filed the petition seeking enforcement of the fundamental right to choice of their partner and for a declaration to the effect that the Special Marriage Act, 1954 includes within its ambit the solemnization of same-sex marriage. The petitioners argued the provisions of the Special Marriage Act, 1954 to be violative of their fundamental rights under Articles 14, 15, 16, 19 and 21 of the Constitution and cited Navtej, inter alia.

*Citation: Writ C. No. 7692 of 2020*

## **UDIT SOOD V. UNION OF INDIA**

Court: Delhi High Court

Date filed: N/A

Challenge: The petitioners filed the petition praying before the court for a declaration that the Special Marriage Act, 1954 applied to any two individuals who wished to marry under the Act regardless of their sex and that the gender- or sexuality-based restrictions in the Act had to be read down to enable such an interpretation. The petitioners therefore challenged the constitutionality of all such provisions which were construed as requiring one 'male' and one 'female' for the solemnization of marriage.

*Citation: Writ C. No. 2574 of 2021*

## **JOYDEEP SENGUPTA V. UNION OF INDIA**

Court: Delhi High Court

Date filed: 5 July, 2021

Challenge: The petition in part was filed by an Overseas Citizen of India and their foreign national partner praying for the issuance of a declaration that a person married to an Overseas Citizen of India, and whose marriage is registered and subsisting for two years, regardless of whether that marriage is a same-sex or queer marriage, be eligible to apply as a spouse for an OCI card under Section 7A(1)(d) of the Citizenship Act, 1955. Additionally, a challenge was made to the provisions of the Foreign Marriage Act, 1969 on grounds that the exclusion of same-sex and queer marriages was unconstitutional and violative of Articles 14 and 21 of the Constitution of India. The petition also challenged the provisions of the Special Marriage Act, 1954; in so far they excluded same-sex and queer marriages, to be violative of Articles 14, 15, 19 and 21 of the Constitution. Finally, the petition also sought a declaration that the right to legal recognition of a same-sex or queer marriage be declared a fundamental right

under Articles 14, 15, 19 and 21 of the Constitution of India. The petition placed reliance on Navtej, inter alia.

*Citation: Writ C. No. 6150 of 2021*

## **II. BROADER IMPACT OF NAVTEJ JOHAR V. UNION OF INDIA: CONSTITUTIONAL MORALITY, TRANSFORMATIVE CONSTITUTIONALISM AND INTERPRETATION OF THE RIGHT TO EQUALITY**

### **A. DECISIONS ON CONSTITUTIONAL MORALITY OVER SOCIAL MORALITY**

#### **INDIAN YOUNG LAWYERS ASSOCIATION v. STATE OF KERALA**

Court: Supreme Court of India

Date: 28 September, 2018

Decision: The petition was moved in public interest seeking directions to be made to ensure the entry of females between the ages of 10 to 50 years in a certain temple at Sabarimala, which was denied citing a certain custom and usage. The court ruled that the right to freely profess one's religion under Article 25(1) of the Constitution was subject to morality and that that morality under Article 25(1) had to be interpreted as constitutional morality and not societal morality. The court relied on various authorities such as Navtej and held that while constitutional morality is governed by principles of justice, liberty, equality, dignity and fraternity, social morality was based on popular opinions, mainstream or social conceptions which kept changing, and which could not be made the basis for denial of rights to a certain community.

*Citation: (2019) 11 SCC 1*

## **SUHAIL RASHID BHAT v. STATE OF JAMMU AND KASHMIR**

Court: Jammu and Kashmir High Court Date: 25 October, 2019

Decision: The petition was filed challenging the constitutionality of the Jammu & Kashmir Prevention of Beggary Act, 1960 and the Jammu & Kashmir Prevention of Beggary Rules, 1964 made in exercise of powers under Section 9 of the Act in so far as the act criminalized the act of begging. Furthermore, the preamble of the Act mentioned as its objectives the prevention of beggary and the drive of making beggars good citizens. The petition stated that the expression 'good citizen' was vague and that the Act did not simply criminalize begging, but also targeted certain groups and communities whose patterns of life did not fit with the perception of what constituted 'good citizens.' The court ruled that the Act was unconstitutional. By placing reliance on Navtej, the court held that majoritarian opinion, popular views, or what is considered 'mainstream,' cannot be the basis of guaranteeing constitutional rights. Constitutional morality guaranteed equal protections of liberties and freedoms of every individual, which could not be curbed by a majoritarian perception.

*Citation: 2019 SCC OnLine J&K 869*

## **SUBHASHINI v. DISTRICT COLLECTOR**

Court: Kerala High Court

Date: 22 September, 2020

Decision: The petition was moved by a senior citizen who had transferred her property in the name of her son, who later excluded and deprived her of benefits from the property, while also refusing to look after her. Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 provided that only when the transfer

was made by a parent to their child on the condition that the child shall maintain the parent and when the latter failed to do so, could the transfer be called void. However, the petitioners argued using Navtej that inclusiveness and the need to uphold individual dignity of a certain section of people (such as the LGBT community in Navtej and the senior citizens in the present matter) so as to uphold their individual dignity was important. The court citing Navtej and by highlighting the concept of constitutional morality held that the idea of constitutional morality could not be trampled by obscure notions of social morality and that in deciding the scope of Section 23(1), there was no requirement to refer to religious texts or philosophical treatises (social morality) and that the principles of constitutional morality (dignified life under Article 21) prevailed.

*Citation: 2020 SCC OnLine Ker 4080*

## **B. DECISIONS ON TRANSFORMATIVE CONSTITUTIONALISM**

### **SUMPURNANAND v. STATE OF UTTAR PRADESH**

Court: Allahabad High Court

Date: 26 October, 2018

Decision: The petitioners in this case challenged a government order, under which compassionate appointment had to be provided to the dependents of a deceased father, which was contingent on the 'good reputation of the deceased.' This was challenged on grounds of violation of right to equality. The court while discussing transformative constitutionalism cited Navtej and demonstrated how 'equality' as a concept has transformed from legal formalism or classification test which mechanically focused on identifying an intelligible differentia and a rational nexus to a more value-based

approach of substantive equality, and therefore made the point that constitutional jurisprudence has evolved towards recognizing the substantive content of liberty and equality, making the core of Article 14 to emerge out of the shadows of the classification test.

*Citation: Writ C. No. 17169 of 2018*

**TRUSTEE HIDAYA EDUCATIONAL & CHARITABLE TRUST  
v. STATE OF KERALA**

Court: Kerala High Court

Date: 24 January, 2020

Decision: The matter related to a private unaided school which was admitting students from one particular community. The State of Kerala ordered closure of the school citing that the admission of students only of a particular community posed threat to the secular fabric of the constitution. The court first highlighted that even if the institute is private, because it performs a public/state function of providing elementary education guaranteed under Article 21A, it could not provide religious instruction. Also, the court stated, that religious instruction cannot be permitted when it is to the exclusion of other religions.

The court then cited *Navtej* to understand the link between constitutional morality and transformative constitutionalism and the role of public functionaries to ensure constitutional morality, which in itself is composed of many values such as secularism, equality, liberty and fraternity. Based on this, the court concludes that since the school in question was performing a public function, it is supposed to ensure a transformative vision towards a secular society which cherishes multi-culturalism and abides by other values of constitutional morality, such as equality.

*Citation: 2020 SCC OnLine Ker 312*



## **C. DECISIONS ON RIGHT TO EQUALITY JURISPRUDENCE**

### **INDIAN YOUNG LAWYERS ASSOCIATION v. STATE OF KERALA**

Court: Supreme Court of India

Date: 28 September, 2018

Decision: The petition was moved in public interest seeking directions to be made to ensure the entry of females between the ages of 10 to 50 years in a certain temple at Sabarimala, which was denied citing a certain custom and usage. The court cited Navtej in context of gender stereotyping under Articles 14 and 15.

The court, while referring to Navtej and other decisions, held that since the 'main reason' for prohibiting women as argued by an earlier court was the arduous nature of the journey which it said could not be completed by women for physiological reasons, the same fell foul on grounds that it was deeply rooted in a stereotypical and constitutionally flawed notion that women are the 'weaker' sex. The fact that women may not undertake tasks that are 'too arduous' for them was a stereotypical and paternalistic approach and was contrary to the constitutional guarantee of equality and dignity to women.

*Citation: (2019) 11 SCC 1*

### **LT. COL. NITISHA v. UNION OF INDIA**

Court: Supreme Court of India

Date: 25 March, 2021

Decision: The court in this case found the criteria for grant of Permanent Commission to women to be indirectly discriminatory, though facially and seemingly neutral. Broadly, there were three contentious criteria of assessment for the grant of PC: (i) women officers had to clear a certain percentage score, as well as score

higher than the lowest-scoring male officer who had been awarded a PC, (ii) Annual Confidential Reports were to form part of the grading, and (iii) certain medical requirements had to be fulfilled. The court observed that even though on the face of it, these criteria were neutral, however, there were indirect discriminations perpetrated. For instance, in case of Annual Confidential Reports, since female officers had not been eligible for PCs, in their case, the reports were more lackadaisical and were affected by the fact that women officers for all these years had not applied for a range of opportunities and courses, which were considered in the ACRs. Or with respect to the medical criteria, male officers, once they were granted PCs, were not required to maintain the same levels of fitness. However, female officers (who had been ineligible all these years) were now required to prove the very level of fitness that their otherwise similarly situated male colleagues were no longer required to. The court relied on Navtej where Chandrachud J. in holding Section 377 of the Indian Penal Code unconstitutional stated that it drew on the doctrine of indirect discrimination, since although facially neutral in punishing even heterosexual persons engaging in 'unnatural sex', Section 377 disproportionately affected members of the LGBT community.

*Citation: 2021 SCC OnLine SC 261*

### **III. IMPACT OF NAVTEJ JOHAR V. UNION OF INDIA ON THE JUDICIAL CULTURE: INCREASED SENSITIZATION AND UNDERSTANDING OF THE LGBT+ COMMUNITY AND THEIR RIGHTS**

#### **CHINMAYEE JENA v. STATE OF ODISHA**

Court: Orissa High Court

Date: 24 August, 2020

Decision: The petitioner in this case involved a transgender man, who stated that he was staying in a live-in relationship with his partner, a woman, until his partner was illegally detained by her mother and uncle. Accordingly, a writ of habeas corpus was filed. The decision is remarkable in terms of understanding the change in the perspective of judiciary and how judiciary has now started adopting a more sensitive approach to queer issues. The court, in addition to extending the protection, ensures at every place in its decision to use the self-determined pronouns of the petitioner, and also explicitly mentions reasons of its doing so on account of the petitioner's right to self-determination of his gender. In her concurring opinion, Ratho J. extends the court's best wishes to the petitioner and his partner and states that the court hopes and trusts that the petitioner and his partner shall lead a happy and harmonious life and that their families shall not have anything to worry about at all, neither shall the society have any excuse to raise a finger at them.

*Citation: 2020 SCC OnLine Ori 602*

#### **S. SUSHMA v. COMMISSIONER OF POLICE**

Court: Madras High Court

Date: 7 June, 2021

Decision: The case was filed by a lesbian couple who had been staying together. Their relationship was opposed by their families, which is what led to the petition. The decision

marks an important progression for queer rights as the court while extending the necessary protection to the couple, observed that there was need for comprehensive measures to sensitize the society, the parents and various branches of the State such as the Police and judiciary so as to ensure the absence of prejudices against the LGBT+ community. Additionally, the court also orders for prohibition on conversion therapies. The decision shows an increased understanding by the judiciary towards the queer community, as Justice Venkatesh first expresses his inability to understand queer relationships and feelings completely, and then undergoes counselling sessions to ensure that there is no inherent bias in his decision, and so that he understands the cause and the issue to its heart.

*Citation: 2021 SCC OnLine Mad 2096*

#### **IV. IMPACT OF NAVTEJ JOHAR V. UNION OF INDIA BEYOND INDIA: A GLOBAL PERSPECTIVE**

##### **EG v. ATTORNEY GENERAL**

Court: High Court of Kenya

Date: 24 May, 2019

Decision: The petitioners challenged the constitutionality of Sections 162 and 165 of the Penal Code of Kenya, to the extent they applied to criminalize private consensual sexual conduct between adult persons of the same sex, on grounds that the provisions violated their right to equality and to be free from discrimination under Article 27 of the Constitution of Kenya, the right to dignity under Article 28, the right to freedom and security under Article 29, the right to privacy under Article 31, right to freedom of conscience, religion, belief and opinion under Article 32, right to health under Article 43 and their right to fair hearing guaranteed under Article 50 of the Constitution. Additionally, the petition sought declaration from the

court directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector.

The judgment in *Navtej*, which was delivered while the petition in Kenya was filed but still pending, played a significant role for the fight against Sections 162 and 165 as it prompted the counsel for the petitioners to move the court by way of a formal mention and request to address the court on the relevance of *Navtej* to their case, which was granted by the Kenya High Court, pursuant to which parties were directed to file submissions on the relevance of *Navtej* to their arguments and were allocated a date for its oral hearings. The court, however, observed that foreign jurisprudence only had persuasive value for courts in Kenya, citing how the progressive needs and aspirations of Kenya were different from those of other countries. Eventually, the court held Section 162 (the Section 377 equivalent) and Section 165 to be constitutional.

*Citation: Petition Nos. 150 and 234 of 2016*

## **LETSWELETSE MOTSHIDIEMANG v. ATTORNEY GENERAL**

Court: High Court of Botswana

Date: 11 June, 2019

Decision: The petition was filed challenging the constitutionality of Sections 164, 165 and 167 of the Botswana Penal Code which criminalized sexual intercourse between persons of the same sex and/or gender and proscribed both public and private gross decency, arguing the provisions to be violative of the right to equality, the fundamental liberties and the right not to be subjected to inhuman or degrading treatment.

The decision authored by Leburu J. placed reliance on Navtej and the court observed that the provision of Section 377 was indeed comparable to the penal provision in Botswana. The court relied on Navtej at various places, such as for the discussion on the right to privacy and cited the remarks of Chandrachud J, who in Navtej had profoundly stated that in matters of personal intimacy, sexual orientation, the choice of a partner and in the yearning to find love and fulfilment, the State had no role to play. The court similarly placed reliance on the opinions of Misra J. on sexual autonomy of an individual being an inseparable part of individual liberty and on their opinion on dignity. After an extensive discussion on all aspects of the case, the court decided that the provisions were unconstitutional.

*Citation: [2019] MAHGB-000591-16*

## **ONG MING JOHNSON v. ATTORNEY GENERAL**

Court: High Court of Singapore

Date: 30 March, 2020

Decision: Immediately after the Navtej verdict of 6th September, 2018, the petitioners brought the challenge to Section 377A of the Singapore Penal Code, arguing that with new jurisprudence, the matter should be reconsidered. The petitioners challenged the constitutional validity of Section 377A and stated that the provision infringed their right to freedom of expression guaranteed under Article 14 of the Constitution of Singapore as it prevented them from freely expressing their sexual orientation. It was also argued that Section 377A was violative of the right to life and personal liberty protected by Article 9 of the Constitution. More specifically, the petitioners placed reliance on the decision in Navtej and argued that Section 377A must be considered from the dimension of human dignity, which earlier verdicts in Singapore had failed to do.

The High Court of Singapore, however, rejected all these arguments and ruled that expression as was interpreted in *Navtej* was very wide and that in their opinion, the freedom of speech and expression was limited to verbal communication and did not extend to manifestation or expression of one's sexual orientation. The court also noted that the standard of judicial review in Singapore was significantly different from that in India, which did not allow the judiciary in Singapore to review just about any given legislation as readily as the standard perhaps allowed the Indian judiciary.

*Citation: [2020] SGHC 63*





## 10. ACKNOWLEDGEMENTS

The idea of this book originated from the demand raised by members of Bangalore's LGBT community including Mallu Kumbar (Karnataka Sexual Minorities Forum) and Umesh (Jeeva) who made the point that the judgment is not accessible to the Kannada speaking members of the community and that it was imperative that a summary of the judgment be made for wider use and dissemination among the Kannada speaking members of the community.

The current publication will be available in multiple languages, including Kannada.

Thanks are due to Kunal Ambasta, Siddharth Narrain, Niruj Mohan, Rajesh Srinivas, Danish Sheikh, Pawan Dhall, Amritananda Chakraborty, and Deeptha Rao for constructive feedback in the course of the evolution of this draft.

Thanks to Sanjana Yadav for compiling the transcript of the hearing.

Thanks to Vinay Chandran for contributing to the evolution of the draft and making many constructive editorial suggestions.

Thanks to Vinay Sreenivasa and the Alternative Law Forum for publication.

# 11. BIO

Arvind Narrain is a human rights lawyer, activist and writer. He has written extensively on human rights issues including LGBT rights, minority rights and discrimination law. He is the founder member of the Alternative Law Forum in Bangalore, a human rights lawyering collective based in India. He has been part of the team of lawyers involved in the litigation around Section 377 of the Indian Penal Code (IPC), in both the Delhi High Court and the Supreme Court.

He is also the author of *Queer: Despised Sexualities and Social Change* and co-author of *Breathing Life into the Constitution: Human Rights Lawyering in India*. He is the co-editor of *Because I have a voice: Queer politics in India*; *Law Like Love: Queer perspectives on law*; and *Nothing to fix: Medicalisation of sexual orientation and gender identity*.

## **ABOUT THE ALTERNATIVE LAW FORUM (ALF)**

ALF was started in March, 2000, by a collective of lawyers with the belief that there was a need for an alternative practice of law. ALF recognises that a practice of law is inherently political. ALF provides qualitative legal services to marginalised groups; conducts autonomous research with a strong interdisciplinary approach working with practitioners from other fields; acts as a public legal resource; operates as a centre for generating quality resources that make interventions in legal education and training; and is a platform to enable collaborative and creative models of knowledge production.



# RIGHT TO LOVE

## NAVTEJ SINGH JOHAR v. UNION OF INDIA: A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT+ PERSONS

On 6th of September 2018, when the Supreme Court of India read down Section 377 of the Indian Penal Code, it marked a historic victory for a vibrant LGBT+ movement in India. This short booklet looks at key themes, opinion-wise summaries of the judgment as well as ways the judgment can be used going forward. It aims to provide a roadmap to this judgment so that its implications can be better understood by LGBT+ persons as well as all those who are interested in human rights and its futures.

**For more information contact:  
Alternative Law Forum, Bangalore  
altlawforum.org  
contact@altlawforum.org  
+91-80-22865757**