

NAVTEJ SINGH JOHAR – A CONSTITUTIONAL ANALYSIS

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ABSTRACT

Navej Singh Johar is one of the latest judgments delivered by the Supreme Court of India where the Court in its legal reasoning has resorted to the concept of *transformative constitutionalism*. This Article is an analytical comment at the Court's decision and an explanation to the Court's construction of the three most important concepts it has applied in *Navej Singh Johar*, namely, transformative constitutionalism, constitutional morality and the Right to Privacy. We endeavor to highlight how in the judgment, the Court has adopted a reformatory and revolutionary approach while reading down Section 377 of Indian Penal Code which has bolstered the movement for equal rights for homosexuals.

INTRODUCTION

*Navej Singh Johar v. Union of India*¹ is a landmark judgment by the Apex Court and the initial, founding steps towards ameliorating the legal position of homosexual adults. The Supreme Court of India, in September 2018, read down Section 377² of the Indian Penal Code while reversing the earlier decision of the Court in *Suresh Kumar Koushal*.³ The five-judge bench of the Court while doing so recognized the Fundamental Rights possessed by the homosexual and the LGBT community. The judgment came as a moment of celebration for numerous individuals and groups who had been advocating equal rights for homosexuals since a long time now.

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¹ *Navej Singh Johar v. Union of India*, (2018) 10 SCC 1.

² The *Indian Penal Code*, 1860, S. 377.

³ *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*, (2014) 1 SCC 1.

While reading down Section 377, the Court excluded from its ambit - consensual sexual intercourse between adults in private. The three most important concepts which developed and constituted the Court's reasoning and analysis, in the opinion of the researchers, were the conception of transformative constitutionalism, constitutional morality and the recently guaranteed Right to Privacy. The archaic principles, on which the foundation of Section 377 rested, could not stand upright when challenged against these three facets of the Constitution. The Court's dynamic interpretation of the issue emanating from Section 377 - which criminalised homosexual acts between consenting adults - and the entire reasoning adopted by the Court deserves strict academic scrutiny. The Court's stance on this issue has undoubtedly been visionary, revolutionary and reformative.

In this research paper, the researchers endeavour to analyse the important aspects of the Supreme Court of India's recent decision in *Navtej Singh Johar*. *First*, we shall present a brief judicial history regarding Section 377 and the issues raised in the present case; *secondly*, we will do a thorough analysis of the concept of '*transformative constitutionalism*'; *thirdly*, we shall attempt to understand the Court's reasoning on '*constitutional morality*'; *lastly*, we shall delve into how the court has interpreted the newly recognised fundamental '*right to privacy*' in relation to Section 377 of the Indian Penal Code.

JUDICIAL BACKDROP

*Navtej Singh Johar and Others v Union of India*⁴ is a Supreme Court decision by a five-judge bench of the then Chief Justice Dipak Mishra, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud, Justice R.F. Nariman and Justice Indu Malhotra. Four separate judgments were delivered wherein the court partially struck down Section 377 of the Indian Penal Code which states that

“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

⁴ *supra* note 1.

for a term which may extend to ten years, and shall also be liable to fine.”⁵

This is not the first time when this issue was brought before the court. In the case of *Naz Foundation v. Government of NCT of Delhi*,⁶ the Delhi High Court had stated that discrimination on the basis of sex was prohibited under Article 15 of the Constitution.⁷ The Court interpreted ‘sex’ to include ‘sexual orientation’. The High Court stated that individuals who are looked down as deviants should not be ostracized or excluded. The High Court had ruled that part of Section 377 which criminalized consensual sexual acts between adults was in violation of Articles 14, 15 and 21.

This judgment was challenged in the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*.⁸ The Court gave the justification that the Section does not discriminate against any particular group of people or identity but only criminalizes certain acts which when committed would be an offence. The Court went on to say that the LGBT community was only a ‘*miniscule*’ fraction of the total population. One of the arguments placed before the Court was that the Section had become a tool for the harassment and torture of the LGBT community. The Court had rejected the argument by stating that the misuse by police authorities is not a reflection of the vires of the Section.

TRANSFORMATIVE CONSTITUTIONALISM

The Constitution of India on various occasions has been referred to as a dynamic document. Apart from being the fundamental governing law of the country, it is also considered to be a social document. In addition to that, the Constitution envisaged to protect and promote the essential liberties of minority groups and classes of individuals who had been systematically and historically disadvantaged and discriminated against. This underlying principle entailed that the Constitution was aware of the *status quo* at the time of its enactment, however, unlike the American Constitution; it chose and aspired

⁵ The *Indian Penal Code*, 1860, S. 377.

⁶ *Naz Foundation v. Government of NCT of Delhi*, (2009) 3 SCR 1.

⁷ INDIA CONST. art. 15.

⁸ *supra* note 3.

to transform the society from what it was. Although the society was unequal, it aimed to achieve equality rather than reinforcing the status quo. One of the essential purposes of Constitution is considered to have a reformatory effect on the society for the better and this objective is the fundamental pillar of transformative constitutionalism.⁹

The Supreme Court of India, while interpreting the Constitution incorporates the concept of transformative constitutionalism. Essentially, this denotes that the Constitution aspires to transform the society rather than bolster the existing values subscribed by the majority. The Court in *Navej Singh Johar* adopted this line of reasoning quite eloquently. The Court enunciated the inner thirst of the Constitution to transform the Indian society and thereby, embrace the ideals of justice, liberty, equality and fraternity. This also suggests that the Constitution has the ability to change with time and adopt according to the societal needs. It is this ability of the Constitution which gives it the character of a dynamic, living and organic document.

With regard to Section 377 of the IPC, the Court observed that the society has progressively transformed a lot from what it was in 1860 when IPC was brought into force. The sexual minorities have been recognised and accepted in various legal spheres¹⁰ however, criminalisation of homosexual conduct under Section 377 creates nothing but a chilling effect. The principle of transformative constitutionalism is applied to ameliorate this condition.

The Court observed that the judiciary has the duty to ensure that a sense of transformation emanates and is propagated in the society via the Constitution as well as other provisions of law. The purpose of transformative constitutionalism thus, is to steer the society with the help of legal institutions, in a direction of democratic egalitarianism with an increased protection of fundamental rights and other freedoms. The bench applied this principle to hold that the ideals and values enshrined in our Constitution must be a reformatory nudge to bring about change in the societal beliefs.

⁹ *State of Kerala and Anr. v. N.M. Thomas and Ors.*, AIR 1976 SC 490.

¹⁰ *National Legal Services Authority v. Union of India and Ors.*, (2014) 5 SCC 438.

Penalising homosexual conduct, in the opinion of the bench, denuded individuals belonging to LGBT community of their constitutional right to live a fulfilling life. The Court went on to hold that Section 377 violates the Right to Life and equal protection of law. However, the underlying principle in the whole reasoning emanated from the ‘*transformative constitutional*’ facet of the Constitution. In de-criminalisation of consensual homosexual intercourse between two adults, the Constitution assured that not just the homosexual but the entire LGBT community can live a fearless life with freedom from state intrusion in consensual intimacy.

Moreover, the Court while taking a sensitive stance recognized that the entire homosexual community had been oppressed, deprived of justice within a country, which is dedicated to human freedom. To address this issue, transformation of the society is essential. Transformative constitutionalism entails that the Constitution in and of itself has the ability to produce a social catharsis. In such a case, the transformative power of the Constitution is a way in which the Constitution speaks to the rest of the society. Essentially, Constitution plays the important role of questioning the existing notions about the dominance of sexes and genders. It plays a transformative role as well as directs the society’s attention towards resolving the polarities of sex and binary nature of gender. By virtue of which, “...*the constitutional values prevail over the impulses of the time.*”

The conception of ‘*transformative constitutionalism*’ has been adopted by the apex court in its other judicial decisions as well. While decriminalising the archaic offence of adultery, the Court in *Joseph Shine*¹¹ recognised the transformative nature of the Constitution and how it affects the society. One of the basic purposes of law is considered to act as a guiding light for an individual’s conduct in the society. In our opinion, the recent judgments of the Supreme Court seek to transform the status quo which exists in the society by asserting the transformative nature of constitution and the values which emanate from it.

¹¹ *Joseph Shine v. Union of India*, 2018 (11) SCALE 556.

Therefore, transformative constitutionalism played a very important role in determining the Court's basis of its reasoning in *Navtej Singh Johar*. However, the question which remains is whether merely by decriminalisation of homosexual conduct, that is, by removing a negative barrier without ensuring any positive rights for the LGBT community, how far will the society be transformed? If societal transformation through constitutional values was the purpose of the *Navtej Singh Johar* judgment, it can be considered nothing more than a first step towards enhancing the position of the homosexual community in the society.

Albeit being an initial step towards realising the rights of minority LGBT community, it was an extremely significant one. It reversed the decision in the preceding case of *Suresh Kumar Koushal* where the court had relied upon the morality of the majority to uphold the constitutional validity of Section 377. *Navtej Singh Johar*, on the other hand, aspires to transform the current majoritarian societal opinion in relation to homosexuality. However, only time will tell as to how far the Constitution and the law would be successful to achieve its transformative aim.

CONSTITUTIONAL MORALITY

The then Chief Justice of India, Dipak Mishra, had observed in his judgement that constitutional morality was not restricted to the literal text and provisions of the Constitution as this concept was not about the '*mere observance of the core principles of constitutionalism*'.¹² It should enable in ushering a pluralistic and inclusive society.

The aim of our Constitution was to secure inalienable rights to the citizens to foster a spirit of growth and development. Moreover, it was envisaged that the executive, legislature and the judiciary would practice and stay alive to the concept of constitutional morality. This concept urges these organs of the State to maintain a heterogeneous fibre in the society.

The principle of constitutional morality will be violated if there is an attempt to shove a uniform, homogenous and standardized philosophy in the society

¹² *supra* note 1.

and hence, the organs of the state should ensure that majoritarian principles do not overpower other considerations during policy decisions.

In *Government of NCT of Delhi v. Union of India and Others*,¹³ it was observed that “Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse.”¹⁴

The courts have a duty to uphold the principles emanating from the constitution and adjudicate over the validity of a law. The courts also have a duty to not be influenced by the majoritarian view. When a penal provision, like Section 377 in this case, is challenged, notions of social morality and popular opinions which have no legal tenability, should not be allowed to trample over constitutional morality. Through this principle, the courts can decide in a just manner even if the group whose fundamental right is violated is fairly small. This is in contrast to the *Suresh Kumar Koushal* case where the court while upholding the constitutional validity of Section 377 stated that “...a miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders...”¹⁵

Courts play an essential role in ensuring that whenever there is a violation of a fundamental right, constitutional morality overcomes societal morality. Due to the prevalence of social morality, the members of the LGBT community have been, for a long period of time, outlawed by the society. The court in the *Suresh Kumar Koushal* case, had failed to protect the Fundamental Rights of the community. Just like the Constitution aimed to rectify the discrimination against the backward community, these facets of the majoritarian social morality against the LGBT community should be rectified. Social morality cannot be a justification for the violation of fundamental rights.

¹³ *Government of NCT of Delhi v. Union of India and Ors.*, 2018 (8) SCALE 72.

¹⁴ *Id.*

¹⁵ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶43.

Section 377 is a Victorian era law and hence, the rationale behind the provision and the morality which was prevalent at that time is not relevant anymore and there is no reason to continue with the law.

It is clear that social morality cannot be used as a veil to criminalize homosexual intercourse between consenting adults. The court had made clear in *S. Khusboo v Kanniamaal*¹⁶ that “notions of social morality are inherently subjective and 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.”¹⁷

Since the Fundamental Rights are a part of the Constitution, the majoritarian governments do not have the subject of dignity and liberty of any individual within their reach and the courts can apply constitutional morality to ensure the rights of ‘discrete and insular’ minorities.¹⁸ Constitutional morality ensures that a particular majoritarian view of social morality does not prevail. Justice DY Chandrachud stated that constitutional morality reflects that in the struggle for existence, the ideal of justice should be an overriding factor over any other notion of social acceptance. Constitutional morality is a balance against popular public morality.

Opponents argue that homosexuality is against morality and is unacceptable in the Indian society. In the case of *Naz Foundation* it was held,

“Thus, popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality... In our scheme of things, constitutional morality must

¹⁶ *S. Khusboo v. Kanniamaal*, (2010) 5 SCC 600.

¹⁷ *Id.*

¹⁸ *supra* note 1.

outweigh the argument of public morality, even if it be the majoritarian view.”¹⁹

The Right to Live a dignified life is guaranteed by the Constitution and hence the Court declared that LGBT individuals are equal citizens of India. They cannot be discriminated against and have the Right to Express themselves through their intimate choices.²⁰ The Court further stated that constitutional morality will supersede any culture or tradition and the expression of sexuality between consenting adults cannot be dictated by the opinions prevalent in the society. The Court acts like a counter majoritarian institution and protect the rights guaranteed by the constitution irrespective of the majoritarian view.

THE RIGHT TO PRIVACY

The Indian jurisprudence on the Right to Privacy witnessed its zenith in 2017 when the Supreme Court of India through a nine-judge bench read Right to Privacy as a Fundamental Right within the ambit of Article 21 of the Constitution in *Justice K S Puttawamy v. Union of India*.²¹ The Court in *Navtej Singh Johar* gave due regard to the principles laid down in the aforementioned case. It recognised that the individual autonomy includes sexual orientation of a person as well. One’s sexual identity is an inalienable and intrinsic part of his/her very identity. Essentially, the individual autonomy determines the identity of an individual and thereby, constitutes a significant aspect of the dignity of such individual.

The LGBT community is seeking a basic Right to Companionship, as long as it is consensual. This Right to Consensual Companionship has been a recognized right as it is observed and understood that sexual intimacy is essential for the well-being of a society and thorough development of human personality.²² The South African Supreme Court has also noted that the theory of privacy incorporates sexuality as well. In that Court’s opinion, privacy

¹⁹ *Naz Foundation v. Government of NCT of Delhi*, (2009) 3 CCR 1.

²⁰ *supra* note 1.

²¹ *Justice K S Puttawamy v. Union of India*, (2017) 10 SCC 1.

²² *Bowers v. Hardwick*, 478 U.S. 186 (1986).

acknowledges both a Right to Private Intimacy and autonomy without any sort of interference.²³

The Indian Supreme Court while reversing the judgment in *Suresh Kumar Koushal* held that subsequent to the interpretation of Right to Privacy under Article 21, the principle laid down in *Suresh Kumar Koushal* is not relevant anymore and is not a sustainable basis to deny the Right to Privacy. The very purpose of Right to Privacy is to protect individuals from the disdain of the majorities. The Right to Privacy does not depend on what the majority opinion is. The Court in *Navej Singh Johar* criticised the method adopted in *Suresh Kumar Koushal* which regarded mere popular acceptance as a valid basis to disregard rights conferred on individuals by virtue of the Constitution. Majoritarian principles must not be applied to deny Rights guaranteed by the Constitution.

As the nine-judge bench in *Puttaswamy* judgment held sexual orientation to be a facet of a person's privacy, Section 377 of IPC interferes with a homosexual person's private, individual life. The Court held that Section 377 violated the Right to Privacy guaranteed to an individual, disregarding the public/majority opinion.

The Supreme Court of India has in various recent cases relied upon the right to privacy, recognised as a fundamental right in *Puttaswamy* judgment. The Apex Court in *Joseph Shine* while dealing with the issue of adultery and in *Common Cause (A Registered Society) v. Union of India and Another*²⁴ while dealing with the issue of euthanasia, acknowledged and enunciated the importance of an individual's autonomy in the backdrop of the recently recognised right to privacy.

Therefore, the growing recognition of the right to privacy leading to recognition of autonomy in an individual's private sphere cannot accept an archaic law such as Section 377, which intrudes upon the private life of consenting homosexual individuals. The Court bolstered the Right to Privacy

²³ *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and Ors.*, 1998 (12) BCLR 1517 (CC).

²⁴ *Common Cause (A Registered Society) v. Union of India and Anr.*, (2018) 5 SCC 1.

while denying the provision any constitutional validity. This is again, an important step taken by the judiciary towards complete realisation of fundamental rights for the LGBT community in India.

CONCLUSION

The Supreme Court of India in *Navtej Singh Johar*, has undoubtedly taken a boldly significant step towards a legal system which enforces the incorporationist and egalitarian values of the Constitution of India. It endeavours to change the status quo and the current societal beliefs by virtue of transformative constitutionalism while upholding constitutional morality over and above the morality of the majority society. While doing so, the Court recognised the importance of the right to privacy and how it is essential for it to operate in the private, consensual conduct of homosexual adults.

The researchers in this paper have endeavoured to give a holistic view of the various previous judicial decisions in relation to Section 377 of the IPC. Thereafter, three most important principles are dealt with by us, which the Supreme Court of India has recently adopted in its reasoning in several landmark judgments, *namely*, the principle of transformative constitutionalism, constitutional morality and the well-recognised individual's Right to Privacy.

De-criminalising private homosexual intercourse between two consenting adults by reading down Section 377 of the IPC, is a bold step which the Court has taken in an aspiration towards a society where the members of the LGBT community enjoy all fundamental rights granted by the Constitution, on par with everyone else. However, a lot still needs to be done, in a positive manner, for the protection of the LGBT community from the systematic oppression and discrimination which it has suffered in the Indian society. Reading down of Section 377, thus, is only a first step towards equal protection of the LGBT community. The three organs of the State and the society has a long way to go from *Navtej Singh Johar* to ensure that the morality and values emanated from the Constitution prevail and guide us towards a better tomorrow with dignity, sexual autonomy and individuality for the LGBT community in India.