Challenging the Constitutionality of Restrictions on Same Sex Sexual Relations: Lessons from India

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KEYWORDS: same sex sexual relations**,** sexual orientation, equality, non-discrimination, right to privacy, human dignity, liberty, expression, constitutional interpretation, Indian Constitution, *Navtej Singh Johar and Others v Union of India*

1. INTRODUCTION

In September 2018, in the *Navtej Singh Johar* case,[1] India's Supreme Court unanimously ruled that section 377 of the Indian Penal Code (1860) (IPC), was unconstitutional and had to be read down insofar as it penalized any consensual sexual activity between two adults, be it homosexuals, heterosexuals and lesbians. The Judgment marked the end of almost a quarter of a century of complex legal challenges and campaigning by LGBT organisations.[2]

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[1] *Navtej Singh Johar and Others v Union of India through Secretary Ministry of Law and Justice*, Writ Petition No. 76 of 2016, available at https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf [last accessed 22 October 2018).

[2] Nicol, et al. (eds), *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* (2018). It is notable that sexual orientation issues have barely been raised by other States during the three cycles in which India has undergone Universal Periodic Review, See Report of the Working Group on the Universal Periodic Review - India, Third Cycle, 17 July 2017, UN Doc a/HRC/36/ 10 and Add. 1.

2. BRITISH COLONIAL RULE AND THE INDIAN PENAL CODE

Most of the Indian subcontinent was under British rule from 1858 to 1947.[3] The Indian Penal Code (1860) (IPC) was the first codification of criminal law in the British Empire. The model was replicated in a number of other British colonies,[4] but never in the UK itself. A successful war of independence ended colonial rule and led to the creation of India and Pakistan as sovereign States.

A. Section 377 of the Indian Penal Code

Section 377 of the IPC 1860 reads as follows:

> *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.*

The law was imposed on India by the government of the British India (the *Raj*) as part of a package of laws against public vice. On its face, it made no reference to homosexuality or any other same sex attraction. In practice, it was interpreted as criminalising same sex sexual

[3] James, *Raj: The Making and Unmaking of British India* (1998); *Tharoor, Inglorious Empire: What the British Did to India* (2018); Gilmour, *The British in India: Three Centuries of Ambition and Experience* (2018). For the century prior to 1858, British settlements and possessions were administered by the East India Company, until the Indian Rebellion of 1857.

[4] Han and O'Mahoney, 'British Colonialism and the Criminalization of Homosexuality' (2014) 27 *Cambridge Review of International Affairs* 268.

activities on the basis that they were unnatural. The same language as s. 377 (even the same section number) or the same substance was replicated in Bangladesh, Myanmar/Burma, Singapore, Malaysia, Brunei, Sri Lanka, and Papua New Guinea and some 17 African colonies.[5] There is a widely-held view that, prior to the colonisation of India, same-sex relationships were not frowned upon.[6] S. 377 is commonly represented as an attempt to 'civilise' the Indian population through the imposition of standards of morality from the Victorian era where sexual activities were considered to be mainly for procreation.[7] It has been used has to prosecute consensual as well as non-consensual sexual acts.[8] However, since 1860, less than 150 persons have been prosecuted under s. 377. In the modern era, prosecutions have become increasingly rare.[9] Even so, there had been consistent claims that s.

[5] Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (2008), available at https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism [last accessed 22 October 2018]; Sanders, '377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) 4 *Asian Journal of Comparative Law* 1.

[6] Vanita and Kidwai (eds), *Same-Sex Love in India: A Literary History* (2000), cited by Justice Chandrachud in *Navtej Singh Johar* at pr. 14, n 6.

[7] 'Matters of consent and sexual offences reflect the Victorian assumptions of Macaulay's time, but were nonetheless generally an advance on existing English laws, Wright, 'Macaulay's Indian Penal Code and Codification in the Nineteenth Century British Empire' (2012) *Journal of Commonwealth Criminal Law* 25 at 38. See also Brown, *Penal Power and Colonial Rule* (2014).

[8] Narrain, 'A New Language of Morality: From the Trial of *Nowshirwan* to the Judgement in *Naz Foundation*' (2010) 4 *The Indian Journal of Constitutional Law* 84.

[9] In *Dudgeon v United Kingdom*, the European Court observed that in, 'In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been

377 was the basis for routine and continuous violence against sexual minorities by the police, the medical establishment, and the State.[10] The police used the existence of the offence to justify practices such as illegal detention, sexual abuse and harassment, extortion and the outing of queer people to their families.[11] In 2015, police in different states and union territories arrested 1,491 people under s. 377, including 207 minors and 16 women.[12]

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any public demand for stricter enforcement of the law. It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public,' Application No 7525/76, Merits, 22 October 1981, para. 60. In *Toonen v Australia*, the Human Rights Committee considered that sections of the Tasmanian Criminal Code 'interfered' with T's privacy, even though they had not been enforced for a decade. The policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct did not amount to a guarantee that no actions would be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly interfered with the T's privacy', (488/92), Merits, 31 March 1994, C/50/D/488/1992. On the effects of criminalization, even if not enforced, see Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics' (2001) 89 *California Law Review* 643.

[10] International Commission of Jurists, *'"Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity'* (Geneva, 2017), available at https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf [last accessed 22 October 2018].

[11] Sanders, supra n 5. See also the allegations of various respondents in *Naz Foundation v Govt. of NCT of Delhi*, infra n 21.

[12] Thomas, '14% of those arrested under section 377 last year were minor', *The Times of India*, 29 September 2016, available at https://timesofindia.indiatimes.com/city/mumbai/14-of-those-arrested-under-section-377-last-year-were-minors/articleshow/54573741.cms [last accessed 22 October 2018].

B. The Constitution of India

The Constitution of India was adopted by a Constituent Assembly of India on 26 November 1949. It became effective on 26 January 1950. It replaced the Government of India Act (1935) as the country's fundamental governing document, as the Dominion of India became the Republic of India, an independent sovereign state. It is the longest Constitution of any sovereign State. Its framers borrowed many features of colonial legislation and retained much of its penal legislation. The Preamble to the Constitution (as amended) declares that the people of India have resolved to constitute India into a 'sovereign socialist secular democratic republic', and to secure to all its citizens, 'Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation.'[13] As the Constitution is the supreme law of India, the Parliament can amend it but not override its basic structure. As is in the nature of Constitutions, it establishes the political and legal framework for the federal State and its constituent parts, and for the government. It also sets out 'fundamental rights' (Part III), 'directive principles' of State Policy (Part IV) and the 'fundamental duties of citizens' (Part V). The Constitution repealed many the major pieces of colonial legislation but all the law in force in the territory of India immediately before the commencement of this Constitution, including the 1860 IPC, continued in force until altered, repealed or amended.

[13] On the growing use of preambles in constitutional interpretation, including in India, see Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 *International Journal of Constitutional Law* 714.

C. The Indian Supreme Court

The Supreme Court is India's highest constitutional court. The law declared by the Supreme Court becomes binding on all courts within India, and upon the union and state governments. Its duty, as mandated by the Constitution, is to act as a watchdog, preventing any legislative or executive act from overstepping constitutional bounds. The judiciary protects the fundamental rights of the people as enshrined in the Constitution from infringement by any state body, and balances the conflicting exercise of power between the central, regional and local authorities.

The Indian Supreme Court is a widely respected judicial institution;[14] although since 2008, there have been some open allegations of maladministration by the Chief Justice with respect to the handling and allocation of sensitive and high profile cases.[15] It generally has a high reputation for its independence and impartiality and for encouraging the development of public interest litigation to help the poor and the marginalized.[16] It has made a major contribution to human rights jurisprudence in many areas.[17] For example, the right to life, guaranteed under Article 21 of the Constitution has been interpreted to expanded to include a number of human rights, including the right to a speedy trial, the right to water; the right to earn a livelihood, the right to health, and the right to education.[18] More recently, it has upheld

[14] Neuborne, 'The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 476.

[15] Safi, 'India's Top Judges Issue Unprecedented Warning Over Integrity of Supreme Court', *Guardian*, 12 January 2018.

[16] Chandra, 'Courting the People: Public Interest Litigation in Post-Emergency India' (2018) 16 *International Journal of Constitutional Law* 710.

[17] Though doubts remain as to their implementation and effects of its judgments. See Lokaneeta, 'Debating the Indian Supreme Court: Equality, Liberty, and the Rule of Law'. (2017) 13 *Law, Culture and the Humanities* 353.

[18] Chinnappa Reddy, *The Court and the Constitution of India: Summit and Shallows* (2012).

a women's right to choose her life partner and her autonomy in the sphere of intimate personal decisions[19] and treated honour based violence as not only a matter of criminal law, but also as contrary to adults' fundamental right to exercise choice as guaranteed under Articles 19(1)(a) (freedom of expression) and 21 (right to life and personal liberty) and of the Constitution.[20]

3. THE *NAZ FOUNDATION* AND *KOUSHAL* CASES

In 2009 the High Court Delhi held in the *Naz Foundation v Govt. of NCT of Delhi*,[21] that s. 377, in so far as it criminalized consensual sexual acts of adults in private, violated Articles 21 (life and personal liberty), 14 (right to equality) and 15 (non-discrimination) of the Constitution. The High Court relied on the practice of regional and international human rights mechanisms. However, in 2013, this ruling was dramatically reversed by the Supreme Court in *Suresh Kumar Koushal v Naz Foundation and Others*.[22] The judgment of the two-Justice panel was dismissive of alleged discrimination towards sexual minorities, hostile in tone to the 'so-called rights of LGBT persons',[23] considered that the judgments and decisions of

[19] *Shafin Jahan v Asokan*, Criminal Appeal No. 366 of 2018, (2018) SCC OnLine SC 343, available at https://www.sci.gov.in/supremecourt/2017/19702/19702_2017_Judgement_08-Mar-2018.pdf [last accessed 22 October 2018].

[20] *Shakti Vahini v Union Of India*, Writ Petition (Civil) No. 231 of 2010, available at https://supremecourtofindia.nic.in/supremecourt/2010/18233/18233_2010_Judgement_27-Mar-2018.pdf [last accessed 22 October 2018).

[21] Writ Petition (Civil) No.7455/2001, available at http://lobis.nic.in/ddir/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf [last accessed 22 October 2018]

[22] (2014) 1 SCC 1, Civil Appeal No.10972 of 2013, available at https://www.sci.gov.in/jonew/judis/41070.pdf [last accessed 22 October 2018].

[23] Ibid, para 52.

other jurisdictions (including Canada, Nepal, South Africa, the European Court of Human Rights, the US and the UN Human Rights Committee) could not be applied 'blindfolded' to decide the constitutionality of a law enacted by the Indian legislature[24] without a critical examination of the conditions, social norms and attitudes in India,[25] and expressed the view that only a miniscule fraction of the country's population constituted lesbians and gays and less than 200 persons had been prosecuted.[26] The decision in *Koushal* attracted criticism,[27] but s. 377 remained valid. However, in February 2016, the Supreme Court decided to refer the issue to a five-Justice Constitution Bench for reconsideration.

4. THE RIGHT TO PRIVACY

Although it was a historic decision, *Navtej Singh Johar* was not entirely unexpected. Two major decisions presaged it. Historically, gender rights have been better protected in India than same-sex relations. In 2014, in *National Legal Services Authority v Union of India* (widely known as *NALSA*) the Supreme Court recognized not just transgender rights, but a third gender (*hijra*, a traditional Indian male-to-female trans group).[28] Those identifying as members of the third gender were fully entitled to all the rights under the Constitution, including the right to freedom from discrimination. In particular, the Court noted that the

[24] Id.

[25] Ibid, paras 52-53.

[26] Ibid, pr. 43.

[27] Kirby, 'Sexuality and International Law: The New Dimension' (2014) *European Human Rights Law Review* 350; Khaitan, '*Koushal v Naz*: Judges Vote to Recriminalise Homosexuality' (2015) 78 *Modern Law Review* 672; Bhatia, 'Equal Moral Membership: Naz Foundation and the Refashioning of Equality under a Transformative Constitution' (2017) 1 *Indian Law Review* 115.

[28] (2014) 5 SCC 438.

recognition of rights under the Constitution was not dependent on prevailing social mores. The Court also found that, as an historically marginalised group, *hijras* ought to benefit from affirmative action programmes. In August 2017 in *K.S. Puttaswamy v Union of India*,[29] the Supreme Court held that there was a fundamental right to privacy within the Indian Constitution as an incident of the right to life and liberty guaranteed under Article 21. It also explicitly stated that sexual orientation was a facet of a person's identity.[30] In an unprecedented move, five of the nine Justices commented in that judgment that the *Koushal* decision was wrong. At the time *Puttaswamy* was decided, the appeal in *Navtej Singh Johar* was pending.

5. *NAVTEJ SINGH JOHAR*

A. The political context in *Navtej Singh Johar*

In the *Naz Foundation* case in 2009, the Indian government had submitted that, 'social and sexual mores in foreign countries cannot justify decriminalization of homosexuality in India' because 'western morality standards are not as high as in India'.[31] Whilst formally listed as a defendant in *Navtej Singh Johar*, it was significant that the Indian government did not file any arguments on the constitutional validity of s. 377 to the extent it applied to 'consensual acts of adults in private'. However, a number of interveners, predominantly religious groups, filed arguments supporting the provision. The main opposition Congress party publicly supported repeal of s. 377.

[29] (2017) 10 SCC 1.

[30] Ibid, para 126.

[31] Supra n 21, para 24.

B. The Jurisprudential Approaches of the Indian Supreme Court

To contextualise its judgments with respect to the Constitution, the Supreme Court resorts to a number of conceptual tools. First, it views the Constitution as a vehicle for 'transformative constitutionalism', that is, transforming a society progressively and inclusively for the better. It is conceived of as a 'great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy'.[32] This ability of a Constitution to transform gives it the character of a living, organic and breathing document that can adapt to the needs of society and developments taking place within it. Secondly, the Court applies the principle of 'constitutional morality'. This is based on the core values set out in the Preamble to the Constitution but also embraces wider virtues such as ushering in a pluralistic and inclusive society. The strengthening of constitutional morality is regarded as an obligation on all state organs, including the Judiciary. The Court is thus guided by the conception of constitutional morality, rather than by social morality. Thirdly, the Court strives to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity was an inseparable facet of every individual that invited reciprocal respect from others to every aspect of an individual which he or she perceived as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. Fourth, following the decision in *Puttaswamy*, regard had to be given to the constitutional status of the 'elevated right to privacy'.

C. The Judgments in *Navtej Singh Johar*

Rather unhelpfully, four concurring judgments were delivered, running to almost 500 pages. In all four, *Koushal* was specifically overruled, and in fairly brutal terms. In marked contrast

[32] *State of Kerala and Another v N.M. Thomas and Another*, AIR 1976 SC 490, para 1, per Justice Krishna Iyer.

to the two-Justice panel in *Koushal*, all of the judgments are replete with positive references to constitutional jurisprudence, for example from, Canadian, Fiji, the European Court of Human Rights, the European Court of Justice, Nepal, the Philippines, the US and South Africa, [33] the jurisprudence of UN human rights treaty monitoring bodies, along with academic literature.[34] All the judgements referred to the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2006).[35] While concurring in the outcome of the case, the Justices came at the issues from different perspectives and differed in terms of their reasoning. It is helpful to highlight their respective jurisprudential approaches and their discussions of Article 14 (equal protection of laws), 15(1) (non-discrimination on grounds of sex), 19 (freedom of expression) and 21 (right to life and personal liberty).

D. Chief Justice Misra and Justice Khanwilkar

Chief Justice Misra, in a Judgment supported by Justice Khanwilkar, regarded non-recognition and denial of expression of choice as the central issue. Criminalising carnal

[33] On the use of foreign precedents see Groppi and Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (2013); Yoshino and Kavey, 'Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law ' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1079; Venter, 'The Use of Foreign Precedents by Constitutional Judges' (2014) 12 *International Journal of Constitutional Law* 261.

[34] Two of the judgements cite the English philosopher John Stuart Mill. Coincidently he worked for over 30 years for the East India Company. In 1858, the Government of India Act transferred the administration of India from the Company to the Crown.

[35] Available at https://yogyakartaprinciples.org/ [last accessed 22 October 2018]. An updated version, the *Yogyakarta Principles plus 10* (YP+10) was adopted on 10 November, 2017.

intercourse under s. 377 was 'irrational, indefensible and manifestly arbitrary'.[36] It abridged both human dignity as well as the fundamental right to privacy and choice of the citizenry, however small a section of it. As sexual orientation was an essential and innate facet of privacy, the right to privacy took within its sweep the right of every individual, including that the LGBT community, to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.[37]

S. 377 was also discriminatory. It classified and penalized persons who indulged in carnal intercourse with the object to protecting women and children from being subjected to carnal intercourse. However, this classification had no reasonable nexus with the object sought to be achieved as the non-consensual acts, which were criminalized by s. 377, had already been designated as penal offences under s. 375 IPC (rape) and under the Protection of Children from Sexual Offences Act (2012). Rather, s. 377 had resulted in a distasteful and objectionable collateral effect whereby even 'consensual acts', which were neither harmful to children nor women and were performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, had been targeted. This discrimination and unequal treatment meted out to the LGBT community, as a separate class of citizens, was unconstitutional for violating their right to equality in Article 14.[38] The manifest arbitrariness of a provision of law could also be a ground for declaring a law as unconstitutional.[39] In this respect, the issue of consent was critical. As s. 377 did not contain any such qualification embodying the absence of 'wilful and informed consent' to criminalize carnal intercourse, it criminalised even consensual sexual acts between adult homosexuals,

[36] Misra, CJ and Khanwilkar, J., para 240.

[37] Ibid, para 229.

[38] Ibid, para 237.

[39] Citing *Shayara Bano v Union of India and others*, (2017) 9 SCC 1

heterosexuals, bisexuals and transgenders. Thus, it failed to make a distinction between consensual and non-consensual sexual acts between competent adults. Further, s. 377 IPC failed to take into account that consensual sexual acts between adults in private space were neither harmful nor contagious to the society. In respect of the liberty of persons belonging to the LGBT community, s. 377 subjected them to societal pariah and dereliction. The Section also interfered with consensual acts of competent adults in private space. Sexual acts could not 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, s. 377, so long as it criminalised consensual sexual acts of whatever nature between competent adults, was manifestly arbitrary.[40]

Sexual orientation was one of the many biological phenomena that was natural and inherent in an individual and was controlled by biological factors. The science of sexuality had theorized that an individual exerted little or no control over whom he/she gets attracted to.[41] Section 377 operated as a restriction on freedom to express sexual identity and orientation under Article 19 of the Constitution. However, s. 377 did not meet the criteria of proportionality and violated the fundamental right of freedom of expression including the right to choose a sexual partner.[42]

S. 377 also assumed the characteristic of unreasonableness, for it became a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouded the lives of the LGBT community in criminality and constant fear marred their joy of life. They constantly faced social prejudice and disdain and were subjected to the shame of being their very natural selves. An archaic law that was incompatible with constitutional values

[40] Dipak Misra, CJ and Khanwilkar, J., para 239.

[41] Ibid, para 144.

[42] Ibid, para 247.

could not be preserved.[43] Moreover, the very existence of s. 377 criminalised transgenders, casting a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice had to be eradicated and the transgenders had to be free to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life.[44] As noted, *Koushal* was specifically overruled. Its reasoning was fallacious and was a retrograde step contrary to the direction of the progressive interpretation of the Constitution.[45]

E. Justice Nariman

For Justice Nariman, the Victorian morality expressed in s. 377 had to give way to constitutional morality.[46] He attached particular significance to certain provisions of domestic legislation, the Mental Healthcare Act 2017, whereby the Indian Parliament had unequivocally declared that the earlier stigma attached to same-sex couples, as persons who were regarded as mentally ill, had gone for good.[47] Moreover, in the treatment of mental illness there was to be no discrimination based on 'sexual orientation'. Such legislation meant that it was not open for a constitutional court to substitute societal morality for constitutional morality. S. 377 demeaned same-sex consenting adults by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma

[43] Id.

[44] Ibid, para 249.

[45] Ibid, paras 169-74,

[46] Nariman J, para. 78.

[47] Ibid, paras. 66-77. It is remarkable that it was only in 2018 that the Indian Psychiatric Society formally expressed the view that sexual orientation was not a psychiatric disorder. That was 45 years after the equivalent decision in the US.

associated with such persons.[48] Constitutional morality always trumped any imposition of a particular view of social morality by shifting and different majoritarian regimes.[49]

With respect to the right to equality in Article 14, s. 377, in penalizing consensual gay sex, was manifestly arbitrary, capricious and irrational.[50] The chilling effect caused by such a provision also violated a privacy right under Article 19(1)(a), which could by no stretch of imagination be said to be a reasonable restriction in the interest of decency or morality. Justice Nariman made extensive reference to the *Yogyakarta Principles*.[51] These principles gave further content to the fundamental rights contained in Articles 14, 15, 19 and 21. Viewed in the light of these principles, s. 377 had to be declared unconstitutional.[52]

F. Justice Chandrachud

For Justice Chandrachud the case involved much more than merely decriminalising certain conduct which a colonial law has proscribed. It was about an aspiration to realise constitutional rights.[53] S. 377 was critiqued for being based on ostensibly universal meanings of natural and unnatural. Rather, penal consequences had to be based on notions of consent and harm.[54] The indeterminacy and vagueness of the terms 'carnal intercourse' and 'order of nature' rendered s. 377 constitutionally infirm as violating the equality clause in Article 14.[55] A constitutional analysis of s. 377 had to be situated within the contexts of the right to

[48] Ibid, para 79.

[49] Ibid, para 81.

[50] Ibid, para 82.

[51] Ibid, paras. 84-87. See supra n 35.

[52] Ibid, para 88.

[53] Chandrachud, J, para 24.

[54] Ibid, paras 24-29.

[55] Ibid, para 30.

privacy and the right to health. Constitutional morality required the Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. From an extensive analysis of comparative national jurisprudence from across the world, including Belize, Canada, Ecuador, Fiji, Hong Kong, Israel, Italy, Nepal, South Africa, Trinidad and Tobago, UK and the UK, and human rights jurisprudence from the European Court of Human Rights and the UN Human Rights Committee,[56] Justice Chandrachud considered the overwhelming weight of international opinion and the dramatic increase in the pace of recognition of fundamental rights for same-sex couples to reflect a growing consensus towards sexual orientation equality.[57] After discussing the relationship between crime and morality, the Justice supported the view that 'constitutional morality', rather than mainsteam views about sexual morality, should be the driving factor in determining the validity of s. 377.[58] In penalising consensual sexual conduct between adults of the same sex s. 377 violated the constitutional guarantees of liberty and equality. It denuded members of the LGBT communities of their constitutional right to lead fulfilling lives. Its application to adults of the same sex engaged in consensual sexual behaviour violated the constitutional guarantee of the right to life and to the equal protection of law.[59] Sexual orientation was integral to the identity of the members of the LGBT communities. It was intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. S. 377 was founded on moral notions, which were an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture.[60] If the Constitution had to have meaning for them on, then sexual and gender based minorities could not live in

[56] Ibid, paras 105-126.

[57] Ibid, para 126.

[58] Ibid, paras 127-46.

[59] Ibid, para 147.

[60] Ibid, para 148.

fear. In its quest for equality and the equal protection of the law, the Constitution guaranteed to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assured to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.[61] Societal notions of heteronormativity could not regulate constitutional liberties based on sexual orientation.[62]

G. Justice Indu Malhotra

For Justice Indu Malhotra, the only female member of the Court, s. 377 failed the twin test of classification under the right to equality (Article 14) that: (i) there should be a reasonable classification based on intelligible differentia; and (ii) the classification should have a rational nexus with the objective sought to be achieved. Rather, s. 377 created an artificial dichotomy.[63] The natural or innate sexual orientation of a person could not be a ground for discrimination and could not withstand the test of constitutional morality. Where legislation discriminated on the basis of an intrinsic and core trait of an individual, it could not form a 'reasonable classification based on an intelligible differentia.'[64] In *NALSA*,[65] the Supreme Court had granted equal protection of laws to transgender persons. There was no justification to deny the same to LGBT persons.[66] A person's sexual orientation was intrinsic to their being. It was connected with their individuality and identity. A classification which discriminated between persons based on their innate nature violated their fundamental rights,

[61] Ibid, para 150.

[62] Ibid, para 151.

[63] Indu Malhotra, J, para 14.3

[64] Id.

[65] Supra n 28.

[66] Indu Malhotra, J, para 14.4.

and could not withstand the test of constitutional morality.[67] In contemporary civilised jurisprudence, with States increasingly recognising the status of same-sex relationships, it would be retrograde to describe such relationships as being 'perverse', 'deviant', or 'unnatural'.[68] The proscription of a consensual sexual relationship under s. 377 was not founded on any known or rational criteria. Sexual expression and intimacy of a consensual nature, between adults in private, could not be treated as 'carnal intercourse against the order of nature'.[69] Thus, apart from not satisfying the twin test under Article 14, s. 377 was also manifestly arbitrary, and hence violated Article 14.[70] Section 377 violated the prohibition on discrimination in Article 15,[71] the right to life and liberty guaranteed by Article 21 because it prevented LGBT persons living a dignified life,[72] and the right to privacy as an intrinsic part of Article 21[73] since *Puttaswamy*,[74] the right to health in Article 21,[75] and the freedom of expression in Article 19.[76]

History owed an apology to the members of the LGBT community and their families, for the delay in providing redress for the ignominy and ostracism that they had suffered through the centuries. The members of this community were compelled to live a life full of

[67] Ibid, para 14.5.

[68] Ibid, para 14.6.

[69] Ibid, para 14.8.

[70] Ibid, pr. 14.9.

[71] Ibid, para 15.

[72] Ibid, paras 16-16.1.

[73] Ibid, para. 16.2.

[74] Supra n 29.

[75] Indu Malhotra, J, para 16.3. Justice Indu Malhotra, like Justice Nariman, also regarded the terms of the Mental Healthcare Act 2017 as relevant in not treating sexual orientation as a mental illness.

[76] Ibid, paras. 17.-17.2. Section 377 could not be justified as a reasonable restriction under Article 19(2) on the basis of public or societal morality, since it was inherently subjective.

fear of reprisal and persecution. This was because of the failure of the majority to recognise that homosexuality was a completely natural condition, part of a range of human sexuality. The mis-application of s. 377 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. LGBT persons deserved to live a life unshackled from the shadow of being 'unapprehended felons'.[77]

6. CONCLUDING COMMENTS

The story of s. 377 is a classic example of an alien law imposed by the colonial power but then retained by the new State on its liberation.[78] Meanwhile the same colonial power's own history led it to decriminalize private homosexual sex between two men over the age of 21 in 1967, lower the age of consent for gay/bisexual men to 16 in 2000, and to include 'sexual orientation' as a protected characteristic under equality legislation. Indeed, the UK now presents itself as one of the leaders of the global campaign to decriminalize homosexuality and to treat LGBTQI person as equals in all respects. However, the essence of s. 377 had survived for 158 years (from 1860 to 2018). For 68 of those years (1950-2018) it had survived notwithstanding the provisions of the Indian Constitution. Thus 'the lethargy of the law is manifest yet again.'[79] There has to be at least some degree of irony in just how many different constitutional provisions the Supreme Court in *Navtej Singh Johar* considered that s. 377 violated. As noted, s. 377 was enacted to reflect Victorian morality and as part of a

[77] Ibid, para 20.

[78] Human Rights Watch (2008), supra n 5.

[79] Chandrachud, J, para 2.

civilising mission. However, as Justice Chandrachud observed, in terms of effect on the LGBT community, 'Civilisation has been brutal'.[80]

Navtej Singh Johar undoubtedly represented a huge victory for LGBT persons throughout India. Although prosecutions had been rare, the very existence of s. 377 stigmatized a community as criminal and was the basis for routine and continuous violence and discrimination against sexual minorities. The judgment in *Navtej Singh Jo*har did not contain any wider remedial provisions.[81] However, the arrests, detentions, harassments and social outings founded on the constitutionality of s. 377 in relation to same sex sexual activities must end. National and local Police and security forces will need training to that effect.

The worldwide direction of travel in respect of decriminalization of same-sex sexual activities is clear.[82] *Navtej Singh Johar* is a clear and eloquent, if extensive, expression of modern liberal constitutional and human rights jurisprudence. It has all the appearance of a landmark judgment. There are many countries in which the legacies of UK colonial laws criminalising homosexuality are still in force and are enforced much more strictly than they had been in India. *Navtej Singh Jo*har has provided those who wish to challenge laws which replicate the language or substance of s. 377 with a rich array of jurisprudential weapons on which to draw. Its broad ranging analysis of human dignity, liberty, equality and non-discrimination, expression, privacy and health has also contributed to the broader constitutional dialogue between constitutional courts on issues of sexual orientation

[80] Ibid, para 1.

[81] Cf the extensive remedial provisions in *NALSA* (recognition of a third gender), supra n 28, and in *Vahini v Union Of India* (honour killings), supra n 20. Implementation of the Supreme Court's remedial provisions is commonly poor.

[82] Cowell and Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 *Human Rights Law Review* 341.

equality.[83] However, it is only a first step towards the necessary range of equality and non-discrimination laws relating to sexual orientation.[84] That the Indian government did not positively argue for the constitutionality of s. 377 and the extremely muted political reaction in India to the Supreme Court's decision bodes well.[85] However, historical experience suggests that the paths to wider equality rights and protection against discrimination on grounds of sexual orientation will be difficult and contested.

[83] Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (2017).

[84] Baisley, 'Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 *Human Rights Quarterly* 134; McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 *Human Rights Law Review* 613.

[85] Mandal, 'Section 377: Whose Concerns Does The Judgment Address?' (2018) Vol. 53, Issue No. 37, *Economic and Political Weekly*, 15 September 2018, available at https://www.epw.in/journal/2018/37 [last accessed 22 October 2018].