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## Case commentary: Navtej Singh Johar v. Union of India (Decriminalising love and the journey towards Constitutional Morality)

(Shayna)

### Introduction

Difference often becomes the very ground for discrimination. India, a nation that proudly celebrates its identity of unity in diversity, has nevertheless struggled to acknowledge identities that fall outside socially constructed notions of what is considered “normal.” This contradiction becomes especially visible in the treatment of sexual minorities.

Homosexuality-understood as romantic and sexual attraction between persons of the same sex-has long been a subject of intense debate in Indian society. Deeply embedded social norms, moral anxieties, and colonial legacies have historically shaped public attitudes towards homosexuality, often resulting in stigma, exclusion, and criminalisation. For decades, consensual same-sex relationships were viewed not as expressions of identity, but as offences against social morality.

It is within this socio-legal backdrop that the landmark judgment of the Supreme Court in *Navtej Singh Johar and Others v. Union of India* (2018)<sup>1</sup> assumes profound constitutional significance. The case marked a decisive shift from societal morality to constitutional morality and reaffirmed that the Constitution protects individual dignity, autonomy, and equality irrespective of sexual orientation. By partially reading down Section 377 of the Indian Penal Code<sup>2</sup>, the Court made it clear that difference cannot be a valid ground for discrimination in a constitutional democracy.

### Background

Even after years of decolonisation, a colonial-era provision continued to shape the legal and social discourse surrounding the LGBTQ+ community in India. Section 377 of the Indian Penal Code, 1860, criminalised “carnal intercourse against the order of nature.” Although the

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<sup>1</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

<sup>2</sup> Indian Penal Code, No. 45 of 1860, § 377 (India).

provision did not explicitly refer to homosexuality, the use of terms such as “against the order of nature” and “unnatural” implicitly branded heterosexuality as natural while portraying same-sex relations as deviant.

Notably, neither the statute nor any authoritative legal document clearly defined what constituted “natural” or “unnatural” sexual acts. This ambiguity allowed prevailing social morality and majoritarian notions of normalcy to influence the interpretation and application of the law. While Section 377 also covered non-consensual acts and bestiality, its enforcement in practice disproportionately targeted consensual same-sex relationships between adults. As a result, the provision became a tool of harassment, fear, and social exclusion for the LGBTQ+ community.

### **Judicial history**

The constitutional validity of Section 377 was challenged much before the decision in *Navtej Singh Johar*. One of the earliest and most significant challenges came in *Naz Foundation v. Government of NCT of Delhi* (2009)<sup>3</sup>. The Naz Foundation, a Delhi-based non-governmental organisation working in the field of HIV/AIDS awareness, challenged Section 377 on the ground that it arbitrarily criminalised consensual sexual acts between adults and violated fundamental rights guaranteed under the Constitution.

In a landmark judgment dated 2 July 2009, the Delhi High Court held that criminalising consensual same-sex relations violated Articles 14, 15, and 21 of the Constitution. The Court read down Section 377 to exclude consensual sexual acts between adults in private and emphasised that constitutional morality must prevail over social morality.

However, this progressive interpretation was overturned in *Suresh Kumar Koushal v. Naz Foundation* (2013)<sup>4</sup>, where the Supreme Court upheld the constitutional validity of Section 377. The Court observed that the provision affected only a “minuscule minority” and held that any change in the law should be left to the legislature. This judgment was widely criticised for its narrow understanding of fundamental rights and for subordinating individual dignity to majoritarian morality.

A significant shift occurred in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017)<sup>5</sup>, where a nine-judge bench of the Supreme Court unanimously recognised the right to privacy as a fundamental right under Article 21. Importantly, the Court acknowledged that sexual orientation is an essential attribute of privacy, dignity, and personal autonomy, and several

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<sup>3</sup> *Naz Found. v. Gov't of NCT of Delhi*, 160 Delhi L.R. 277 (Del. H.C. 2009).

<sup>4</sup> *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 S.C.C. 1 (India).

<sup>5</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

judges openly criticised the reasoning adopted in *Suresh Kumar Koushal*. This laid the constitutional foundation for reconsidering Section 377.

### **Issues before the court**

Against this background, the Supreme Court in *Navtej Singh Johar v. Union of India* was required to decide whether Section 377, insofar as it criminalised consensual sexual relations between adults of the same sex, was constitutional. The Court also examined whether such criminalisation violated Articles 14, 15, 19, and 21 of the Constitution.<sup>6</sup>

Another important issue before the Court was whether social morality could be allowed to override constitutional morality, especially when the dignity and rights of a marginalised community were at stake.

### **Arguments of the petitioners**

The petitioners argued that Section 377 did not merely criminalise certain sexual acts but effectively criminalised an entire identity. By labelling consensual same-sex relations as “unnatural,” the law forced LGBTQ+ individuals to live in secrecy and fear, thereby denying them dignity and equality.

It was contended that Section 377 was arbitrary and violated Article 14 of the Constitution. The petitioners further argued that discrimination based on sexual orientation amounts to discrimination based on sex, which is prohibited under Article 15. By suppressing the expression of one’s identity and relationships, the law also infringed Article 19.

Most importantly, the petitioners submitted that the right to life under Article 21 includes the right to live with dignity, autonomy, and privacy. Strong reliance was placed on the *Puttaswamy* judgment, which recognised sexual orientation as an intrinsic and inseparable part of individual identity.

### **Arguments of the respondents**

The Union of India argued that Section 377 did not criminalise any particular community but only regulated certain sexual acts. It was contended that the provision was rooted in societal morality and had existed for a long time.

The respondents further argued that changes to such a law should be brought about by the legislature rather than the judiciary, and concerns were raised about the possible impact of decriminalisation on social morality.

### **Judgment and reasoning**

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<sup>6</sup> INDIA CONST. arts. 14, 15, 19, 21.

In September 2018, a five-judge Constitution Bench of the Supreme Court unanimously held that Section 377 was unconstitutional to the extent that it criminalised consensual sexual relations between adults. The Court read down the provision while clarifying that it would continue to apply to non-consensual acts, acts involving minors, and bestiality.

The Court rejected the reasoning adopted in *Suresh Kumar Koushal* and held that fundamental rights cannot depend on the numerical strength of those who claim them. Emphasising constitutional morality, the judges observed that the Constitution exists to protect individual freedoms even when society is unwilling to accept them.

The Court recognised that sexual orientation is natural and an essential part of one's identity. Acknowledging the historical injustice faced by the LGBTQ+ community, the Court observed that "history owes an apology" to those who were subjected to discrimination and criminalisation for decades.

### **Significance of the judgement**

The *Navtej Singh Johar* judgment is a landmark in Indian constitutional history. It marked a clear departure from colonial morality and reaffirmed the Constitution as a living document capable of responding to changing social realities.

By decriminalising consensual same-sex relations, the Court restored dignity and legal recognition to the LGBTQ+ community. The judgment reinforced the idea that democracy is not merely about majority rule, but about protecting the rights and freedoms of minorities.

### **Conclusion**

The decision in *Navtej Singh Johar and Others v. Union of India* goes beyond the reading down of a penal provision. It represents a deeper constitutional commitment to dignity, equality, and individual freedom. By choosing constitutional morality over social prejudice, the Supreme Court affirmed that difference can never justify discrimination.

In doing so, the judgment strengthened the promise of the Indian Constitution—that every individual, regardless of identity or orientation, has the right to live with dignity, without fear, and without shame.

### **References**

1. INDIA CONST. arts. 14, 15, 19, 21.
2. Indian Penal Code, No. 45 of 1860, § 377 (India).
3. *Naz Found. v. Gov't of NCT of Delhi*, 160 Delhi L.R. 277 (Del. H.C. 2009).
4. *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 S.C.C. 1 (India).
5. *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).
6. *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

7. Supreme Court Observer, *Navtej Singh Johar v. Union of India*, <https://www.scobserver.in/cases/navtej-singh-johar-v-union-of-india/>.
8. SCC Online Blog, *Navtej Singh Johar v. Union of India: Case Analysis*, <https://www.sconline.com/blog/>.
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