NAVTEJ JOHAR V. UNION OF INDIA: LOVE IN LEGAL REASONING

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The Supreme Court of India in Navtej Singh Johar v. Union of India (2018), read down §377of the Indian Penal Code, 1860. I argue that in reaching this verdict, the Court furthered the use of 'love' in legal reasoning. It did so, first, by reaffirming its position that an adult has the autonomy to choose whom to have sexual relations with. However, this individual autonomy-centric view, I argue, cannot become the foundation for the wider recognition of LGBTQ+ rights because it views autonomy as liberty, and demands only non-interference in the individual's private sphere. I argue that the second, and more profound, understanding of love acknowledges its transformative potential, its power to break down oppressive structures, and its role as an anchor of individual identity. This paves the way for the legal recognition of queer relationships on the one hand, and the reform of orthodox opposite- sex relationships, on the other.

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I. INTRODUCTION

In a historic judgement, the Supreme Court of India on September 6, 2018 decriminalised carnal intercourse 'against the order of nature' by reading down §377 of the Indian Penal Code, 1860 ('IPC'), a draconian remnant of India's colonial past.[1] While the provision technically applied to sexual acts common to heterosexual intercourse as well (such as oral, digital or anal sex), it was used most commonly to persecute and subjugate those belonging to the LGBTQ+ community.

There are several aspects of the judgement relevant to constitutional and criminal law, such as the expansion of the right to privacy, a deeper understanding of the right to equality, a renegotiation of the sphere of criminal responsibility and criminalisation, and a more comprehensive articulation of the role of 'harm' in criminalisation. These, among other issues, have comprehensively been dealt with elsewhere.[2] The judgement also marks the culmination of the LGBTQ+ community's decades-long battle against marginalisation and discrimination, leading not just to a legitimisation of alternate sexual identities, but a broad-based understanding of the trappings of gender identity,[3] and its role in an individual's life. In that sense, the judgement is germane also to jurisprudence, philosophy and politics.

I shall focus on the two ways in which the Supreme Court furthered the use of 'love' in legal reasoning: firstly, by recognising, as it had in the past, the autonomy of an adult to choose whom to have sexual relations with (the traditional, individualistic approach), and secondly, by acknowledging the place of companionship, connection, and desire in shaping an individual's identity (the feminist, social approach). It is my contention that the latter view marks a desirable departure from the familiar tropes hitherto used to anchor fundamental rights, and can lay the foundation for greater diversity in the recognition of both individual identity, and social relationships in India. I choose to discuss this aspect, moreover, because 'love' as a relevant legal category and as a determinant of legal decision-making is severely neglected in Indian legal and academic writing.

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

2 *Section 377 Judgement*: *Expanding LGBT Rights in India*, IACL-AIDC BLOG, September 12-20, 2018, available at https://blog-iacl-aidc.org/section-377-expanding-lgbt-rights-in-india (Last visited on August 22, 2019).

3 Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶44:

> "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."

In this paper, I shall first provide an overview of the judgement, including a brief legal history, and some of the most critical findings. I shall then delve into the Court's use of the 'right to love' as a function of individual autonomy. Following this, I shall expound on what I mean by the use of 'love' in legal reasoning in a theoretical sense, and explain how the decision in *Navtej Singh Johar* v. *Union of India*[4] ('Navtej Singh Johar') has laid the foundation for this approach. I shall then argue that this approach has the potential to make Indian jurisprudence richer, by creating the space for the recognition of relationships that currently exist on the margins of law and society.

Before proceeding to the overview, however, I believe it necessary to identify certain terms that will be used through the course of this paper, to clarify why they are being employed, and the meanings they intend to convey. First, I shall use the term 'heterosexual' and 'non-heterosexual', not to convey that 'heterosexual' is the default sexuality, but to cover the diversity of sexualities outside heterosexuality, without specifically labelling any of them. These terms shall be used only in reference to sexual acts, while the term LGBTQ+ will be the preferred term to refer to sexual identities other than heterosexual. Secondly, while using the term 'feminist' in this paper, I am referring to cultural feminist ideas that have long advocated a more connected, social understanding of identities.[5] I strongly endorse the idea, without resorting to biological essentialism, that the individualistic conception of identity is a distinctly masculine, legal idea which does not conform to the feminine or queer experience of identity. Finally, when speaking of love, I refer not just to romantic love, but the more universal values of desire, compassion, spiritual connection, and companionship that are often rooted in, but frequently go beyond, sexuality.

II. NAVTEJ JOHAR V. UNION OF INDIA: AN OVERVIEW

A. A BRIEF HISTORICAL BACKGROUND

The struggle for LGBTQ+ rights began outside courts,[6] with organisations such as the AIDS Bhedbhav Virodhi Andolan working to spread awareness about the discrimination faced by persons living with HIV/AIDS, and the high incidence of HIV/AIDS amongst LGBTQ+ persons due to the shame and stigma created by §377.[7] Though petitions were filed against §377 from the early 1990s

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4 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

5 CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-63 (2003).

6 Vikram Doctor, *View*: *Strike Down Section 377 as it has no Place in Today's India*, *THE ECONOMIC TIMES*, January 13, 2018.

7 *See* AIDS Bhedbhav Virodhi Andolan, *Less than Gay*: *A Citizen's Report on Homosexuality in India*, November-December 1991, available at https://docs.google.com/file/d/0BwDlipuQ0I6ZMXVmNWk0ajdqWEU/edit (Last visited on October 9, 2019).

in various fora, they continued to be dismissed.[8] The petition by Naz Foundation, a sexual health NGO working with gay men, was finally heard by the Delhi High Court (on the order of the Supreme Court of India) in 2006 as a matter of public interest.[9]

The focus of the petition was on declaring §377 of the IPC unconstitutional in order to allow LGBTQ+ persons to come out into the open and have better access to healthcare, especially in cases of HIV/AIDS. In 2009, the Delhi High Court declared the provision unconstitutional on the ground that it violated Articles 14 (right to equality), 15 (prohibition of discrimination) and 21 (right to life) of the Constitution of India by discriminating against those who identified as homosexual.[10]

This judgement, however, was overturned by the Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation*[11] ('Suresh Kumar Koushal') which held that §377 of the IPC did not lead to any considerable discrimination, since LGBTQ+ persons constituted a miniscule portion of the population,[12] and the power and responsibility to decriminalise the provision lay with the Parliament.[13] The review petitions filed by the Central Government, the Naz Foundation and several others in 2013,[14] against the Supreme Court's decision in Suresh Kumar Koushal,[15] were also dismissed.[16] The judgement faced severe backlash, both within India[17] and from the international community.[18] Efforts outside court were made to strengthen the discourse against criminalisation of non-heterosexual acts, through greater visibility, research and debate.[19]

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8 Ishan Marvel, *"Why would anyone Choose to be Gay in a Society that is so Negative Towards Homosexuality?"*: *An Interview with Anjali Gopalan*, THE CARAVAN, February 7, 2016; Alternative Law Forum, *Navtej Johar v. Union of India*: *A Transformative Constitution and the Rights of LGBT Persons*, September 5, 2018, available at http://altlawforum.org/wp-content/uploads/2018/09/RightToLove_PDFVersion-1.pdf (Last visited October 9, 2019).

9 Pritam Pal Singh, *377 Battle at Journey's End*, THE INDIAN EXPRESS, September 6, 2018.

10 Naz Foundation v. State (NCT of Delhi), 2009 SCC Online Del 1762.

11 Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

12 *Id*., ¶43.

13 *Id*., Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶¶31-33.

14 Naz Foundation (India) Trust v. Suresh Kumar Koushal, (2014) 3 SCC 220.

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

16 Naz Foundation (India) Trust v. Suresh Kumar Koushal, (2014) 3 SCC 220.

17 Gowthaman Ranganathan, *Ruling in India not the Last Word*, GAY AND LESBIAN REVIEW, June 25, 2014; *see* Orinam, *377 GDoR Images from Across the Globe*, available at http://orinam.net/377/377-gdor-images/ (Last visited on October 10, 2019).

18 Press Trust of India, *UN Chief Ban Ki-moon Calls for Equality for Lesbians*, *Gays and Bisexuals*, ECONOMIC TIMES, December 12, 2013; Ravina Shamdasani & Cecile Poilly, *Pillay Dismayed at Re-imposition of Criminal Sanctions for Same-Sex Relationships in India*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, December 12, 2013.

19 Press Trust of India, *Global Research Works Helped SC Verdict on Section 377*, DECCAN HERALD, September 17, 2018.

In the legal sphere, the approach of the Supreme Court in *National Legal Services Authority* v. *Union of India*,[20] in relation to the discrimination of transgender persons based on gender and sexual identities was refreshingly opposed to that of Suresh Kumar Koushal.[21] The Court held, "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom…". It went on to add, "Transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education, leave aside social exclusion."

These excerpts indicate that the Supreme Court of India treated sexual orientation and gender identity as intrinsically related aspects of a person's identity, and categorically condemned the discrimination faced by transgender persons. The Court referred to, and relied on, progressive documents such as the Yogyakarta Principles[22] and held that discrimination on the basis of sexual orientation and gender identity nullifies the right to equality.[23] This position clashed directly with the decision in Suresh Kumar Koushal which refused to acknowledge that the existence of §377 of the IPC in and of itself discriminated against sexual minorities.[24] It appeared, therefore, that the homophobic and exclusionary politics that had led to the recriminalisation of non-heterosexual acts in 2013 had come under challenge from all quarters, and was ready to be explicitly rejected.

A fresh writ petition was filed in 2016 by five celebrity petitioners,[25] challenging the constitutionality of §377 of the IPC, and claiming direct discrimination due to the provision.[26] While the petition was pending, the Supreme Court of India, in *K.S. Puttaswamy* v. *Union of India*,[27] confirmed that the right to privacy was a fundamental right under Article 21 of the Constitution of India, and further, that the protection of the right extended to the individual's sexual orientation.[28] The Supreme Court's decision in Navtej Singh Johar, therefore, was hardly surprising.

B. HIGHLIGHTS OF THE JUDGEMENT

In the Navtej Singh Johar decision, §377 of the IPC was declared unconstitutional to the extent that it criminalised consensual sexual intercourse

[20] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

[21] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

[22] National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶22.

[23] *Id*., ¶77.

[24] *Id*., ¶40.

[25] Navtej Singh Johar (renowned Bharatanatyam dancer and a Sangeet Natak Akademy awardee), Sunil Mehra (journalist and storyteller), Ritu Dalmia (celebrity chef), Aman Nath (writer, hotelier and architectural restorer), and Keshav Suri (hotelier).

[26] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶5.6.

[27] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

[28] *Id*., ¶ 323: "Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation."

between adults of the same sex.[29] One of the major implications of this decision has been the adjustment of the boundaries of criminal law. In practice, §377 was primarily used *against* adult homosexuals,[30] or to prosecute cases of child sexual abuse.[31] The stigma created by the provision necessarily meant that adults from the LGBTQ+ community could never use it to seek criminal sanction for rape.[32] On the face of it, however, the provision extends to sexual *acts*, and not the sexual orientation of those who practise them.

The decision in Navtej Singh Johar decriminalised only the consensual practice of such acts, implying that when they are performed without consent, the aggrieved party may find reprieve in §377 of the IPC. Since the practice and expression of homosexuality is not a crime, the law no longer sanctifies the stigma around homosexuality. It follows that practising homosexuals, or transgender persons, who are subjected to any of the acts covered by §377 without their consent, are less likely to be deterred from invoking §377 as a shield. This could significantly alter the power dynamics currently implicit in Indian rape law, which envisages only female victims, and male perpetrators of rape.[33]

Since §377 is gender neutral, and only consensual practice of acts covered by the provision has been decriminalised, there is now nothing to prevent men from being legally regarded as victims, and women from being considered as potential perpetrators of rape. Insofar as same-sex encounters are concerned, this would be a welcome step, extending the protection of the criminal justice system to the LGBTQ+ community.

However, if §377 of the IPC is alternately read as criminalising acts, notwithstanding the sexual orientation of the person who performs them (as its wording suggests), it may now be possible for men to prosecute women for non-consensual sexual acts other than penile-vaginal penetration. Nevertheless, without appropriate safeguards which account for the inherent imbalance of power between men and women, this could lead to a situation where women's complaints of rape are met with counter-complaints by their perpetrators under §377, thereby creating a chilling effect.[34] On this point, therefore, judicial or legislative clarification would be welcome.

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[29] Dipak Misra C.J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶253 (xvii).

[30] Indu Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶6.5.

[31] Aloke Tikku, *Most Sec 377 Cases are of Child Abuse*, *not of Consensual Gay Sex*, *HINDUSTAN TIMES*, September 13, 2015.

[32] Naz Foundation v. State (NCT of Delhi), 2009 SCC Online Del 1762, ¶¶21 and 22 (Discussion on documented cases and incidents of custodial rape and torture suffered by LGBTQ+ persons, and yet there is no record of §377, IPC being used by any such person to report such an incident); *see also* Namita Bhandare, *The Use and Misuse of Section 377*, LIVE MINT, October 31, 2014.

[33] Indian Penal Code, 1860, §§375, 376, 376A, 376B, 376C, 376D.

[34] Shraddha Chaudhary, *Reconceptualising Rape in Law Reform*, 13(2) SOCIO-LEGAL REVIEW 164-165 (2017).

Another aspect of the judgment worthy of discussion is the acknowledgement that the Constitution of India, embodying a distinct constitutional morality, is meant to protect discriminated minorities from majoritarian subjugation. The bench emphasised the living and transformative nature of the Constitution.[35] The Constitution of India, as a living document, must (to put it simplistically) keep pace with societal evolution,[36] which meant, in this case, that §377 of the IPC and the Victorian prudery from which it emerged, belonged only in the pages of history. As a transformative Constitution, the document must go further. It must contribute to the progressive realisation of rights, and actively strive to create a more accommodative, and pluralistic society, which meant, in this case, that putting an end to LGBTQ+ marginalisation could not be left to the whims of a majoritarian government.

A common thread running across the opinions of all four opinions delivered in Navtej Singh Johar was that §377 of the IPC was an assault on the privacy, dignity and autonomy of the LGBTQ+ community. The provision, it was found, had silenced and marginalised the members of the community, preventing them from expressing their sexual and romantic identities or acknowledging their desires and partnerships, and forcing them to live a life of shame and marginalisation.[37] §377 of the IPC was held to be violative of Article 21, Article 14 and Article 19 of the Constitution of India based, in very large part, on the fact that it interfered with an entire community's 'right to love'.[38]

III. LOVE IN LEGAL REASONING: THE RIGHT TO LOVE AS AN ASPECT OF INDIVIDUAL AUTONOMY

There is no formal recognition of a 'right to love' per se, whether in the Constitution of India, or in international human rights law instruments. As far as romantic love is concerned, it is arguably implicit in the right to marry, recognised by the European Convention on Human Rights ('ECHR', 1950, Article 12),[39] the Universal Declaration of Human Rights ('UDHR', 1949, Article 16(1)),[40] the International Covenant on Civil and Political Rights ('ICCPR', 1966,

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35 Dipak Misra C.J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ ¶95-99.

36 Chief Justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34.

37 Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 47.

38 While the Supreme Court never explicitly mentioned such a right, the decision was widely perceived as affirming it. *See The Right to Love*: *On Section 377 Verdict*, THE HINDU, September 7, 2018; Senthorun Raj, *What Does it Mean to Love in Indian Law?*, QUARTZ INDIA, September 11, 2018, available at https://qz.com/india/1385607/section-377-how-indian-judges-wrote-lgbtq-love-into-law/ (Last visited on August 24, 2019); Danish Sheikh, *A Right to Love*, THE INDIAN EXPRESS, February 8, 2016.

39 European Convention on Human Rights, 1950, Art. 12: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

40 Universal Declaration of Human Rights, 1948, Art. 16(1): "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

Article 23(2)),[41] and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD, 2006, Article 23(1)(a)).[42] This link is, indubitably, somewhat tenuous, because love and marriage need not necessarily go hand-in- hand. Marriages may often be more about convenience than love,[43] and love need not always result in marriage. Notwithstanding this, even if it is assumed *arguendo* that the right to marry implies a right to love, it is obvious from the wording of the instruments cited above, that the essence of the right to marry is the right to *choose* whom to marry. It is not as though every human being is entitled to a partner, regardless of whether another human being wants to marry them. The right has meaning only when two competent adults are willing to marry. By exclusion, therefore, it prevents third parties, such as the State, relatives, or despondent ex-lovers, from preventing such a marriage without reasonable cause.[44] Therefore, what the right seeks to protect is the autonomy of the individual to choose whom to marry (and love).

This, precisely, has been the approach of the Supreme Court of India in a slew of recent cases. In *Shafin Jahan* v. *Asokan K.M.*[45] ('Shafin Jahan'), the Court was hearing an appeal on the decision of the Kerala High Court, which granted custody of a 24-year old, adult, competent woman, Hadiya (Akhila before she married and converted to Islam), to her father. The High Court had also annulled her marriage to a Muslim man, Shafin Jahan, on the ground that she had been brainwashed into the marriage, despite her explicit statement to the contrary. Finding that Hadiya did not suffer from mental incapacity or coercion, the Supreme Court reversed the decision of the High Court of Kerala, observing that the right to choose was critical to the expression of individual identity. Chandrachud J., succinctly observed,

> "The right to marry a person of one's choice is integral to Article 21 of the Constitution… Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness."[46]

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41 International Covenant on Civil and Political Rights, 1966, Art. 23(2): "The right of men and women of marriageable age to marry and to found a family shall be recognized."

42 United Nations Convention on the Rights of Persons with Disabilities, 2006, Art. 23(1)(a):

> "States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:
>
> The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized."

43 Marriages may be contracted for a host of reasons that do not include love: they have historically been (and arguably still are) used as a means of forging political alliances, they may be the easiest way of getting citizenship of another country, or they may be forced by societal expectations.

44 *See* Roberts C.J.'s dissenting judgement in Obergefell v. Hodges, 2015 SCC OnLine US SC 6, in the context of the meaning of the right to marry in the U.S.A.

45 Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

46 *Id*., ¶21.

In another instance, the writ petition in *Shakti Vahini* v. *Union of India*[47] sought directions to be given to state governments and the Central Government, requiring them to take preventive steps to combat honour killings, and deal with instances of honour killings seriously. The Court, expressing its horror at the practise of lynching couples who married outside their community or without the consent of their community, observed,

> "If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation."[48]

Therefore, the 'right to love' as implicit in the right to marry, has repeatedly been affirmed by the Indian Apex Court as a function of the individual's right to choose. It has not, however, been recognised for its symbolic, and constitutive role in an individual's life.

In a familial sense, the 'right to love' is implicitly protected by rights against interference in established family or personal life. The ECHR (Article 8),[49] for instance, obligates states parties to respect citizens' private and family lives. The UDHR (Article 16(3),[50] ICCPR (Articles 17 and 23(1)),[51] International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966, Article 10)[52] and United Nations Convention on the Rights of the Child (UNCRC, 1989,

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47 Shakti Vahini v. Union of India, (2018) 7 SCC 192.

48 *Id*., ¶44.

49 European Convention on Human Rights, 1950, Art. 8:
"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

50 Universal Declaration of Human Rights, 1948, Art. 16(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

51 International Covenant on Civil and Political Rights, 1966, Art. 17:
"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or Correspondence, nor to unlawful attacks on his honour and reputation.
(2) Everyone has the right to the protection of the law against such interference or attacks."
International Covenant on Civil and Political Rights, 1966, Art. 23(1):
"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

52 International Covenant on Economic, Social and Cultural Rights 1966, Art. 10(1):
"The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

Preamble and Article 16),[53] among others, all recognise the special place of the family and seek to protect it against undue interference from the State. However, the fundamental right being recognised and protected, once again, is the privacy and autonomy of the *individual*, a negative right, against interference by the state in matters that are deemed to be to be outside the public sphere, such as her family, home, reputation and personal correspondence. Even where the family is protected as a 'unit of society', there is no recognition of the symbolic and constitutive role of families and relationships (built on love) in shaping the individual's identity and being.

In some cases, the 'right to love' comes attached with rights against discrimination, or a right to equality, whereby one class of persons cannot be denied the right to choose whom they love or have sexual relations with. This has been the approach taken by the European Court of Human Rights ('ECtHR'), when finding that same-sex couples had private[54] and family[55] lives on the same footing as opposite sex couples under Article 8 of the ECHR. Similarly, the Delhi High Court in *Naz Foundation* v. *Govt.* (*NCT of Delhi*)[56] ('Naz Foundation') declared §377 of the IPC unconstitutional, in large part, because it treated those who identified as homosexual differently from those who did not, without any legitimate cause for the distinction.[57]

This individual-autonomy-centric view that protects the individual's right to love as a function of her liberty to choose a marriage or sexual partner, her right to express her autonomy and individuality, and her right to privacy, dignity

[53] United Nations Convention on the Rights of the Child, 1989, Preamble:

> "…Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community..."

United Nations Convention on the Rights of the Child, 1989, Art. 16:

> "(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

[54] Dudgeon v. United Kingdom, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, (22 October 1981). (The criminalisation of buggery amongst consenting, adult males (over the age of 21) was found to violate the private life of the applicant.).

[55] Schalk and Kopf v. Austria, Application No. 30141/04, Council of Europe: European Court of Human Rights, (24 June 2010). It was held that same-sex couples do have "family life" for the purposes of Article 8, ECHR:

> "…the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would."

[56] Naz Foundation v. State (NCT of Delhi), 2009 SCC Online Del 1762, ¶94:

> "Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation, it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class."

[57] *Id*.

and non-interference, was also a big part of the Supreme Court's rationale in Navtej Singh Johar. For instance, Dipak Misra J. observed, "Dignity while expressive of choice is averse to creation of any dent. 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 dented."[58]

IV. LOVE IN LEGAL REASONING: A DEPARTURE FROM THE TRADITIONAL AUTONOMY-CENTRIC VIEW

While the individual autonomy-centric view of the right to love is necessary, I believe it is severely limited in its reach. On the theoretical plane, it ends with the recognition of the right of an individual to choose whom to have sex with, and in what manner, failing to extend to the emotional and spiritual value of companionship and connection that may often be intrinsic to a sexual relationship.[59] As a result, it also falls short of acknowledging the role of love, sex, and companionship in shaping an individual's identity and, therefore, her choices.

The practical implication of its limited reach is that while a right to non- interference can be built upon this approach, it cannot be the basis for the development of positive rights. Positive rights, to found families that are not necessarily bound by orthodox social paradigms, such as heterosexuality, sex, marriage or procreation, and which challenge hegemonic social structures such as gender roles, need a more profound conception of love in legal reasoning. In this section, I shall demonstrate how the decision in Navtej Singh Johar laid the foundation for such a conception, which I shall refer to, for lack of a better term, as the jurisprudence of love.

The jurisprudence of love, in the broadest terms, refers to the operationalisation of 'love' to further the ends of justice. Of the several aspects that such jurisprudence might have, I believe three merit some discussion: the transformative potential of love, the power of love to break down oppressive structures, and the role of love in the lives of individuals.

A. THE TRANSFORMATIVE POTENTIAL OF LOVE

The transformative potential of love means, first, as Martha Nussbaum painstakingly demonstrates, that love can prompt good behaviour, and thereby lead to a more just society. This may take a number of forms, but, "the loves that prompt good behaviour are likely to have some common features: a concern for the beloved as an end rather than a mere instrument; respect for the

[58] Dipak Misra C.J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶144.

[59] For this view of individual autonomy as liberty, *see* Kennedy J., Lawrence v. Texas, 2003 SCC OnLine US SC 73.

human dignity of the beloved; a willingness to limit one's own greedy desires in favour of the beloved."[60]

As regards legal systems, specifically, the transformative potential of love, by accommodating mercy and compassion, can elevate legal decision-making to justice. In the immortal words of Shakespeare, "And earthly power doth then show likest God's, When mercy seasons justice."[61] A most relevant, contemporary example of the application of this transformative potential in legal systems across the world is the growth of restorative justice as an alternative to punitive criminal justice. Aside from its focus on reformation and closure, restorative justice incorporates and operationalises the transformative potential of love by emphasising human connection, empathy and remorse.[62]

Research has shown that restorative justice interventions, where appropriately carried out can reduce recidivism.[63] When compared to other forms of intervention in the criminal justice system, restorative justice conferences appear to be nearly doubly as effective in preventing reoffending, at least insofar as youth offenders are concerned.[64] Most importantly, restorative justice measures prevent the victim from feeling alienated from her own narrative, silenced, and isolated in her efforts to get justice, an experience that the majority of victims associate with a traditional criminal justice approach.[65]

In Navtej Singh Johar, the use of the transformative potential of love as a jurisprudential tool is most evident in the apology issued to the members of the LGBTQ+ community by Indu Malhotra J.,

> "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

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60 MARTHA NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE, 382 (2013).

61 SHAKESPEARE, THE MERCHANT OF VENICE, Act IV, Scene I.

62 *See* HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (October 2003).

63 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, 2006, available at https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf (Last visited on August 31, 2019).

64 Ministry of Justice, Government of the United Kingdom, *What Works in Managing Young People who Offend? A Summary of the International Evidence*, 2016, available at https://www.gov.uk/government/publications/what-works-in-managing-young-people-who-offend (Last visited on August 28, 2019).

65 SUSAN L. MILLER, AFTER THE CRIME: THE POWER OF RESTORATIVE JUSTICE DIALOGUES BETWEEN VICTIMS AND VIOLENT OFFENDERS 7-8 (2011).

> is a completely natural condition, part of a range of human sexuality."[66]

The apology, while legally unnecessary, humanised the decision, placing it within the historical context of injustice perpetrated by the legal system, emphasising the need to make amends. In doing so, the Supreme Court of India went beyond a simple application of constitutional principles to meet the infinitely more elegant goal of delivering justice.

B. LOVE THAT BREAKS DOWN OPPRESSIVE STRUCTURES

Another sense in which love can further the ends of justice is by breaking down oppressive structures. Constitutional scholar David Richards has illustrated, through a number of case-studies, how the practice of loves that violate 'Love Laws' (the term he employs for laws which are meant to preserve patriarchal hierarchies) leads to the erosion and reshaping of the social structures of power.[67] Though Richards' argumentation is somewhat circuitous, his central thesis, that love, when it transgresses social orthodoxy, challenges oppressive hierarchies and triggers justice, is simple and intuitive. It can better be understood in light of Bell Hooks' idea that the practice of love can lead to the breakdown of the patriarchy, which relies on a masculinity devoid of emotion and afraid of human connection. Acceptance of mature human emotions, and the development of safe spaces to express love and cultivate relationships, has the potential to replace anger, aggression and the struggle for power, upon which the patriarchy is built, with love, empathy and compassion.[68]

The decision in Navtej Singh Johar is, in the truest sense, a shining example of the power of love to break down oppressive structures. To begin with, the petition, in addition to relying on solid arguments in constitutional and criminal law, privacy, feminism and queer theory, brought the lived experiences of homosexual individuals in India before the court.[69] While the case was being

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[66] Indu Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶20.

[67] *See generally* DAVID A.J. RICHARDS, WHY LOVE LEADS TO JUSTICE: LOVE ACROSS THE BOUNDARIES (2015).

[68] *See generally* BELL HOOKS, THE WILL TO CHANGE: MEN, MASCULINITY AND LOVE (2004).

[69] Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶50:

> "Out of twenty Petitioners, sixteen are gay, two are bisexual women and one is a bisexual man. One among the Petitioners is a transwoman. Three of the Petitioners explain that they suffered immense mental agony due to which they were on the verge of committing suicide. Another two stated that speaking about their sexual identity has been difficult, especially since they did not have the support of their families, who, upon learning of their sexual orientation, took them for psychiatric treatment to cure the so-called 'disease.' The families of three Petitioners ignored their sexual identity. One of them qualified to become an Indian Administrative Services officer in an examination which more than 4,00,000 people write each year. But he chose to forgo his dream because of the fear that he would be discriminated against on the ground of his sexuality. Some of them have experienced depression; others faced problems focusing on their studies while growing up; one among them was forced to drop out of high school as she was residing in a girl's hostel

heard, Menaka Guruswamy, in what will surely be remembered as one of the most iconic arguments before the Supreme Court, personalised the effect of the law. Giving faces and names to the members of the LGBTQ+ communities who lived and loved under the shadow of the provision,[70] she departed from the abstraction ordinarily considered central to legal reasoning.

As a substantive argument, and not merely an emotive appeal, she stated, "How strongly must we love knowing we are unconvicted felons under Section 377? My Lords, this is love that must be constitutionally recognized, and not just sexual acts."[71] And indeed, in its decision, the Supreme Court of India did recognise the right to love as integral to an individual's autonomy, privacy and dignity rights.[72] The decriminalisation of consensual, non-heterosexual intercourse amongst adults was not merely a vindication of constitutional morality and the fundamental rights of a marginalised community. It was a salute to the valiant practise of love by the LGBTQ+ community in the face of harassment and discrimination, and the validation of its aspiration to an equal love,

> "… people criminalized by the operation of the provision, challenge not only its existence, but also a gamut of beliefs that are strongly rooted in majoritarian standards of what is 'normal'… the attack on the validity of Section 377 is a challenge to a long history of societal discrimination and persecution of people based on their identities."[73]

Another instance of the breakdown of oppressive structures through the practice of love is the decision of the High Court of Madras in Arunkumar v. The Inspector General of Registration[74] ('Arunkumar'). In this case, Justice Swaminathan held that a marriage between a man and a transwoman, both Hindus, would be valid under §5 of the Hindu Marriage Act, 1955, notwithstanding that the term 'bride' in the provision had hitherto been interpreted to mean a biological female. In coming to this decision, the court observed, "By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to

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where the authorities questioned her identity. The parents of one of them brushed his sexuality under the carpet and suggested that he marry a woman. Some doubted whether or not they should continue their relationships given the atmosphere created by Section 377. Several work in organisations that have policies protecting the LGBT community in place. Having faced so much pain in their personal lives, the Petitioners submit that with the continued operation of Section 377, such treatment will be unabated."

70 Sanjana Govil, *India's Section 377 Hearings*: *Reasons for Hope as another Wait Begins*, ASIA DIALOGUE, July 24, 2018.

71 Coreena Suares, *Constitution Must Recognise Love*, *not just Sexual Acts*: *Menaka Guruswamy on Sec*. *377*, DECCAN CHRONICLE, July 13, 2018.

72 Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶67.

73 *Id*.

74 Arunkumar v. Inspector General of Registration, 2019 SCC OnLine Mad 8779.

see the obvious, one needs not only physical vision in the eye but also love in the heart."[75]

C. LOVE AS AN ANCHOR OF INDIVIDUAL IDENTITY

The third and final sense in which love can be a jurisprudential tool is through the acknowledgement of the role of love in constituting individual identity. Plato, speaking in different voices in his seminal text 'Symposium' describes what love *is*, and in doing so, also touches upon what love can *do*. This, I believe, is the best way to understand and explore the role that love can play in an individual's life. According to Erixymachus,

> "…the love, more especially, which is concerned with the good, and which is perfected in company with temperance and justice, whether among gods or men, has the greatest power, and is the source of all our happiness and harmony, and makes us friends with the gods who are above us, and with one another."[76]

Agathon, describing Eros, the God of love, says he is the source of courage, temperance, justice and wisdom, and the inspiration for all art and beauty,

> "… at the touch of him every one becomes a poet, even though he had no music in him before; this also is a proof that Love is a good poet and accomplished in all the fine arts; for no one can give to another that which he has not himself, or teach that of which he has no knowledge… The arts of medicine and archery and divination were discovered by Apollo, under the guidance of love and desire; so that he too is a disciple of Love. Also the melody of the Muses, the metallurgy of Hephaestus, the weaving of Athene, the empire of Zeus over gods and men, are all due to Love, who was the inventor of them. And so Love set in order the empire of the gods… I say of Love that he is the fairest and best in himself, and the cause of what is fairest and best in all other things."[77]

Socrates, dismissing Agathon's conception, echoes Diotima. According to him, love is essentially a longing or desire for the ultimate good, or the good from which all other goods, such as beauty and wisdom, derive. Reproducing his dialogue with Diotima, he says,

> "… 'Then,' she said, 'the simple truth is, that men love the good.' 'Yes,' I said. 'To which must be added that they love the

[75] *Id*., ¶1.
[76] *See* PLATO, THE SYMPOSIUM (*translated* by Alexander Nehamas & Paul Woodruff, 1989).
[77] *Id*.

> possession of the good?' 'Yes, that must be added.' 'And not only the possession, but the everlasting possession of the good?' 'That must be added too.' 'Then love,' she said, 'may be described generally as the love of the everlasting possession of the good?' 'That is most true.'" [78]

Each of these expositions indicates the overwhelming role of 'love', whether romantic or spiritual, specific or universal, in human life. As a source of inspiration or a driver of action, as aspiration or experience, 'love', and the connections we form out of love, shape our characters and anchor our identities. In the case of Shafin Jahan, the Indian Supreme Court briefly touched upon the link between personhood and identity on the one hand, and the choice of life partner on the other,

> "The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual."[79]

However, it was not until Navtej Singh Johar, that this link was explicitly acknowledged. The judges repeatedly referred to the definition of 'sexual orientation' in the Yogyakarta Principles, which goes far beyond merely sexual preference to include "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."[80] Justice Chandrachud, quoting Justice Leila Seth at the very outset of his judgement, observed "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."[81] Recognising the right asserted by the petitioners as the right to lead full lives, and not just to have their sexual orientation constitutionally respected on par with heterosexuals, he placed human connection and relationships at the heart of individual identity,

> "Consensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience

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78 *Id*.

79 Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368, ¶19.

80 International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, *Introduction to the Yogakarta Principles* (March 2007).

81 Justice Leila Seth, *A Mother and a Judge Speaks Out on Section 377*, *THE TIMES OF INDIA*, January 26, 2014.

> towards their partner. This "institutionalized expression to love" must be considered an important element in the full actualisation of the ideal of self-respect."[82]

D. REFORMING SOCIAL INSTITUTIONS THROUGH THE JURISPRUDENCE OF LOVE

The jurisprudence of love, thus, articulated in the judgement, has the potential to kickstart a journey towards the integration of alternate sexual identities and family forms into society, while simultaneously reforming existing social structures and institutions to make them more egalitarian and inclusive. This potential was explicitly recognised by the Supreme Court when it placed enforced heteronormativity on a continuum of repressive practices perpetrated by society, all of which can effectively begin to be challenged by recognising a right to love,

> "The order of nature that Section 377 speaks of is not just about nonprocreative sex but is about forms of intimacy which the social order finds 'disturbing'… 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."[83]

In fact, the Apex Court's use of 'love' in its reasoning aspired to the loftier aim of a society unfettered by the repressive gender norms and prescriptions through which it is currently ordered. The attack on §377 was mounted not only on the ground of the indignity it caused to homosexuals as a class, but additionally on the basis of its role in creating hierarchies, both within and amongst relationships,

> "Relationships which question the [male/female] divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function."[84]

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[82] Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶67.
[83] *Id*., ¶32.
[84] *Id*., ¶47.

Arguably, the move towards democratising social institutions through the jurisprudence of love has already begun. Ruth Vanita, writing in 2011 had stated that same- sex couples or couples in which one partner was transgender, did frequently enter into customary marriages in India.[85] The illegality of same-sex marriage, however, meant that such unions could not be registered, and such couples were consequently deprived of the legal and social protection and validity available to cisgendered, heterosexual couples. A significant shift from this position is observable after the decision in the decision in Arunkumar discussed earlier. Ordering the registration of a marriage between a transwoman and a man under §5 of the Hindu Marriage Act, 1956, the Madras High Court in that case held,

> "Seen in the light of the march of law, the expression 'bride' occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman. The only consideration is how the person perceives herself."[86]

While it is difficult (and imprudent) to predict the course that the law will take, the journey of Europe is enlightening in this regard. Writing in 2001, Waaldijk noted that the laws of most European countries appeared to be following an observably similar path in dealing with homosexuality, moving from decriminalisation to taking active anti- discrimination measures, and finally to providing avenues for the legal recognition and formalisation of same-sex partnerships and parenting.[87] In 2016, it was observed that there was, indeed, a distinct trend in the continent towards increased recognition of same-sex relationships, albeit different models had been employed to facilitate this recognition.[88]

The approach of the ECtHR has also been similar.[89] Homosexual activity was held to be protected under the ECHR, Article 8 as an important aspect of a person's private life in *Dudgeon* v. *UK*.[90] The ECtHR subsequently maintained a policy of requiring serious reasons for interference with the rights of a person

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85 Ruth Vanita, *Democratising Marriage*: *Consent*, *Custom and the Law* in LAW LIKE LOVE: Queer Perspectives on Law, 338 (Arvind Narain & Alok Gupta eds., 2011).

86 Arunkumar v. Inspector General of Registration, 2019 SCC OnLine Mad 8779, ¶16.

87 Kees Waaldjik, *Towards the Recognition of Same-Sex Partners in European Union Law*: *Expectations Based on Trends in National Law* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 635 (Robert Wintemute & Mads Andenæs eds., 2001).

88 Ian Curry-Sumner, *Same-Sex Relationships in a European Perspective* in EUROPEAN FAMILY LAW, Vol. III (Scherpe ed., 2016).

89 *See* Jens M. Scherpe, *From Odious Crime to Family Life—Same-Sex Couples and the ECHR* in CONFRONTING THE FRONTIERS OF FAMILY AND SUCCESSION LAW: Liber Amicorum Walter Pintens 1225 (Alain Laurent Verbeke ed., 2012).

90 Dudgeon v. United Kingdom, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, (October 22, 1981).

based on sexual orientation. However, since the protection was based in a right to privacy, the right of same-sex couples to a 'family life' under Article 8 was not recognised until the decision in *Schalk and Kopf* v. *Austria* ('Schalk and Kopf').[91]

Previously, in *Karner* v. *Austria*,[92] the ECtHR shifted the burden to justify any difference in treatment based on sex or sexual orientation on member states, and, additionally, required member states to prove that the said difference was *necessary* (and not just sufficient) to achieve their stated aims.[93] The Government of Austria had argued that the difference in treatment between same-sex couples and opposite-sex couples was meant to promote the legitimate aim of protecting the traditional family.[94] Not only did the ECtHR observe that this aim was "rather abstract",[95] but it also found that it could be promoted through other means, and the difference in treatment was not *necessary* to achieve it.[96] This was reiterated in Schalk and Kopf,[97] and the ECtHR also agreed that Article 12 of the ECHR (the right to marry) could no longer be limited to opposite sex couples.[98] However, given the nature of the European Union, and the generally cautious approach taken in matters germane to family and culture,[99] the ECtHR, unsurprisingly, decided that there was no obligation on the member states to allow same-sex marriage.

If the journey of European nations and the European Union is any indication, Indian law has set out on a path to the diversification of how 'family' is understood, at least in law, starting with a move to end differential treatment between same-sex and opposite-sex relationships. There is little doubt that the use of love in legal reasoning makes room for same-sex relationships (and not just sexual acts) to be legally recognised through civil unions or marriage, and extend to same-sex families (whether so formalised or not), the right to reproduce through surrogacy, and to adopt children.

A conception of love as intimacy rooted in privacy demands non-interference, because privacy, in its typical liberal iteration, is a right to be left alone.[100] It does not require the recognition of the relationships that result from

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91 Schalk and Kopf v. Austria, Application No. 30141/04, Council of Europe: European Court of Human Rights, (24 June 2010).

92 Karner v. Austria, Application No. 40016/98, Council of Europe: European Court of Human Rights (24 July 2003).

93 *Id*., ¶¶37, 41.

94 *Id*., ¶35.

95 *Id*., ¶41.

96 *Id*.

97 Schalk and Kopf v. Austria, Application No. 30141/04, Council of Europe: European Court of Human Rights (June 24, 2010).

98 *Id*., ¶61.

99 Scherpe, *supra* note 89.

100 For this view of privacy as non-interference, *see* Griswold v. Connecticut, 1965 SCC OnLine US SC 124; *See also* J. Braxton Craven Jr., *Personhood*: *The Right to be Let Alone*, 25(4) DUKE LAW JOURNAL 699 (1976).

love, and can, in fact, serve as an argument against recognition.[101] Yet the idea of love as constitutive of individual identity, and a challenge to oppressive social structures, read in conjunction with the declaration of the transformative goals of the Indian Constitution, demands positive action.[102] I would argue, therefore, that there is now an *obligation* upon legislative and judicial authorities to extend full citizenship and rights at par with heterosexuals, to the LGBTQ+ community. If the right to love is, indeed, essential to an individual's self-respect and her aspirations of self- actualisation, as the discussions above would indicate, a failure to give full recognition to every expression of the said love is an infringement of the right.

A counter-argument to the effect that decriminalisation of consensual non- heterosexual activity under §377 of the IPC is recognition enough, and there is no need for formal recognition of same-sex relationships, much less of their right to be parents, is foreseeable. In response, I would draw attention to the fact that the Supreme Court of India expressly held that while intimate, sexual relations were an aspect of LGBTQ+ identity, the issue at hand required a more holistic perspective, allowing the acceptance of LGBTQ+ persons as full members of society.[103] In other words, though reading down §377 was *necessary* to recognise the right of the LGBTQ+ community to love, it would not be *sufficient*.

Moreover, as previously discussed, by recognising love, and relationships based in love, as the anchor of individual identity, the Indian Supreme Court has made the ability to enter into such relationships, and have them recognised and sanctified by law, a crucial aspect of personhood. For most people, marriage, commitment, children, and family are not abstract legal concepts, but stages of human development and aspiration which give meaning to their personal lives. As Graeme Austin articulately argues, in withholding from the community, the ability to formalise their relationships, the law denies them access to symbols through which human beings order their lives, and envision relationships in their day to day existence.[104] At a practical level, such recognition is important to extend ancillary rights which flow from it, such as the right to inherit property upon death of a partner, or to seek maintenance on divorce, or the right to seek civil and criminal redress in the event of domestic violence, among others. Therefore, whether viewed from a deontological or consequentialist perspective, the argument that the decriminalisation of consensual non- heterosexual acts is sufficient to give effect to the LGBTQ+ community's right to love does not hold ground.

The formal recognition of queer relationships has the potential to diversify current legal understanding of 'family' in another way. It can challenge conventional, heteronormative relationship scripts, breaking down gendered

[101] *See* Thomas J.'s dissenting opinion in Obergefell v. Hodges, 2015 SCC OnLine US SC 6.

[102] This was implicitly recognised by Chandrachud J. in Navtej Singh Johar v. Union of India, (2018) 10 SCC 1,¶60.

[103] Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

[104] *See* Graeme W. Austin, *Family Law and Civil Union Partnerships—Status, Contract and Access to Symbols* (Victoria University of Wellington Legal Research Papers, Paper No. 35, 2012).

division of labour and departing from gender-specific norms through an active rejection of heteronormativity.[105] This queering and diversification of relationships, as a whole, creates a roadmap for the reform of orthodox relationships. When same-sex relationships demonstrate that it is possible to function and flourish outside the bounds of gender norms steeped in inequality, opposite- sex relationships can also be imagined free of these shackles.

As previously discussed, the challenge to §377 of the IPC, through the right to love, was also a challenge to hierarchising practices. The fall of §377 is, then, the logical first step to the breakdown of unequal relationship practices. As concerns the law, this could offer a chance to make opposite-sex relationships more egalitarian. A relevant starting point might be to think about the way care-related activities, such as raising children, and tending to the sick and elderly, are currently organised in families. Overwhelmingly in the traditional family, these responsibilities in addition to other uncompensated household chores fall to women, even though society as a whole requires and benefits from them.[106]

The Indian Supreme Court's use of 'love' in legal reasoning, therefore, has the potential to become a driver of justice. The changes envisaged in the preceding paragraphs are indubitably tectonic, but they are no more than a logical corollary to the jurisprudence of love already established. I would argue that if the Indian legal system is more than an anarchical jumble of meaningless declarations, these tectonic shifts are inevitable. All we need is time.

V. CONCLUSION

I have argued that the Supreme Court of India in Navtej Singh Johar v. Union of India,[107] contributed to constitutional jurisprudence in two ways. Firstly, it reiterated its autonomy-centric view of the 'right to love', previously discussed in cases such as Shafin Jahan v. Asokan K.M.,[108] and Shakti Vahini v. Union of India,[109] placing the right to love within the matrix of the right to privacy, dignity and the freedom of expression. Secondly, and more importantly, it employed love in legal reasoning, thereby articulating, for the first time, a 'jurisprudence of love' in India.

For the purposes of this paper, I defined the jurisprudence of love to mean the operationalisation of love to further the ends of justice. I discussed three aspects of such jurisprudence (the transformative potential of love, the practice of love that breaks down oppressive structures, and love as the anchor of individual

[105] *See* Ellen Lamont, *"We can Write our Scripts ourselves"*: *Queer Challenges to Heteronormative Courtship Practices*, 31(5) GENDER AND SOCIETY 624 (2017).

[106] *See* M.A. Fineman, *Cracking the Foundational Myths*: *Independence*, *Autonomy and Self-Sufficiency*, 8(13) JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW 13-29 (2000).

[107] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

[108] Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

[109] Shakti Vahini v. Union of India, (2018) 7 SCC 192.

identity), demonstrating how the decision in Navtej Singh Johar represented or articulated each of these aspects. In the final section of the paper, I argued that the jurisprudence of love, as established in the judgement has the potential to become the foundation for wide-ranging reforms in family law. With the decision in Arunkumar v. Inspector General of Registration,[110] it would appear that the process of diversification and democratisation of family law has already begun, and the Indian legal system is now obliged to carry the momentum forward. The complete recognition of personhood of the LGBTQ+ community requires access to methods of formal recognition of relationships and avenues of founding families on the same footing as opposite-sex relationships.

This is not to say that opposite-sex relationships should become the template for an exercise in integration. Instead, the aim to give the LGBTQ+ community access to symbols such of formal recognition (such as civil unions or marriage) and parenthood where they so desire, should become the first step in the larger project of diversifying what 'family' means in law. This would mean challenging and reforming the sexist, and often discriminatory gender politics of traditional heteronormative relationships.

The path to redefining established social institutions and demolishing oppressive social structures will undoubtedly be long and hard, but with the jurisprudence of love articulated in Navtej Singh Johar, the possibilities are endless.

[110] Arunkumar v. Inspector General of Registrations, 2019 SCC OnLine Mad 8779.