

# NAZ TO NAVTEJ: NAVIGATING NOTIONS OF EQUALITY

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*This paper explores the extent to which Navtej advanced the equality and non-discrimination jurisprudence in India. To do so, it places Navtej besides Naz and traces the parallels and divergences between the two decisions in their interpretation of the equality and non-discrimination provisions. The paper looks at the following themes in Navtej: higher standard of review; indirect discrimination; constitutional morality; intelligibility of differentia; and, transformative constitutionalism. It is argued that while Navtej did not entirely follow Naz, it brought into the Indian jurisprudence certain crucial, independent advancements in the understanding of equality and non-discrimination.*

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## I. INTRODUCTION

The Naz<sup>1</sup> to Navtej<sup>2</sup> trajectory is by now well known, and needs no introduction. At the crux of this line of cases is the colonial era provision – §377, Indian Penal Code, 1860 – which criminalised “carnal intercourse against the order of nature”, interpreted to include even consensual, non peno-vaginal sex, between adults.<sup>3</sup> The much celebrated judgment of the Delhi High Court in *Naz Foundation v. State (NCT of Delhi)* (‘Naz’), which read down §377 to exclude consensual, non peno-vaginal sex between adults, was followed by the disappointing

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<sup>1</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762.

<sup>2</sup> *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791.

<sup>3</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶4 (“Consent is no defense to an offense under S. 377 IPC and no distinction regarding age is made in the section”).

Supreme Court decision in *Suresh Kumar Koushal v. Naz Foundation*<sup>4</sup> ('Koushal'), which refused to grant a "miniscule fraction of the country's population"<sup>5</sup> their "so-called"<sup>6</sup> rights. That the Supreme Court in *Navtej* reversed *Koushal* was no surprise; the stinging criticism and the mobilisation that followed *Koushal* ensured that the outcome itself in *Navtej Singh Johar v. Union of India* ('*Navtej*'), though historic, was not unexpected.<sup>7</sup> A careful reading of *Navtej* however shows that the Supreme Court made unprecedented strides in the interpretation and application of the equality and non-discrimination provisions under Article 14 and 15 of the Constitution of India.

In this piece, I place *Naz* and *Navtej* side by side, and explore the notion of equality underlying the two judgments. *Naz* received critical acclaim for its interpretation of the equality provisions.<sup>8</sup> I examine to what extent *Navtej* retains the understanding put forth in *Naz*, and where it diverges from it. I argue that though the use of the equality provisions in *Navtej* does not entirely map onto the interpretation set out in *Naz*, *Navtej* makes crucial, independent advancements

<sup>4</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

<sup>5</sup> *Id.*, ¶ 43.

<sup>6</sup> *Id.*, ¶ 52.

<sup>7</sup> Nizam Pasha, *Section 377 Ruling may be Landmark, but SC is yet to Pass the Real Test*, September 13, 2018, available at <https://thewire.in/law/supreme-court-377-ruling> (Last visited on August 1, 2019) (describing the decision in *Navtej* as a low-hanging fruit).

<sup>8</sup> GAUTAM BHATIA, *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS* 40, 41 (2019); Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for all Minorities*, 2(3) NUJS LAW REVIEW (2009).

*Naz* has however also been critiqued. One of the reasons for its critique is its failure to adopt an intersectional approach. It is argued that decriminalisation is an inadequate remedy for the marginalised amongst the LGBTQ community. Decriminalisation, as the sole remedy, only benefits those who experience oppression along a singular axis—their sexual orientation. See also Siddharth Mohansingh Akali, *Learning from Suresh Kumar Koushal v. Naz Foundation through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements*, 31 BERKELEY J. GENDER L. & JUST. 121, 147, 154, 155, 165, 166 (2016); Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7(2) HEALTH AND HUMAN RIGHTS, 142-164, 156 (2004) (admitting that decriminalisation of same-sex sexual acts in private would have limited consequences for the wider queer community as for §377 would continue operate within public spaces, along with the existing range of nuisance laws found in the Indian Penal Code and the state Police Acts which could be used to harass and prosecute queer people in public spaces).

Another reason for *Naz*' critique is its excessive reliance on foreign precedent. See Akali, *supra* note 8, 169; Ashley Tellis, *Disrupting the Dinner Table: Re-thinking the 'Queer Movement' in Contemporary India*, 4(1) JINDAL GLOBAL LAW REVIEW, 145, 151 (2012).

*Naz* has also been critiqued for the prominence given to the right to privacy. See Akali, *supra* note 8, 171, 172; Darshan Datar, *Reconsidering Naz: The Theoretical Shortcomings of a Privacy Based Approach to Homosexuality*, February 3, 2014, available at <https://blogs.kcl.ac.uk/kslr/?p=483> (Last visited on August 1, 2019); Jason Keith Fernandes, *The Dilemma after the Decision: Strays thoughts after Gay Liberation*, *TEHELKA*, August 18, 2009, available at <http://derivishnotes.blogspot.com/2009/08/dilemma-after-decision-strays-thoughts.html> (Last visited on August 1, 2019); Ratna Kapur, *Multitasking Queer Reflections on the Possibilities of Homosexual Dissidence in Law*, 4 JINDAL GLOBAL LAW REVIEW 36, 53 (2012); Saptarshi Mandal, *'Right to Privacy' in Naz Foundation: A Counter-Heteronormative Critique*, 2 NUJS LAW REVIEW (2009); Zaid Al Baset, *Section 377 and the Myth of Heterosexuality*, 4(1) JINDAL GLOBAL LAW REVIEW (2012).

in the constitutional understanding of equality and non-discrimination. In some places it takes forward and substantiates holdings in *Naz*, while in others it puts forth new interpretations, championing a substantive notion of equality.

To make my argument, I first examine one of the existing doctrinal tests under Articles 14 and 15—the classification test—and its critiques. (Part II). This is important to set the context for how *Naz*, by strengthening the protection granted to “minorities and vulnerable groups” from “oppressive cultural norms” targeting them,<sup>9</sup> signaled a paradigm shift in the interpretation of these provisions. The other doctrinal test used to assess violations of Articles 14 and 15 is the arbitrariness test.<sup>10</sup> This test was used by the Delhi High Court in *Naz*,<sup>11</sup> and the Supreme Court in *Navtej*,<sup>12</sup> to read down §377. However, I do not examine this test, since the purpose of this piece is to set out how the understanding of equality evolved from *Naz* to *Navtej*. From my reading, though the reasons why §377 was held to be arbitrary varied in *Naz* and *Navtej*,<sup>13</sup> the content of the test remained largely constant across the two decisions.

<sup>9</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶ 107.

<sup>10</sup> The classification test, as will be shown below in Part II, has been subject to criticism, for embodying a formal understanding of equality, and a deferential standard of review. The arbitrariness test evolved in response to these criticisms, in *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3. It has been used in subsequent judicial decisions as well. For instance, see *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722; *Sharma Transport v. State of A.P.*, (2002) 2 SCC 188; *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

However, this test has been critiqued as being plagued by vagueness. See Tarunabh Khaitan, *Equality: Legislative Review under Article 14*, available at [https://www.academia.edu/25321692/Equality\\_Legislative\\_Review\\_under\\_Article\\_143](https://www.academia.edu/25321692/Equality_Legislative_Review_under_Article_143), 8 (Last visited on August 1, 2019); Shivam, *Arbitrariness Analysis under Article 14 with Special Reference to Review of Primary Legislation*, *ILI LAW REVIEW*, 184 (2016); Shankar Narayanan, *Rethinking “Non-Arbitrariness”*, 4 *NLUD STUDENT LAW JOURNAL*, 134 (2017); Bhatia, *supra* note 8, 48.

The arbitrariness test has also been critiqued for setting out a standard of equality detached from a fundamental tenet of equality law: the requirement for comparative disadvantage. See Khaitan, *supra* note 10, 5; Shivam, *supra* note 10, 188; Narayanan, *supra* note 10, 139. Thus, the status of the arbitrariness test as a standard for assessing violations of the equality and non-discrimination guarantee is contested within the literature, though courts have continued to apply it.

<sup>11</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶¶89, 90.

<sup>12</sup> *Misra CJ and Khanwilkar J. (Majority opinion) in Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶238, 239; *Nariman J. (Concurring opinion) in Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶82, 94; *Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶27, 29; *Malhotra J. (Concurring opinion) in Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶14.9.

<sup>13</sup> In *Naz*, the Court held that §377 was arbitrary because it criminalised private sexual relations between consenting adults without any evidence of serious harm to anyone else. *Misra CJ and Khanwilkar J.*, in the majority opinion in *Navtej*, held §377 to be arbitrary for being overbroad, by failing to make a distinction between consensual and non-consensual sexual acts between competent adults, with the former being “neither harmful nor contagious to society”. *Nariman J.*, in his concurring opinion in *Navtej*, held §377 to be arbitrary in light of evidence that “gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalised”. Further, the provision was held to be “excessive and disproportionate” because the punishment goes up to life imprisonment. Finally, *Nariman J.* pointed out that post the amendment of §375 in 2013, non peno-vaginal intercourse between a man and a woman cannot be penalised, but the same between a same sex couple can, contributing to the arbitrariness of §377. *Chandrachud J.*, in his concurring opinion, held that §377 is arbitrary because it is based on the moral notion that

I then explore the unique contributions made by Naz in advancing the interpretation of Articles 14 and 15, under the classification test (Part III). I go on to examine whether Navtej followed the path set out in Naz, pointing out certain similarities, and one major divergence, which I argue sets the equality jurisprudence backwards (Part IV). I then highlight how Navtej furthers the constitutional understanding of equality, especially noting where it travels beyond Naz to give teeth to the equality and non-discrimination provisions. I look at two crucial themes here: first, questioning the intelligibility of the stated differentia, and second, endorsing the transformative nature of the Constitution of India, and elaborating on the dual nature of the transformation envisaged. Through these themes, I show how Navtej contributes to developing a rich, substantive constitutional jurisprudence on equality in India (Part V).

## II. THE CLASSIFICATION TEST AND ITS CRITIQUE

Article 14 guarantees to all persons “equality before the law, and equal protection of the laws” within the territory of India. Article 15(1) provides that “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. Article 15 is considered “an instance and particular application of the right to equality which is generally stated in Article 14. Article 14 is the genus while Article 15 [is the] species”.<sup>14</sup>

Traditionally, the classification test has been used to examine violations of Articles 14 and 15.<sup>15</sup> This test recognises that laws will necessarily have to make classifications between persons, and thus subjects to constitutional scrutiny only those classifications that are *unreasonable*. To assess reasonability, this test examines whether: (a) there exists an *intelligible* differentia on the basis of which the classification is made, and (b) whether the differentia bears a *rational nexus* to the *object* of the classification [emphasis mine].<sup>16</sup>

The first limb of the classification test—the requirement of intelligible differentia—has historically embodied a formal understanding of equality, based on the Aristotelian notion of equality that advocates for equals be treated equally. By consequence, treating “unequals” differently does not violate the

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“intercourse which is lustful is to be frowned upon”, asking a section of Indian citizens that, “while love they may, the physical manifestation of their love is criminal” which is “manifest arbitrariness writ large”. Finally, Malhotra J., in her concurring opinion, held §377 to be arbitrary because it is too open-ended, and thus it could lead to misuse against members of the LGBTQ community. Thus, the reasons §377 was held to be arbitrary varied across Naz and the separate opinions in Navtej.

<sup>14</sup> Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶99.

<sup>15</sup> Tarunabh Khaitan, *Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement*, 50(2) JOURNAL OF INDIAN LAW INSTITUTE, 179, 192 (2008).

<sup>16</sup> State of W.B. v. Anwar Ali Sarkar, (1952) 1 SCC 1.

equality guarantee.<sup>17</sup> Reflecting this understanding, the Supreme Court, in *Air India v. Nergesh Meerza*<sup>18</sup> (‘Nergesh Meerza’), held,

“if equals and unequals are differently treated, no discrimination at all occurs so as to amount to an infraction of Article 14 of the Constitution. *A fortiori* if equals or persons similarly circumstanced are differently treated, discrimination results so as to attract the provisions of Article 14”.<sup>19</sup>

Under this test, as long as there is an existing division of people into two categories, there is an intelligible differentia between them. People in the two classes are therefore unequal and can be treated differently. This test however offers no scope for questioning this initial division.<sup>20</sup> For instance, in *Ram Krishna Dalmia v. S.R. Tendolkar*<sup>21</sup> (‘Ram Krishna Dalmia’), the Court held that the classification can be on different bases, “geographical, or according to objects or occupations or the like”, and the law would be constitutional if “on account of some special circumstances or reasons applicable to the [individual/group] and not applicable to others, the [individual/group] can be treated as a class”.<sup>22</sup> The Court, however, did not incorporate into the test a requirement to investigate whether the bases for classification—the “special circumstances or reasons”—are in themselves a product of inequality, meaning that even if they are, they satisfy the criteria of the classification test, which only requires that there be a classification or an existing division into two classes.

What this means in practice is aptly demonstrated in *Nergesh Meerza*, which involved a challenge to certain provisions of the Air India Employee Service Regulations creating a significant disparity between male and female crew with respect to service conditions. The Supreme Court, relying on these very differences in service conditions between men and women, held that there exists an intelligible differentia between the two categories. Though the Court noted that the work performed by the male and female crew-members was similar, it did not question their initial division into two categories. The Court thus failed to recognise that the initial classification – which was accepted as the intelligible differentia – was itself sex-based, and treated men and women unequally.

<sup>17</sup> Catherine A. MacKinnon, “*Sex Equality under the Constitution of India: Problems, Prospects, and ‘Personal Laws’*”, 4(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 182, 183 (2006); SANDRA FREDMAN, DISCRIMINATION LAW 8 (2011).

<sup>18</sup> *Air India v. Nergesh Meerza*, (1981) 4 SCC 335.

<sup>19</sup> *Air India v. Nergesh Meerza*, (1981) 4 SCC 335.

<sup>20</sup> It should be noted that this is only one of the critiques of this model of formal equality. I rely on this critique here, since it is the one most valid to the present context of the shift between Naz and Navtej. Other critiques of the formal equality model can be seen, for instance, at FREDMAN, *supra* note 17, 8- 14.

<sup>21</sup> *Ram Krishna Dalmia v. S.R. Tendolkar*, 1958 SCC OnLine SC 6.

<sup>22</sup> This formulation has been cited, and applied, in later decisions. See *Lachhman Das v. State of Punjab*, 1962 SCC OnLine SC 33.

In this manner, Nergesh Meerza applied the rule in *Ram Krishna Dalmia*: as long as a division exists, any law or rule adopting this division is immune from an equality challenge, as it is seen to embody an intelligible differentia. There is no inquiry into the intelligibility of this initial division. As MacKinnon notes, this equality approach “maps itself onto existing social hierarchies”, ratifying them rather than challenging them. It draws lines of difference where society has drawn them: “When reasonableness is established by mirroring society as it is, inequality is validated by an unequal status quo”.<sup>23</sup> The traditional classification test is therefore incapable of addressing “complex inequalities”.<sup>24</sup>

Take the example of a rule that allows promotions only when an employee has finished a specified uninterrupted period of work. On the face of it, there exists an intelligible differentia between employees who have completed, without interruptions, the specified period, and others who have not. However, a closer examination of the differentia reveals two things: *First*, though the rule does not make a facial classification on the basis of sex, a larger proportion of men will benefit from the rule in comparison to women, due to the existing socio-cultural environment in India where women are expected to perform a major share of the child-care responsibilities. Thus, women employees, especially of a certain age group, will find it difficult to complete the requisite period without interruptions, while men, of the same age group, will be able to meet this requirement. Under the traditional classification test as applied in India, this is irrelevant to the equality assessment. *Second*, the conceptualisation of an ideal employee as one who is able to complete a specified period of work without interruptions has been critiqued as being based on the “male norm”, set by men and modeled on the experiences of men, who usually do not have responsibilities of care (whether of children, the unwell, or the elderly).<sup>25</sup> It is therefore no surprise that the rule benefits men. If so, is the differentia between the two categories of employees actually intelligible, or does it merely reflect a social construct built on the experiences of the dominant social group? This, however, is not an assessment that is undertaken under the traditional classification test. Further, in failing to investigate the intelligibility of the stated differentia as the manifestation of a social construct, the classification test preserves existing social inequality. Stereotypes about women as mothers have historically been used to confine women to the home and away from the workplace; the unequal distribution of child-care responsibilities, which exists today, is a continued reflection of these stereotypes. By failing to question the differentia, the first limb of the classification test, as traditionally applied in India, preserves and legitimises these existing social hierarchies and norms, and furthers inequalities between men and women.

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<sup>23</sup> MACKINNON, *supra* note 17, 184, 187.

<sup>24</sup> BHATIA, *supra* note 8, 50.

<sup>25</sup> ANN PHOENIX & ANNE WOOLLETT, MOTHERHOOD: MEANINGS, PRACTICES AND IDEOLOGIES 195 (1991) (arguing that the patterns of work and nature of commitment expected from an ideal employee exclude those who have caring responsibilities, usually women).

The second limb of the classification test has been critiqued as a highly deferential standard of review, as it only requires that the intelligible differentia have a *rational nexus* with the *objective* of the classification.<sup>26</sup> A rigorous standard of review, Khaitan argues, ought to have three components. *First*, an assessment of the suitability of the measure employed to further the state objective, i.e., whether the specific measure can actually further the objective of classification. This is what is classification test. *Second*, even if the measure is suitable, it should be assessed whether it is necessary to achieve the objective, i.e., if there are alternative measures which achieve the objective to a similar extent, without infringing the said right (or infringing it to a lesser extent), then the measure, while suitable, is not necessary. *Third*, even if the measure is both suitable and necessary, it is important to balance competing interests – on one hand, the court should ask itself how important the right in question is, and how seriously the impugned measure would restrict it. On the other, the importance of the state interest in question needs to be examined, along with asking how effectively and to what degree this interest will be achieved by the impugned measure. So, if an important right is only slightly restricted towards achieving an important state interest that is substantially furthered, on balance, the impugned measure should be permissible.<sup>27</sup>

These three steps – suitability, necessity, and balancing – have been together termed “proportionality review”.<sup>28</sup> The existing standard of review under the classification test demands only that a rational nexus exists between the measure making the classification and the objective of the classification. It thus only incorporates the suitability aspect, and excludes the necessity and balancing components of the proportionality test, making the standard of review, under Articles 14 and 15, highly deferential.<sup>29</sup> In fact, as Khaitan notes, this standard of review has been so deferential that it has led the Supreme Court to remark that, “sustained attempt[s] to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Article 14 of the Constitution”.<sup>30</sup>

The classification test is therefore inadequate in its current form as it envisages a formal conception of equality that keeps in place existing social hierarchies, *and* it subjects the impugned rule to a deferential standard of review.

<sup>26</sup> See also Khaitan, *supra* note 15, 186; M.P. JAIN, INDIAN CONSTITUTIONAL LAW 858 (5th ed., 2004) (courts “show a good deal of deference to legislative judgment and do not lightly hold a classification unreasonable. A study of the cases will show that many different classifications have been upheld as constitutional”); Tarunabh Khaitan, *Equality: Legislative Review under Article 14*, available at [https://www.academia.edu/25321692/Equality\\_Legislative\\_Review\\_under\\_Article\\_143\\_8](https://www.academia.edu/25321692/Equality_Legislative_Review_under_Article_143_8) (Last visited on August 1, 2019); Bhatia, *supra* note 8, 45 (describing the equality jurisprudence under the classification test as “minimalistic”).

<sup>27</sup> Khaitan, *supra* note 15, 184.

<sup>28</sup> *Id.*, 183-185; See also Khaitan, Bhatia, *supra* note 8, 52 (describes proportionality as a “far more exacting standard than rational review”).

<sup>29</sup> Khaitan, *supra* note 15, 190.

<sup>30</sup> LIC of India v. Consumer Education & Research Centre, (1995) 5 SCC 482.

### III. NAZ FOUNDATION: ROLE IN ADVANCING EQUALITY

Naz has received critical acclaim for putting forth a “progressive re-interpretation of certain constitutional provisions, especially that of Article 15... [which] had remained a largely sterile provision, subsumed entirely by the general guarantee of equality under Article 14 and rarely given the distinct importance that it deserves”.<sup>31</sup> Similarly, it has been praised for “moving away from a formalistic vision of equality...[by initiating] a rich, complex jurisprudence of equality which was truer to Indian Constitution’s transformative purposes than what had come before”.<sup>32</sup> This section examines the unique contributions made by Naz in advancing the interpretation of equality under Articles 14 and 15, through *first*, championing a higher standard of review for certain acts of classification, *second*, offering a different understanding of the very act of classification, and *third*, redirecting close judicial attention to the objective of the classification.

#### A. HIGHER STANDARD OF REVIEW

As the previous section demonstrates, the classification test embodies a deferential standard of review. The arbitrariness test, though not considered in this piece, has also been critiqued for its deferential nature.<sup>33</sup> All classifications have traditionally been subject to these deferential tests, including those made on grounds set out specifically in Article 15(1). However, as Khaitan points out, there is a qualitative difference between an act of classification in general, and one based on the listed grounds under Article 15(1): for instance, there is a distinction between an act classifying sellers of tea and coffee, and an act classifying men and women. If so, it seems unreasonable that the state is held to the same standard of justification for both sets of classifications.<sup>34</sup> This is also out of sync with the constitutional text itself, which does not restrict the equality guarantee to the general provision under Article 14, but specifically prohibits the state from discriminating against persons on ground of their “religion, race, caste, sex, place of birth or any of them”, indicating heightened importance given to these grounds.<sup>35</sup> However, courts have traditionally ignored this, holding, as in *Madhu Kishwar v. State of Bihar*<sup>36</sup> (‘Madhu Kishwar’), that discrimination on ground of sex, a listed ground under Article 15(1), would be subject to the deferential classification test: “when women are discriminated only on the ground of sex ... the basic question is whether it is founded on intelligible differentia and bears reasonable or rational relation”.<sup>37</sup>

<sup>31</sup> Khaitan, *supra* note 15, 420, 421.

<sup>32</sup> Bhatia, *supra* note 8, 40, 41.

<sup>33</sup> Khaitan, *supra* note 15, 192.

<sup>34</sup> *Id.*, 196.

<sup>35</sup> *Id.*, 195, 196.

<sup>36</sup> *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125.

<sup>37</sup> *Id.*, ¶19.



*Anuj Garg v. Hotel Assn. of India*<sup>38</sup> ('Anuj Garg') offered a refreshing change to this trend by highlighting why the listed grounds under Article 15(1) should be treated differently. Anuj Garg struck down as unconstitutional a law that prohibited women from being employed in spaces serving alcohol for suffering from "incurable fixations of stereotype morality and conception of sexual role", and hence discriminating on the ground of sex.<sup>39</sup> In *Anuj Garg*, the Supreme Court held that legislations impinging on individual autonomy should be subject to deeper judicial scrutiny, to ensure that no law, in its ultimate effect, perpetuates the oppression of women. Personal freedom was held to be a "fundamental tenet which cannot be compromised", requiring a "heightened level of scrutiny" in cases of a measure infringing on autonomy.<sup>40</sup> Thus, the listed grounds under Article 15(1) were to be treated differently as they were incidents of autonomy of an individual.

Further, this emphasis on personal autonomy, and the requirement for heightened scrutiny, was linked to the special judicial role in case of laws reflecting oppressive cultural norms targeting minorities and vulnerable groups: "It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over".<sup>41</sup> Thus, the Court in *Anuj Garg* proposed a higher standard of scrutiny for measures that disadvantage a vulnerable group defined on the basis of a characteristic that relates to personal autonomy. This higher standard was identified as:

"whether the **legislative interference to the autonomy...is justified as a legitimate aim and proportionate** to the aim pursued<sup>42</sup> ...there should be a reasonable relationship of proportionality between the means used and the aim pursued.<sup>43</sup> [emphasis added]"<sup>44</sup>

Thus, *Anuj Garg* brought in the proportionality standard, shifting away from assessing only rational nexus and towards rigorous scrutiny. The decision in *Anuj Garg* was relied on in *Naz* to propose a higher standard of scrutiny with respect to the grounds listed in Article 15(1). The Court held that the animating principle behind the listed grounds under Article 15(1) is personal autonomy: "personal autonomy is inherent in the grounds mentioned in Article 15".<sup>45</sup> Since

<sup>38</sup> *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1.

<sup>39</sup> *Id.*, ¶44.

<sup>40</sup> *Id.*, ¶¶39, 44, 45.

<sup>41</sup> *Id.*, ¶39.

<sup>42</sup> *Id.*, ¶47.

<sup>43</sup> *Id.*, ¶49.

<sup>44</sup> Applying the proportionality test, the impugned provision was struck down as the measure was not *necessary* to ensure safety of women, in the face of less restrictive alternate measures which placed on the state the obligation to provide safer work environments, instead of preventing women from seeking employment within a specific industry.

<sup>45</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶112.

the listed grounds pertained to characteristics relating to personal autonomy, as per Anuj Garg, measures subjecting persons to disadvantage on the basis of those grounds would be subject to a higher standard of scrutiny: “The Court [in Anuj Garg] held that Article 15’s prohibition of sex discrimination implies the right to autonomy and self-determination, which places emphasis on individual choice. Therefore, a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny”.<sup>46</sup> This heightened standard of scrutiny requires that the state interest be “legitimate and relevant...and [the legislation]...be proportionate towards achieving the state interest.”<sup>47</sup>

Thus, Naz, like Anuj Garg, went beyond the deferential classification test, and advocated a higher standard of scrutiny based on the proportionality test. As set out above, the proportionality test usually involves assessing suitability of the measure (“rational nexus”), its necessity, and finally, the balancing of interests. However, it should be noted that the Court in Naz did not explicitly lay down the content of the proportionality test as involving these three steps. Yet, the very incorporation of the proportionality test as a standard of review for certain acts of classification signified a momentous shift away from the otherwise deferential standards used to assess state action violating the right to equality and non-discrimination.

Apart from incorporating the proportionality test for listed grounds under Article 15(1), the Delhi High Court in Naz also extended this heightened standard to those grounds “that are not specified in Article 15 but are analogous to those specified therein”.<sup>48</sup> To identify these analogous grounds, the Court once again relied on the principle of personal autonomy, holding that grounds analogous to the listed grounds “will be those which have the potential to impair the personal autonomy of an individual”.<sup>49</sup> Relying on jurisprudence of the Canadian<sup>50</sup> and South African<sup>51</sup> courts, personal autonomy was said to involve not just “immutable” characteristics that cannot be changed, but also those characteristics that are changeable only at “an unacceptable cost to personal identity”.<sup>52</sup>

This is a crucial holding, since Article 15(1) otherwise appears to contain a closed list of grounds, without a residual clause into which analogous

<sup>46</sup> *Id.*, ¶108; *Id.*, ¶113: “As held in Anuj Garg, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against “reasonableness” under Article 14 but be subject to “strict scrutiny””.

<sup>47</sup> *Id.*, ¶92.

<sup>48</sup> *Id.*, ¶112.

<sup>49</sup> *Id.*; For other principles used to deduce analogous grounds under comparative law, see FREDMAN, *supra* note 17, 130-139.

<sup>50</sup> *Corbiere v. Canada*, (1999) 2 SCR 203.

<sup>51</sup> *Willem M. Prinsloo v. Gerhardus Stephanus Van Der Linde*, 1997 SCC OnLine ZACC; *Jeanette Harksen v. Michael John Lane*, 1997 SCC OnLine ZACC 12.

<sup>52</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶¶102, 103.

grounds can be added.<sup>53</sup> Naz specifically concerned sexual orientation, not a listed ground under Article 15(1). The Court in Naz accepted the argument of the petitioner that:

“‘sex’ in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex- discrimination cannot be read as applying to gender simpliciter. The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning “normal” or “natural” gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex [emphasis added]”<sup>54</sup>

This indicates that in the specific context of Naz, ‘sexual orientation’ as a ground for discrimination was seen as included within ‘sex’, since both are based on stereotypes about gender roles. Despite this, the Court also identified the “common thread”<sup>55</sup> underlying the listed grounds – personal autonomy – and opened up the closed list under Article 15(1) to analogous grounds.<sup>56</sup> This is important for personal characteristics such as disability, or age, which cannot be directly read into existing rounds—like sexual orientation into sex—but which nevertheless are characteristics involving an individual’s autonomy. Thus, the Court in Naz not only accepted discrimination on ground of sexual orientation as part of discrimination on the basis of sex, but also set the course for the future by opening up the list of grounds that require a heightened scrutiny.<sup>57</sup>

Since Article 15(1) does not contain a residual clause within which to accommodate these analogous grounds (which cannot be read into the existing grounds in Article 15), it has been argued that the open-ended equality provision in Article 14 performs this function. Thus, as per Naz, for grounds explicitly listed under Article 15(1) and for grounds analogous to these listed grounds

<sup>53</sup> Article 15(1) reads, “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. It has a fixed list of grounds. Compare it to, for instance, §9(3), of the Constitution of South Africa, 1997, which reads, “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. The word “including” indicates that the list of grounds is open.

<sup>54</sup> Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶99.

<sup>55</sup> Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy and Dignity*, 2 NUJS LAW REVIEW 511, 514 (2009).

<sup>56</sup> Shreya Atrey, *Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15*, 16 THE EQUAL RIGHTS REVIEW 178, 179 (2016) (Pointing out that Naz challenged the view that the list of grounds under Article 15(1) is fixed).

<sup>57</sup> See Khaitan, *supra* note 8, 424, 425: “Opening up the scope of Article 15 to other analogous grounds (like disability) was not critical for the result of the case. Yet, given this ruling, all autonomy-related grounds can now claim the special protection of Article 15”.

– located within Article 14 – a heightened standard of scrutiny would be applicable. Through this, Naz advanced an interpretation of the Constitution that read the equality (Article 14) and non-discrimination (Article 15(1)) provisions together. It did so by incorporating the governing principles of the non-discrimination clause – which was more specific, but limited to a closed list of five ‘grounds’ – into the equality clause, which was more abstract, but covered all potential instances of disadvantageous or discriminatory legislative classification.<sup>58</sup>

This interpretation was unique as the interrelationship between Articles 14 and 15 had previously proceeded in the opposite direction, from the “abstract formulation” of equality under Article 14 to the more “specific formulation” under Article 15.<sup>59</sup> That the standard of review applicable to the listed grounds under Article 15(1) was the same as the standard under Article 14 (as in *Madhu Kishwar*) is an example of this one-way relationship. In *Naz*, the Court reversed this logic, and used the rationale underlying Article 15(1) to offer heightened protection for analogous classifications under Article 14 as well. The Court thus liberated Article 14 from the formalistic conception of equality that had “cribbed, cabined and confined” this provision within “traditional and doctrinaire limits”.<sup>60</sup> This role of Article 15(1) in interpreting Article 14 is also historically legitimate. The drafting history of the Constitution reveals that though Article 14 was initially placed away from Article 15(1), and alongside Article 21, it was then removed and placed before Article 15(1). This, *Bhatia* argues, suggests that the constitutional commitment to equality was always meant to be understood in terms of non-discrimination.<sup>61</sup> This vision of the drafters was brought to life in *Naz*.

Before moving on, it is important to note that personal autonomy, as a unifying principle underlying listed and analogous grounds of discrimination, has been critiqued. In its traditional form, the personal autonomy principle protected individuals from differential treatment on the basis of those characteristics that are immutable or cannot be changed.<sup>62</sup> This would include characteristics such as sex and race, which one is born with. However, immutability, as an indicator of personal autonomy, is a limited notion. Characteristics such as religion are arguably matters of an individual’s choice, and hence are not immutable or unchangeable, but are still fundamental to one’s autonomy.<sup>63</sup> Seemingly recognising this limitation of the notion of immutability, the Delhi High Court in *Naz* defines personal

<sup>58</sup> *Bhatia*, *supra* note 8, 53.

<sup>59</sup> *Id.*, 57.

<sup>60</sup> *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3, ¶10 (described the classification test as having “cribbed, cabined and confined” the notion of equality within “traditional and doctrinaire limits”, and therefore proposed the arbitrariness test as an alternative).

<sup>61</sup> *Bhatia*, *supra* note 8, 59-61.

<sup>62</sup> For instance, in *Corbiere v. Canada*, (1999) 2 SCR 203, ¶13 (the court identified the unifying principle underlying the listed grounds under §15 of the Canadian Charter of Rights and Freedoms, 1982: “It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable”).

<sup>63</sup> FREDMAN, *supra* note 17, 131.

autonomy as involving not just immutable characteristics, but also those characteristics that are changeable only at “an unacceptable cost to personal identity”.<sup>64</sup> In this sense, Naz put forward a broad notion of personal autonomy, going beyond immutability. However, even this expanded notion of personal autonomy has been critiqued for failing to take into account how the grounds of discrimination have been sites of disadvantage and exclusion.<sup>65</sup> Bhatia argues that Naz addresses this critique by defining the purpose of the non-discrimination provision in the Constitution as remedying group disadvantage, and linking the disadvantage to deprivation of personal autonomy.<sup>66</sup> Thus, though the Court in Naz explicitly identifies only personal autonomy as the unifying principle,<sup>67</sup> a reading of Naz on the whole suggests that non-discrimination (and equality) targets not just any violation of personal autonomy, but violations of autonomy of groups that have suffered from disadvantage and exclusion in the past.

## 1. Act of Classification

As noted in the previous section through the example of a rule granting promotions to employees only on completion of a specified, uninterrupted period of work, one of the drawbacks of the classification test is that it fails to take into account the impact of the classification. Though on the face of it the rule makes a classification based on period of work, the impact of that classification falls on female employees, and thus, in effect, the rule entrenches social hierarchy by reaffirming existing inequalities between men and women. The impact of the rule on an already disadvantaged or vulnerable class (here, women) is irrelevant to the traditional formulation of the classification test, which only requires an intelligible differentia (here, between employees who have completed the specified, uninterrupted period of work and those who have not) having a rational nexus to the objective of the classification (here, it could be claims of efficiency or expertise as a result of an uninterrupted period of work, or incentive for employees for completing the said period of work through a promotion). Thus, the traditional classification test fails to recognise that the rule, though facially not based on sex, is in effect entrenching differences between men and women by granting a greater proportion of men promotions.

§377, like the promotion rule, is facially neutral in that it makes a classification between persons engaging in “natural” and “unnatural” intercourse, irrespective of their sexual orientation. However, courts, while interpreting §377,

<sup>64</sup> Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶¶102, 103.

<sup>65</sup> Bhatia, *supra* note 8, 68.

<sup>66</sup> *Id.*

<sup>67</sup> The Court in Naz, as set out above, makes multiple references to the principle underlying grounds in 15(1) being personal autonomy: “personal autonomy is inherent in the grounds mentioned in Article 15” (¶112) or “The Court [in *Anuj Garg*] held that Article 15’s prohibition of sex discrimination implies the right to autonomy and self-determination, which places emphasis on individual choice” (¶108) or grounds analogous to the listed grounds “will be those which have the potential to impair the personal autonomy of an individual” (¶112).

have deemed sexual intercourse to be “natural” only if it is for the process of reproduction.<sup>68</sup> Thus, “natural” intercourse under §377 is heterosexual intercourse. As a result, the effect of §377 is to criminalise entirely forms of sexual expression and intimacy amongst same-sex couples. Naz recognises this, holding:

§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.<sup>69</sup>

Thus, in Naz, the Court looked closely at the very act of classification to determine whether it had an impact on vulnerable groups, and thus in effect classified on the basis of personal characteristics. This shift has two consequences: *first*, a reinterpretation of the act of classification to mean not just classification on the face of it, but also the classification in effect, due to differential impact on groups; *second*, a transition in the preliminary inquiry under Article 14 from the nature of the classification (whether based on an intelligible differentia, having a rational nexus to the object of the classification) to whether the law disadvantaged groups on the basis of their personal characteristics involving autonomy.<sup>70</sup> Applying this test to the promotion rule, it is obvious that the rule has an adverse impact on women – by denying them promotions – and in effect classifies on the basis of sex.

## 2. Legitimacy of the Objective of Classification

In Naz, the Court did not just accept the stated objective of the provision as given, and test whether the differentia bore a nexus to the objective, but instead interrogated the very legitimacy of the objective. In this regard, the Court held that “popular morality or public disapproval of certain acts” is not a constitutionally legitimate objective for restricting fundamental rights. The Court distinguished “popular morality...based on shifting and subjecting notions of right and wrong” from “constitutional morality derived from constitutional values”.<sup>71</sup> This, Bhatia argues, signifies a conceptual advance in Indian equality jurisprudence, since legislation that justified inequality by “invoking public hostility towards a class of people, based on characteristics related to personal autonomy, and which had the effect of stigmatising them and undermining their dignity, could

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<sup>68</sup> See *Khanu v. Emperor*, 1924 SCC OnLine Sind JC 49, which held that “the natural object of carnal intercourse is that there should be the possibility of conception of human beings”. See also *Lohana Vasantlal Devchand v. State*, 1967 SCC OnLine Guj 22, described as unnatural “imitative” sexual acts such as oral sex, and *Fazal Rab Choudhary v. State of Bihar*, (1982) 3 SCC 9 brought within §377 “sexual perversity”.

<sup>69</sup> *Naz Foundation v. State* (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶94.

<sup>70</sup> Bhatia, *supra* note 8, 56.

<sup>71</sup> *Naz Foundation v. State* (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶79.

not survive Article 14 scrutiny”.<sup>72</sup> It demonstrated the counter-majoritarian role of the judiciary in countenancing social exclusion,<sup>73</sup> and thus extended the constitutional prohibition on untouchability to “new avatars of disability based on sexual identity”.<sup>74</sup>

#### IV. NAVTEJ JOHAR: MAPPING ONTO NAZ

The previous section sketched the contributions made by Naz to the constitutional equality jurisprudence in India, highlighting its incorporation of a rigorous standard of review with respect to certain acts of classification, the introduction of a shift away from the form of the classification to its impact, and the use of the concept of constitutional morality as a touchstone for assessing the legitimacy of state objectives. This section closely maps Navtej onto Naz, to examine the similarities and differences in the notion of equality espoused across the two cases as against these three themes.

##### A. STANDARD OF REVIEW

Naz took two crucial steps forward with regard to standard of review. It recognised that classification on the basis of grounds listed under Article 15(1) is qualitatively different from other classifications, and hence should be subject to a higher standard of review. It then extended this higher standard, not just to the listed grounds alone, but also other grounds analogous to the listed grounds (though “sexual orientation” itself was seen as included within “sex”).

In Navtej, the Supreme Court, to various degrees, recognised the latter point. The majority opinion of Misra CJI and Khanwilkar J and the concurring opinion of Nariman J, did not make a ruling on Article 15(1), and instead held §377 unconstitutional under Articles 14, 21, and 19(1)(a). The concurring opinion of Justice Chandrachud J, in contrast, held that discrimination on ground of sexual orientation is a form of sex discrimination, since both are based on stereotypes governing gender norms:

“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, care-takers that are attracted to men – it is unlikely that such persons or society at large will accept that the idea that two men or

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<sup>72</sup> Bhatia, *supra* note 8, 55.

<sup>73</sup> Khaitan, *supra* note 8, 431.

<sup>74</sup> Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 NUJS LAW REVIEW 399 (2009).

two women could maintain a relationship<sup>75</sup>...Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The case for gay rights undoubtedly seeks justice for gays. But it goes well beyond the concern for the gay community. The effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes<sup>76</sup>.”

Thus, like Naz, Chandrachud J made a strong case for why discrimination on ground of sex includes discrimination on ground of sexual orientation, also cementing the role of the “anti-stereotyping principle” within Article 15(1).<sup>77</sup> However, Chandrachud J did not, as Naz did, address the issue of analogous grounds, possibly because it was not strictly necessary in this case. Baruah argues that reading sexual orientation into sex, while crucial, fails to recognise the saliency of sexual orientation as an independent source of identity and a ground of discrimination (rather than as part of sex). He does not deny the logic of the sex-based argument, but argues that it should be made clear that sexual orientation is “another glaring basis of unfair discrimination which human societies have engaged in”.<sup>78</sup> Chandrachud J’s arguments, while powerful, could obscure this salience, while also making it difficult for the future inclusion of other non-enumerated grounds, such as disability, and age, which cannot be read into any of the existing grounds, like sexual orientation can be read into sex.

Malhotra J., in her concurring opinion, offers an alternative perspective, mirroring the holding in Naz on analogous grounds. On the one hand, Malhotra J. accepts that “sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their ‘sexual identity and character’”.<sup>79</sup> On the other hand, though not necessary for the outcome in Navtej, she holds that the “underlying commonality between the grounds specified in Article 15” is ideas of “immutable status” – including grounds such as race, caste, sex, and place of birth, which are aspects over which a person has no control and hence are immutable – and “fundamental choice” – grounds such as religion, which are not unchangeable, but are choices central to an individual’s identity.<sup>80</sup> Thus, like Naz, Malhotra J. puts forward a broad notion of personal autonomy, not limited to immutability. On this basis, Malhotra J accepts that grounds analogous to the ones listed in Article 15(1) are those which have an “adverse impact on an individual’s personal autonomy, and is undermining of his personality”.<sup>81</sup> Thus, as

<sup>75</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶44.

<sup>76</sup> *Id.*, ¶52.

<sup>77</sup> *Id.*, ¶37.

<sup>78</sup> Baruah, *supra* note 55, 514.

<sup>79</sup> Malhotra J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶15.1.

<sup>80</sup> *Id.*, ¶15.2.

<sup>81</sup> *Id.*



in Naz, and in contrast to the decision of Chandrachud J., Malhotra J. opened up the close list in Article 15(1) to the inclusion of analogous grounds.

However, the Delhi High Court in Naz went one step further. Not only did it open up the closed list in Article 15(1), but it also recognised the unique status of the listed grounds and grounds analogous to them, and subjected classifications on the basis of these grounds to higher scrutiny. This was one of the most important contributions made by Naz, since it went beyond the otherwise deferential rational nexus standard of review. The Supreme Court in Navtej, however, did not follow Naz here. The majority decision,<sup>82</sup> and the three concurring decisions,<sup>83</sup> stuck to rational nexus, instead of shifting to a higher standard of review through proportionality. Nariman J was the only one who made reference to the dictum in Anuj Garg requiring proportionality review for measures disadvantaging vulnerable groups on ground of personal characteristics involving autonomy.<sup>84</sup> Despite this, Nariman J. did not import the proportionality standard, but continued to apply the classification test. It should be noted that the proportionality standard was not strictly necessary for reading down §377, as the provision would be unconstitutional under the classification test itself.<sup>85</sup> However, the main benefit of the higher standard of review would have been reaped in future cases by vulnerable minorities.<sup>86</sup> By failing to affirm Naz on this point, the Supreme Court in Navtej diverged from a crucial holding that contributed to the substantive understanding of equality espoused by Naz.

The use of a higher standard of scrutiny by Naz has been critiqued. Naz relied on Anuj Garg to develop this higher standard. However, post Anuj Garg, which was a two-judge bench decision of the Supreme Court, a Constitution Bench in Ashok Thakur v. Union of India<sup>87</sup> ('Ashok Thakur') held that a higher standard of scrutiny would not apply to affirmative action decisions. It has been argued that Ashok Thakur, being a higher bench decision, would prevail over Anuj Garg,<sup>88</sup> that Ashok Thakur was not restricted to affirmative action, and extended to all classifications;<sup>89</sup> and, that the "protective discrimination" measure in Anuj

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<sup>82</sup> Misra CJI and Khanwilkar J. (Majority opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶237.

<sup>83</sup> Nairma J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶94; Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶26-37; Malhotra J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶¶14.2-14.9.

<sup>84</sup> Nariman J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶¶144-147.

<sup>85</sup> In fact, the Court in Naz identified that §377 would be unconstitutional under any standard of review, not just a heightened one (Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶113).

<sup>86</sup> Khaitan, *supra* note 8, 427.

<sup>87</sup> Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.

<sup>88</sup> M.P. Singh, *Decriminalisation of Homosexuality and the Constitution*, 2 NUJS LAW REVIEW 376, (2009).

<sup>89</sup> Raghavan, *supra* note 74, 414.

Garg is a form of affirmative action, and hence could not be subject to higher scrutiny.<sup>90</sup>

Naz reconciled the two judgments, and in my opinion rightly so, by drawing a distinction between measures which disadvantage a vulnerable group and measures like affirmative action, which seek to assist them in achieving equality.<sup>91</sup> Measures which create or perpetuate the legal, social, and economic inferiority of vulnerable groups are to be subject to a higher standard of scrutiny, as against measures which seek to compensate such groups for disadvantages they have suffered, promote equal employment opportunities and advance full development of the “talent and capacities of our nation’s people”.<sup>92</sup> A measure like the “protective discrimination” measure in Anuj Garg falls into the first category, as it perpetuates subordination of women by prohibiting them from employment based on stereotypes, while affirmative action measures fall into the second category, in that they seek to enable vulnerable groups to overcome forms of historic disadvantage. In this sense, the heightened review standard does not make any of the listed grounds, or grounds analogous to them, “proscribed classifications”, which would mean that *any* classification on these grounds would be subject to rigorous review.<sup>93</sup> Instead, the heightened review standard applies only with respect to classifications that further disadvantage a vulnerable group on the basis of the listed grounds, or grounds analogous to them. This is a clear indication of a substantive understanding of equality, with the Court in Naz recognising that equality does not necessarily mean consistent treatment. The history of disadvantage and subordination experienced by certain groups necessarily implies that they be treated differently—through, for instance, affirmative action policies—to ensure “real and effective”<sup>94</sup> equality. Navtej represents a missed opportunity for a five-judge bench of the Supreme Court to put to rest these critiques, and harmoniously read together Anuj Garg, Ashok Thakur, and Naz to import a higher standard of review for certain acts of classification and thus contribute to the substantive notion of equality set out in Naz.

## 1. Act of Classification

Unlike its holding on a higher standard of review, Navtej followed, and to me furthered, the shift introduced in Naz from the form of the classification to its impact. Chandrachud J., in his concurring opinion, held that what is relevant in assessing the constitutionality of an impugned measure is not the “object of the state in enacting it”, but the “effect that the provision has on affected individuals and on their fundamental rights”, thus bringing within the scope of the

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<sup>90</sup> Singh, *supra* note 88, 376.

<sup>91</sup> Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶110.

<sup>92</sup> *Id.*, ¶109.

<sup>93</sup> *Id.*, ¶109: “In Anuj Garg, the Court, however, clarified that the heightened review standard does not make sex a proscribed classification.”

<sup>94</sup> Bhatia, *supra* note 8, 62.

Constitution “indirect discrimination”, where a facially neutral measure has an adverse impact on members of certain groups.<sup>95</sup>

Chandrachud J. assessed the wide-ranging impact §377 has on the LGBTQ community. At a prima facie level, it prevents them from engaging in physical and sexual expressions of intimacy, by terming these “unnatural” and criminalising them. However, as Narrain notes, homosexuality is about a lot more than the very sexual act; it is a question of one’s identity.<sup>96</sup> Chandrachud J. reflect this understanding, by examining closely the “expressive message”<sup>97</sup> conveyed by the continued existence of §377. §377 dictates that gay people are to be recognised only as criminals, typecasts “LGBTQ individuals as sex-offenders, categorising their consensual conduct on par with sexual offences like rape and child molestation”,<sup>98</sup> and perpetuates social prejudice and stigma against them.<sup>99</sup> Thus, though facially neutral, the wording of §377 is to “efface specific identities”. These identities, Chandrachud J holds, are “the soul of the LGBT community”.<sup>100</sup> By disrespecting their identities, §377 denies them equal citizenship.<sup>101</sup>

The fear of discrimination, stigma and violence accompanying §377 also prevents members of this community from attaining basic sexual rights and

<sup>95</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶41.

<sup>96</sup> Siddharth Narrain, *Lost in Appeal: The Downward Spiral from Naz to Koushal*, 6(4) NUJS LAW REVIEW, 580 (2013).

However, note that ethnographic discussions on same-sex behaviour in India contest the claim that homosexual behavior automatically connotes homosexual identity. For many “queer sub-alterns”, identity is more closely associated with familial roles, than sexual acts. Though they engage in sexual relations with persons of the same sex, they do not identify themselves as homosexual. See Shivananda Khan, *Culture, Sexualities, and Identities: Men who have Sex with Men in India*, JOURNAL OF HOMOSEXUALITY, 40:3-4, 99-115 (2001). See also, Akali, *supra* note 8, 157, 158: citing Khan, Akali argues, “the notion or practice of placing “sexual desire and a sexual sense of self as the center of a personal self arises out of Western constructions of the liberal self “as a distinct entity separate and separated from his/her family, kinship group, and social milieu.” In India, where family and community are traditionally more important than the self, MSMs do not necessarily construct their identities around their same-sex sexual behavior...in the Indian context, especially for lower-caste, lower-class men, “[i]dentities shift, change, and shape themselves according to context, place, social situation, need, and desire.” As a result, it is inappropriate “to fit Indian sexual and cultural histories as well as contemporary behaviors and identities into a Western sexual discourse.” These critiques suggest that sexual relations with a person of the same sex do not always denote homosexual identity. However, while this critique is crucial and should be kept in mind, it does not take away from the argument that §377 has a greater impact on persons with a homosexual identity. What the ethnographic literature suggests is that it has an impact not just on persons who identify as homosexual, but also *some* persons in heterosexual relationships, who express sexuality more fluidly. Acknowledging this however does not take away the impact §377 has on *all* persons who do identify as homosexual, who are prohibited from sexual intimacy, and whose identities are criminalised.

<sup>97</sup> Khaitan, *supra* note 26, 16-18 (noting the importance of the ‘expressive impact’ of a provision).

<sup>98</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶136.

<sup>99</sup> *Id.*, ¶51.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

health, resulting in increased prevalence of HIV/AIDS amongst members of this group.<sup>102</sup> Chandrachud J further takes into account the role of §377 in blackmail and assault of members of the LGBTQ community, both by society and by state institutions such as the police.<sup>103</sup> Homophobic attitudes make it almost impossible for these victims of abuse to access justice.<sup>104</sup> Chandrachud J makes reference to the loneliness experienced by members of the community due to absence of social support, causing “immense mental agony”, and placing them at the risk of taking their lives.<sup>105</sup> All these observations were made in the context of “real life narrations of sufferings of discrimination, prejudice and hate” experienced by members of this community.<sup>106</sup> Thus, Navtej provided space to voices that are otherwise ignored. In this manner, Navtej performed a comprehensive assessment of the impact of the provision, focusing not just on its *direct* impact (preventing sexual intimacy), but also its broader *material* impact (for instance, its impact on physical and mental health, and its use for harassment and blackmail) and its *expressive* or *symbolic* impact.<sup>107</sup>

In response to the use of the impact or effects test in Naz, Raghavan remarked: “one is skeptical about whether this argument will prevail before a cynical Supreme Court bench. There do not appear to be many cases in which a facially neutral law has been successfully challenged because it is enforced in a discriminatory manner”.<sup>108</sup> The Supreme Court in Navtej lay to rest this speculation, by holding that a facially neutral law can be challenged as discriminatory, marking the first time that the Supreme Court has explicitly recognised the concept of indirect discrimination.<sup>109</sup>

Chandrachud J also went further than Naz in developing the idea of indirect discrimination, by referring to comparative jurisprudence on the

<sup>102</sup> *Id.*, ¶¶71, 81, 83-87, 90. Chandrachud J. however acknowledges that the experiences of all homosexual individuals are not identical, and depends on their other social locations: “However, it is important to note that ‘sexual and gender minorities’ do not constitute a homogenous group, and experiences of social exclusion, marginalization, and discrimination, as well as specific health needs, vary considerably” (*Id.*, ¶72).

<sup>103</sup> *Id.*, ¶¶48, 51; Malhotra J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶16.3.

<sup>104</sup> Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶51.

<sup>105</sup> Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶¶49, 50, 93 noting the (“clear correlation between persecutory laws against LGBT individuals... leading to greater levels of depression, anxiety, self-harm, and suicide”).

<sup>106</sup> Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶¶49, 51, 80.

<sup>107</sup> Khaitan, *supra* note 26, 16 (laying down this categorization of the different forms of impact).

<sup>108</sup> Raghavan, *supra* note 74, 414.

<sup>109</sup> Gautam Bhatia, “Civilisation has been Brutal”: Navtej Johar, Section 377 and the Supreme Court’s Moment of Atonement, September 6, 2018, available at <https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/> (Last visited on August 1, 2019).

issue.<sup>110</sup> The rationale for recognising indirect discrimination, set out by the South African Constitutional Court in *City Council of Pretoria v. Walker*,<sup>111</sup> was cited by Chandrachud J: “The concept of indirect discrimination... was developed precisely to deal with situations... where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice”.<sup>112</sup> This directly corresponds to MacKinnon’s critique of the classification test as reinforcing existing social hierarchy by mapping onto it. The recognition of indirect discrimination moves away from this trend, by including within the equality assessment the impact of a provision on an already disadvantaged group, thus ensuring that a provision does not further existing social hierarchy.

However, the test for indirect discrimination in the Indian context is still unclear. The concept was first introduced in the United States decision of *Griggs v. Duke Power Co.*<sup>113</sup> (‘Griggs’), which outlawed measures that have a “disproportionate impact” on a certain group, and are thus “fair in form but discriminatory in operation”.<sup>114</sup> The United States Supreme Court however did not elaborate on what numerical proportion of a group should be affected for the measure to have a disproportionate impact on the group. This test then travelled across jurisdictions, and has been reiterated in various forms. For instance, the European Court of Justice in *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*<sup>115</sup> (‘Bilka’) held that indirect discrimination on the basis of sex exists when a measure excludes “a far greater number of women than men”. Thus, the test relied on in *Bilka* was not “disproportionate impact”, but whether the measure had an impact on a “far greater number” of one group over another. However, once again, there is no clarity about what constitutes a “far greater number” of one group. Further, what is the relevant pool of comparison? Consider the example of the promotion rule, which has an adverse impact on women. In this context, as Fredman notes, “should a comparison be drawn between all women and all men, or only between qualified women and qualified men, or between women and men who had actually applied for the job or promotion?”<sup>116</sup> Recognising these difficulties in establishing a numerical threshold, European Union Law – for instance, the Directive 2006/54/EC

<sup>110</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶ 43.

<sup>111</sup> *City Council of Pretoria v. Walker*, 1998 SCC OnLine ZACC 1.

<sup>112</sup> *Id.*, ¶43.

<sup>113</sup> *Griggs v. Duke Power Co.*, 1971 SCC OnLine US SC 47 (‘Griggs’). It should be noted that *Griggs* was a case under Title VII, Civil Rights Act, 1964. In *Washington v. Davis*, 1976 SCC OnLine US SC 105 (the United States Supreme Court refused to accept the concept of indirect discrimination within the Fourteenth Amendment of the Constitution). *Navtej*, in citing *Griggs*, does not reason why Indian constitutional jurisprudence on equality should deviate from that of the United States in this regard, but merely uses *Griggs* to import indirect discrimination into the Indian context.

<sup>114</sup> *Id.*, 431.

<sup>115</sup> *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61984CJ0170&from=EN> (Last visited on August 2, 2019).

<sup>116</sup> FREDMAN, *supra* note 17, 185.

of the European Parliament and of the Council of 5 July 2006 ('EU Directive')<sup>117</sup> – moved away from such thresholds, and defines indirect discrimination as “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex”.<sup>118</sup> This standard does not require the claimant to show that the measure disadvantaged a specific proportion of members of a specific group, avoiding difficulties involved in determining the proportion, and delineating the pool of comparison. Instead, the claimant is only required to show that the claimant, as a woman, was at a disadvantage in comparison to men.

What makes the decision of Chandrachud J. in *Navtej* confusing is that the opinion, while adopting indirect discrimination, refers to *Griggs*, *Bilka* and the EU Directive,<sup>119</sup> all of which set out different standards for assessing when a measure is indirectly discriminatory. At the same time, while conducting the actual impact assessment, Chandrachud J does not use any of these standards, but decides the issue of indirect discrimination with reference to the direct, material and expressive impact of §377. Further, Chandrachud J also does not set out when instances of indirect discrimination can be justified. In *Griggs*, for instance, which dealt with an admission test for employment, the Court held that the “touchstone” is “business necessity”, meaning that the employment practice can be justified, even if indirectly discriminatory, if shown to be related to job performance.<sup>120</sup> Acceptable justifications for indirect discrimination within Indian constitutional jurisprudence were however not set out in the concurring opinion of Chandrachud J. Thus, though the decision in *Navtej* settled the speculation post *Naz* about the status of indirect discrimination within the constitutional jurisprudence in India, further clarity is required on the test to assess the same.

## 2. Legitimacy of the Objective of Classification

Regarding the assessment of the objective of the classification, *Navtej* maps closely onto *Naz*. All the four decisions distinguished between public morality – which is inherently subjective – and constitutional morality, in assessing the legitimacy of the objective of classification.<sup>121</sup> Constitutional morality was defined as “the morality that has inherent elements in the constitutional norms and the

<sup>117</sup> *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006*, available at [https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0\\_036:en:PDF](https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0_036:en:PDF) (Last visited August 2, 2019).

<sup>118</sup> *Id.*, Art. 2(1)(b).

<sup>119</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶43.

<sup>120</sup> *Griggs*, *supra* note 113, 431.

<sup>121</sup> Misra CJ and Khanwilkar J. (Majority opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶111-123; Nariman J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶78, 80; Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶137, 141-144; Malhotra J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶14.5.

conscience of the Constitution”.<sup>122</sup> Emphasis was laid on the role of constitutional morality in “ushering in a pluralistic and inclusive society”<sup>123</sup> and maintaining the “heterogenous fiber in society”: “Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality”.<sup>124</sup> The “step-motherly treatment” of the LGBT community was identified as a facet of majoritarian social morality.<sup>125</sup> This majoritarian or social morality was also traced back to the Victorian era, and its “attendant puritanical moral values”<sup>126</sup> rooted in “Judeo-Christian morality [condemning] non- procreative sex”.<sup>127</sup>

## V. NAVTEJ JOHAR: GOING BEYOND NAZ

The previous section mapped Navtej onto Naz, and made three comparative observations: first, where Navtej did not go as far as Naz, by failing to endorse Naz’ holding on a higher standard of review for the listed grounds under Article 15(1) and grounds analogous to the listed grounds; second, where Navtej went further than Naz, by conducting a more comprehensive assessment of the impact of the provision and for the first time, providing Supreme Court approval to the concept of “indirect discrimination”; and third, where Naz and Navtej overlapped with regard to the object of the provision and the use of constitutional morality as a touchstone to assess the legitimacy of the state objective. This section looks at two crucial, independent advancements made by Navtej, going beyond Naz in furthering the constitutional understanding of equality.

### A. INTELLIGIBILITY OF DIFFERENTIA

While acclaimed as a historic verdict for the LGBTQ community, Naz has also been critiqued for failing to disrupt the prevalent, dominant heterosexual narrative. Existing literature critiquing Naz attributes this to its use of the right to privacy to read down §377. The right to privacy protects decision-making in the private sphere (as distinguished from the public sphere)— spatial privacy— and the exercise of private choices—decisional privacy. Though Naz makes reference to privacy in both these senses,<sup>128</sup> in its final holding, the Court read down §377 to exclude from its ambit consensual sexual acts between adults

<sup>122</sup> Misra CJI and Khanwilkar J. (Majority opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶118, citing with approval *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.

<sup>123</sup> *Id.*, ¶111.

<sup>124</sup> *Id.*, ¶116.

<sup>125</sup> *Id.*, ¶¶121, 123.

<sup>126</sup> Nariman J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶78.

<sup>127</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶¶15, 137.

<sup>128</sup> Danish Sheikh, *Privacy in Public Spaces: The Transformative Potential of Navtej Johar v. Union of India*, CRIMINAL LEGALITIES IN THE GLOBAL SOUTH (2019); Mandal, *supra* note 8, 536.

“in private”.<sup>129</sup> This use of the spatial notion of privacy has been critiqued as benefiting only the privileged amongst the LGBTQ community, who have access to private spaces; the rights of lower caste members from socio-economically disadvantaged backgrounds, who often do not have such access, remain unprotected.<sup>130</sup>

However, and more crucially for my argument, the language of the right to privacy has been also been critiqued for failing to promote social acceptance of, and respect for, homosexual behaviour. As Datar notes:

“In many ways, the privacy-based approach in Naz leads to the binary of *hetro v. homo*, continuing to be the backdrop for the homosexual subjects struggle for equality and liberty against the repression of non- heterosexual practices in the private sphere. The decision simply served to shift the binary of *homo v. hetro* into the bedroom, it did not break it, the homosexual is still not equal to the heterosexual, and the privacy based approach simply re-establishes the inferiority of the homosexual to some extent by keeping him/her in the bedroom. Hence, the homosexual exists in the bedroom, absent from the public spaces that are largely still majoritarian and heterosexual in their sexual orientation. Furthermore, liberation when viewed through the prism of privacy has an emphasis of protection against hate; it doesn’t break the narrative that causes hate...privacy as a right is more a protection against persecution than an empowerment to break discrimination and acceptance that sexual minorities both crave and require.”<sup>131</sup>

Mandal similarly argues that privacy-based interventions play only a limited role in “counter-heteronormative struggles”, since they leave notions of ‘natural’ and ‘unnatural’ sexualities unexamined, irrespective of whether privacy is conceived as spatial or decisional privacy.<sup>132</sup> Baset observes that within the overwhelmingly heterosexist social context in India, “the right to privacy does not ensure inclusion [of queer Indians] into the moral public”.<sup>133</sup> Kapur also remarks that Naz maintains and legitimises heteronormativity because it is “largely based on the right to privacy”.<sup>134</sup>

<sup>129</sup> Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶132, (“We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution”).

<sup>130</sup> Akali, *supra* note 8, 143, 171; Fernandes, *supra* note 8.

<sup>131</sup> Datar, *supra* note 8.

<sup>132</sup> Mandal, *supra* note 8, 525.

<sup>133</sup> Baset, *supra* note 8, 101.

<sup>134</sup> Ratna Kapur, *Beyond Male and Female, The Right to Humanity*, April 19, 2014, available at <https://www.thehindu.com/opinion/op-ed/beyond-male-and-female-the-right-to-humanity/article5926142.ece> (Last visited on August 1, 2019).



Comparing the Supreme Court decision in *National Legal Services Authority v. Union of India*<sup>135</sup> (‘NALSA’) to Naz, Kapur argues that NALSA is a “dynamic decision” because it embedded “the rights of transgender persons primarily within the right to equality in the Indian Constitution”, unlike Naz, which relied on privacy.<sup>136</sup> Similarly, Mandal wonders how the “privacy argument” became the pre- eminent legal strategy for decriminalisation cases world over, instead of “other more established legal concepts such as equality”.<sup>137</sup> These authors thus suggest that the rights to equality and non-discrimination would, unlike the right to privacy, disrupt the dominant heterosexist order.

In fact, Naz did rely on the right to equality and non-discrimination, in addition to the right to privacy. However, I argue that the manner in which the right to equality and non-discrimination is used in Naz suffers from the same limitation as the right to privacy, in that it fails to interrogate the “naturalness” of heterosexuality.

Though Naz set out a higher standard of review—the proportionality test – for listed grounds, and grounds analogous to the listed grounds, the Court in Naz ultimately used the classification test to hold §377 unconstitutional. To reiterate, the classification test has two limbs: the existence of (a) intelligible differentia, and (b) rational nexus between the differentia and the objective of the provision. The differentia here was the distinction drawn within §377 between “natural” and “unnatural” carnal intercourse. In Naz, the Court did not challenge the intelligibility of this differentia, and thus failed to question the labeling of certain sexual acts as “unnatural”. The intelligibility test was an opportunity for the Court to do so, which the Court did not utilise. Instead, taking the differentia as given, the Court directly went onto assessing the nexus between the differentia and the objective of the provision, and held that there exists no nexus:

“the legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private. The second legislative purpose elucidated is that §377 IPC serves the cause of public health by criminalising the homosexual behaviour. As already held, this purported legislative purpose is in complete contrast to the averments in NACO’s affidavit. NACO has specifically stated that enforcement of §377 IPC adversely contributes to pushing the infliction underground, make risky sexual practices go unnoticed and unaddressed. §377 IPC thus hampers HIV/AIDS prevention efforts”.<sup>138</sup>

<sup>135</sup> *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

<sup>136</sup> Kapur, *supra* note 134.

<sup>137</sup> Mandal, *supra* note 8, 526.

<sup>138</sup> *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762, ¶92.

In the absence of a rational nexus, §377 fell short under the second limb of the classification test, and thus was held to violate the equality guarantee under the Constitution.

The outcome in *Naz* is certainly praiseworthy. However, by failing to use the intelligibility test to interrogate the dominant social order, and the dichotomy between “natural” and “unnatural” forms of sexual intercourse, *Naz*, in effect, resurrected the “myth of heterosexuality”, and cemented its omnipresence as an “uncontested...eternalised” fact.<sup>139</sup> The reasoning of the Court in *Naz* did not challenge the designation same-sex intimacy as “unnatural”; it only held that such forms of sexual expression could not be criminalised. Thus *Naz* did little to eradicate the stigma of homosexuality.<sup>140</sup> In this sense, *Naz* failed to create “meaningful liberation” for subordinated queers in India, by failing to question patriarchy, gender binaries, and others ways in which power oppresses vulnerable subjects in India.<sup>141</sup>

In contrast, Chandrachud J., in his concurring opinion in *Navtej*, uses the intelligibility test to question the labeling of certain sexual acts as “unnatural”:

“At the very outset, we must understand the problem with the usage of the term ‘order of nature’. What is ‘natural’ and what is ‘unnatural’? And who decides the categorization into these two ostensibly distinct and water-tight compartments?<sup>142</sup> [emphasis added]...the ‘naturalness’ and omnipresence of heterosexuality is manufactured by an elimination of historical specificities about the organisation, regulation and deployment of sexuality across time and space.” It is thus this “closeting of history” that produces the “hegemonic heterosexual” - the ideological construction of a particular alignment of sex, gender and desire that posits itself as natural, inevitable and eternal. Heterosexuality becomes the site where the male sexed masculine man’s desire for the female sexed feminine woman is privileged over all other forms of sexual desire and becomes a pervasive norm that structures all societal structures<sup>143</sup>.”

<sup>139</sup> Baset, *supra* note 8, 92, 93.

<sup>140</sup> Shamnad Basheer et al., *Section 377 and the ‘Order of Nature’: Nurturing ‘Indeterminacy’ in the Law?*, 2 NUJS LAW REVIEW 436 (2009) (“the *Naz* Foundation judgment does little by way of eradicating the social stigma of homosexuality. In fact, it continues to condemn it by labeling it an ‘unnatural’ sexual activity”).

<sup>141</sup> Kapur, *supra* note 8, 36, 53.

<sup>142</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶28. However, it is important to note that Chandrachud J is the only judge amongst the five-judge bench who took this line of argument. Further, concurring opinions are not binding, and do not constitute precedent for future cases (Vrinda Bhandari et al., *An Analysis of Puttaswamy: The Supreme Court’s Privacy Verdict*, 11 INDRASTRA GLOBAL 2 (2017)).

<sup>143</sup> *Id.*, ¶29.

Citing Menon,<sup>144</sup> Chandrachud J. holds that the idea of “normal sexuality” is a “cultural and social construct”, created and maintained by those who benefit from the distinction.<sup>145</sup> The existing heteronormative framework recognises only sexual relations that conform to social norms, and delegitimises sexual relations outside this framework.<sup>146</sup> Chandrachud J. thus concludes: “it is difficult to locate any intelligible differentia between...terms such as ‘natural’ and ‘unnatural’.”<sup>147</sup>

Through this, Navtej gives teeth to the classification test, and uses it to probe the intelligibility of the stated differentia. In this form, the otherwise formal classification test takes on a substantive hue. If the reasoning in Navtej is followed, a classification between groups that merely maps onto existing inequalities can be scrutinised to assess its intelligibility. Applying this holding to the promotion rule, the intelligibility of the differentia it embodies – between an ideal employee as one who completes an uninterrupted period of work, and a deviant employee as one who does not – can be interrogated as reflecting a social construct, built on the experiences of men, benefiting men, and maintained by men.

Heteronormativity dictates that heterosexual intercourse is natural and homosexual intercourse is not, leading to one group of persons being treated unequally; §377 maps onto this inequality, and is a product of it. In Naz, the Court read down §377 without unsettling what lies at the root of the provision. Navtej, on the other hand, subverts the logic of the provision, by contesting the natural-unnatural distinction—the “hetero v. homo binary”—and by identifying its origin within heteronormative social structures. In this manner, Navtej strengthens the first limb of the classification test, representing a shift away from a formal understanding of equality, and thus proving to be a better ally for “counter-heteronormative struggles” than Naz.

## B. TRANSFORMATIVE CONSTITUTIONALISM

The previous section argues that Navtej invigorated the classification test in ways Naz did not. Though Navtej did not take forward Naz’s holding on a higher standard of review for certain grounds and thus left the rational nexus limb of the classification test untouched, Navtej used the intelligible differentia limb to dispute the dichotomy between natural and unnatural forms of sexual intercourse. Through this, Navtej took a step towards using the rights to equality and non-discrimination as tools to challenge existing structures of oppression

<sup>144</sup> NIVEDITA MENON, “HOW NATURAL IS NORMAL? FEMINISM AND COMPULSORY HETEROSEXUALITY”, IN *BECAUSE I HAVE A VOICE, QUEER POLITICS IN INDIA* (2005).

<sup>145</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India* (2018) 1 SCC 791, ¶31.

<sup>146</sup> *Id.*, ¶57.

<sup>147</sup> *Id.*, ¶29.

– heteronormativity being one of them – enhancing the potential of these rights as instruments of transformation.

This interpretation of the classification test adopted by Chandrachud J in *Navtej* aligns closely with the vision of the Constitution as a transformative document. Naz does make brief reference to the idea of transformative constitutionalism, holding that the fundamental rights enshrined in the Constitution are meant to foster a “social revolution” by creating an egalitarian society where all citizens are equally free from coercion by the state, such that liberty is not the privilege of a few.<sup>148</sup> However, *Navtej* furthers this idea of social transformation as the principle underlying the Constitution by using the notion in its interpretation of constitutional provisions. The strengthening of the classification test in *Navtej* through its usage in contesting social structures labeling one form of intercourse as “unnatural” is an example of such use.

Misra CJI and Khanwilkar J., in their majority opinion, emphasise the “transformative and evolving nature” of the “dynamic and tireless” right of equality.<sup>149</sup> Speaking directly to the notion of transformative constitutionalism, they hold that:

“the ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution... the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy... The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better”.<sup>150</sup>

They identify the role of the Constitution and the Court as protecting the interests of those who have been subject to “humiliation, discrimination, separation and violence” by the State and society at large, sometimes including their own family.<sup>151</sup> They highlight that the Indian Constitution differs from other constitutions, which assume that all are equal and in so doing simply entrench existing inequalities.<sup>152</sup> Achieving equality within this transformative project therefore requires “eradication of systemic forms of discrimination and material disadvantage” in order to allow people to “realise their full human potential within positive

<sup>148</sup> *Naz Foundation v. State* (NCT of Delhi), 2009 SCC OnLine Del 1762, ¶80.

<sup>149</sup> Misra CJI and Khanwilkar J. (Majority opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶85.

<sup>150</sup> *Id.*, ¶95.

<sup>151</sup> *Id.*, ¶89.

<sup>152</sup> *Id.*, ¶100. Here, the majority opinion makes reference to the holding of the South African Constitutional Court in *Bato Star Fishing (P) Ltd. v. Minister of Environmental Affairs and Tourism*, 2004 SCC OnLine ZACC 6.

social relationships”.<sup>153</sup> This is a strong indicator of a substantive vision of equality. Under a formal approach, in the context of existing inequalities between two groups, the two classes would not be alike, and hence could be treated differently. A substantive approach to equality, reflected in Navtej, has the potential to recognise that the existing division into different classes is itself a product of inequality, and thus needs to be addressed rather than reinforced.

Chandrachud J. similarly identifies the vision of the Constitution framers as addressing the “histories of suffering of those who suffered oppression and a violation of dignity”.<sup>154</sup> The Constitution of India, Chandrachud J. observes, was

“burdened with the challenge of “drawing a curtain on the past” of social inequality and prejudices... The Indian Constitution... was an attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society. All citizens were to be free from coercion or restriction by the state, *or* by society privately”.<sup>155</sup>

Through this, Chandrachud J makes clear that the goal of transformative constitutionalism is not just the transformation in the relationship between individuals and the state, but also between individuals.<sup>156</sup> In this sense, the Indian Constitution seeks a “thorough reconstruction of State and society itself”, recognising that in the context of the “layered sovereignty” in Indian society, the State is not the only locus of power.<sup>157</sup> Thus, protecting the rights of LGBTQ individuals is not just about guaranteeing their rights within the constitutional scheme but requires a “vision of...what it means for the majority”.<sup>158</sup> In its transformational role, the Constitution thus questions, and attempts to resolve, the prevailing notions of sex and gender and the dominance of some groups over others.<sup>159</sup> Through this, the Court in Navtej takes a step towards correcting centuries of stigma and prejudice associated with the LGBTQ community,<sup>160</sup> and thus sets a course for the future.<sup>161</sup> This represents an advance over the approach adopted in Naz. Though Naz in its

<sup>153</sup> *Id.*, ¶104.

<sup>154</sup> Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶138.

<sup>155</sup> *Id.*, ¶138.

<sup>156</sup> *Id.*, ¶52.

<sup>157</sup> Bhatia, *supra* note 8.

<sup>158</sup> Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶145.

<sup>159</sup> *Id.*, ¶153.

<sup>160</sup> Nariman J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶79; Misra CJ and Khanwilkar J. (Majority opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶3 (“We have to bid adieu to the perceptions, stereotypes and prejudices deeply ingrained in the societal mindset so as to usher in inclusivity in all spheres and empower all citizens alike without any kind of alienation and discrimination”).

<sup>161</sup> Chandrachud J. (Concurring opinion) in Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶7.

outcome read down §377, its reasoning, as has been pointed out in its critiques, did not attempt to disrupt the “hetero v homo binary”; instead, it focused on ensuring inclusivity by accommodating sexual minorities into the existing heteronormative social structure. Navtej, in contrast, through its vision of the Constitution as a transformative document, and the use of this vision in constitutional interpretation, takes steps towards displacing this social structure.

Unlike Naz which recognises the rights of the LGBTQ community to privacy, equality and non-discrimination, Navtej recognises that merely granting sexual minorities these constitutional rights is not sufficient; for these rights to be “real and effective”, structures of oppression that label certain forms of behaviour, and consequently certain groups of persons, as the “other” have to be addressed. The continued existence of §377 in its historic form undoubtedly legitimises these structures. However, the reading down of §377 alone – as in Naz – is not sufficient to dismantle them. This is reflected in critiques of Naz that argue that Naz benefits only the privileged amongst the LGBTQ community; vulnerable members continue to be subject to harassment and abuse.<sup>162</sup> To address the needs of the vulnerable, the heteronormative structure of society (which intersects with other axes of oppression such as gender, caste, class, disability and age) has to be targeted. Navtej, through its use of the principle of transformative constitutionalism and the strengthened classification test, takes a step in this direction.

At the same time, it is important to recognise that judicial decisions are not “quick fixes”,<sup>163</sup> and often do not, on their own, lead to social transformation. In fact, the Court in *Navtej* acknowledges this, with Chandrachud J. observing that constitutional values will be imbibed by society only gradually.<sup>164</sup> Constitutional courts are merely “external facilitators” of this process, by offering a safeguard against both excess of state power and the democratic concentration of power with certain groups.<sup>165</sup>

## VI. CONCLUSION

In conclusion, Navtej does not entirely follow Naz in its holdings, with its major divergence being the failure to set out a higher standard of review for certain acts of classification based on the listed grounds under Article 15(1), and grounds analogous to those. However, Navtej in its own way bolsters the classification test, by using the intelligible differentia standard to contest the existing

<sup>162</sup> See *supra* note 8.

<sup>163</sup> Fernandes, *supra* note 8 (critiquing the tendency to regard the judiciary as overseers of justice: “Rather than take the long and bitter path via social contestation for the rights that were in question, activists have very often chosen to skip this crucial negotiation and get a quick fix via a decision of the Court. As necessary as some of these decisions may have been, indeed, like the case of 377, what it has done is to contribute to the emptying of politics from the civil space”).

<sup>164</sup> Chandrachud J. (Concurring opinion) in *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶140.

<sup>165</sup> *Id.*, ¶144.

dichotomy between natural and unnatural sexual intercourse. Though the outcome in Naz and Navtej was the same – the reading down of §377 – Navtej, in its reasoning, responds to the criticisms of Naz. Instead of merely offering individuals the freedom to engage in same-sex relations in the private, Navtej moves towards challenging the heteronormativity of the public sphere. The interpretation given to the intelligible differentia standard by Chandrachud J. plays a significant role in this. Finally, through its use of the principle of transformative constitutionalism, Navtej provides a guiding principle for future cases of constitutional interpretation, shedding light on the ability of the Constitution to produce a “social catharsis”.<sup>166</sup>

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<sup>166</sup> *Id.*, ¶155.