

LESBIAN, GAY, BISEXUAL AND TRANSGENDER HUMAN RIGHTS IN INDIA: FROM NAZ FOUNDATION TO NAVTEJ SINGH JOHAR AND BEYOND

*Robert Wintemute**

Prof. Robert Wintemute, first authored an article for the NUJS Law Review back in 2011. The article titled ‘Same-sex Love and Indian Penal Code §377: An Important Human Rights Issue for India’ was published in Volume 4, No. 1 (p. 31-65), focusing on the human rights issue concerning the criminalisation of same-sex marriage under §377, was written in the aftermath of the Delhi High Court reading down the provision and advocated the affirmation by the Indian Supreme Court of the Delhi High Court’s position. The article went on to become one of the academic articles to be cited by the Supreme Court of India when it finally read down §377 in 2018. In this article, Prof. Wintemute revisits the journey of §377, outlining the key takeaways from the discussions in Navtej Singh Johar v. Union of India, the decision of the Supreme Court of India which ultimately decriminalised same-sex intercourse under §377. A version of this article has also been published as a chapter in the book titled Human Rights in India, (Satvinder S. Juss (Satvinder Singh) ed., 1st ed.) published by Routledge (2019).

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* Professor of Human Rights Law, King’s College London, United Kingdom.

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I. INTRODUCTION

‘Justice delayed’ is not always ‘justice denied’. In some cases, it is much better than ‘no justice at all’. The Supreme Court of India’s reading down of §377 of the Indian Penal Code (‘IPC’), prohibiting “carnal intercourse against the order of nature”, on September 6, 2018 is an excellent example of ‘much better late than never’ and, perhaps, ‘could not have happened sooner’. The litigation that led to the judgment in *Navtej Singh Johar v. Union of India* (‘Johar’)¹ began as Writ Petition No. 7455, filed in the Delhi High Court by the Naz Foundation in December 2001.² Nearly seventeen years later, after two decisions of the Delhi High Court, and five decisions of the Supreme Court of India, the criminal law that continued to stigmatise more queer persons than any other in the world, has ceased to apply to consenting adults in private. This paper will describe the sequence of judgments that preceded Johar, analyse the Supreme Court’s reasoning in Johar, and consider the potential impact of Johar, both on the criminal law beyond India, and in India beyond the criminal law.

II. NAZ FOUNDATION IN THE DELHI HIGH COURT

The Naz Foundation’s writ petition in 2001 stressed on the harmful effects of §377 on public health, i.e., on the non-governmental organisations’ work to teach “men who have sex with men” to protect themselves against HIV infection. The writ petition argued that, “unless the self-respect and dignity of sexual minorities is restored by doing away with discriminatory laws such as §377, it will not be possible to promote HIV/AIDS prevention in the community—the consequences of which are disastrous”.³ On September 2, 2004, the Delhi High Court dismissed the petition because the Naz Foundation did not have the standing to challenge §377. It stated “(W)e find there is no cause of action as no prosecution is pending against the petitioner. Just for the sake of testing the legislation, a petition

¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
² See Shalini Nair, *Many Ups and Downs in Battle Against 377*, *THE INDIAN EXPRESS*, January 11, 2018, available at <https://indianexpress.com/article/explained/many-ups-and-downs-in-battle-against-ipc-section-377-homosexuality-lgbtq-5019604> (Last visited on December 12, 2019); See also Maria Thomas, *Timeline: The Struggle Against Section 377 Began Over Two Decades Ago*, *QUARTZ INDIA*, available at <https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights> (Last visited on December 12, 2019).
³ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶2.

cannot be filed”.⁴ On February 3, 2006, the Supreme Court disagreed on the need for a prosecution,⁵ and sent the case back to the Delhi High Court: “(T)he matter does require consideration and is not of a nature which could have been dismissed on the ground afore- stated”.⁶

After a 12-day hearing in the autumn of 2008,⁷ the Delhi High Court (speaking through the Ajit Prakash Shah C.J. and S. Muralidhar J.) published its judgment on July 2, 2009.⁸ The Delhi High Court noted that the Union of India had contradicted itself: “The Ministry of Home Affairs (MHA) sought to justify the retention of §377 IPC, whereas the Ministry of Health & Family Welfare insisted that continuance of §377 IPC has hampered the HIV/AIDS prevention efforts”.⁹ Civil society was represented by Voices against Section 377 IPC ... a coalition of 12 organisations that represent child rights, women’s rights, human rights, health concerns as well as the rights of same sex desiring people including those who identify as (LGBT).¹⁰ During the proceeding, Voices against Section 377 IPC presented “documented instances of exploitation, violence, rape and torture suffered by LGBT persons”.¹¹

The Delhi High Court considered “the right to live with dignity and the right of privacy”, as dimensions of Article 21 of the Constitution of India (no deprivation of “life or personal liberty except according to procedure established by law”), holding that “§377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 ... (and) denies a gay person a right to full personhood which is implicit in notion of life under Article 21”.¹² The Delhi High Court then turned to Article 14 (“equality before the law” and “equal protection of the laws”):

“§377 ... is facially neutral ..., but in its operation it does end up unfairly targeting a particular community. ... (The) sexual acts which are criminalised are associated more closely with ... the homosexuals as a class. §377 ... has the effect of viewing all gay men as criminals. ... (T)he discrimination caused to MSM

⁴ See *Paperbook*, Shekhar Seshadri v. Suresh Kumar Koushal, Curative Petition (C) No. of 2014 in Review Petition (C) Nos. 221 of 2014, 13, available at https://orinam.net/377/wp-content/uploads/2014/04/CurativePetition_MentalHealth.pdf (Last visited on December 12, 2019)

⁵ The European Court of Human Rights did not require a prosecution in *Dudgeon v. United Kingdom*, 1981 ECHR 5, ¶41. The US Supreme Court required a prosecution in *Lawrence v. Texas*, 2003 SCC OnLine US SC 73 (2003).

⁶ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶6.

⁷ See *Notes of Proceedings*, *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, February 23 to March 27, 2012, Supreme Court of India, 3, available at http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf (Last visited on December 12, 2019).

⁸ *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762.

⁹ *Id.*, ¶11.

¹⁰ *Id.*, ¶19.

¹¹ *Id.*, ¶21.

¹² *Id.*, ¶48.

and gay community is unfair and unreasonable and, therefore, in breach of Article 14 ...”¹³

As for Article 15 (no discrimination “on grounds only of religion, race, caste, sex, place of birth”), the Court ruled that “sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15”, including “discrimination of one citizen by another in matters of access to public spaces”.¹⁴ The Court did not find it necessary to deal with Article 19, including freedom of expression, and instead left the question open.¹⁵ In conclusion, it declared “§377 IPC, insofar it criminalises consensual sexual acts of adults in private, (is) violative of Articles 21, 14, and 15 of the Constitution. By ‘adult’ we mean everyone who is 18 years of age and above”.¹⁶

The Delhi High Court’s judgment was celebrated in India and around the world. On the map of criminalising countries, India’s colour had changed. However, were these celebrations premature? For a non-Indian observer, it was not obvious how a judgment of the Delhi High Court (which has jurisdiction over only around 2% of India’s population) could settle the question of the constitutionality of §377 for the entire country. What if one of the 23 other High Courts (for example, the Allahabad, Bombay, Calcutta, or Madras High Court) disagreed with the Delhi High Court’s conclusion? Absent a ruling by the Supreme Court, there would have been doubt even if there had been no appeal. The (divided) Union of India decided not to appeal, which in some legal systems would have ended the case, because no third party would have had standing to defend the criminal law.¹⁷ However, Suresh Kumar Koushal and another (“citizens of India who believe they have the moral responsibility and duty in protecting cultural values of Indian society”)¹⁸ were allowed to appeal to the Supreme Court, through a special leave petition which became a civil appeal (“Koushal”).

III. KOUSHAL IN A TWO-JUDGE SUPREME COURT OF INDIA

After a 15-day hearing in February and March 2012, a two-judge bench of the Supreme Court (speaking through G.S. Singhvi J. and Sudhansu Jyoti Mukhopadhaya J.) published its judgment on December 11, 2013. It concluded that §377 “does not suffer from the vice of unconstitutionality and (that) the declaration made by the (Delhi High Court) is legally unsustainable”.¹⁹ The Supreme Court relied heavily on the fact that the IPC had been amended around thirty times since

¹³ *Id.*, ¶¶94, 98.

¹⁴ *Id.*, ¶104.

¹⁵ *Id.*, ¶126.

¹⁶ *Id.*, ¶132.

¹⁷ See *Hollingsworth v. Perry*, 2013 SCC OnLine US SC 69.

¹⁸ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶16.

¹⁹ *Id.*, ¶80.

1950, including with regard to provisions on rape in 2013, but that §377 had not been amended (especially in light of the Union of India's decision to not appeal the Delhi High Court's judgment): "This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision".²⁰

Unlike the Delhi High Court, the Supreme Court found that "§377 IPC does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation".²¹ It was posited that there was insufficient evidence in the record that "homosexuals, gays, etc., are being subjected to discriminatory treatment either by the State or its agencies or the society",²² and because §377 classified on the basis of conduct, it did not suffer from "the vice of arbitrariness and irrational classification," and did not deny "equality before the law" or "equal protection of the laws," or discriminate on the ground of sex, contrary to Articles 14 and 15.²³ Moreover, the Delhi High Court was said to have "overlooked that a miniscule fraction of the country's *population* constitute lesbians, gays, bisexuals or transgenders and in (the) last ... 150 years less than 200 persons have been prosecuted ... and this cannot be made sound basis for declaring that section *ultra vires* the provisions of Articles 14, 15 and 21 ...".²⁴

Turning to Article 21, the Supreme Court observed that "(t)he right to privacy... has been read into Article 21 through an expansive reading of the right to life and liberty".²⁵ Yet the Court did not ask itself whether "privacy" includes private sexual activity, and whether criminalisation of such activity requires a strong justification. Instead, it dismissed the argument that §377 is used "to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community," because "this treatment is neither mandated by the section nor condoned by it ... (T)he mere fact that the section is misused by police authorities and others is not a reflection of (its unconstitutionality)".²⁶ It also considered irrelevant the international and comparative "privacy" precedents cited by the Delhi High Court:

"In its anxiety to protect the so-called rights of LGBT persons and to declare that §377 IPC violates the right to privacy ..., the Delhi High Court has extensively *relied upon the judgments of other jurisdictions*. Though these judgments ... are informative in relation to the plight of sexual minorities, we feel that they

²⁰ *Id.*, ¶45.

²¹ *Id.*, ¶60.

²² *Id.*, ¶63.

²³ *Id.*, ¶65.

²⁴ *Id.*, ¶66 (emphasis added).

²⁵ *Id.*, ¶70.

²⁶ *Id.*, ¶76.

cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature”.²⁷

As will be seen below, Naz Foundation and other parties opposed to §377 were very unlucky when these two judges were assigned to hear Koushal. Most cases in the Supreme Court of India are decided by only two judges (compared with a minimum of five in the Supreme Courts of Canada and the United Kingdom), and further review is rarely possible. For a non-Indian observer, what appears to be missing in India’s court system is a layer of regional Courts of Appeal between the High Courts and the Supreme Court. Should six or eight Courts of Appeal (perhaps one for every three or four High Courts, taking into account the populations of different states) be created to reduce the appellate caseload of the Supreme Court, and perhaps also to relieve it of its original jurisdiction? A redistribution of judicial resources could allow cases to be heard by a single High Court judge, with an appeal (with leave) to a three-judge bench of the Court of Appeal, and then (with leave) to a five-judge bench of the Supreme Court. If a reduction in the caseload of the Supreme Court were to make it possible, a five-judge bench in all cases could help to increase the consistency of the Supreme Court’s judgments, and reduce the effect of “the luck of the draw”.

IV. NALSA IN A TWO-JUDGE SUPREME COURT OF INDIA

The most striking features of the Koushal judgment were its insistence on, firstly, that a “miniscule fraction of the country’s population” did not deserve protection under the Constitution of India; and secondly, that international and comparative law is irrelevant in interpreting the Constitution of India. On April 15, 2014, a two-judge bench of the Supreme Court (speaking through K.S. Radhakrishnan J. and A.K. Sikri J.) published its judgment in National Legal Services Authority (‘NALSA’) v. Union of India, which concerned not §377 but “the constitutional and other legal rights of the transgender community”.²⁸ The position taken in NALSA was the polar opposite of Koushal with regard to these two questions of firstly, constitutional protection of minorities; and secondly, international and comparative law.

With regard to the size of the transgender population, Sikri J. wrote: “Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These (transgenders), *even though insignificant in numbers*, are still human beings and therefore they have every right to enjoy their human rights”.²⁹ As for international and comparative sources, Radhakrishnan J. considered them in detail. He cited national legislation and case

²⁷ *Id.*, ¶77 (emphasis added).

²⁸ National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶20 (per K.S.P. Radhakrishnan J.).

²⁹ *Id.*, ¶129 (per A.K. Sikri J.); *see also Id.*, ¶53 (“though a minority”) (per K.S.P. Radhakrishnan J.).

law (including from Pakistan and Nepal), the 2002 judgment of the European Court of Human Rights (‘ECtHR’) in *Christine Goodwin v. United Kingdom*, European Union legislation and case law, a resolution of the European Union’s European Parliament, and the civil-society-initiated Yogyakarta Principles:³⁰

“We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of ... “guarantee to equality and non-discrimination” on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, (must or should?) be applied in India as well.

...

... Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting (them), they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding... principles. ... (A) constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, *though a minority*, especially when their rights have gained universal recognition and acceptance.

... Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution(,) to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on (transgender) and the International Conventions, including Yogyakarta (P)inciples, ... must be recognised and followed ...”³¹

After considering the international and comparative sources, the two-judge bench of the Supreme Court in *NALSA* reached dramatically different conclusions from the two-judge bench of the Supreme Court in *Koushal*:

“... Discrimination on the ground of sexual orientation or gender identity ... impairs equality before law and equal protection of law and violates Article 14

...

³⁰ *Id.*, ¶¶25-45, 76-78 (per K.S.P. Radhakrishnan J.) (emphasis added).

³¹ *Id.*, ¶¶46, 43, 59 (per K.S.P. Radhakrishnan J.).

... The discrimination on the ground of ‘sex’ under Articles 15 and 16 ... includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.

... Article 19(1)(a) ... states that all citizens shall have the right to freedom of speech and expression, which includes one’s right to expression of his self- identified gender ... through dress, words, action or behaviour... No restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) (e.g., “decency or morality”)...

... Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21...

... Gender identity ... forms the core of one’s personal self, based on self identification, not on surgical or medical procedure ...”³²

To protect the constitutional rights of India’s transgender community, the Supreme Court made a sweeping declaration:

“129. We, therefore, declare:

- (1) Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
- (2) Transgender persons’ right to decide their self identified gender is also upheld and the Centre (quasi-federal government) and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
- (3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments. ...
- (4) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as ... depression, suicidal tendencies, social stigma, etc. and any

³² *Id.*, ¶¶ 62, 66, 69, 75, 82 (per K.S.P. Radhakrishnan J.).

insistence for (sex-reassignment surgery) for declaring one's gender is immoral and illegal.

- (5) Centre and State Governments should take proper measures to provide medical care to Transgenders in the hospitals and also provide them separate public toilets ...
- (6) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
- (7) Centre and State Governments should take steps to create public awareness so that Transgenders will ... be not treated as untouchables. ...³³

V. PUTTASWAMY IN A NINE-JUDGE SUPREME COURT OF INDIA

The contradictory approaches in *Koushal* and *NALSA* made the constitution of a five-judge bench of the Supreme Court possible. That likelihood became a virtual certainty when, on August 24, 2017, in *K.S. Puttaswamy v. Union of India*,³⁴ ('Puttaswamy') an exceptional nine-judge bench of the Supreme Court (which has up to thirty one judges who generally sit in two-judge benches) made an order declaring: "The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution (of India)." In addition to the four-page "Order of the Court", the nine judges wrote six separate opinions totaling 543 pages.

A challenge to a national identity card scheme gave rise to the finding of a constitutional right to privacy. Although the Court's focus was informational privacy and data protection, five of nine judges commented on the potential application of the right to privacy to §377. The opinion of Chandrachud J., writing for Khehar C.J., Agrawal J., Nazeer J., and himself, concluded (emphasis added):

"Privacy is the constitutional core of human dignity. ... *Privacy includes at its core* the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and *sexual orientation*. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy".³⁵

³³ *Id.*, ¶135.

³⁴ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

³⁵ *Id.*, ¶323 (emphasis added) (per D.Y. Chandrachud, J.).

Under the heading “Discordant Notes”, Chandrachud J. discussed Koushal and rejected the reasons given by the two-judge bench: the size of India’s LGBT minority (“a miniscule fraction of the country’s population”), the irrelevance of legal developments outside India, and the small number of prosecutions under §377. On the contrary, Chandrachud J. wrote:

“The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. ... Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution”.³⁶

He added:

“The view in Koushal that the (Delhi High Court) had erroneously relied upon international precedents ... is ... unsustainable. ... (The) rights (of LGBT persons) are not ‘so-called’ but are real rights founded on sound constitutional doctrine. ... Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination. ... Koushal presents a *de minimis* rationale when it asserts that there have been only two hundred prosecutions for violating §377. The *de minimis* hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. ... The chilling effect ... poses a grave danger to the unhindered fulfilment of one’s sexual orientation, as an element of privacy and dignity. ... Consequently, we disagree with the manner in which Koushal has dealt with the privacy-dignity based claims of LGBT persons ... Since the challenge to §377 is pending ... before a (five-judge) Bench ..., we would leave the constitutional validity to be decided in an appropriate proceeding”.³⁷

³⁶ *Id.*, ¶144 (per D.Y. Chandrachud, J.).

³⁷ *Id.*, ¶¶145-147 (per D.Y. Chandrachud, J.).

Kaul J. agreed with the criticisms of Koushal made by the four judges: “One’s sexual orientation is undoubtedly an attribute of privacy”.³⁸ With five of nine judges expressly disagreeing with Koushal, it seemed almost certain that the five-judge bench in Johar would “read down” §377, and consign to history blanket criminalisation in India of certain forms of same-sex sexual activity.

VI. NAVTEJ SINGH JOHAR IN A FIVE-JUDGE SUPREME COURT OF INDIA

After a four-day hearing that ended on July 17, 2018, the five-judge bench of the Supreme Court published its 493-page judgment in *Navtej Singh Johar v. Union of India*³⁹ very quickly, less than eight weeks later, on September 6, 2018. For a non-Indian observer, what was unusual about the case that finally “read down” §377 was that it was not the original case brought by the Naz Foundation, which is still the subject of a pending curative petition. Exercising its original jurisdiction, the Supreme Court ruled on a set of new writ petitions filed after Koushal by individuals affected by §377.⁴⁰ Similar original jurisdiction does not exist in Canada, the UK or the USA, where new writ petitions would not have been possible. The new writ petitions caused the media spotlight to shift from the team of lawyers and others supporting the Naz Foundation case (who had stuck with it since 2001 and consulted widely across the LGBT community to make it a collective effort)⁴¹ to the new petitioners (who appeared to have ‘jumped on the bandwagon’). On the other hand, it could be said that the stories of the new petitioners helped to humanise the case further.⁴² As long as the contributions of everyone who contributed to the victory are acknowledged, most people who fought against §377 would not care which writ petition the Indian Supreme Court used as the vehicle to end its long and harmful reign.

As in Koushal, the Union of India did not attempt to defend the constitutional validity of §377 (as applied to “consensual acts of adults in private”), and instead “(left) the same to the wisdom of (the Supreme Court)”.⁴³ However,

³⁸ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶647 (per Sanjay Kishan Kaul J.).

³⁹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

⁴⁰ See *5 Petitioners Who Challenged Section 377*, ECONOMIC TIMES, September 6, 2018, available at <https://economictimes.indiatimes.com/news/politics-and-nation/5-petitioners-who-challenged-section-377/navtej-singh-johar/slideshow/65700685.cms> (Last visited on December 13, 2019).

⁴¹ See Vivek Diwan, *Celebrating the Long Journey that has Led to this Pride*, THE WIRE, November 25, 2018, available at <https://thewire.in/lgbtqia/delhi-pride-parade-section-377> (Last visited on December 13, 2019); *A Community Effort: The Battle Against S377*, available at <http://orinam.net/377/background-of-sec-377/community-effort-battle-against-s377/> (Last visited on December 13, 2019); Vivek Diwan, *On the Verge of a Kind of Freedom: Ridding India of Section 377*, ARC INTERNATIONAL, August 16, 2018, available at <https://arc-international.net/blog/on-the-verge-of-a-kind-of-freedom-ridding-india-of-section-377/> (Last visited on December 13, 2019).

⁴² Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶49-50.

⁴³ *Id.*, ¶46 (per Dipak Misra J.).

third-party interveners provided the Court with standard arguments against decriminalisation: §377 prohibits acts that involve “abusing the organs” and are contrary to the constitutional concept of dignity;⁴⁴ “persons indulging in unnatural sexual acts which have been made punishable under (§377) are more susceptible and vulnerable to contracting HIV/AIDS”;⁴⁵ “the family system ... will be in shambles, the institution of marriage will be detrimentally affected and rampant homosexual activities for money would tempt and corrupt young Indians into this trade”;⁴⁶ “the political, economic and cultural heritage of those countries (that have decriminalised) are very different from India which is a multicultural and multi-linguistic country”;⁴⁷ “decriminalising ... would run foul to all religions practised in the country”;⁴⁸ “(p)rohibition against carnal intercourse involving penetration into non-sexual parts of the body does not constitute discrimination as laws based on biological reality can never be unconstitutional”;⁴⁹ “‘sexual orientation’ ... is alien to (the Indian) Constitution and ... cannot be imported ... (without) a constitutional amendment”;⁵⁰ and “decriminalisation ... will open a floodgate of social issues ... as same sex marriages would become social experiments with unpredictable outcome”.⁵¹ These arguments were dismissed or ignored.

As for the wide range of arguments accepted by the Supreme Court, I will organise the authorities they relied on as follows: constitutional protection of minorities; international and comparative law; social change and the living Constitution; sexual orientation, sexual activity, and choice; rights to dignity and privacy; right to health; right to freedom of expression; right to equality; justifications for criminalisation; and conclusions and remedies.

A. CONSTITUTIONAL PROTECTION OF MINORITIES

The Johar bench rejected with impatience Koushal’s exclusion of “minuscule minorities” from the protection of the Constitution of India. Dipak Misra C.J. (writing for himself and A.M. Khanwilkar J.) observed that “it is expected from the courts ... to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality”.⁵² The Court protects “the constitutional rights of the citizens, *howsoever small that fragment of the populace maybe*. The idea of number, in

⁴⁴ *Id.*, ¶49 (per Dipak Misra J.).

⁴⁵ *Id.*, ¶53 (per Dipak Misra J.).

⁴⁶ *Id.*, ¶54 (per Dipak Misra J.).

⁴⁷ *Id.*, ¶55 (per Dipak Misra J.).

⁴⁸ *Id.*, ¶56 (per Dipak Misra J.).

⁴⁹ *Id.*, ¶62 (per Dipak Misra J.).

⁵⁰ *Id.*, ¶69 (per Dipak Misra J.).

⁵¹ *Id.*, ¶74 (per Dipak Misra J.).

⁵² *Id.*, ¶131 (per Dipak Misra J.).

this context, is meaningless”⁵³ Dipak Misra C.J. described Koushal’s reference to LGBT persons as “a very minuscule part of the population” as “perverse” and “violative of the equality principle” in Article 14.⁵⁴ He further observed that “(T) his Court is not concerned with the number of persons belonging to the LGBT community ... and must not hesitate in striking down (a) provision of law on the account of it being violative of the fundamental rights of certain citizens, *however minuscule their percentage may be*”.⁵⁵ Indeed, “the Courts must step in whenever there is a violation of the fundamental rights, *even if the right(s) of a single individual is/are in peril*”.⁵⁶

Nariman J. emphatically rejected the idea that, because the legislature is free to amend §377, the courts should not intervene: “The very purpose of the fundamental rights chapter ... is to withdraw the subject of liberty and dignity of the individual and place (it) beyond the reach of majoritarian governments so that constitutional morality can be applied... to give effect to the rights ... of ‘discrete and insular’ minorities”.⁵⁷ The size of the LGBT population and the number of prosecutions under §377 was stated to be irrelevant.⁵⁸ Further, Malhotra J. added: “Fundamental Rights are guaranteed to all citizens alike, irrespective of whether they are a numerical minority. ... (W)hile the majority is entitled to govern; the minorities ... are protected by the solemn guarantees of (fundamental) rights ... under Part III”.⁵⁹ Chandrachud J. wrote in the same vein: “Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life”.⁶⁰

B. INTERNATIONAL AND COMPARATIVE LAW

Similarly, the Supreme Court bench that decided Johar had no doubt, contrary to the view of the Koushal bench, felt that international and comparative law should be considered in interpreting the Constitution of India. Chandrachud J. observed that “the Indian Penal Code must be brought into conformity with both the Indian Constitution and the rules and principles of international law that India has recognised. Both make a crucial contribution towards recognising the human rights of sexual and gender minorities”.⁶¹ He added that, “(o)ver the past several decades, international and domestic courts (outside of India) have developed a strong body of jurisprudence against discrimination based on sexual orientation,”⁶²

⁵³ *Id.*, ¶132 (per Dipak Misra J.) (emphasis added).

⁵⁴ *Id.*, ¶181 (per Dipak Misra J.).

⁵⁵ *Id.*, ¶183 (per Dipak Misra J.) (emphasis added).

⁵⁶ *Id.*, ¶268.8 (per Dipak Misra J.) (emphasis added); *See also id.*, ¶244 (“the citizenry, howsoever small”).

⁵⁷ *Id.*, ¶352 (per R.F. Nariman, J.).

⁵⁸ *Id.*, ¶367 (per R.F. Nariman, J.).

⁵⁹ *Id.*, ¶643.5 (per Indu Malhotra, J.).

⁶⁰ *Id.*, ¶610 (per D.Y. Chandrachud, J.).

⁶¹ *Id.*, ¶529 (per D.Y. Chandrachud, J.).

⁶² *Id.*, ¶530 (per D.Y. Chandrachud, J.).

and therefore, included “an analysis of comparative jurisprudence from across the world”.⁶³ He expressed that although “socio-historical contexts differ from one jurisdiction to another”, “the overwhelming weight of international opinion ... reflects a growing consensus towards sexual orientation equality. We feel inclined to concur with the accumulated wisdom reflected in these judgments, not to determine the meaning of ... the Indian Constitution, but to provide a ... confirmation of our conclusions ...”⁶⁴

The international and comparative materials⁶⁵ cited by the Court in *Johar* included the 1957 report of the Wolfenden Committee on decriminalisation in England and Wales,⁶⁶ as well as criminal law decisions of the European Court (formerly Commission) of Human Rights,⁶⁷ the Supreme Court of the United States,⁶⁸ the United Nations Human Rights Committee,⁶⁹ and courts in Belize, Ecuador, Fiji, Hong Kong, South Africa, and Trinidad & Tobago.⁷⁰ As in *NALSA*, the Supreme Court also cited the civil society initiated Yogyakarta Principles. Nariman J. described them as “conform(ing) to our constitutional view of the fundamental rights of the ... persons who come to this Court”, and as “giv(ing) further content to the fundamental rights contained in Articles 14, 15, 19 and 21”.⁷¹ In particular, Chandrachud J. cited Principle 33 on the right to be free from criminalisation.⁷²

C. SOCIAL CHANGE AND THE LIVING CONSTITUTION

Would the views of those who drafted the Constitution of India in 1950 preclude protection of LGBT persons? Misra C.J. and Khanwilkar J. made it clear that they would not:

“... We emphasise on the role of the constitutional courts in realising the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters. ...

... It is the duty of the courts to realise the constitutional vision of equal rights in consonance with the current demands and

⁶³ *Id.*, ¶561 (per D.Y. Chandrachud, J.).

⁶⁴ *Id.*, ¶563 (per D.Y. Chandrachud, J.).

⁶⁵ Among the law journal articles collecting these materials for the Indian courts was Robert Wintemute, *Same-Sex Love and Indian Penal Code §377: An Important Human Rights Issue for India*, 4 NUJS L. REV., 31 (2011).

⁶⁶ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶237, 292, 297, 305, 393, 582-584, 630.

⁶⁷ *Id.*, ¶¶214, 219, 237, 531-534, 540, 551-552.

⁶⁸ *Id.*, ¶¶104, 149, 204, 206, 209, 299-306, 534-535, 553.

⁶⁹ *Id.*, ¶¶169-170, 218, 312, 506, 537.

⁷⁰ *Id.*, ¶¶111-112, 115, 117, 171, 213, 309-311, 446, 539, 540-543, 545, 562, 640.2.5, 640.3.5.

⁷¹ *Id.*, ¶¶355, 359 (per R.F. Nariman J.).

⁷² *Id.*, ¶528 (per D.Y. Chandrachud J.).

situations and not to read and interpret the same as per the standards of equality that existed decades ago. ...

The society has changed much now ... In many spheres, the sexual minorities have been accepted”.⁷³

Chandrachud J. drew attention to the origins of §377 as a British colonial law:

“... India continues to enforce a law imposed by an erstwhile colonial government, a law that has been long done away with by the same government in its own jurisdiction (the United Kingdom)..

...Indian citizens belonging to sexual minorities ... have waited and watched as their fellow citizens were freed from the British yoke while their fundamental freedoms remained restrained under an antiquated and anachronistic colonial- era law—forcing them to live in hiding, in fear, and as second-class citizens”.⁷⁴

Similarly, Malhotra J. noted that “British Prime Minister Theresa May in her speech ... on April 17, 2018 urged Commonwealth Nations to overhaul ‘outdated’ anti-gay laws”:

“Across the world, discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations ... I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK’s Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today”.⁷⁵

D. SEXUAL ORIENTATION, SEXUAL ACTIVITY, AND CHOICE

§377 and similar laws were drafted at a time when the concept of ‘sexual orientation’ did not exist. It was assumed that any individual who engaged in prohibited sexual activity had freely chosen to deviate from social norms, and was not in any way predisposed to such activity, or that any such predisposition had to be considered as a mental illness. The Supreme Court’s judgement in *Johar* reflects a modern understanding of sexual orientation. Misra C.J. and Khanwilkar J. asked:

⁷³ *Id.*, ¶¶95, 97, 118 (per Dipak Misra C.J.).

⁷⁴ *Id.*, ¶¶394, 405 (per D.Y. Chandrachud J.).

⁷⁵ *Id.*, ¶633 (per Indu Malhotra, J.).

“... whether sexual orientation alone (attraction) is to be protected or both orientation and choice (of sexual conduct when an individual act on their attraction) are to be accepted as long as the exercise of these rights by an individual do not affect another’s choice or ... has the consent of the other ...

... homosexuality ... is just as much ingrained, inherent and innate as heterosexuality. Sexual orientation ... is as natural a phenomenon as other natural biological phenomena. What the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is controlled by neurological and biological factors.

...

... Whether one’s sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation”.⁷⁶

Malhotra J. reached similar conclusions:

“... Sexual orientation (attraction) is not a matter of choice. ... Homosexuality is a natural variant of human sexuality.

... Sexual orientation is immutable, since it is an innate feature of one’s identity, and cannot be changed at will. The choice of LGBT persons to enter into ... sexual relations with persons of the same sex is an exercise of their personal choice (to act on their attraction), and an expression of their autonomy and self-determination”.⁷⁷

Nariman J. noted that “the thinking in Victorian England and early on in America was that homosexuality was to be considered as a mental disorder”,⁷⁸ before quoting the July 2018 “Position statement on Homosexuality” of the Indian Psychiatric Society:

... “In the opinion of the ... Society homosexuality is not a psychiatric disorder. This is in line with the position of American Psychiatric Association and ... the World (H)ealth Organisation which removed homosexuality from the list of psychiatric

⁷⁶ *Id.*, ¶¶11, 155, 156 (per Dipak Misra C.J.).

⁷⁷ *Id.*, ¶¶636.1, 643.3 (per Indu Malhotra J.).

⁷⁸ *Id.*, ¶340 (per R.F. Nariman J.).

disorders in 1973 and 1992 ... The I.P.S. recognises same-sex sexuality as a normal variant of human sexuality much like heterosexuality and bisexuality. There is no scientific evidence that sexual orientation can be altered by any treatment ... The (I.P.S.) ... supports decriminalisation of homosexual behaviour”⁷⁹

E. RIGHTS TO DIGNITY AND PRIVACY

Given its approach to protecting minorities, using international and comparative sources, interpreting the Constitution as a living instrument, and understanding same-sex sexual orientation and conduct (as normal), the Johar bench easily found, relying on Puttaswamy, that §377 violates the rights to dignity and privacy guaranteed under Article 21. Misra C.J. and Khanwilkar J. had “no hesitation to say that (§)377 ... abridges both human dignity as well as the fundamental right to privacy”, which includes “the right of every individual including that of the LGBT (community) to express their choices in terms of sexual inclination without the fear of ... criminal prosecution”⁸⁰

Chandrachud J. reached the same conclusion:

“The exercise of the natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to ‘sexual privacy’ to protect the rights of sexual minorities. ...

Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. ...

The impact of §377 has travelled far beyond criminalising certain acts. ... The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

... In decriminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

... In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. ...”⁸¹

⁷⁹ *Id.*, ¶244 (per R.F. Nariman J.); *See also Id.*, ¶¶636.3-636.5 (per Indu Malhotra J.).

⁸⁰ *Id.*, ¶244 (per Dipak Misra J.).

⁸¹ *Id.*, ¶¶468, 610-613 (per D.Y. Chandrachud J.).

Malhotra J. also found violations of the rights to dignity and privacy:

“... LGBT persons, like ... heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over... intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21 ... (which) would encompass the right to sexual autonomy.

...§377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. ... LGBT individuals are forced to either lead a life of solitary existence without a companion, or lead a closeted life as “un-apprehended felons”. §377 prevents LGBT persons from leading a dignified life as guaranteed by Article 21.

... The right to privacy ... extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. ... §377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private...”⁸²

F. RIGHT TO HEALTH

Another aspect of Article 21, in addition to dignity and privacy, is the right to health. Chandrachud J.’s opinion included a detailed assessment of the effects of §377 on the physical health of queer persons:

“... §377 denies consenting adults the full realisation of their right to health

... It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by ... members of sexual and gender minorities ...

Laws that criminalise same sex intercourse ... curb the effective prevention and treatment of HIV/AIDS....

⁸² *Id.*, ¶¶640.2.4, 640.2.6, 640.3.3 (per Indu Malhotra J.).

... MSM and transgender persons may not approach State health care providers for fear of being prosecuted for engaging in criminalised intercourse.

...⁸³

He cited a United Nations Programme on HIV and AIDS report which found that rates of HIV infection are nearly four times higher among male-male sexual activity in Caribbean countries that criminalise same-sex sexual relations, compared with Caribbean countries that do not.⁸⁴

Chandrachud J. also discussed the negative effects of §377 on the mental health of LGBT persons:

“The treatment of homosexuality as a disorder has serious consequences on the mental health and well-being of LGBT persons. ... Global psychiatric expert Dinesh Bhugra has emphasised that radical solutions are needed ... stating there is a “clear correlation between political and social environments” and how persecutory laws against LGBT individuals are leading to greater levels of depression, anxiety, self-harm, and suicide. ...

Counselling practices will have to ... provid(e) support to homosexual clients to become comfortable with who they are ... Instead of trying to cure something that is not even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and changing societal values. ...⁸⁵

Malhotra J. noted a paradox in Indian legislation: “§377 criminalises LGBT persons, which inhibits them from accessing (physical) health-care facilities, while (§21(1)(a) of) the Mental Healthcare Act, 2017 provides a right to access mental healthcare without discrimination, even on the ground of ‘sexual orientation’”.⁸⁶

G. RIGHT TO FREEDOM OF EXPRESSION

One could argue that criminalisation of private sexual activity is best analysed under the right to privacy in Article 21 of the Indian Constitution, because expression in Article 19(1)(a) often involves an attempt, in a public place, to communicate an idea or an image to an audience, such as bystanders observing

⁸³ *Id.*, ¶¶493, 502, 507 (per D.Y. Chandrachud J.).

⁸⁴ *Id.*, ¶509 (per D.Y. Chandrachud J.).

⁸⁵ *Id.*, ¶¶515, 519 (per D.Y. Chandrachud J.).

⁸⁶ *Id.*, ¶640.4.6 (per Indu Malhotra J.).

the annual Delhi Queer Pride parade.⁸⁷ However, four members of the Johar bench found §377 to be violative of Article 19(1)(a). Misra C.J. and Khanwilkar J. concluded that §377 “is violative of the fundamental right of freedom of expression including the right to choose a sexual partner”.⁸⁸ They added that “(a)ny discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression”.⁸⁹ Malhotra J. also found a violation of Article 19(1)(a): “LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under §377”.⁹⁰

H. RIGHT TO EQUALITY

The ECtHR in *Dudgeon v. United Kingdom*⁹¹ (‘Dudgeon’) in 1981, the United Nations Human Rights Committee in *Toonen v. Australia*⁹² in 1994, and the United States Supreme Court in *Lawrence v. Texas* (‘Lawrence’) in 2003,⁹³ all restricted their analysis to the right to privacy, and declined to rule on arguments related to equality. To its credit, the Supreme Court in Johar went beyond privacy and considered equality.

Prior to 2013, §377 seemed to involve indirect discrimination based on sexual orientation because, although §377 appeared to be neutral by prohibiting all anal intercourse, gay and bisexual men are more likely to engage in anal intercourse than heterosexual men and women (the option of vaginal intercourse is not available), and all queer persons were more likely than heterosexual persons to be stigmatised by §377.⁹⁴ However, after the amendments to the offence of rape in 2013, §375 IPC appeared to permit consensual anal or oral intercourse between a man and a woman, while §377 prohibited consensual anal or oral intercourse between two men. The amendments arguably had converted indirect sexual orientation discrimination into direct sexual orientation discrimination,⁹⁵ just as the Texas legislature had done with its same-sex only offence of “deviate sexual intercourse” in *Lawrence*.⁹⁶

⁸⁷ See e.g., *Bayev v. Russia*, Applns. Nos. 67667/09, 44092/12, and 56717/12 (European Court of Human Rights, June 20, 2017).

⁸⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶262.

⁸⁹ *Id.*, ¶268.7, 268.16 (per Dipak Misra J.).

⁹⁰ *Id.*, ¶641.1 (per Indu Malhotra J.).

⁹¹ *Dudgeon v. United Kingdom*, 1981 ECHR 5 (ECtHR, October 22, 1981).

⁹² *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), April 4, 1994, available at: <https://www.refworld.org/cases,HRC,48298b8d2.html> (Last visited on December 13, 2019).

⁹³ *Lawrence v. Texas*, 2003 SCC OnLine US SC 73.

⁹⁴ This argument was accepted by all three judges of the Québec Court of Appeal with regard to §159 of Canada’s Criminal Code in *R. v. Roy*, [1998] RJQ 1043, 125 CCC (3d) 442.

⁹⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶221, 232-233, 235, 252, 366, 423, 637.7.

⁹⁶ The neutral prohibition of different-sex or same-sex anal or oral intercourse (“sodomy”) was replaced in 1973 by Texas Penal Code, §21.06: Homosexual Conduct. (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

Misra C.J. and Khanwilkar J. found that §377 lacked “a reasonable nexus” and was “manifestly arbitrary”, and therefore, violated Article 14 (“equality before the law”, “equal protection of the laws”).⁹⁷ Nariman J. agreed that §377 “will offend Article 14 as it will discriminate between heterosexual and homosexual adults which is a distinction which has no rational relation to the object sought to be achieved ... namely, the criminalisation of all (anal or oral) sex ... as being against the order of nature”.⁹⁸

Chandrachud J. also found a violation of Article 14,⁹⁹ but went on to conduct a detailed assessment of whether §377 creates a form of discrimination based on sex,¹⁰⁰ different from that under Article 15 (“The State shall not discriminate against any citizen on grounds only of ... sex”):¹⁰¹

“... If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination ... prohibited by Article 15 on the grounds only of sex. ...

§377 criminalises behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles. ...

... a heterosexist society both expects and requires men and women to engage in only opposite-sex sexual relationships. The existence of same-sex relationships is, therefore, repugnant to heterosexist societal expectations.

... one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles. ... The effort to end discrimination against gays should be understood as

⁹⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶252, 268.14, 268. 15.

⁹⁸ *Id.*, ¶366 (per R.F. Nariman J.). In ¶367, he also referred to a violation of Article 15.

⁹⁹ *Id.*, ¶423 (per D.Y. Chandrachud J.).

¹⁰⁰ See Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE LAW JOURNAL 145 (1998); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 NEW YORK UNIVERSITY LAW REVIEW 197 (1995); Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MODERN LAW REVIEW 334 (1997); Robert Wintemute, *Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators*, 14 KING'S COLLEGE LAW JOURNAL 267 (2003). The sex discrimination argument was recently accepted by United States federal appellate courts, interpreting the federal prohibition of sex discrimination in employment, in *Hively v. Ivy Tech Community College*, 853 F 3d 339 (7th Cir 2017) (en banc), and *Zarda v. Altitude Express, Inc.*, 883 F 3d 100(2nd Cir 2018) (en banc).

¹⁰¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶429-440 (per D.Y. Chandrachud J.).

a necessary part of the larger effort to end the inequality of the sexes. ...

... The effect of §377, thus, is not merely to criminalise an act, but to criminalise a specific set of (LGBT) identities. ...

... A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1).

History has been witness to a systematic stigmatisation and exclusion of those who do not conform to societal standards of what is expected of them. §377 rests on deep rooted gender stereotypes. ...¹⁰²

Like Chandrachud J., Malhotra J. found violations of both Article 14 and Article 15. With regard to Article 14, she held: “The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification ...”¹⁰³

She also found that §377 is “manifestly arbitrary”, because “the basis of criminalisation is the ‘sexual orientation’ of a person, over which one has ‘little or no choice’”.¹⁰⁴ As for Article 15, she concluded:

“... Sex ... in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their ‘sexual identity and character’. The J.S. Verma Committee had recommended that ‘sex’ under Article 15 must include ‘sexual orientation’ ... The prohibition against discrimination under Article 15 on the ground of ‘sex’ should therefore encompass instances where such discrimination takes place on the basis of one’s sexual orientation...”¹⁰⁵

Unlike Chandrachud J., who found a link between §377 and gender roles and stereotypes, Malhotra J. read “sexual orientation” into the ground “sex” in Article 15. In doing so, she relied on the academic argument that “immutable statuses” and “fundamental choices” should be read into an open-ended list of

¹⁰² *Id.*, ¶¶438, 447, 449-450, 458, 460-461 (per D.Y. Chandrachud J.).

¹⁰³ *Id.*, ¶637.3 (per Indu Malhotra J.).

¹⁰⁴ *Id.*, ¶¶637.10 (per Indu Malhotra J.).

¹⁰⁵ *Id.*, ¶638.2 (per Indu Malhotra J.).

grounds of discrimination in the equality clause of a Constitution.¹⁰⁶ She then cited *Egan v. Canada*,¹⁰⁷ in which the Supreme Court of Canada read “sexual orientation” into the open-ended list in §15(1) of the Canadian Charter as an “analogous ground”,¹⁰⁸ without noting that Article 15 of the Constitution of India contains a closed list of grounds:

“... A similar conclusion (to the one in Canada) can be reached in the Indian context as well in light of the underlying aspects of immutability and fundamental choice. The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15”.¹⁰⁹

I. JUSTIFICATIONS FOR CRIMINALISATION

The Johar bench ruled that §377 is a *prima facie* violation of the rights to dignity, privacy, health, freedom of expression, and equality (including the right to be free from sex discrimination). The justifications for restricting these rights that some of the interveners asserted were all rejected. Misra C.J. and Khanwilkar J. observed that criminalisation of same-sex carnal intercourse “hardly serves any legitimate public purpose or interest”, but allows “the harassment and exploitation of the LGBT community”.¹¹⁰ Indeed, it was found that §377 “takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality”.¹¹¹ For Nariman J., “(w)hen it is found that ... the State has no compelling reason to continue an existing law which penalises same-sex couples who cause no harm to others, ... it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate State rationale to uphold (§377)”.¹¹² Chandrachud J. dismissed the claim of some interveners that “homosexuality is against popular culture and is thus unacceptable in Indian society”.¹¹³ This mainstream view could not prevail against constitutional morality:

“We are aware of the perils of allowing morality to dictate the terms of criminal law. ... The LGBTQ community has been a

¹⁰⁶ *Id.*, ¶638.3 (per Indu Malhotra J.) (citing Tarunabh Khaitan citing John Gardner reviewing Robert Wintemute, *Sexual Orientation and Human Rights*, 1995).

¹⁰⁷ *Egan v. Canada*, 1995 SCC OnLine Can SC 46.

¹⁰⁸ *Compare* Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶211 (per Dipak Misra J.) in which they mistakenly describe the application of *Egan* in the subsequent case of *Vriend v. Alberta*, 1998 SCC OnLine Can SC 29 as a conclusion by the Supreme Court of Canada that “‘sex’ includes sexual orientation”.

¹⁰⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶638 (per Indu Malhotra J.).

¹¹⁰ *Id.*, ¶238 (per Dipak Misra J.).

¹¹¹ *Id.*, ¶260 (per Dipak Misra J.).

¹¹² *Id.*, ¶367 (per R.F. Nariman J.).

¹¹³ *Id.*, ¶603 (per D.Y. Chandrachud J.).

victim of the predominant (Victorian) morality which prevailed at the time when the Indian Penal Code was drafted and enacted. Therefore, we are inclined to observe that it is constitutional morality, and not mainstream views about sexual morality, which should be the driving factor in determining the validity of §377”.¹¹⁴

J. CONCLUSIONS AND REMEDIES

Misra C.J. and Khanwilkar J. concluded that “(§)377 of the IPC, so far as it penalises any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional”,¹¹⁵ and that Koushal stands overruled,¹¹⁶ as Lawrence in 2003 overruled *Bowers v. Hardwick*.¹¹⁷ They made it clear that §377 could still be constitutionally applied to a sexual act that involves an animal, is not consensual, or is not “in private space”.¹¹⁸

For Chandrachud J., “(t)hat it has taken sixty-eight years even after the advent of the (1950) Constitution is a sobering reminder of the unfinished task which lies ahead”.¹¹⁹ Malhotra J. added that “adult” means “persons above the age of 18 years who are competent to consent”,¹²⁰ and that:

“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of ... persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality”.¹²¹

Nariman J. ordered a broad remedy similar to the one in NALSA:

“... the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media ..., and initiate programmes to reduce and finally eliminate the stigma associated with such persons. Above all, all government

¹¹⁴ *Id.*, ¶594 (per D.Y. Chandrachud J.).

¹¹⁵ *Id.*, ¶267 (per Dipak Misra J.).

¹¹⁶ *Id.*, ¶268.18; *See also id.*, ¶¶181, 184, 203.

¹¹⁷ *Bowers v. Hardwick*, 1986 SCC OnLine US SC 165.

¹¹⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶267, 268.17 (per Dipak Misra C.J.).

¹¹⁹ *Id.*, ¶616 (per D.Y. Chandrachud J.).

¹²⁰ *Id.*, ¶645.1 (per Indu Malhotra J.).

¹²¹ *Id.*, ¶644 (per Indu Malhotra J.).

officials, including and in particular police officials, ... (shall) be given periodic sensitisation and awareness training of the plight of such persons in the light of the observations contained in this judgment".¹²²

VII. FUTURE APPLICATION OF JOHAR IN THE CRIMINAL LAW BEYOND INDIA, AND IN INDIA BEYOND THE CRIMINAL LAW?

A. CRIMINAL LAW BEYOND INDIA

The Johar judgment could be described as ‘one small step for a court, one giant leap for LGBT humankind’. It removed the criminal law that affected more LGBT persons than any other in the world, through reasoning that should be very persuasive in the 70 United Nations member states that continue to criminalise, most of which are in the Global South. It is likely to inspire or strengthen court challenges to similar British colonial laws in Pakistan, Bangladesh, Sri Lanka, Myanmar, Malaysia, Singapore and Brunei, as well as in Africa (e.g., Nigeria) and the English-speaking Caribbean (e.g., Jamaica). The significance of Johar and India’s consequent rise in the “global league table” of LGB equality¹²³ from level 0 to level 1, and from roughly the bottom third to roughly the middle third can be seen below.

Level of law reform	Number and percentage of United Nations member states (International Lesbian Gay, Bisexual, Trans and Intersex Association, “State-Sponsored Homophobia”, 2017; ¹²⁴) (Note that Taiwan is not a United Nations member state)
4 - Equal access to marriage for same-sex couples	26 of 193 or 13.5% (including Austria from January 1, 2019 and Mexico despite regional variations)
3 - An alternative registration system for same-sex couples	13 of 193 or 6.7% (total with 4 or 3 = 39 of 193 or 20.2%)

¹²² *Id.*, ¶ 370 (per R.F. Nariman J.).

¹²³ From this point on, I will sometimes refer only to LGB equality, because of the difficulty of producing a single “global league table” for LGB and transgender-specific issues, and because the Supreme Court has gone further in NALSA with regard to transgender persons (e.g., reservations in education and employment) than in Johar with regard to LGB persons. What the Court requires for LGB persons should apply to transgender persons, but not necessarily vice versa.

¹²⁴ See ILGA WORLD, STATE-SPONSORED HOMOPHOBIA REPORT, available at <https://ilga.org/state-sponsored-homophobia-report> (Last visited on December 19, 2019).

2 - An anti-discrimination law includes sexual orientation and no criminal law	27 of 193 or 14.0% (total with 4, 3 or 2 = 66 or 193 or 34.2%)
1 - No anti-discrimination law but no criminal law	57 of 193 or 29.5% (including China, India, Indonesia, Japan, Russia and Turkey)
0 - Criminalisation of all same-sex sexual activity or all male-male sexual activity (in some cases, despite an anti-discrimination law)	70 of 193 or 36.3% (excluding India since September 6, 2018)

Level of law reform	Asia	Africa	Europe	Americas	Oceania
4 – marriage	0	1	16	7	2
3– partnership law	0	0	11	2	0
2 – anti-discrimination law	2	3	13	8	1
1 – no criminal law	18	18	8	8	5
0 – criminal law	22 (52.4%)	32 (59.3%)	0	10 (28.6%)	6 (42.9%)

B. IMPACT IN INDIA BEYOND THE CRIMINAL LAW

What impact will Johar effectuate in India, beyond the domain of criminal law? In 2011, I suggested five steps in LGB law reform, slightly different from levels 0 to 4 in the table above. Firstly, repeal of the death penalty for same-sex sexual activity; secondly, the decriminalisation of such activity (no fines or imprisonment); thirdly, the removal of all discrimination against such activity from the criminal law; fourthly, legislation prohibiting discrimination based on sexual orientation and fifthly, reform of family law.¹²⁵

The first step was taken (at the latest) when the Indian Penal Code came into force on January 1, 1862. The second step was taken in Johar on September 6, 2018. It seems clear from the Supreme Court's reasoning that it would not tolerate other forms of discrimination against same-sex sexual activity in the criminal law, such as a higher age of consent, which many European countries used to continue to stigmatise (at least) male-male sexual activity for many

¹²⁵ Robert Wintemute, *Same-Sex Love and Indian Penal Code §377: An Important Human Rights Issue for India*, 4 (1) NUJS L. REV. 31, 51 (2011).

years after decriminalisation. In England and Wales, 33 years passed between decriminalisation through the Sexual Offences Act, 1967 (with an age of consent of 21 for male-male sexual activity) and equalisation of the age of consent at 16 through the Sexual Offences (Amendment) Act, 2000, before the Sexual Offences Act, 2003 removed all remaining discrimination in the criminal law. However, in India, the second and third steps were probably both taken on September 6, 2018, given that the age of consent in all cases in India is now 18.¹²⁶

As for step four (discrimination against LGB individuals in public-sector employment, including the armed forces, private-sector employment, and other areas) and step five (reform of family law to include same-sex couples), it is hard to predict how far the Supreme Court will decide in future cases. Did it mean what it said about “equal citizenship” or will some differences in treatment be seen as justifiable? The soaring rhetoric of the Supreme Court in *Johar* goes far beyond the cautious conclusion of the ECtHR in *Dudgeon* in 1981, which declined to rule on the question of an equal age of consent, and added: “‘Decriminalisation’ does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features”.¹²⁷ It was not until 1999 that the ECtHR went beyond decriminalisation in an LGB case,¹²⁸ or found discrimination based on sexual orientation,¹²⁹ and it did not require an equal age of consent until 2003.¹³⁰

Misra C.J. and Khanwilkar J. insisted that “(t)he LGBT community possess the same human, fundamental and constitutional rights as other citizens”.¹³¹ This means, in particular, that “any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception”.¹³² However, they distinguished between the LGBT community’s “right to a union” or “right to companionship” under Article 21 and marriage: “When we say union, we do not mean the union of marriage, though marriage is a union”.¹³³ Nariman J. referred not to “equal citizenship”, but to a right of LGBT persons “to be treated in society as human beings without any stigma being attached to any of them”.¹³⁴

¹²⁶ See Criminal Law Amendment Act, 2013; *Independent Thought v. Union of India*, (2017) 10 SCC 800 (the age of consent must also be eighteen in the context of a male-female marriage).

¹²⁷ *Dudgeon v. United Kingdom*, 1981 ECHR 5, ¶61.

¹²⁸ *Smith and Grady v. United Kingdom*, *Lustig-Prean and Beckett v. United Kingdom* (ECtHR, September 27, 1999) (dismissal of LGBTQ+ members of armed forces).

¹²⁹ *Mouta v. Portugal*, (1999) 31 EHRR 1055 (ECtHR, December 21, 1999) (gay father lost custody of his daughter).

¹³⁰ *S.L. v. Austria* (ECtHR, January 9, 2003). The ECtHR might have done so earlier if the legislation challenged in *Sutherland v. United Kingdom* (ECtHR, July 1, 1997) had not been amended.

¹³¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶255 (per Dipak Misra J.).

¹³² *Id.*, ¶261 (per Dipak Misra J.).

¹³³ *Id.*, ¶167 (per Dipak Misra J.).

¹³⁴ *Id.*, ¶369 (per R.F. Nariman J.).

The most sweeping statements about equality were made by Chandrachud J. He noted that decriminalisation is a necessary but minimal first step:

“...Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is a first step. The constitutional principles on which it is based have application to a broader range of entitlements. The Indian Constitution is based on an abiding faith in those constitutional values. In the march of civilizations across the spectrum of a compassionate global order, India cannot be left behind”.¹³⁵

He went well beyond the ‘right not to be a criminal’ by declaring that “lesbians, gays, bisexuals and transgender have a constitutional right to equal citizenship in all its manifestations”,¹³⁶ that “(s)exual orientation is recognised and protected by the Constitution”,¹³⁷ that “LGBT individuals are equal citizens of India”, and “that they cannot be discriminated against”.¹³⁸

He also noted that the “right to be an equal citizen” must include the right to be openly lesbian, bisexual, gay or transgender (emphasis added):

“...Confronting the closet would entail ... ensuring that individuals belonging to sexual minorities, have the *freedom to fully participate in public life*, breaking the invisible barrier that heterosexuality imposes upon them. ... (O)ur constitutional jurisprudence must recognise that *the public assertion of identity founded in sexual orientation is crucial* to the exercise of freedoms”.¹³⁹

In the public sector, Articles 14, 15(1) and 16(2) will provide protection, if “sex” continues to be interpreted as applying to or including ‘sexual orientation’, as Chandrachud J. and Malhotra J. found. This protection will include public-sector employment, as in the case of *Shrinivas Ramchandra Siras v. Aligarh Muslim University*.¹⁴⁰ In the private sector, Article 15(2) will provide protection with regard to “(a) access to shops, public restaurants, hotels and places

¹³⁵ *Id.*, ¶564 (per D.Y. Chandrachud J.).

¹³⁶ *Id.*, ¶¶377, 378 (per D.Y. Chandrachud J.).

¹³⁷ *Id.*, ¶378 (per D.Y. Chandrachud J.).

¹³⁸ *Id.*, ¶605 (per D.Y. Chandrachud J.).

¹³⁹ *Id.*, ¶469 (per D.Y. Chandrachud J.).

¹⁴⁰ *Dr. Shrinivas Ramchandra Siras v. The Aligarh Muslim University* (per Sunil Ambwani J. & K.N. Pandey J.), available at <https://www.icj.org/wp-content/uploads/2010/04/SR-Siras-v.-Aligarh-Muslim-University-High-Court-at-Allahabad-India.pdf> (Last visited on December 18, 2019); see also *THE ALIGARH* (EROS ENTERTAINMENT KARMA PICTURES, 2016).

of public entertainment; or (b) the use of... places of public resort ... dedicated to the use of the general public”.

Yet private-sector employment seems to fall outside Articles 14, 15 and 16. The Anti-Discrimination and Equality Bill 2016, introduced in the Lok Sabha on March 10, 2017 by Member of Indian Parliament, Dr. Shashi Tharoor (advised by Prof. Tarunabh Khaitan)¹⁴¹ would fill the gap. This is because the Bill sought to prohibit discrimination in employment and other areas (emphasis added) based on “caste, race, ethnicity, descent, sex, *gender identity*, pregnancy, *sexual orientation*, religion and belief, tribe, disability, linguistic identity, *HIV status*, nationality, marital status, food preference, skin tone, place of residence, place of birth or age”, or “any other personal characteristic which, ... is either outside a person’s effective control, or constitutes a fundamental choice, or both”.¹⁴²

Chandrachud J. also anticipated future debates about the inclusion of same-sex couples into Indian family law, when he referred to the “right to love”, “the freedom to enter into relationships”, the “right to form unions”, the “right to family life”, and the “right ... to a partner”. He began by noting that same-sex love is not the only kind of “forbidden love” in Indian society (emphasis added):

“... What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority. Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes *the right to love not just a separate battle for LGBT individuals, but a battle for all*”.¹⁴³

He then stated some general principles about the right to same-sex love (emphasis added):

“... it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner.... Social institutions must be arranged in such a manner that individuals have the *freedom to enter into relationships untrammelled by binary of sex and gender* and receive the requisite institutional recognition to perfect their relationships. ...

¹⁴¹ Anti-Discrimination Bill Project, available at <https://sites.google.com/site/tarunabh/Home/discrimination-law> (Last visited on December 19, 2019).

¹⁴² Anti-Discrimination and Equality Bill, 2016, 289 of 2016, Cls. 3(i), 3(ii)(a), available at <http://164.100.47.4/billtexts/lbills/lbills/asintroduced/2991.pdf> (Last visited on December 19, 2019).

¹⁴³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶425 (per D.Y. Chandrachud J.).

... Courts around the world have not stopped at decriminalising ... they have... developed ... broader rights ... (which) include ... *the right to form unions and the right to family life.*

... From an analysis of comparative jurisprudence from across the world, the following principles emerge: ...

The right ... to a partner, to find fulfilment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;

Sexual orientation implicates negative and positive obligations on the State. It not only requires the State not to discriminate, but also calls for the state to recognise rights which bring true fulfilment to same-sex relationships ...¹⁴⁴

Malhotra J. alluded to these debates as well. She mentioned countries that allow same-sex couples to marry and adopt children,¹⁴⁵ and explained how §377 causes LGBT persons to stay “in the closet”: “They are *forced not to disclose* a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society ... Unlike heterosexual persons, they are *inhibited from openly forming* and nurturing fulfilling relationships ...¹⁴⁶

For a non-Indian observer, a final, striking feature of Johar is the references to decisions of courts outside India regarding issues beyond criminalisation, which strictly speaking were not relevant to the review of §377. Misra C.J. and Khanwilkar J. appear to have mistakenly relied on the US Supreme Court’s same-sex marriage decision, *Obergefell v. Hodges*,¹⁴⁷ at the start of a discussion of what appears to be the United States Supreme Court’s decriminalisation reasoning in *Lawrence*.¹⁴⁸ However, Chandrachud J. made no such mistake. His extensive survey of comparative law included the Supreme Court of Canada on the absence of protection against private-sector employment discrimination,¹⁴⁹ the Supreme Court of Nepal on a (not-yet-implemented) right to same-sex marriage,¹⁵⁰ the ECtHR on the absence of a “specific legal framework” for same-sex couples in Italy,¹⁵¹ the United States Supreme Court on same-sex marriage,¹⁵² and the United

¹⁴⁴ *Id.*, ¶¶482, 545, 561.5, 561.6 (per D.Y. Chandrachud J.).

¹⁴⁵ *Id.*, ¶632 (per Indu Malhotra J.).

¹⁴⁶ *Id.*, ¶641.1 (per Indu Malhotra J.).

¹⁴⁷ *Obergefell v. Hodges*, 2015 SCC OnLine US SC 6.

¹⁴⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶204, 208 (per Dipak Misra, J.).

¹⁴⁹ *Id.*, ¶548 (per D.Y. Chandrachud J.).

¹⁵⁰ *Id.*, ¶550 (per D.Y. Chandrachud J.).

¹⁵¹ *Id.*, ¶¶551-552 (per D.Y. Chandrachud J.).

¹⁵² *Id.*, ¶¶553-554 (per D.Y. Chandrachud J.).

States and United Kingdom Supreme Courts on refusals by Christian bakers to make a cake for a same-sex marriage or with the slogan “Support Gay Marriage”.¹⁵³

Will the Supreme Court of India one day interpret the “equal citizenship” of LGBT+ persons under the Constitution of India as requiring that same-sex couples be allowed to marry and to raise children (whether they are adopted or genetically related to one partner because of assisted reproduction)? It is hard to say how long the journey to full legal equality for LGBT persons in India will take. However, the Supreme Court knows that it has started down that road. In its Johar judgment, it has made an excellent start.

¹⁵³ *Id.*, ¶¶556-557 (per D.Y. Chandrachud J.).