

# EDITORIAL NOTE: NAVTEJ SINGH JOHAR

## SPECIAL ISSUE

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In *Navtej Singh Johar v. Union of India* (“Navtej Singh Johar” or “Navtej”),<sup>1</sup> the Court read down Section 377, which criminalises “carnal intercourse against the order of nature with any man, woman or animal”, or commonly, unnatural intercourse. Those convicted under this law, the judiciary, civil society and legal academia across the world, have often questioned what is to be understood as the import of ‘intercourse in keeping with the order of nature’ in the context of sodomy statutes and criminal provisions similar to Section 377.<sup>2</sup> Indian law, had for its part decided unnatural sex to mean non-procreative, penetrative sex whether consensual or not,<sup>3</sup> which has substantially expanded the scope for criminalised acts in subsequent cases.<sup>4</sup> The law may appear to be facially neutral, as it appears to criminalise certain sexual acts, irrespective of the perpetrator, but past judgments have betrayed a disapproval for specific communities, particularly those who identify as lesbian, gay, transsexual, bisexual, intersex, queer, or any other non-normative sexual identity.<sup>5</sup> The judicial expansion of the scope of the provision and an increasing inclination towards criminalization of the ‘unnatural’ which targeted specific communities led to the emergence of a counter-movement. This movement championed the cause of the LGBTIQ+ community, through

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

<sup>2</sup> See, e.g., Nivedita Menon, *India: Section 377: How Natural is Normal?*, January 1, 2004, available at <http://www.sacw.net/SexualityMinorities/nivedita01Jan2004.html> (Last visited on May 1, 2020).

Sunil Babu Pant v. Government of Nepal, Writ No. 917 of the year 2064 (BS) (2007) (Supreme Court of Nepal); Rakesh Shukla, *Nothing Unnatural About It*, TIMES OF INDIA, February 2013, available at <https://timesofindia.indiatimes.com/edit-page/Nothing-unnatural-about-it/article-show/1411615.cms> (Last visited on May 1, 2020); Shamnad Basheer, Sroyon Mukherjee & Karthy Nair, *Section 377 and the ‘Order of Nature’: Nurturing ‘Indeterminacy’ in the Law?*, 2 NUJS L. REV. 433 (2009).

<sup>3</sup> In *Khanu v. Emperor*, 1924 SCC OnLine Sind JC 49, the Court substantially expanded the meaning of penetrative sex, which was furthered in *State of Kerala v. Kundumkara Govindan*, 1968 SCC OnLine Ker 138 and subsequent cases as canvassed in *infra* note 5.

<sup>4</sup> *Muhammad Ali v. State*, All Pakistan Law Decisions, High Court of Dacca, 447 (1961); Joseph, *infra* note 6.

<sup>5</sup> Saptarshi Mandal, *Section 377: Whose Concerns does the Judgment Address?*, 53(37) ECONOMIC AND POLITICAL WEEKLY (2018); Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 41(46) ECONOMIC AND POLITICAL WEEKLY (2006).

publications, activism, marches, discursive accounts from the community, legal literature, as well as legal and political reform.<sup>6</sup>

This culminated in the first petition challenging Section 377, filed by AIDS Bhedbhav Virodhi Andolan, in 1994 which was ultimately dismissed in 2001 because the petitioners had disbanded.<sup>7</sup> However, as we know, the journey continued in the subsequent petition filed by the Naz Foundation in 2001, challenging the constitutionality of Section 377, which was initially dismissed by a two-judge bench at the Delhi High Court and in the following review petition.<sup>8</sup> Thereafter, upon the matter being remanded to the Delhi High Court, another Division Bench read down Section 377 to decriminalize consensual intercourse of adults in private as the Section otherwise was violative of Articles 14, 15 and 21 (“Naz Foundation”).<sup>9</sup> An appeal to the Supreme Court, however, resulted in a Division Bench overturning the decision in Naz Foundation, thus recriminalizing Section 377.<sup>10</sup> Interventions were made by organisations in counter to this verdict including the Naz Foundation, Voices against 377, and NACO among others. It was not long before, then, that Navtej Singh Johar along with other queer persons such as Keshav Puri, Ritu Dalmia, queer students and alumni of IIT, Arif Jafar, and the founders of the Humsafar Trust also filed curative petitions and writ petitions before the Supreme Court, both prior to and subsequent to *National Legal Services Authority v. Union of India* and *K.S. Puttaswamy v. Union of India*.<sup>11</sup> The petition was assigned to a Constitutional Bench in 2018 which resulted in Supreme Court finally reading down Section 377 on September 6, 2018, in Navtej after seventeen long years of legal struggle.

There is unanimity that the Navtej decision is historical,<sup>12</sup> but quite importantly, several strides have been made by this decision for the possibility of

<sup>6</sup> See Sherry Joseph, *Gay and Lesbian Movement in India*, 31(33) ECONOMIC AND POLITICAL WEEKLY (1996); Vikram Seth et al., *Open Letter for the Overturning of Section 377 of the Indian Penal Code*, September 15, 2006, available at <http://www.sacw.net/SexualityMinorities/OletterSec377sept06.html> (Last visited on May 1, 2020).

<sup>7</sup> *Id.*; Pritam Pal Singh, *377 Battle at Journey's End*, INDIAN EXPRESS, September 6, 2018, available at <https://indianexpress.com/article/explained/section-377-verdict-supreme-court-decriminalisation-gay-sex-lgbtq-5342008/> (Last visited on May 1, 2020).

<sup>8</sup> Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762.

<sup>9</sup> *Id.*

<sup>10</sup> Suresh Kumar Koushal v. NAZ Foundation, (2014) 1 SCC 1.

<sup>11</sup> Vivek Divan, *On the Verge of a Kind of Freedom: Ridding India of Section 377*, August 16, 2018, available at <http://arc-international.net/blog/on-the-verge-of-a-kind-of-freedom-ridding-india-of-section-377> (Last visited on May 1, 2020); National Legal Services Authority v. Union of India, (2014) 5 SCC 438; K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>12</sup> Greater Kashmir, *Supreme Court Decriminalises Homosexuality*, September 7, 2018, available at <https://www.greaterkashmir.com/news/india/supreme-court-decriminalises-homosexuality/> (Last visited on May 1, 2020); Jeffery Gettleman, *India Gay Sex Ban is Struck Down. 'Indefensible,' Court Says*, September 6, 2018, available at <https://www.nytimes.com/2018/09/06/world/asia/india-gay-sex-377.html> (Last visited on May 1, 2020); Tarak Sarkar, *LGBTQ*

advocating for further rights of marginalised sexual identities. Provisions criminalising sexual intercourse ‘against the order of nature’ occur repeatedly as such in the statutes of seventy-odd countries, of which thirty-eight are erstwhile British colonies.<sup>13</sup> This British legacy, whether intentionally or not, paved the way for subsequent defenses of Section 377, by the State,<sup>14</sup> religious groups, and other organized groups.<sup>15</sup> They claimed that the law was intended to reflect public Indian morality which did not recognise the multiplicity of sexualities, alleged to be alien to this sub-continent prior to its colonisation. However, the decision in Navtej judicially recognizes the truth in the Indian historicisation of queer people, particularly Justice Chandrachud’s judgment, and further moves towards constitutional morality.<sup>16</sup> This recognition of the inclusion of this significant community in modern India’s history is one of the many contributions of the judgement, which has made substantial strides in equality, freedom of expression, anti-discrimination, liberty, and privacy jurisprudence, drawing on other landmark decisions of the Supreme Court, foreign jurisprudence and instruments such as the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.<sup>17</sup> However, while acknowledging its significance, it is crucial to also acknowledge the several questions thrown up by commentators in the decision’s anticipation and aftermath.<sup>18</sup>

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*Community Celebrates One Year of Decriminalising Section 377*, September 6, 2019, available at <https://www.aninews.in/news/national/general-news/wb-lgbtq-community-celebrates-one-year-of-decriminalising-section-37720190914202336/> (Last visited on May 1, 2020).

- <sup>13</sup> JOHN GODWIN, *Legal Environments, Human Rights and HIV Responses among Men who have Sex with Men and Transgender People in Asia and the Pacific: An Agenda for Action*, UNITED NATIONS DEVELOPMENT PROGRAM (July 2010); See ENZE HAN & JOSEPH O’MAHONEY, *BRITISH COLONIALISM AND THE CRIMINALIZATION OF HOMOSEXUALITY: QUEENS, CRIME AND EMPIRE* (2018); M.L. Friedland, *Codification in the Commonwealth: Earlier Efforts*, COMMONWEALTH LAW BULLETIN 18 (1992). (India was the first British colony to have this provision on its statute books, and later became a model provision for other British colonies.)
- <sup>14</sup> Ministry of Home Affairs, *Counter-Affidavit by the Government of India*, High Court of New Delhi, 2005, as cited in CORINNE LENNOX & MATTHEW WAITES, *HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH* (2013) at p. 84; Fazal Rab Choudhary v. State of Bihar, (1982) 3 SCC 9; Indian Law Commission, *Report of the Indian Law Commission on the Penal Code*, (May 1837); Nowshirwan v. Emperor, 1934 SCC OnLine Sind JC 59; Khanu v. Emperor, 1924 SCC OnLine Sind JC 49.
- <sup>15</sup> Orinam, *Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation*, April 2012, available at [http://orinam.net/content/wp-content/uploads/2012/04/Naz\\_SC\\_Transcript\\_2012\\_final.pdf](http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf) (Last visited on May 2, 2020).
- <sup>16</sup> RUTH VANITA & SALEEM KIDWAI (eds.), *SAME-SEX LOVE IN INDIA: A LITERARY HISTORY* (2000) (cited by Justice Chandrachud in Navtej Singh Johar, ¶14).
- <sup>17</sup> Suhrith Parthasarathy, *Section 377: Drawing a Curtain on the Past*, THE HINDU, September 13, 2018, available at <https://www.thehindu.com/opinion/lead/drawing-a-curtain-on-the-past/article24937833.ece> (Last visited on May 1, 2020); D. McGoldrick, *Challenging the Constitutionality of Restrictions on Same-Sex Sexual Relations: Lessons from India*, HUMAN RIGHTS LAW REVIEW 19(1) (2019).
- <sup>18</sup> See Ashok Row Kavi, *What Next after Sec. 377?*, DECCAN HERALD, September 23, 2018, available at <https://www.deccanherald.com/specials/sunday-spotlight/what-next-after-sec-377-694097.html> (Last visited on May 1, 2020); Arvind Narrain, *Section 377: A Greater Transformation*,

For the NUJS Law Review, the constitutional challenge and the concomitant social struggle to decriminalise Section 377 has been unique, more so as six of the works contained in our previous Special Issues were relied upon by the Supreme Court. This has been an encouraging, and unparalleled recognition of the role of Indian legal academic literature in shaping decisions of the Court. This recognition was preceded by years of work wherein successive Editorial Boards of NUJS Law Review closely followed the passage of this constitutional challenge through the Courts, and created a parallel journey in supplementing scholarship that could guide the courts and policy-makers in their decision. In 2009, after the Naz Foundation judgement, the Editorial Board of the Review published a Special Issue (Volume 2, Issue 3) on Section 377 of the IPC with the specific objective of curating legal publications, that would guide the Supreme Court of India in the appeal against the Naz Foundation judgement. However, on appeal, in the Suresh K. Koushal judgement, the Supreme Court overturned the Delhi High Court's decision, an outcome that ran contrary to a large swath of legal scholarship, including the work contained in our Special Issue.

Consequently, the Editorial Board of the Review put together another Special Issue (Volume 6, Issue 4) in 2014, focusing on the incongruity of views of the Naz judgement and the Suresh Koushal judgement. It is noteworthy that while most of the articles in both the Special Issues endorsed the reading down of Section 377, there were also opinions within the articles which questioned the efficacy and legal validity of bringing about such a change through the judiciary. However, remaining steadfast to our duty to produce varieties of opinions, we carried seemingly contradictory, but legally and analytically unerring, opinions that we received from our contributors. We consider both Issues to be testament to our unwavering commitment to provide a platform for the finest academic literature in law. The reliance on six articles of our previous Special Issues by the Supreme Court, in coming to its decision in the Navtej decision, was a vindication of the untiring efforts of preceding Editorial Boards and most importantly, our authors. We are humbled by the recognition of academic scholarship in general and are simultaneously proud in being able to specifically contribute to what is easily one of the most socially and constitutionally historic verdicts of our times.

However, while acknowledging its significance, it is crucial to also acknowledge the several questions thrown up by commentators in the decision's anticipation and aftermath. As an attempt to answer some of these questions, supplement the growing body of literature on this matter and carry forward the legacy

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September 10, 2018, available at <https://www.thehindu.com/opinion/op-ed/a-greater-transformation/article24910086.ece> (Last visited on May 1, 2020); OISHIK SIRCAR & DIPIKA JAIN, NEW INTIMACIES, OLD DESIRES – LAW, CULTURE AND QUEER POLITICS IN NEOLIBERAL TIMES (2017); Mandal, *supra* note 5.

of previous editorial boards, we have put together the present Special Issue on the Navtej Singh Johar verdict.

Ramya Chandrashekhara, a Bangalore based lawyer, in her article *'Identity as Data: A Critique of the Navtej Singh Johar Case and the Judicial Impetus towards Databasing of Identities'*, critiques the construct of innate sexuality adopted in the Navtej Singh Johar judgement and analyses the impact of such a construct on matters of public policy. Central to her critique are legislations provisioning for gender identification such as the Transgender Persons (Protection of Rights) Act, 2019 and the Personal Data Protection Bill, 2018. Relying on the Foucauldian discourse on Biopolitics and Biopower, she argues that the 'innateness' approach, when codified in legislations of the likes mentioned above, leads to pigeonholing of identities in segregated and essentialised categories that can be easily watched and manipulated. As an alternative, she recommends interpreting identities in a more nuanced and fluid manner by recognising the constant evolution of the understanding of what constitutes 'body' and the 'self' and the influence of technology and discursive practices on such understanding.

Robert Wintemute, Professor of Human Rights Law at King's College London, in his article *'Lesbian, Gay, Bisexual and Transgender Human Rights in India: From Naz Foundation to Navtej Singh Johar and Beyond'* traces the trajectory of the decriminalisation struggle by analysing the sequence of judicial verdicts that led to Navtej Singh Johar. The article also analyses the effect of the verdict beyond the queer rights discourse by focusing on its impact on constitutional jurisprudence on equality, minority protection, freedom of expression, privacy and right to health among other things. The article concludes by positing authors view on the potential influence of the judgement both on criminal law beyond India, and in India beyond criminal law.

Shraddha Chaudhary, a Senior Research Associate at the Jindal Global Law School, in her article *'Navtej Johar v. Union of India: Love in Legal Reasoning'* analyses the role of 'love' as a determinant of legal decision making in the Navtej Johar verdict of the Supreme Court. She argues that the concept of 'love' finds expression in the judgement in two forms: firstly, in form of recognition of individual's autonomy in matters pertaining to sexual relations and secondly, as the acknowledgement of the place of companionship, connection, and desire in shaping an individual's identity. She recommends anchoring legal reasoning in terms of the latter for she views the latter form as having the potential to make Indian jurisprudence richer, by creating the space for the recognition of relationships that currently exist on the margins of law and society.

Gauri Pillai, a Rhodes Scholar and DPhil (Law) candidate at the University of Oxford, in her article *‘Naz to Navtej: Navigating Notions of Equality’* contrasts the two seminal judgments in the history of the challenge to Section 377 of the IPC. In doing so, she outlines the contours of the advances made in anti-discrimination and equality jurisprudence as presented in the Naz Foundation judgment and the Navtej Singh Johar judgment. She argues that each judgment has made unique contributions to this body of jurisprudence, specifically on subjects including transformative constitutionalism, indirect discrimination, and the standard of review. She concludes that the Navtej decision uniquely applies the standard of review to the distinctions between natural and unnatural intercourse, and broadly challenges heteronormativity in the public sphere.

Satchit Bhogle, a practising advocate at Bombay High Court, in his article *‘The Momentum of History – Realising Marriage Equality in India’* delves into the depths of the fundamental concept of ‘marriage equality’, which essentially denotes the consideration and recognition of same-sex marriage, at par with the traditional heterosexual union. He undertakes a holistic approach in tackling the issues concerning the concept, by not only elucidating upon the importance of the right to marry but also the constitutional veracity of several concomitant legal issues. He accords a fresh colour to the traditional notions of marriage, with a firm emphasis upon the need to normalise the perspective so-mentioned. Associated with the same is his analysis of the idea of constitutional morality, which entail viewing ‘marriage equality’ in relation to fundamental rights, such as privacy and autonomy, and freedom of expression. He concludes his enriching piece on a determinative note, by observing that not only are there ‘jurisprudential ingredients’ which definitively favour the prevalence of marriage equality but also that the existing statutes, that of the Hindu Marriage Act and the Special Marriage Act, are also capable of being interpreted in a manner that allows for the same.

Ajita Banerjee, a queer feminist and researcher, in her article *‘Beyond Decriminalisation: Understanding Queer Citizenship through Access to Public Spaces in India’*, brings out the sheer cruelty that queer individuals are greeted by in public spaces, and the insurmountable odds that society imposes upon them. She explores the idea of the law as a ‘panopticon’, wherein she engages in a detailed discussion on several statutes, current and old, which cumulatively instated a constant state of surveillance in relation to queer individuals, and the horrors that these provisions put them through. She concludes by discussing ways in which, queer individuals may be extricated from the seemingly impenetrable web of inclemency, that has been conjured up by the duo of the formal law, and the informal society. She observes, that a proper course of action would not only include refraining from undue persecution of the queers, but also a proactive approach in protecting their basic rights.

## EDITORIAL NOTE

Radhika Radhakrishnan, a researcher at Internet Democracy Project and consultant for Internet Governance Forum, United Nations, in her article *'How does the Centre appear from the Margins? Queer Politics after Section 377'*, adopts an intersectional approach to focus on hierarchies and exclusions within queer communities and to argue that decriminalization of Section 377 is one of numerous struggles in the history of queer struggle in India. She critiques the Navtej verdict for primarily benefitting gay men while excluding substantive application of female sexuality and for having only a little in store for trans communities. She concludes by highlighting the urgent need to strengthen queer solidarities after the Navtej verdict and recommends certain focus areas where activist, legal and academic energies can be extended to benefit queer and trans women under the law.

This consolidated Special Issue of the NUJS Law Review, then, is a humble addition to this growing body of literature, a celebration and criticism of the judgment through its various articles, and a tribute to those who have silently but arduously undertaken the grassroots movement, which brought about the decision in Navtej. Through this Issue, the NUJS Law Review and the authors hope to respond to the Courts in a manner not possible within the Courtroom.