NAVTEJ: A QUEER RIGHTS JURISPRUDENTIAL REVOLUTION?

*Gayathree Devi KT & Sameer Rashid Bhat**

The Indian Supreme Court's decision in Navtej was, no doubt, a significant step in the direction of recognising queer rights in India, particularly in the private space. However, was it the queer rights jurisprudential revolution it is made out to be? As the judgment turns two, this article answers this question by analysing how other courts – whether domestic or foreign – have reacted to Navtej in their queer rights jurisprudence. On the domestic front, the Supreme Court's positioning in the constitutional system as an 'apex court' implies little scope for resistance from the lower judiciary. This mandatory influence of Navtej has led to a queer rights revolution within India, specifically through the recognition of the right of queer couples to cohabit. On the international front, Navtej's comparative influence has been felt in courts in Commonwealth countries dealing with queer rights issues. Even though some foreign courts have refused to employ Navtej's reasoning in their decisions, the fact that Navtej has inspired queer rights litigation abroad also signifies its revolutionary impact.

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I. INTRODUCTION

A revolution, in the simplest terms, is the mark of a new beginning – a successful effort to transform the principles and practices governing life, through conscious mobilisation.[1] By analogy, a jurisprudential revolution, or revolutionary

* D. Phil (Law) and DPhil (Public Policy) Candidates, University of Oxford. We are grateful to the editors of the NUJS Law Review for their invitation to write for this special edition, valuable editorial inputs and extraordinary patience.

1 Bruce Ackerman, The Future of Liberal Revolution 5-6 (Yale University Press, 1992).

adjudication,[2] transforms or 'revolutionises' a certain area of law and in turn, collective lives, through conscious mobilisation by actors in the judicial system. In the sphere of constitutional rights, this mobilisation, we argue, primarily occurs through rights-supportive judges and the interpretive processes they resort to, and therefore, one way of assessing the revolutionary effects of a judicial decision is to consider the influence it has had over other courts. As Lipkin posits, revolutionary adjudication differs from normal adjudication precisely because it establishes a legal paradigm for replication and refinement in future cases.[3] The question of whether it is producing coherence, not merely by appealing as a precedent but also by creating general principles which adequately state the essential values embodied in the paradigm,[4] is key to this analysis of the revolutionary effects of adjudication. It is through this lens that we propose to explore whether the Indian Supreme Court's decision in *Navtej Singh Johar* v. *Union of India* ('Navtej') is truly the queer[5] rights jurisprudential revolution it is made out to be. We do so by considering how Navtej has been received by domestic and foreign courts, adapting our method of assessment to the specificities of queer rights.

In the domestic context, by virtue of Article 141 of the Indian Constitution,[6] there is little chance for any court in the lower rungs of the judiciary to resist a transformative change initiated by the Supreme Court. At the same time, a lower court may have some choice in respect of the discourse or interpretation it adopts to sustain that change. This choice is particularly conspicuous in Navtej– althoughthe apex court arrived at a queer-friendly conclusion, some of its reasoning furthers heteronormative expectations by insisting that sexual orientation is 'innate' whereas the rest respects the 'fluidity' of sexual and gender identities. Therefore, lower courtscansustain the legal paradigm endorsed by the Supreme Court through either one of these two lines of reasoning. The choice that they are incentivised to make here, we argue, is key to understanding whether the decision in Navtejis truly revolutionary. Additionally, we argue that a revolution in queer rights jurisprudence would also need to move beyond the narrative of sexual intimacy in the 'private' space and legitimise queer identities as being equal in all areas of living.

In the international context, it goes without saying that the Indian Supreme Court does not have a mandatory influence over foreign courts. But it does not operate in a silo either. Being part of the global group of constitutional courts that are in a constant dialogue with each other, the Supreme Court is capable

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2 *See generally* Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68(3) Nebraska Law Review 701 (1989); Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism 138-47 (Duke University Press, 2000).

3 Lipkin, *supra* note 2, at 145.

4 Lipkin, *supra* note 2, at 740-1.

5 Throughout this paper, we use the term 'queer' to describe the spectrum of sexual and gender identities that are not heterosexual or cisgender.

6 The Constitution of India, 1950, Art. 141 "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

of influencing queer rights jurisprudence and advocacy across borders too.[7] This comparative influence, we argue, also signifies a decision's revolutionary effects. Therefore, we consider whether Navtej has had such influence and if it has, we further query which of the two discourses - 'innateness' and 'fluidity' – findsreplication abroad.

In this backdrop, Part II of this paper considers the revolutionary effects of Navtej on domestic courts by analysing how lower courts in India have upheld and refined Navtej in the two years since the judgment. Part III captures how Navtej influenced foreign courts in these two years, and revolutionised queer rights litigation or jurisprudence elsewhere. Part IV summarises the conclusions reached in previous parts.

II. DOMESTIC INFLUENCE

A. QUEER IDENTITIES: FLUID OR FIXED?

It needs no reiteration that Navtej declared§377 of the Indian Penal Code unconstitutional to the extent that it criminalised consensual sexual conduct between adults of the same sex.[8] The judgment was hailed as a victory for queer rights, for the criminalisation of homosexual sexual conduct has long been used to discriminate against the queer community and to invisibilise them, although §377 of the IPC does not criminalise sexual or queer identities as such.[9] The greatest significance of Navtej lies, therefore, in the fact that it recognises that the tentacles of laws like §377 reach into all aspects of society, including health, employment, housing, education, etc. and entrench discrimination against a community. Particularly, it is the judgment delivered by Justice Chandrachud that takes these aspects into account in its reasoning for decriminalising consensual homosexual sexual conduct, and laudably recognises the queer identity and not merely queer sexual behaviour.[10] Therefore, at the domestic level, Navtej certainly cut time into a 'before' and a 'now' when it comes to queer rights jurisprudence: it would be remiss not to acknowledge that Navtej created a space for a more holistic legal recognition of queer rights in India.

However, it is also true that the discursive framework employed by some of the judges in Navtej requires the queer community to conform to heteronormative expectations in order to call for a change. By 'heteronormative', we mean what Berlant and Warner consider 'institutions,structures of understanding, and practical orientations that make heterosexuality seem not only coherent – that

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7 *See generally* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29(1) University of Richmond Law Review 99 (1994).

8 Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.

9 Pratik Dixit, *Navtej Singh Johar v Union of India: Decriminalising India's Sodomy Law*, 24(8) International Journal of Human Rights 1-20 (2019).

10 Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶5 (per Chandrachud, J.).

is, organised as a sexuality – but also privileged'.[11] The heteronormative expectation runs thus – heterosexuality is innate and immutable and hence 'normal'; therefore, queer sexualities ought to be 'innate' in order to be normalised through court processes.[12] Subscribing to this line of argumentation is homonormative.[13]

As several others before us have pointed out,[14] Navtej reinforces the notion that sexual orientation and sexuality are 'essential', 'natural' or 'immutable' characteristics. Justice Mishra, for instance, reasons, in part, that sexual orientation is a natural identity and "the natural identity of an individual should be treated to be absolutely essential to his being."[15] Similarly, Justice Malhotra holds that "sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will."[16] Essentialising sexuality or sexual orientation in this manner, however, may box people into rigid categorisations and pre-constructed identities, which is less than ideal.[17] Sexualities are complex and fluid,[18] and a legal standard that fails to recognise this is reductive, heteronormative and homonormative.[19] Therefore, although *Navtej* challenged an existing heteronormative framework that characterised same-sex relations as 'unnatural', it also did so, in part, through yet another heteronormative framework that considers sexuality immutable.

At the same time, as Bhatia points out, Navtej also demonstrates, in part, an appreciation of the debate between those who consider sexuality to be

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[11] Lauren Berlant and Michael Warner, *Sex in Public*, 24(2) Critical Inquiry 547–566 (1998).

[12] *See* Alexa DeGagne, *Defining Sexuality Through the Courts in California's Proposition 8*, 65(14) Journal of Homosexuality 1957 (2018).

[13] Homonormativity internalises heteronormativity by placing heterosexual expectations and constructs about sexuality and gender as the norm for the queer community. *See* Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism* in Russ Castronovo & Dana D Nelson (eds.), Materializing Democracy: Toward A Revitalized Cultural Politics, 175-194 (2002).

[14] *See*, e.g., Saptarshi Mandal, *Section 377: Whose Concerns Does The Judgment Address?*, EPW, September 12, 2018, available at https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment (Last visited on August 30, 2020); Ramya Chandrasekhar, *Identity as Data: A Critique of the Navtej Singh Johar Case and the Judicial Impetus Towards Databasing of Identities*, Vol. 12(3-4) NUJS Law Review (2019); Gautam Bhatia, *"Civilization has been brutal": Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement*, September 6, 2018, available at https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/ (Last visited on August 30, 2020).

[15] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶4 (per Mishra J.).

[16] *Id.,* ¶19 (per Malhotra, J.).

[17] *See* Eve Kosofsky Sedgwick, Epistemology of the Closet (1st edn., 2008); Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability,* Vol. 46 Stanford Law Review, 503 (1994).

[18] To be sure, we do not claim that sexual orientation cannot be innate or biological. The limited point we make is that presenting sexual orientation as a notion that can *only* be innate invisibilises queer persons whose lived experiences tell them otherwise.

[19] DeGagne, *supra* note 12 (raising the same argument in the context of the United States).

'immutable' and those who consider it as a matter of choice.[20] This is evident from Justice Mishra's holding that:

> When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a...limited recognition keeps the individual choice at bay.[21]

Although Justice Mishra talks about the 'innateness' of sexual orientation, the thrust of his judgment was to the effect that personal choice and autonomy were central to sexuality and sexual orientation. His emphasis on each person's individuality and identity, which is grounded in the exercise of personal choice,[22] comes close to recognising all queer identities without prejudice. Similarly, a broad and impactful assertion of the significance of personal autonomy to queer identities comes from Justice Chandrachud's judgment:

> An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities...Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives...To confine it to closed categories would result in denuding human liberty of its full content as a constitutional right.[23]

Despite her consider ableemphasis on 'immutability', even Justice Malhotra concedes at one point that sexuality is an 'exercise of personal choice', and 'an expression of [the] autonomy and self-determination'.[24]

The above exposition indicates that Navtej adopted divergent approaches to support the recognition of queer rights, and in turn, presented contradicting discourseforlower courts to rely on. By adopting this middle-ground, Navtej essentially put the lower judiciary at a crossroads, with the choice of assimilating either an essentialist approach or a more inclusive approach. We argue that what determines whether Navtej has truly revolutionised queer rights jurisprudence in India depends on which of these two legal paradigms it incentivised for lower courts. If the paradigm of 'immutability' finds more acceptance, it mayrisk leaving some sexualities and genders forever out of the dominant legal discourse,

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[20] Gautam Bhatia, *Case Comment: Navtej Singh Johar v. Union of India: The Indian Supreme Court's Decriminalization of Same-Sex Relations*, 22(1) Max Planck Yearbook of United Nations Law 218, 226 (2019).

[21] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶9 (per Mishra J.).

[22] *Id*., ¶81.

[23] *Id*., ¶66 (per Chandrachud, J.) (references omitted).

[24] *Id*., ¶19 (per Malhotra, J.).

and is therefore, not a radical or revolutionary break from the heteronormative jurisprudence of the past.

B. MOVING BEYOND SEXUALINTIMACY IN PRIVATE

The significance of Navtej also lies in the fact that, although the ultimate outcome of the decision was the decriminalisation of same-sex relations, the judgment encapsulates the theoretical, conceptual, constitutional and moralunderpinnings of queer rights and is a recognition of the far-reaching discriminatory effects of the erasure of queer identities. These dicta are significant for they are an acknowledgement from the court that there is more to queer identities than the exercise of sexual intimacy in private spaces.[25] Reducing queerness to a 'private act' risks invisibilising the queer community from public spaces[26] and disregards the need for protecting expressions of sexuality (for instance, in terms of appearance and clothing) in public.[27] It further risk sleaving queer families and relationships that are not sexual out of the umbrella of legal protection.[28] Therefore, queer rights jurisprudence must move beyond the paradigm of protecting private sexual conduct.

In Navtej, a significant statement that furthers such a holistic appreciation of what queer rights jurisprudence must hope to achieve comes from Justice Mishra. He observed that queer communities are entitled to the right to equality, and that equality does not only signal a "recognition of individual dignity, but also includes within its sphere ensuring of equal opportunity to advance and develop their human potential and social, economic and legal interests."[29] Similarly, Justice Nariman concluded that queer persons have 'a fundamental right to live with dignity' andare 'entitled to be treated in society as human beings without any stigma being attached to any of them'.[30]

Justice Chandrachud acknowledges this more explicitly by referring to the South African Constitutional Court's 1999 decision in National Coalition for Gay and Lesbian Equality, which we quote in full for the point cannot be articulated better than this:

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[25] Siddharth Narrain, *Lost In Appeal: The Downward Spiral from Naz to Koushal*, Vol. 6(4) NUJS Law Review, 580 (2013); Lawrence Liang and Siddharth Narain, *Striving for Magic in the City of Words*, Kafila, August 3, 2009, available at https://kafila.online/2009/08/03/striving-for-magic-in-the-city-of-words/(Last visited on September 27, 2020).

[26] Gautam Bhan, *Right to Privacy and its Links to Section 377*, August 24, 2017, available at https://www.dailyo.in/voices/right-to-privacy-sexuality-section-377-fundamental-rights/story/1/19151.html (Last visited on September 27, 2020).

[27] Saptarshi Mandal, *'Right to Privacy' in Naz Foundation: A Counter-Heteronormative Critique*, Vol. 2 NUJS Law Review 525, 533 (2009).

[28] Laura Rosenbury and Jennifer Rothman, *Sex in and Out of Intimacy*, Vol. 59, Emory Law Journal, 809 (2010).

[29] Navtej Singh Johar v. Union of India (2018) 10 SCC 1, ¶104 (per Mishra, J.).

[30] *Id*., ¶97 (per Nariman, J.).

> Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.[31]

He recognises that beyond interfering with the privacy of queer communities, §377 has an invidious impact, for it entrenches stereotypes about gender roles and perpetuates harassment, fear, restricted access to public spaces and the lack of safe spaces.[32] It is reductive, therefore, to consider Navtej as a challenge only to §377 of the IPC. In reality, it is a challenge to a range of stereotypes rooted in heteronormativity and a history of discrimination against queer persons. Navtej, for many, signifies a hope that the constitutional guarantee of equality becomes truly inclusive of all queer identities.[33] From a constitutional standpoint, this recognition that Navtejalso challenges the heteronormativity of public spaces[34] is significant. Justice Chandrachud's acknowledgement that laws like §377 of the IPC 'obliterate' queer identities, deny them their constitutional entitlement to equal protection and dignity, and deprive them of an equal citizenship[35] is the exact kind of revolution that queer rights jurisprudence needs. What truly sets the stage for the kind of incremental change that queer rights activists hope to achieve through litigation is the recognition in Navtej that the right to autonomy of a free individual must also 'capture the right of persons of the community to navigate public places on their own terms, free from state interference'.[36]

Therefore, if it is accepted that Navtej was always meant to be a stepping stone to achieving incremental progress in queer rights jurisprudence, it becomes important to recognise that the narrative cannot be restricted to private sexual conduct, but should involve a broader legitimisation of all queer relationships, including same-sex marriage (it is arguable if marriage perpetuates heteronormative expectations, but that is not a debate we intend to touch upon here), and a prohibition of discrimination against queer persons based on their identity in public spaces, including employment, education, healthcare, etc. There is also a desperate need to address the intersectional nature of the discrimination faced by queer persons belonging to marginalised groups, which is merely mentioned in passing once in Navtej.[37] We argue, therefore, that another factor that determines whether Navtej has truly revolutionised queer rights jurisprudence in India

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[31] National Coalition for Gay and Lesbian Equality v. Minister of Justice, (1999) 1 SA 6 (CC) (per Sachs J., concurring).

[32] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶51 (per Chandrachud, J.).

[33] *Id*., ¶53 (per Chandrachud, J.).

[34] *Id*., ¶62 (per Chandrachud, J.).

[35] *Id*., ¶51 (per Chandrachud, J.).

[36] *Id*., ¶62 (per Chandrachud, J.).

[37] *Id*., ¶23 (per Chandrachud, J.).

depends on whether lower courts are taking discourse on queer rights beyond the sphere of private sexual intimacy.

C. THE ROAD TAKEN BY HIGH COURTS

Since Navtej, several High Courts in India have dealt with cases that have at their centre the need to recognise queer identities and queer rights. In seeking to protect queer identities, these courts have, in varying degrees, placed reliance on Navtej. In this section, we analyse the discourse relied on in some of these cases to consider whether litigation initiated is seeking to move beyond sexual intimacy and whether High Courts have been cognisant of the heteronormative underpinnings of the 'essential' discursive framework employed on occasion in Navtej.

Days after the Supreme Court's decision in Navtej became public, the Kerala High Court delivered its judgment in a habeas corpus petition in which one of the incidental questions up for consideration was whether 'persons of same gender' were entitled 'to lead a live-in relationship'.[38] A 'live-in relationship' goes beyond the realm of sexual intimacy and visits broader notions of cohabitation, mutual care and commitment, albeitwithin the ambit of the right to choose a partner, recognised by the Supreme Court in Navtej.[39] In considering this case, therefore, the Kerala High Court first observed that adults have the right to exercise their personal choice as regards whether or not to marry and whom to marry, which are decisions that lie fundamentally outside the control of the State.[40] Notably, the court also recognised that 'even if the parties are not competent to enter into the wedlock, they have the right to live together even outside the wedlock'.[41] This recognition of intimacies beyond the conception of marriage is encouraging, especially because it is a step in the direction of 'queering' kinship and relationships.[42] Similarly, the Court's reliance on Navtejto invoke the notion of constitutional morality, which rests upon the 'recognition of diversity that pervades the society' is promising.[43] In the same breath, however, the Kerala High Court also adverted to the essentialist explanations in Navtej that "sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorised that an individual exerts little or no control over who he/she gets attracted to."[44] This has the unfortunate effect of perpetuating a reductionist understanding of queer identity and is certainly not the ideal way forward.

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38 Sreeja S. v. Commr. of Police, 2018 SCC OnLine Ker 3578 ('Sreeja').

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

40 Sreeja S. v. Commr. of Police, 2018 SCC OnLine Ker 3578 , ¶8.

41 *Id*., ¶7.

42 Ratna Kapur, *Multi-Tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law*, Vol. 4(1) Jindal Global Law Review, 36 (2012); On marriage as a heteronormative institution, *see* Ryan Conrad, Against Equality: Queer Critiques of Gay Marriage (2010).

43 Sreeja S. v. Commr. of Police 2018 SCC OnLine Ker 3578, ¶10.

44 *Id*., ¶10, citing Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶143 (per Mishra, J.).

The fact that this is the one of the only twodicta from Navtej that the court chose to quote is quite disconcerting,for it is an indication that the court is unwilling to give up the heteronormative ideals that defined the pre-Navtej era. In any event, as the first decision on queer rights to follow Navtej, and as a welcome step beyond the recognition of sexual intimacy, *Sreeja* is a reassuring addition to India's queer rights jurisprudence. Additionally, by expressly extending the queer rights jurisprudence of Navtej to recognise a lesbian relationship, Sreejaallays concerns that Navtej's real benefit extends only to India's gay population.[45]

Shortly thereafter, in 2019, the Calcutta High Court also had to deal with a similar case concerning the cohabitation rights of a lesbian couple. In *SSG*,[46] once again, the court was considering a habeas corpus petition filed by one of the partners. The language employed by the Calcutta High Court is certainly more queer-friendly than the discourse in *Sreeja*. The court observed that consensual cohabitation is not illegal because Article 21 of the Indian Constitution "inheres within its wide amplitude an inherent right of self-determination with regard to one's identity and freedom of choice with regard to sexual orientation or choice of partner."[47] It further observed that such self-determination 'even if not procreative' is protected under our scheme of constitutional morality. By moving beyond heteronormative conceptions of familial relations, and not once making essentialist or 'immutability' arguments, the Calcutta High Court presented a decision that respects queer identities and voices more.

This year has seen two more cases concerning cohabitation so far. In *Madhu Bala* v. *State of Uttarakhand*, the Uttarakhand High Court cited the Kerala High Court's holding in Sreeja that the court has the duty to honour an individual's right to choose their partner.[48] Crucially, it skipped all references to the essentialist holdings of Navtej, and instead placed reliance on the notions of self-determination and identity inherent in Article 21 of the Constitution.[49] However, in a strange turn of events, even though the partners claiming the right of cohabitation were adults, the Court chose to give an opportunity to the detenue's family to present their case, even after the detenue expressed her intention to cohabit with the petitioner.[50] This paternalistic approach of the court is surprising for it raises questions about why the right of personal choice of a queer adult is subject to rebuttal by such person's family members.[51] If the choice of an adult is subject to interference by

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45 For this argument, *see* Radhika Radhakrishnan, *How does the Centre appear from the Margins? Queer Politics after Section 377*, Vol.12(3-4) NUJS LAW REVIEW (2019).

46 SSG v. State of W.B., WP 23120(W) of 2018 (Cal. H.C.).

47 *Id*.

48 Madhu Bala v. State of Uttarakhand, 2020 SCC OnLine Utt 276 ¶5.

49 *Id*., ¶6.

50 *Id*., ¶8-9.

51 Surabhi Shukla, *Madhu Bala v. State of Uttarakhand and Others Habeas Corpus Petition No. 8 of 2020*, LAW AND SEXUALITY, July 10, 2020, available at https://lawandsexuality.com/2020/07/10/madhu-bala-v-state-of-uttarakhand-and-others-habeas-corpus-petition-no-8-of-2020/#more-511 (Last visited on August 31, 2020).

such adult's family, it is doubtful if the court is truly fulfilling its duty to protect the rights of queer persons from interference by private parties.

Most recently, the Orissa High Court considered the question of cohabitation. The court's judgment begins with a recognition of the preferred pronouns of the petitioner, a trans man,[52] and entails a reproduction of the Yogyakarta Principles.[53] In deciding on the matter of cohabitation, the Court referred to the judgment delivered by Justice Chandrachud in Navtej to hold that the petitioner had the right to have a live-in relationship with a person of his choice, 'even though such person may belong to the same gender as the petitioner'.[54] Interestingly, the court adopted the language of rights and held that the petitioner and his partner had the 'right to stay as live-in partners'.[55] Moreover, it observed that the partner who identified as a woman, had all rights enshrined under the Protection of Women from Domestic Violence Act, 2005. It is unclear, however, if the court made this observation because it considered the couple to be in man-woman relationship by self-identification or if it extended the application of the Protection of Women from Domestic Violence Act, 2005 to all women in queer relationships. In any event, by legitimising the relationship between a trans man and a woman and moving beyond homosexual relations, Chinmayee makes a stride forward to recognising the plurality of queer identities and relationships.

Clearly, since Navtej, India has seen a progressive wave of judgments from the lower judiciary on the right of queer persons to cohabit with a partner of their choice. Although these decisions have their flaws, they have largely adopted the more holistic, rather than essentialist, approach that Navtej proposed, accommodating the fluidity and diversity of queer identities. The movement beyond sexual intimacy and gay rights is important, for it signifies that the strategy of queer rights advocates to seek incremental changes from the Indian judiciary may, after all, contribute to mainstreaming queer narratives and queer identities. If the discourse in these judgments is anything to go by, *Navtej* seems to have truly initiated a revolution in Indian queer rights jurisprudence. However, one must remain acutely aware that the Indian judiciary is still predominantly heteronormative as an institution, and navigating that space for queer-inclusion may involve several bargains and concessions.

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[52] Chinmayee Jena v. State of Odisha, 2020 SCC OnLine Ori 602, ¶1.

[53] *Id*., ¶9. The Yogyakarta Principles are a set of international principles outlining human rights law standards relating to sexual orientation and gender identity.

[54] *Id*., ¶12-13.

[55] *Id*., ¶13.

III. COMPARATIVE INFLUENCE

A. GLOBAL JUDICIAL DIALOGUE

The Indian Supreme Court does not operate in a silo; as a constitutional court, it is a key participant in the global judicial dialogue on human rights. It is engaged in a cross-fertilisation of legal principles and solutions from jurisdictions that have similar constitutional provisions and laws, or legal problems.[56]

As is evinced by the fact that the Indian Supreme Court's decision are often cited by foreign courts,the Indian Constitution is a subject of comparative law interest despite its late entry into the world of constitutions. India's jurisprudence has been of particular interest to fellow countries of the Commonwealth of Nations, perhaps because of the similarity of laws. This comparative influence of the Court is of interest to us because foreign courts are under no obligation to cite comparative jurisprudence from India, and yet do so. Since no court adopts foreign jurisprudence blithely at the risk of being accused of imposing 'foreign fads or fashions',[57] there must be strong reasons for placing reliance on comparative jurisprudence. As Fredman argues, judges generally choose what they regard as the most persuasive authority, but convergence or divergence with that authority requires 'persuasive deliberative reasons for such choices'.[58]

In this light, we propose to consider the transnational or comparative influence of the Indian Supreme Court's decision in Navtej for two reasons: first, the Indian Supreme Court is one of the major constitutional courts in the world to have decriminalised same-sex relations and engaged with the recognition of queer rights; and secondly, the Indian Penal Code was used as a model by the British government for penal codes in a number of other former colonies in both Asia and Africa. Considering that universal values underpin human rights, there is good reason to expect that similarly worded human rights across jurisdictions should be given similar meanings.[59]

In this backdrop, we argue that if the Indian Supreme Court's jurisprudence is offering persuasive legal reasons for judges abroad and filling a potential latent in queer rights advocacy and jurisprudence in another jurisdiction, that certainly speaks to the revolutionary effect of the Court's decision. On the other hand, if foreign courts have chosen to diverge from Navtej, we consider their reasons for doing so, for they may (or may not) provide important learnings for

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[56] Slaughter, *supra* note 7; Sandra Fredman, Comparative Human Rights Law, 8 (OUP Oxford, 2018); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, Vol. 20,Oxford Journal of Legal Studies, 499 (2000).

[57] Lawrence v. Texas 2003 SCC OnLine US SC 73 (per Scalia J., dissenting) at 598, citing Foster v. Florida 537 US 990 (2002) (US Supreme Court) (per Thomas J., concurring in denial of certiorari).

[58] Fredman, *supra* note 56, at 12.

[59] *Id*., 17; Bernstein v. Bester, (1996) 2 SA 751 (South African Constitutional Court) (per Kriegler J.).

the Indian Supreme Court. At the same time, we recognise that some constraints on the use of comparative law include significant differences in the legal texts in each jurisdiction, institutional and doctrinal differences between jurisdictions, and differences in social, economic, historical, and political contexts between jurisdictions.[60]

B. THE ROAD TAKEN BY FOREIGN COURTS

In this section, we consider how the India Supreme Courtcame to influence queer rights jurisprudence abroad by referring to recent queer rights judgments in Trinidad and Tobago, Botswana, Kenya and Singapore.

We begin our analysis with the decision of the High Court of Trinidad and Tobago in Jason Jones. The Court delivered its judgment months before Navtej – in fact, Navtej cites Jason Jones to support its conclusions.[61] However, we refer to this case for it may make one wonder why Puttaswamy[62] should not be regarded as the queer rights jurisprudential revolution India needed – for Puttaswamy expressly confirmed that the Indian Constitution guarantees a fundamental right to privacy and explicated the content of the right in detail.[63]

In Jason Jones, the High Court of Trinidad and Tobago upheld a challenge to the domestic law criminalising same-sex relations. In doing so, the court placed reliance on the dictum in Puttaswamy that sexual orientation is an essential attribute of privacy, which is inextricably linked to human dignity.[64] The court's engagement with Indian jurisprudence extended to questioning the rationale underlying the Supreme Court's earlier decision in Koushalbased on its more recent decision in Puttaswamy.[65] However, beyond the notions of dignity and autonomy and the right to respect for a private and family life, the High Court of Trinidad and Tobago crucially also relied on the right to equality and the right to freedom of expression,[66] perhaps because rooting queer rights in privacy alone denies the expression of queer identities in public spaces.[67] It is precisely for this reason that we do not consider Puttaswamy the queer rights jurisprudential revolution India needed, although it is certainly one of the pillars that Navtej stands on and can be regarded as pre-revolutionary adjudication[68] that created a sub-paradigm that

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60 Fredman, *supra* note 56, at 13.

61 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶39 (per Nariman, J.); Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶114 (per Chandrachud, J.).

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

63 *Id*., ¶126.

64 Jason Jones v. Attorney General of Trinidad and Tobago, Claim No. CV2017-00720 (High Court of Justice), ¶¶90-91 (Trinidad and Tobago).

65 *Id*., ¶90 fn 75.

66 *Id*., ¶¶94-95.

67 Mandal, *supra* note 27, at 532-534.

68 *See* Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, Vol. 3(1) The Journal of Appellate Practice and Process, 1-28, 17 (2001).

furthered the legal paradigm in Navtej. In any event,much like Navtej, Jason Jones also recognised that criminal sanctions have the potential to further oppressive and discriminatory attitudes towards queer persons in public spaces.[69] Tellingly though, in the context of the discussion in Section II, the High Court of Trinidad and Tobago did not adopt essentialist discourse in its decision, which is certainly a lesson for courts in India to learn.

We turn next to Botswana; in 2019, Botswana's High Court declared unconstitutional the country's colonial law which criminalised same sex relations. Crucially, the court's reasoning borrows heavily from Navtej. In asserting that the right to privacy protects an individual's decision autonomy and decisional privacy or privacy of choice without unwarranted State interference, the court referred to the judgment of Justice Malhotra in Navtej.[70] Similarly, it referred to Justice Chandrachud's judgment to hold that societal notions of heteronormativity cannot regulate the rights of queer persons.[71] It also adverted to Justice Mishra's judgment to set out sexual autonomy as an important feature of individual liberty and human dignity.[72] Based on these dicta, the Botswana High Court ultimately held that criminalising the right to sexual expression violates an individual's dignity and self-worth.[73] Once again, in adopting only the more queer-friendly reasoning in Navtej, the Botswana High Court also sets an example for India. Crucially, the Court's convergence with Indian law is explained through a universal rights-based framework rooted in the notions of dignity, autonomy and liberty.

Even as we see a convergence in the queer rights approaches of India, Trinidad and Tobago, and Botswana, at least two jurisdictions – Kenya and Singapore – diverged from Navtej recently. It is worth considering their reasons for doing so, to explore if Navtej could have done more to address the concerns of these courts. At a minimum, however, it is necessary to acknowledge that Navtej was significant enough not to be ignored in either jurisdiction, and that in itself, is a mark of its revolutionary effects.

Turning to Kenya, in *EG*,[74] the High Court of Kenya considered whether §§162 and 165 of Kenya's Penal Code are unconstitutional for violating the right to equality, the right to dignity and the right to privacy, among others. §162 criminalises having 'carnal knowledge of any person against the order of nature',[75] whereas§165 criminalises acts of 'gross indecency' between two male

[69] Jason Jones v. The Attorney General of Trinidad and Tobago Claim No. CV2017-00720 (High Court of Justice), ¶95 (Trinidad and Tobago).

[70] Letsweletse Motshidiemang v. Attorney General, MAHGB-000591-16 (High Court of Botswana), ¶122 (Botswana), citing Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶16.2 (per Malhotra, J.).

[71] *Id*., ¶123, citing Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶151 (per Chandrachud, J.).

[72] *Id*., ¶¶140, 147, citing Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶130, 230, (per Mishra, J.).

[73] *Id*., ¶151.

[74] EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019) (Kenya).

[75] Penal Code, 1930, §162 (Kenya).

persons.[76] Interestingly, hearings in this case began when Navtej was still under consideration by the Indian Supreme Court. Once the judgment in Navtej was delivered, therefore, the petitioners in *EG* sought the court's permission to place reliance on Navtej and made new submissions.[77] The Kenyan High Court briefly summarised the judgment too. Yet, without explicating its reasons for departing from Navtej, the Court refused to decriminalise same-sex relations. We map the Court's reasons for refusing the petition against the holdings of Navtej to see if Navtej left any gaps in its jurisprudential approach.

The Kenyan High Court rejected the petitioner's argument that the laws violate the right to equality and freedom from discrimination on the basis that the impugned provisions do not specifically target males and are neutrally worded.[78] Aside from the fact that the text of §165 quite literally targets male persons by name, this explanation is eerily reminiscent of the reasoning offered by the Indian Supreme Court in Koushal – that§377 of the IPC only outlaws certain 'acts' and not whole 'identities'.[79] This argument, however, was addressed in detail in Navtej by Justice Chandrachud. He placed reliance on Naz to observe that although §377 of the IPC (and by analogy, §§162 and 165 of the Kenyan Penal Code) is facially neutral, in 'operation', it unfairly targets gay men and has the 'effect' of viewing all of themas criminals.[80] As Justice Chandrachud notes in his judgment, "while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights."[81] Curiously, the Kenyan High Court fails to account for such indirect discrimination even though Article 27 of the Kenyan Constitution, which guarantees the right to equality, expressly prohibits indirect discrimination, i.e. discrimination in effects.[82] Although the petitioners pointed in their affidavits that, in the enforcement of §§162 and 165 of the Kenyan Penal Code, they were subjected to discrimination based on sexual orientation, the Court considered that their testaments were not 'tangible evidence'.[83] This is reminiscent of the Indian Supreme Court's position in Naz, where it refused to attach any weight to the petitioners' affidavits detailing discriminatory effects of the law.[84] However, in Navtej, Justice Chandrachud considered precisely such personal affidavits detailing experiencesof prejudicial behaviour as being sufficient to establish

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[76] *Id*., §165.

[77] EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019), ¶229 (Kenya).

[78] *Id*., ¶295-297.

[79] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶38, ('Koushal').

[80] Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762 : (2009) 160 DLT 277, ¶94 ('Naz').

[81] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶34 (per Chandrachud, J.).

[82] The Constitution of Kenya, 2010, Art. 27.

[83] EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019), ¶299 (Kenya).

[84] Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762 : (2009) 160 DLT 277, ¶¶40, 51.

indirect discrimination.[85] Note that the Kenyan High Court's divergences on this point from the comparative jurisprudence of Navtej are not rooted in the constraints set out in the previous section.

The Kenyan High Court also rejected the petitioners' claims that the laws violated their dignity and right to privacy, on several grounds. First, it pitted consensual same-sex relations against Article 45 of the Kenyan Constitution, which provides that "the family is the natural and fundamental unit of society" and that "every adult has a right to marry a person of the opposite sex, based on the free consent of the parties."[86] This statement reflects the exact kind of deep-seated heteronormative attitudes that Navtej held to be an inherent violation of constitutional liberties.[87] For the Kenyan court, Article 45(2) on the right to marry is a unique feature of its constitution that no other constitution in the world embodies – therefore, for the court, there is no reason to look to comparative jurisprudence on the matter.[88] However, even in the Indian context, existing legal norms legitimise only heterosexual matrimonial relations, and yet, Navtej and the High Court decisions that followed it, made the stride of recognising queer relationships. The Kenyan High Court's false equivalence of 'marriage' and 'union'[89] – which by definition in its own domestic law are different[90] – also reflects a phobia of the potential queering of the Kenyan family structure.

Curiously, the Kenyan High Court's high point comes from rejecting the argument that sexual orientation is innate or natural, based on a lack of scientific proof.[91] However, as articulated in Section II above, Navtej articulates and attaches equal significance to two approaches: one, located in an 'immutability' argument, and the other, rooted in personal choice. Therefore, even if the Kenyan High Court found the 'immutability' argument unconvincing, it fails to engage with the ideas of choice and decisional autonomy, and therefore, fails to articulate convincingly why its rejection of Navtej is justified. Note that its explanations for divergences are either based on flawed reasoning or inadequate engagement with foreign jurisprudence.

Finally, we turn to Singapore. §377A of Singapore's Penal Code outlaws the commission of any act of gross indecency by two male persons, whether

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85 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶42 (per Chandrachud, J.).

86 EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019), ¶391 (Kenya).

87 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶151 (per Chandrachud, J.).

88 EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019), ¶398 (Kenya).

89 Gautam Bhatia, *Notes from a Foreign Field: A Critique of the Kenyan High Court's Homosexuality Judgment*, Indian Constitutional Law and Philosophy, May 28, 2019, available at https://indconlawphil.wordpress.com/2019/05/28/notes-from-a-foreign-field-a-critique-of-the-kenyan-high-courts-homosexuality-judgment/ (Last visited on August 30, 2020).

90 Marriage Act, 2014, §3(1) (Kenya).

91 EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019), ¶¶83-95, 102, 393 (Kenya).

in public or in private.[92] After the Indian Supreme Court's decision in Navtej, this law was challenged in three separate petitions, which were considered together and dismissed by the High Court of Singapore (SHC).[93] The court referred to Navtej on several occasions and engaged with the decision in a more meaningful way than the Kenyan High Court. We consider below some of the reasons advanced by the SHC for diverging from Navtej and analyse their persuasive value.

First, the court dismissed the argument that the presumption of constitutionality would not apply to a colonial-era legislation.[94] Interestingly, in order to do so, the SHC drew support from a 1995 decision of the Indian Supreme Court,[95] without considering the revised position on the presumption articulated by Justice Nariman in Navtej in 2018. As he noted, what underlies the presumption of constitutionality of laws is the premise that the Parliament understands the constitutional limitations its enactments are subject to. A pre-constitution lawmade by a foreign legislature or body could not have known or understood the needs and constitutional aspirations of the people, and therefore, the presumption of constitutionality does not attach to such laws.[96] The SHC's failure to engage with thismore recent holding on the presumption of constitutionality is unfortunate.

Secondly, the SHC took issue with the recognition in Navtej that laws like §377 of the IPC violated queer persons' right to freedom of expression. In this respect, the SHC adopted a rather textualist interpretation of the right to freedom of expression 'as being encompassed within the right to freedom of speech'. For the court, therefore, the right did not protect non-verbal communications.[97] It further observed that if 'sexual expression' was a protected right, sexual offences such as incest, paedophilia, necrophilia or bestiality would also deserve the same protection, leading to absurd outcomes.[98] However, in light of the global recognition that the ordinary meaning of 'expression' goes beyond speech activity, the position in Navtej that expression covers expression of sexual and gender identity in any form[99] seems more holistic. Further, as Justice Chandrachud explains, denying "a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them."[100] In any case, the concerns expressed by the SHC convey a false equivalence between consensual relationships between adults and bestiality and

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92 Penal Code, 1871 (Rev. Ed. 2008), §377A (Singapore).

93 Ong Ming Johnson v. Attorney-General 2020 SGHC 63 (Singapore). A prior challenge against the provision had already been dismissed by the High Court of Singapore and subsequently affirmed by the Court of Appeal. *See* Lim Meng Suang v. Attorney General, (2015) 1 SLR 26 (Singapore).

94 Ong Ming Johnson v. Attorney-General, 2020 SGHC 63, ¶152.

95 Nand Kishore v. State of Punjab, (1995) 6 SCC 614.

96 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶90 (per Nariman, J.).

97 Ong Ming Johnson v. Attorney-General, 2020 SGHC 63, ¶¶261-262.

98 *Id*., ¶¶263, 265.

99 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶17.1 (per Malhotra, J.).

100 *Id*., ¶115 (per Chandrachud, J.).

non-consensual relationships, as Justice Malhotra argues,[101] and only entrench-heteronormative attitudes.

Thirdly, the SHC observed that since the Parliament of Singapore had decided to retain §377 Aback in 2007 and 'there was no significant change' in 'societal disapproval towards male homosexual conduct, as opposed to female homosexual conduct', it could not intervene.[102] This idea of public morality is what the SHC relied on while rejecting the petitioners' arguments[103] that §377A is under-inclusive (as it excludes female homosexual conduct) and over-inclusive (as it targets private conduct) and therefore, discriminatory.[104] However, Navtej already addressed this insistence that societal morality prevails over constitutional liberties. Justices Mishra, Malhotra and Chandrachud held that societal morality and majoritarian views can never prevail over constitutional morality;[105] however, the SHC did not engage with the notion of constitutional morality.

Fourthly, the SHC's finding on Article 12 of the Singaporean Constitution is also curious. For the court, the right to equality and equal protection of laws provided by Article 12(1) extends only to the categories mentioned by Article 12(2), which prohibits discrimination based on listed grounds.[106] Interestingly, Article 12(2) of the Singaporean Constitution does not expressly prohibit discrimination on the basis of sex, and is therefore, not akin to Article 15 of the Indian Constitution in text. However, Article 12(1) of the Singaporean Constitution and Article 14 of the Indian Constitution are omnibus equality provisions that are similar in content and do not, in their phrasing, allude to being limited by specific grounds. Navtej certainly views Article 14 as protecting equality beyond the categories specified in Article 15.[107] Thus, it is difficult to see why the SHC could not have adopted Navtej's line of reasoning on equality. The Court was reluctant to adopt a 'proportionality' test, on the ground that such a review of would amount to usurping a legislative function,[108] circling back to the 'public morality' argument above.

Lastly, like the Kenyan High Court, the SHC also rejected the 'immutability' argument raised by the petitioners and distinguished between 'acts' and 'identities'.[109] Therefore, like the Kenyan High Court, the SHC also failed to engage with the more nuanced and queer-friendly propositions laid down in Navtej, explained above.

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[101] *Id*., ¶19(i) (per Malhotra, J.).
[102] Ong Ming Johnson v. Attorney General, 2020 SGHC 63, ¶¶175, 177.
[103] *Id*., ¶¶189, 191, 193.
[104] *Id*., ¶183.
[105] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶16.2 (per Malhotra, J.); *Id*., ¶141 (per Chandrachud, J.); *Id*., ¶¶ 119-124.
[106] Ong Ming Johnson v. Attorney-General, 2020 SGHC 63, ¶¶207, 208 (Singapore).
[107] *See* Bhatia, *supra* note 20 (for a summary of the different notions of equality articulated in *Navtej*).
[108] Ong Ming Johnson v. Attorney-General, 2020 SGHC 63, ¶216 (Singapore).
[109] *Id*., ¶¶273, 282.

From the discussion above, it is clear that Navtej's comparative influence over foreign courts has been limited. At the same time, the decision had a revolutionary effect on queer rights advocacy and litigation abroad. Immediately following Navtej, more than 50,000 people including diplomats signed a petition calling for the decriminalisation of same sex relations in Singapore, and at least three separate petitions that borrowed from the reasoning of Navtej made their way to the SHC.[110] Similarly, the Kenyan High Court allowed petitioners to make separate submissions exclusively on the basis of the reasoning advanced in Navtej.[111] These instances suggest that Navtej equipped queer rights advocates abroad with transformative legal discourse and added momentum to their movements, and that in itself is significant. Although the decisions in Singapore and Kenya may not have decisively broken from the past, the fact that Navtej inspired fresh litigation and spurred a reinvigorated queer rights movement indicates that Navtej has had pre-revolutionary effects over society, if not adjudication.

IV. CONCLUSION

In conclusion, in the short span of two years, Navtej has had a transformative influence over both domestic and international jurisprudence. As this note shows, at the domestic level, the effects of Navtej were felt beyond the realm of private sexual conduct in the area of cohabitation of queer couples too, which some hope would in turn act as a stepping stone to the recognition of same-sex marriage as well. By being the force behind these incremental developments, Navtej marks a revolutionary shift in Indian queer rights jurisprudence. Similarly, Navtej has had a noteworthy impact elsewhere too – more so over queer rights advocacy than on jurisprudence. While some foreign courts have differed from Navtej, the reasons they provide for the same do not so much as present learnings for the Indian Supreme Court to adopt as they further heteronormativity in the name of public morality. If there is one general lesson to take away from the experience of Navtej, it is that where legislative and executive action on progressing minority rights is stifled by societal morality, we need the jurisprudential revolution that is transformative constitutionalism.

[110] Amy Qin, *Inspired by India, Singaporeans Seek to End Gay Sex Ban*, New York Times, December 16, 2018, available at https://www.nytimes.com/2018/12/16/world/asia/singapore-gay-sex-ban.html (Last visited on September 30, 2020).

[111] EG v. Attorney General, Petition Nos. 150 & 243 of 2016 (High Court of Kenya, 2019), ¶¶229-241 (Kenya).