

EDITORIAL NOTE

TAKING NAVTEJ SINGH JOHAR V. UNION OF INDIA TO ITS LOGICAL CONCLUSION

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I. INTRODUCTION

When the Editorial Board of the NUJS Law Review put together Volume 13(3) as the Navtej Singh Johar Special Issue in 2020, it was a moment that signified the vindication of the LGBTQIA+ community's 'right to love' after seventeen years of legal struggle and generations of majoritarian subjugation.¹ Put together after the dust had settled on the *Navtej Johar* verdict,² the release of Special Issue by the NUJS Law Review was an attempt to initiate conversations on the lived experiences of those LGBTQIA+ individuals, who had been considered to be living 'against the order of nature' until then.

The Navtej Singh Johar verdict had brought with itself, an affirmation that the values of individual dignity, autonomy and privacy were not just 'frozen concepts'³ which could be eroded at the altar of societal morality.⁴ This was a significant holding by the Court inasmuch as it set into motion the process of granting visibility to all those persons who had been living their lives under the shadows of §377 of the Indian Penal Code, 1862 ('IPC').⁵ The grant of constitutional protection to these individuals, who had, for the most part of their lives been regarded as 'un-apprehended felons' was however just the beginning of the process of restoring their dignity.⁶

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¹ Devashri Mishra & Aashesh Singh, *Editorial Note: Navtej Singh Johar Special Issue*, Vol. 13 NUJS L. REV., 3 (2020) ('Editorial Note 13(3)'); Shraddha Chaudhary, *Navtej Johar v. Union Of India: Love In Legal Reasoning*, Vol. 12, NUJS L. REV., 3-4 (2019).

² Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 ('Navtej Singh Johar'/'Johar').

³ Same Sex Marriage, In re, 2004 SCC OnLine Can SC 80 (Supreme Court of Canada).

⁴ Navtej Singh Johar, ¶131.

⁵ *Id.*, ¶453; See also, Oxford Union, *Menaka Guruswamy and Arundhati Katju | Full Address and Q&A*, YOUTUBE, April 26, 2020, available at <https://www.youtube.com/watch?v=-Lp6H4YYN-k> (Last visited on June 4, 2021).

⁶ Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, Vol. 110, SOUTH AFRICAN LAW JOURNAL, 450 (1993) (cited by Chandrachud, J. and Malhotra, J. in Navtej

In coming to its decision of decriminalising homosexuality, the Hon'ble Supreme Court emphasised on two related values. These were essentially the values of self-determination and equal citizenship, each of which was held to be constitutive of the idea of individual dignity under the Constitution.⁷ Against this backdrop, the Editorial Note to Volume 13(3) had pertinently mentioned that the Johar verdict has created a fertile ground for further enlivening and realising the rights of the marginalised sexual identities.⁸ Today, we are witnessing the first of many attempts of the LGBTQIA+ community to realise these rights as they struggle before the Delhi High Court⁹ to lay their claims to an institution which forms the bedrock of profound hopes and aspirations, i.e. the institution of marriage.¹⁰ The Delhi High Court, therefore, has essentially been tasked with an expository exercise. In adjudicating the claims laid by the LGBTQIA+ community to same-sex marriage, the Court will have to expound the values of self-determination and equal citizenship, trace their contours to ultimately determine whether the institution of marriage is an essential means to achieve them as envisaged by the Hon'ble Supreme Court in *Navtej Johar*.

In the paragraphs that follow, we shall be highlighting the concomitant aspects that lie at the heart of self-determination and equal citizenship. Through this endeavour, we attempt to apprise the reader as to *why* the institution of marriage substantially enables such values to reach their logical conclusions, especially in a country such as India.

II. SELF-DETERMINATION AND ITS CONCOMITANT ASPECTS

It would be trite to mention here that the Court in *Navtej Johar* unequivocally reiterated its stance in *National Legal Services Authority v. Union of India*,¹¹ on the right to determine one's gender identity and sexual orientation being an integral part of personal liberty under Article 21 of the Constitution.¹² By holding the determination of one's gender identity to be one of the most intrinsic and intimate decisions of an individual in one's private sphere,¹³ the Court in

Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶540, 640.2.6).

⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶161, 268.1, 618.4, 643.3.

⁸ Editorial Note 13(3), *supra* note 1, 2 at 1.

⁹ *Kavita Arora v. Union of India*, W.P(C) 7692/2020 (unreported decision); *Vaibhav Jain v. Union of India*, W.P(C) 7657/2020 (unreported decision); Sofi Ahsan (INDIAN EXPRESS), *No one dying for want of marriage certificates: Centre to HC on same sex marriage plea*, May 24, 2021, available at <https://indianexpress.com/article/india/no-one-dying-as-they-dont-have-marriage-certificates-centre-to-hc-on-same-sex-marriage-plea-7327799/> (Last visited on June 4, 2021).

¹⁰ *Obergefell v. Hodges*, 2015 SCC OnLine US SC 6 (cited by Chandrachud, J. in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶122).

¹¹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

¹² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶640.3.1-640.3.2.

¹³ *Id.*, ¶¶147, 640.3.3.

Navtej Johar was successful in cementing the inextricable link between self-determination, individual autonomy and privacy, which had been drawn by the Court in NALSA under Article 21 of the Constitution. Concurrently, the Court in Navtej Johar also acknowledged and emphasised upon a concomitant aspect of the right to self-determination. This was the aspect of ‘expression’ of one’s self-determined gender identity and sexual orientation.¹⁴

A. THE EXPRESSION OF INDIVIDUAL IDENTITY

The Court in Navtej Johar was cognisant of the fact that an individual’s right to self-determination would be an empty one if they were not allowed to express their identity in the fraternity.¹⁵ As such, while the Court held self-determination to be a part of Article 21 of the Constitution, it also traced the ‘expression’ of such self-determined identity to Article 19(1)(a) and subject it to the exhaustive limitations set out in Article 19(2).¹⁶ In doing so, the Court was only following the trajectory of cases, where it had refused to give a restrictive meaning to the freedom of expression under Article 19(1)(a).

Illustratively, in *Shafin Jahan v. Asokan K.M.*,¹⁷ the Court had held that the right of an individual to choose a life partner was a necessary corollary to accepting their self-determined identity, and that the expression of such a choice stood protected under Article 19 of the Constitution.¹⁸ Similarly, in *Asha Ranjan v. State of Bihar*¹⁹ and *Shakti Vahini v. Union of India*,²⁰ the Court was categorical in stating that the constitutional recognition of an individual’s (self-determined) identity enabled them to choose a life partner without fearing that such expression of choice would not conform to the group thinking of the society.²¹ The reason for such an expansive interpretation of the expression of one’s self-determined identity, however, lies in another concomitant aspect of the right to self-determination, which the Court did not have an occasion to address in Navtej Johar. This is the aspect of self-fulfilment.²²

¹⁴ *Id.*, ¶¶47, 144, 161.

¹⁵ *Ang Ladlad LGBT Party v. Commission of Elections G.R. No.190582 (2010)* (Supreme Court of Philippines) (cited by Chandrachud, J. in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶202); Shradha Chaudhary, *supra* note 1. “If the right to love is, indeed, essential to an individual’s self-respect and her aspirations of self-actualisation, as the discussions above would indicate, a failure to give full recognition to every expression of the said love is an infringement of the right”; Justice Leila Seth, *A Mother and a Judge Speaks Out on Section 377*, THE TIMES OF INDIA, January 26, 2014.

¹⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶256, 268.16, 354, 641.1, 641.4.

¹⁷ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

¹⁸ *Id.*, ¶27.

¹⁹ *Asha Ranjan v. State of Bihar*, (2017) 4 SCC 397.

²⁰ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

²¹ *Asha Ranjan v. State of Bihar*, (2017) 4 SCC 397, ¶61.

²² See generally, GAUTAM BHATIA, *OFFEND SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION*, 3-5 (Oxford University Press, 2016).

B. THE ASSURANCE OF SELF-FULFILMENT

The constitutional guarantee of Freedom of Expression under the Indian Constitution is premised on the individual desire for self-fulfilment as held by the Supreme Court in *Union of India v. Naveen Jindal*.²³ In *Jindal*, while deciding whether it was permissible for the respondent to fly the National Flag of India, the Court held that the objective of the freedom of expression guarantee under the Constitution was to assure individual self-fulfilment.²⁴ As Richards argues, the attainment of this self-fulfilment is only possible through a full and untrammelled exercise of such expression.²⁵ Thus, as long as the expression of one's self-determined identity does not assure their individual self-fulfilment, the right to self-determination would remain an empty shell.

This assurance of self-fulfilment cannot be achieved simply by recognizing an individual's identity and recognizing their inherent right to determine and express the same by mere companionship as was done by the Court in *Navtej Johar*. It is more than a mere freedom from criminal liability and the absence of a chilling effect in expressing their identity.²⁶ Insofar as the LGBTQIA+ community is concerned, it is an assurance that, much like heterosexual couples, they too can aspire for a long-term partnership based on marriage.²⁷ We acknowledge that the Court in *Navtej Johar* did not have an occasion to directly address the issues relating to self-fulfilment and same-sex marriage. However, it cannot be denied that by having traced the expression of individual identity to Article 19(1)(a), the judgement laid down a ripe ground on which the demand for same-sex marriage in order to achieve the assurance of self-fulfilment could be nurtured.

The demand of the LGBTQIA+ community for marriage before the Delhi High Court is however not premised upon a single facet of marriage such as partnership, procreation or adoption. Instead, it is premised on the centrality of marriage to the human condition,²⁸ its essentiality in ensuring emotional

²³ *Union of India v. Naveen Jindal*, (2004) 2 SCC 510, ¶48.

²⁴ *Id.*

²⁵ David A.J. Richards, *Free Speech and Obscenity Law*, Vol. 123(1), UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 45–91 (1974); As has been argued by BHATIA, *supra* note 22, we acknowledge that this cannot be a stand-alone argument for protecting free speech. The argument of self-fulfilment has essentially been used to highlight the ultimate objective of the free expression guarantee under Article 19(1)(a). As such, an argument for protecting free Expression using the rationale of self-fulfilment would also require a detailed discussion on Article 19(2) which is beyond the scope of the present note.

²⁶ *Ang Ladlad LGBT Party v. Commission of Elections*, GR No. 190582 (2010) (Supreme Court of Philippines) (cited by Chandrachud, J. in *Navtej Johar*, ¶202).

²⁷ Saurabh Kripal, *Why It's Time To Consider Same Sex Marriage*, Article 14, October 21, 2020, available at <https://www.article-14.com/post/why-it-s-time-to-consider-same-sex-marriage> (Last visited on June 4, 2020); *See also*, Oxford Union, *supra* note 5 at 1.

²⁸ *Obergefell v. Hodges*, 2015 SCC OnLine US SC 6,17 (2015).

companionship and its multiple transcendent purposes which assure individual self-fulfilment.²⁹

More importantly, this demand is premised upon the fact that the institution of marriage serves as a gateway for same-sex couples to become entitled to a bundle of civil rights which are not naturally available to them upon their union such as the right to adopt, the right to succession of property, etc.³⁰ Same-sex couples are unable to enjoy any of the benefits that a legal recognition of their union would provide, beyond the mere right to ‘companionship’.³¹ This limited right to ‘companionship’ is however devoid of all the other ordinary rights that a heterosexual married couple is able to enjoy as a result of their union being legally recognised by the State. Even if this couple may have spent a significant period of time in a meaningful union, all security and sense of assurance (through their relationship with their partner, their children, their home, finances, property, etc) can only be enjoyed to a limited extent, and exist under a perpetually hanging sword of Damocles. As a result, same-sex couples are compelled to shape all their aspirations concerning their family life and their futures *within* the umbrella of the existing legal regime, which has proven to be woefully inadequate in protecting their interests and assuring their self-fulfilment.

Thus, the demand of the LGBTQIA+ community for marriage before the Delhi High Court is not an end in itself. It is a means to continue the journey started by the AIDS Bhedbhav Virodhi Andolan in 1994,³² and achieve the self-fulfilment required to bring the value of self-determination expounded in Navtej Johar to its logical conclusion.

III. EQUAL CITIZENSHIP AND ITS CONCOMITANT ASPECTS

The second value which the Court held to be constitutive of individual dignity, and which was damaged by §377 of the IPC was that of ‘equal

²⁹ *Id.*

³⁰ For a detailed argument on how the institution of marriage tangibly affects the lives of the same-sex couples by conferring equal civil rights upon them, *see infra*, Part III.B(1); Sharif D. Rangnekar, *The Battle for Same-sex Marriage is Essentially a Fight for Civil Rights*, THE SCROLL, March 1, 2021, available at <https://scroll.in/article/988175/the-battle-for-same-sex-marriage-is-essentially-a-fight-for-civil-rights> (Last visited on June 4, 2021); Abhishyant Kidangoor, *This Indian Same-Sex Couple is Fighting for the Right to Marry. But is Their Country Ready?*, TIME, January 6, 2021, available at <https://time.com/5926324/india-lgbtq-marriage-case/> (Last visited on June 4, 2021).

³¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶155.

³² Vidya Krishnan (THE HINDU), *How the LGBTQ rights movement in India gained momentum*, July 14, 2018, available at <https://www.thehindu.com/society/its-been-a-long-long-time-for-the-lgbtq-rights-movement-in-india/article24408262.ece> (Last visited on June 4, 2021).

citizenship'.³³ The Court essentially held that while §377 sought to criminalise the act of homosexuality, it ended up criminalising the identity of the LGBTQIA+ community itself.³⁴ It enabled prejudices, furthered stereotyping and perpetuated homophobic attitudes, thereby casting a chilling effect on the everyday lives of the LGBTQIA+ community.³⁵ As such, the Court held §377 to be an attack on very identities of the members of the LGBTQIA+ community which deprived them of full and equal citizenship under the Constitution.

Jeremy Waldron has argued elsewhere that the promise of equal citizenship hinges on two related aspects. These are, the confirmation of a basic social standing to an individual as an object of society's protection and the assurance of their inclusiveness in the society.³⁶ Much like the argument against the mere affirmation of the right to self-determination,³⁷ a promise of equal citizenship would remain an empty one without the confirmation of an individual's basic social standing and an assurance of their inclusiveness in the society.

A. THE CONFIRMATION OF A BASIC SOCIAL STANDING

While deciding *Navtej Johar*, the Supreme Court rightly acknowledged that §377 had created a narrative that denied the sense of identity to the LGBTQIA+ community.³⁸ The creation of a narrative that sanctioned their harassment, chilled their expression and denied them access to safe spaces struck at the heart of the promise of equal citizenship.³⁹ Building up on *National Legal Services Authority v. Union Of India*,⁴⁰ where the Court had recognised the basic social standing of non-binary gender identities, the Court in *Navtej Johar*, pertinently acknowledged that the worth of equal citizenship could not be realised by non-binary gender identities unless the expression of their sexualities also received equal constitutional protection.⁴¹ By equating the constitutional protection granted to the expression of non-binary gender identities to that of binary gender identities, the Court not only furthered the idea of a basic social standing in the society but also affirmed it to be the means of achieving equal citizenship.

³³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶618.4. See generally, WILLIAM ESKRIDGE, EQUALITY PRACTICE, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS, 202 (1st ed., Routledge, 2002); Catherine Donovan et al., SAME-SEX INTIMACIES: FAMILIES OF CHOICE AND OTHER LIFE EXPERIMENTS 195 (1st ed., Routledge, 2001).

³⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶643.6.

³⁵ *Id.*, ¶¶458, 561.4.

³⁶ JEREMY WALDRON, THE HARM IN HATE SPEECH, 4-5, 61 (Harvard University Press, 2012); For a brief understanding of Waldron's idea, see also, Gautam Bhatia, *Book Review: Jeremy Waldron, The Harm in Hate Speech*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, March 7, 2014, available at <https://indconlawphil.wordpress.com/?s=the+harm+in+hate+speech> (Last visited on June 4, 2021).

³⁷ See, *supra*, Part II.A.

³⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶643.6.

³⁹ *Id.*, ¶458.

⁴⁰ *National Legal Services Authority v. Union Of India*, (2014) 5 SCC 438.

⁴¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶25.

The decriminalisation of §377 gave the LGBTQIA+ community the right to express its sexuality, thus furthering NALSA's idea of a basic social standing. However, at the same time, the Court also knew that the promise of equal citizenship premised solely on the confirmation of a basic social standing would remain substantially unfulfilled unless the LGBTQIA+ community was also given an assurance of inclusiveness in the society.⁴²

B. THE ASSURANCE OF INCLUSIVENESS

Waldron argues that the assurance of inclusiveness lies at the heart of the value of equal citizenship.⁴³ It is essentially a general sense of security to each individual that *by virtue* of being a person, and *by virtue* of being a member of the society, they will be able to lead a regular life without facing “hostility, violence, discrimination or exclusion by others”.⁴⁴ For vulnerable groups, the withdrawal of such sense of security reinforces their existing structural inequalities, thus renegeing on the promise of equal citizenship.⁴⁵

Naturally, the first step towards lending this sense of sense of security would be the confirmation of a basic social standing in the society as has already been argued above.⁴⁶ However, a mere recognition of one's gender identity, coupled with the constitutional protection of an expression of the same is not enough to achieve the sense of security required by an individual in the society. The achievement of such a sense of security also requires the elimination of the prejudices, stereotypes and homophobic attitudes created by decades of operation of §377 of the IPC.⁴⁷ In a country such as India, the institution of marriage plays a fundamental role in eliminating such prejudices and attitudes and thus, lending a sense of security.

It does so by conferring same-sex couples with equal civil rights which were previously unavailable to them, thus normalising their relationship within the legal system. Concurrently, it also attempts to deconstruct the heteronormative structures created by the society (thus attempting to normalise their relationship within the society) which, in turn, are responsible for the threat to their sense of security.

⁴² *Id.*, ¶154 (per Chandrachud, J.).

⁴³ Waldron, *supra* note 36, 5 at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See, *supra*, Part III.A.

⁴⁷ For an idea on the elimination of prejudices as a means of achieving equal citizenship, see, *Bato Star Fishing (P) Ltd v. Minister of Environmental Affairs and Tourism*, 2004 SCC OnLine ZACC 6 (Constitutional Court of South Africa) (cited by Dipak Misra, CJI in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶100).

1. Marriage as an Instrument to Confer Equal Civil Rights

The rights that individuals are entitled to when their relationship receives legal sanction by way of marriage are manifold. These rights, which are often taken for granted in heteronormative frameworks,⁴⁸ range from being able to obtain insurance for their partners, the ability to inherit property from their deceased partner, co-sign on a lease, or even open a joint-bank account.⁴⁹ Under the current legal framework, individuals in same-sex relationships are denied all the aforementioned rights since their relationships have not been accorded legal sanction. The institution of marriage accords legal sanction to such relationships, thus facilitating the extension of all those assurances, safeguards and bundle of civil rights to same-sex relationships which were previously reserved only for heterosexual relationships. Currently, the lack of legal recognition to such relationships not only threatens their sense of security and fulfilment, but also affects their lives in tangible and detrimental way.

For instance, the institution of marriage enables individuals to leave their property (or other inheritance) to their partner upon their death. The lack of such a safeguard for a same-sex relationship today can potentially leave the surviving partner in a financially dire situation, without any form of legal recourse whatsoever. If the home in which the same-sex couple cohabited is in the name of the individual that passed away, that too would not be possible for the surviving partner to inherit – as can otherwise be done by legally recognised spouses under succession laws.⁵⁰

Similarly, the institution of marriage enables couples to legally adopt, and to raise their own children. Most laws that fall in the domain of family law in India, including those relating to adoption, succession, surrogacy, and guardianship, etc, are all tied to the institution of marriage in some form.⁵¹ The right to parenthood has also been recognised in various instruments of international

⁴⁸ Tarini Mehta, *Where are India's Queer Parents? Having a Family is not Even an Option for Many Indians*, THE PRINT, February 21, 2021, available at <https://theprint.in/opinion/where-are-indias-queer-parents/608267/> (Last visited on June 6, 2021) Tarini Mehta, *Where are India's Queer Parents? Having a Family is not Even an Option for Many Indians*, THE PRINT, February 21, 2021, available at <https://theprint.in/opinion/where-are-indias-queer-parents/608267/> (Last visited on June 6, 2021).

⁴⁹ Abhishyant Kidangoor, *This Indian Same-Sex Couple is Fighting for the Right to Marry. But is Their Country Ready?*, TIME, January 6, 2021, available at <https://time.com/5926324/india-lgbtq-marriage-case/> (Last visited on June 4, 2021); See also, Oxford Union, *supra* note 5 at 1.

⁵⁰ Succession Act, 1925, §32, §35; Hindu Succession Act, 1956, §10.

⁵¹ See Hindu Adoptions and Maintenance Act, 1956, §§7-8, which use the terms “husband” and “wife” thereby indicating that the Act does not recognise adoption by same-sex couples; Juvenile Justice (Care and Protection of Children) Act, 2015, §57; Succession Act, 1925, §§33-35; Hindu Succession Act, 1956, §10; See also Surrogacy (Regulation) Bill, 2019, §2(g), §4(iii)(c)(II).

law, such as the Universal Declaration of Human Rights,⁵² and the International Covenant on Civil and Political Rights.⁵³ With reference to international obligations, the Supreme Court in *Indra Sarma v. V.K.V. Sarma* had also recognised the right of an individual to found a family.⁵⁴ The Court in *K.S. Puttaswamy v. Union of India*, further recognised this right to found a family *within* the scope of Article 21, and declared it to be a vital personal choice that is integral to the dignity of the individual.⁵⁵ However, under the current legal framework, same-sex couples are unable to adopt a child together.⁵⁶ Although it is possible for one of the individuals in a same-sex couple to legally adopt a child – this results in several potential issues, where the other partner cannot be recognised as a legal parent of the child.⁵⁷ Take for instance, Raga D’Silva and Nicola Fenton, who have been together for over 13 years and have raised two children together.⁵⁸ Since Nicola was not recognised as a legal parent, she faced many challenges during the schools admission processes among other things.⁵⁹

The imperative need for civil rights to be extended to same-sex couples in order to assure their inclusiveness in the society, perhaps, became even more evident in the recent months. This is essentially when, in the face of a raging pandemic, they realised that they may not be able to take medical decisions on behalf of their partners, should they be incapacitated or seriously ill.⁶⁰ The non-availability of safeguards and civil rights extended by the institution of marriage, to same-sex couples while they make health related decisions for their partners,⁶¹ or children,⁶² strikes at the heart of the assurance of inclusiveness. It also bears testimony to the fact that despite the rich jurisprudence created by the Hon’ble Supreme Court on LGBTQIA+ rights, the system will not be able to deconstruct its inherently heteronormative structure and extend civil rights to same-sex couples thereby assuring them of their inclusiveness, unless such relationships are given legal recognition.

⁵² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217-A(III), Art. 16(1), available at https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf (Last visited on June 6, 2021).

⁵³ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, 171, Art. 23(2).

⁵⁴ *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, ¶16, ¶67.

⁵⁵ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, ¶298, ¶479.

⁵⁶ Ministry of Women and Child Development, Adoption Regulations, 2017, Notification, January 4, 2017, Regs. 5(2)(a)-(c) available at http://cara.nic.in/PDF/Regulation_english.pdf (Last visited on June 6, 2021).

⁵⁷ Tarini Mehta, *supra* note 48 at 6.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Abhishyant Kidangoor, *supra* note 49 at 6.

⁶¹ *Id.*

⁶² Tarini Mehta, *supra* note 48 at 6.

2. Marriage as an Instrument to Attempt Deconstructing Heteronormative Societal Biases

Heteronormative structures created by the legal system and the society threaten and withdraw the assurance of inclusiveness of the LGBTQIA+ community.⁶³ While the recognition and legal sanction to same-sex relationships can extend civil rights to such relationships and thus deconstruct the heteronormative structures and biases created by the *system*,⁶⁴ such a legal sanction can also lay the ground for the eventual deconstruction of heteronormative biases created by the *society*, which, in turn, lead to the daily exclusion, marginalisation and discrimination against same-sex couples.⁶⁵ The societal biases against live-in and same-sex relationships are not only a threat to the civil rights and dignity of such couples, but often, jeopardise their physical safety too. The sheer number of petitions that have been filed before High Courts even by heterosexual couples in live-in relationships seeking police protection amply illustrates this threat.⁶⁶ The Courts have had to grant police protection to such couples in order to protect them from members of their own families.⁶⁷ The need for police protection from members of one's own family, even in the case of heterosexual relationships is essentially illustrative of the societal morality which is based on a variety of factors such as kinship, caste, heteronormativity and other rigid lines of social authority. However, a common denominator to all such considerations of societal morality has been the system of family which is stated to get damaged even with the slightest derogation from such societal notions.⁶⁸

In a country such as India, group thinking of the society dictates that marriage is the single most important institution to protect this system of family. It does so by lending a sense of moral legitimacy to such relationships.⁶⁹ As such, the absence of a legal sanction of marriage has an even more deleterious impact on relationships that may not conform to societal notions of heteronormativity or lines of social authority. Despite Asha Ranjan and Shakti Vahini having rejected

⁶³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶72.

⁶⁴ *Infra*, Part III.B(i).

⁶⁵ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶72.

⁶⁶ Paramjit Kaur v. State of Punjab, 2020 SCC OnLine P&H 994, P&H, HC, ¶¶8-9; Sadhana Sinsinwar v. State, W.P (Crl.) No. 3005/2018 (unreported decision); Bhawna v. State, W.P.(CRL) 1075/2019, dt. 12.04.2019 (unreported decision); Kamini Devi v. State of U.P., 2020 SCC OnLine All 1740; S. Balakrishnan Pandiyan v. Supt. of Police, 2014 SCC OnLine Mad 8815; Lata Singh v. State of U.P., (2006) 5 SCC 475; Noori Begum v. Superintending of Police, 2021 SCC OnLine Utt 677, ¶4; See also, Areeb Uddin (BAR AND BENCH), *Allahabad High Court passes 26 Orders in 3 Days Granting Police Protection to Couples*, June 23 2021, available at <https://www.barandbench.com/news/litigation/allahabad-high-court-26-orders-3-days-police-protection-couples> (Last visited on June 24, 2021).

⁶⁷ Monu Rajput v. State, 2019 SCC OnLine Del 9154, ¶6; Vanitaben Damjibhai Solanki v. State of Gujarat, Special Crl. Appl. No. 3011 of 2020, Guj HC, ¶3 (unreported decision).

⁶⁸ W. FRIEDMAN, *LAW IN A CHANGING SOCIETY*, 503 (Stevens & Sons, 1959); Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶52; See also, Oxford Union, *supra* note 5 at 1.

⁶⁹ Oxford Union, *supra* note 5 at 1.

the notions of group thinking, it cannot be denied that the group thinking of the society – which only accords moral legitimacy to relationships having the legal sanction of marriage⁷⁰—continues to shape the social reality of hundreds of non-conforming couples, relationships and individuals even today. Therefore, for such couples, the institution of marriage is the first step towards eliminating societal prejudices against their relationship, legitimising it in the eyes of the society and combating heteronormativity at the same time.

Legal recognition of same-sex marriages would, thus help ‘normalise’ same-sex relationships within the *legal system* and also set the tone for these relationships to be eventually normalised for the *society* at large in the future. Recognition within the legal system would facilitate the extension of all those assurances, safeguards and bundle of civil rights to same-sex relationships which were previously reserved only for *normal* i.e heterosexual relationships, thus assuring their inclusiveness and fulfilling the promise of their equal citizenship. While deconstructing a societal structure based on age-old notions of family, kinship, and heteronormativity through the institution of marriage may not be an easy task, the grant of legal sanction to same-sex relationships is definitely the first step towards mitigating the threats to their assurance of inclusiveness brought about due to the existing societal biases and further shaped by the group thinking of the society.

IV. CONCLUSION

Despite Navtej Johar symbolising the victory of India’s LGBTQ+ rights, the battle for recognition of the rights of members of the community is far from over. The denial of marriage-associated civil rights, ranging from the right to adoption, and surrogacy to the right to succession and inheritance, affects the lives of these individuals in tangible ways, compelling them to shape all their aspirations concerning their family life and their futures *within* the umbrella of the existing legal regime which is inadequate and forces them to live as second-class citizens. Same-sex marriage is therefore necessarily required to help expand the constrictive space within which these individuals shape their aspirations, thereby allowing for a greater sense of self-fulfilment. Without the ability to enjoy individual self-fulfilment, the LGBTQIA+ community’s right to self-determination emphatically recognised by the Court in NALSA and Navtej Johar remains an empty shell at most. The legal recognition of same-sex marriage is therefore located in the constitutional, moral, and legal arch of the recent judgements and is the next logical conclusion to an individual’s right to self-determination.

⁷⁰ Counter Affidavit of the Union of India in Kavita Arora v. Union of India, W.P(C) 7692/2020 (Delhi High Court) (unreported decision).

At the same time, the legal recognition of same-sex relationships helps to eliminate societal prejudices, thereby fortifying the promise of equal citizenship and inclusiveness in the society. This would also help to set into motion, the process of deconstructing the existing heteronormative societal framework, a need which was recognised by Justice Chandrachud in the *Navtej Johar*.⁷¹ The Supreme Court also highlighted how the exclusion, discrimination and marginalisation of the LGBTQIA+ community is rooted in the “heterosexism of public spaces” and society’s pervasive bias towards gender binary and opposite-gender relationships, which marginalises all non-heteronormative sexual and gender identities.⁷² The acknowledgement of this bias in the society seems to be gaining momentum. Recently, the Madras High similarly acknowledged the unique struggles, and mental health issues that such individuals suffer from as a result of internalised heteronormativity that stems from societal discrimination.⁷³ It emphasised the need for change, unlearning and awakening in both the law, as well as society.⁷⁴ The Court also prescribed a set of guidelines for safeguarding the LGBTQ+ community, thus enabling their accommodation and upliftment in society.⁷⁵

At the NUJS Law Review, it has been our constant endeavour to supplement the causes being raised in Courts with quality scholarship and to explore the intersection between societal development and legal institutions. The Hon’ble Supreme Court’s reliance on six of the works contained in our previous Special Issues, further strengthened our resolve to produce and curate the finest scholarship in Indian legal academia. As we conclude this note at a time when the Delhi High Court is set to hear the batch of petitions which reinforce everything that the Hon’ble Supreme Court in *Navtej Johar* stood for, we can only hope that the NUJS Law Review is able to assist the legal system and the society in unlearning its prejudices and making space for the LGBTQIA+ community. Through this endeavour, we hope to contribute in realising the LGBTQIA+ community’s claims to marriage — the logical conclusion to *Navtej Singh Johar* and the bedrock of the community’s most profound hopes and aspirations.

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⁷¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶63; *see*, Saptarshi Mandal, ‘*Right To Privacy*’ In *Naz Foundation: A Counter-Heteronormative Critique*, Vol. 2, NUJS L. REV., 526 (2009) (cited by Chandrachud, J. in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶62); *see also* Dipika Jain & Kimberly Rhoten, *The Heteronormative State and the Right to Health in India*, Vol. 6, NUJS L. REV., 629 (2013) (cited by Chandrachud, J. in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶68).

⁷² *Id.*, ¶46, ¶62.

⁷³ *S. Sushma v. Commr. of Police*, 2021 SCC OnLine Mad 2096.

⁷⁴ *Id.*, ¶17.

⁷⁵ *Id.*, ¶42.

At the beginning of the COVID-19 pandemic when the Editorial Board of the NUJS Law Review had put together Volume 13(1), the Board had considered it its ordained responsibility to continue interrogating the uncertainties which the pandemic brought with itself, by producing and advancing quality scholarship in Indian legal academia.⁷⁶ In 2021, with a second wave of the pandemic bringing about an astronomical rise in COVID-19 infections across the country, any semblance of certainty which the latter months of 2020 may have created has been eroded once again.

At a time like this, we hope to carry forward the legacy of our previous boards, by striving to fulfil our responsibility to interrogate the law like never before and pioneer scholarship for the times to come.⁷⁷ This sense of responsibility has kept us dedicated towards our endeavour of producing quality scholarship even during these unprecedented times. This would not have been possible without our extremely motivated team of associate members who displayed immense character and professionalism while balancing their commitments to the NUJS Law Review and their responsibilities at their respective homes. Most importantly, at the NUJS Law Review, we believe that the greatest assets that we have are our authors, whose valuable contributions continue to inspire us each day.

Keeping up with this sense of responsibility and commitment, the Editorial Board of the NUJS Law Review for the academic year 2021-22 presents to you this issue consisting of the following six highly researched and brilliantly written submissions covering a wide range of contemporary legal issues.

In their article, *'Who Judges the Judges?: Viewing Judicial Recusal and Disqualification as a Litigant'*, Anshul Dalmia and Pratyay Panigrahi critique the current Indian framework for judicial disqualification. They highlight the imperative need for impartial adjudicators, and comprehensively review the trajectory of Indian cases relating to the recusal of judge, depicting the shift from the 'real likelihood' test to the 'real danger' test. They also undertake a comparative analysis of judicial recusal frameworks in other common law countries and critically analyse the various tests, standards and mechanisms through which a judge's bias may be dealt with, by the judiciary. They discuss the shortcomings of the test for judicial bias in India, and argue in favour of a shift in standards in order to propagate judicial discipline. To this end, they analyse the feasibility of incorporating the 'reasonable suspicion' model of recusal, in order to streamline the process of judicial disqualification in India.

⁷⁶ Chandrika Bothra & Ravi Shankar, *Editorial Note*, Vol. 13, NUJS L. REV., 1 (2020).

⁷⁷ *Id.*, 5.

Ribhav Pande, in his article, *'Notice of Combinations in Insolvency Proceedings'* explores the interplay of the Competition Act, 2002, with the Insolvency and Bankruptcy Code ('IBC'), 2016, for the purpose of sending the notice of combinations arising out of a Corporate Insolvency Resolution Process ('CIRP') that have an appreciable adverse effect on competition to the Competition Commission of India ('CCI'), as well as for receiving their approval. He explores the law governing the stages of a resolution plan in a CIRP, the mechanism for notifying the CCI of combinations and the respective construction of binding documents under the two enactments. He further studies the operation of the 2018 IBC Amendment through industry practice, and examines the recently introduced expedited approval mechanism for combinations in the form of 'Green Channel' and its relevance to a CIRP. After exploring the absence of an overlap of the IBC with the Companies Act, 2013, in the context of combinations, he concludes with recommendations on arriving at the optimum mechanism for sending a notice to and securing the approval of the CCI for combinations arising in CIRPs.

In his article, *'Recovery of Currency Losses Caused by Exchange Rate Fluctuation: An Indian Law Perspective'*, Sahil Malhotra analyses whether the law in India permits the recovery of currency losses caused due to exchange rate fluctuations, and whether such recoveries may be claimed as damages or as sums due under contractual performance. He concludes that while currency losses can be recovered in both forms of claims, there exist certain shortcomings in the position of the law in India on the recovery of damages for currency loss under §73 of the Indian Contract Act. He discusses these shortcomings specifically in relation to the three elements of causation, remoteness and mitigation under §73 of the Indian Contract Act.

Yash Sinha, in his article, *'GST Compensation to States: An Ineluctable Obligation on the Union'* uses the proviso to Article 368(2) of the Constitution to show how it essentially crafts a contract between two vertical government branches of the State. Using this, he apprises the reader of how a skeletal version of the American 'anti-coercion' principle already exists in India and how the Indian scenario today is a fertile ground for applying the same. Against the backdrop of the 'anti-coercion' principle, the author finally argues how GST compensation essentially becomes a contractual obligation at a Constitutional level, thus eliminating any legal space of revocability otherwise available to the Centre.

In his article, *'Treatment of Seatless Clauses by Indian and English Courts: A Comparative Analysis'* Soumil Jhanwar analyses English and Indian jurisprudence on the discernment of the seat of arbitration in cases where such seat is not mentioned in the arbitration clause. He demonstrates the internal conflicts within the decisions of each of these jurisdictions, attributing the conflicts

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in England to a ‘London bias’ and the conflicts in India to the perversity of the crude approaches taken by Indian courts. In an attempt to avoid such conflicts in the future, he proposes a 10-part test that can function as a basic framework for resolution of conflicts regarding discernment of the ‘seat’ of arbitration. He finally examines the utility of this test against the English and Indian judgments previously discussed by him in the paper.

In his case comment on the recent Supreme Court judgement in the case of *Lt. Col. Nitisha v. Union of India*, Dhruva Gandhi argues how the Supreme Court while having rightly acknowledged ‘indirect discrimination’ in the above case, however misidentified ‘intention’ to be the distinguishing factor between the two types of discrimination. He uses this to establish, how, if ‘intention’ is made a key component in determining discrimination claims, it would, *inter alia*, severely limit the protection against direct discrimination offered by the law. Having apprised the reader of the problems that may arise if ‘intention’ is located as a necessary component of direct discrimination claims, the author finally makes a case for the Courts to revisit the nexus between intention and direct discrimination, or alternatively, expand the contours of discriminatory intent itself.

We hope the readers enjoy reading these submissions and welcome any feedback that our readers may have for us. We would also like to thank all the contributors to the issue for their excellent contributions, and hope that they will continue their association with the NUJS Law Review!

Truly,

Editorial Board (2021-2022)

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The NUJS Law Review