



Prohibition of same-sex sexual conduct struck down in India

Douglas McDonald-Norman reports on *Navtej Singh Johar v Union of India WP (Crl) No 76 of 2016*

In *Navtej Singh Johar v Union of India*, the Supreme Court of India (India's highest court) declared that to the extent that a provision of the *Indian Penal Code* criminalises consensual sexual acts between adults in private, it violates four articles of the *Constitution of India* ('the *Constitution*'). The provision in question was section 377 of the *Indian Penal Code* ('section 377') which criminalises 'carnal intercourse against the order of nature'. Section 377 has been widely understood as a prohibition of same-sex

sexual conduct.

In order to understand the significance of this decision, some background on the judicial treatment of section 377 is necessary. The section was enacted by the British colonial regime in India and hence predates the 1950 commencement of the *Constitution*. One of the judgments in *Navtej Singh Johar* referred to its enactment as follows: 'A hundred and fifty-eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfilment in love.

The law deprived them of the simple right as human beings to live, love and partner as nature made them.' (Chandrachud J at [2]).

Section 377 has been highly controversial. The *Constitution* guarantees equality before the law and equal protection of the laws (article 14), prohibits discrimination on specified grounds (article 15) and protects rights to freedom of expression (article 19(1)(a)) and to life and liberty more broadly (article 21). In recent decades, India's Supreme Courts and state High Courts have often interpret-

ed these rights in expansive terms. The right to life and liberty, in particular, has been interpreted to protect rights to human dignity (*Maneka Gandhi v Union of India* AIR 1978 SC 597), personal autonomy (*Anuj Garg v Hotel Association of India* (2008) 3 SCC 1) and privacy (*Puttaswamy v Union of India* (2017) 10 SCC 1). The apparent contradiction between this progressive constitutional regime and the repressive character of section 377 has prompted decades of litigation and constitutional challenge.

In *Naz Foundation v Government of NCT of Delhi* (2009) 111 DRJ 1, the Delhi High Court found section 377 to be inconsistent with articles 14, 15 and 21 of the Constitution. This decision was overturned on appeal to the Supreme Court, in the much-criticised judgment *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 (*Koushal*). *Koushal* invited controversy and condemnation both for the result reached (the continued criminalisation of same-sex sexual conduct) and for its reasoning. *Koushal*'s explanation of its findings is cursory, partial and troubling; the decision observes, for example, that 'a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders', and employs this in favour of the constitutionality of section 377 – an apparent justification for discrimination based on the size of the targeted group.

After *Koushal*, a coalition of civil society groups again sought a declaration from the Supreme Court of India that section 377 was unconstitutional. (No prosecution under the section was required to prompt these proceedings – an artefact of India's unusually expansive rules on standing.) These proceedings were heard by a five-judge bench of the court. In their resulting decision, the court determined that *Koushal* was incorrectly decided.

The decision in *Navtej Singh Johar* is expansive. It extends to nearly 500 pages in length (across four separate judgments). Its language is often florid and allusive – the first sentence of the first judgment (that of Misra CJ and Khanwilkar J) quotes Goethe and Schopenhauer. If *Koushal* was terse, rigid and unconsidered, *Navtej Singh Johar* is discursive, passionate and extensively researched. Citations include Aristotle, Oscar Wilde, Leonard Cohen, the Hart-Devlin debate, Michel Foucault's *Discipline and Punish* and Vikram Seth; cases cited include decisions from the United States, South Africa, Fiji, Belize, Trinidad and Tobago and the UN Human Rights Committee (in *Toonen v Australia*). The fact that the four judgments

make little reference to one another makes it difficult to identify common ground between the judges except in general terms.

The court in *Navtej Singh Johar* considered at length the purportedly transformative character of the Constitution – the notion that 'the ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting the Constitution' (Misra CJ and Khanwilkar J at [95]). This aspiration operates in concert with the identification of 'constitutional morality' underpinning (and expressed within) the Constitution, characterised by a commitment to liberty, equality and fraternity (Chandrachud J at [143]-[144]). The court explicitly differentiated this 'constitutional morality'



from any prevailing societal morality (Misra CJ and Khanwilkar J at [119]-[122], Nariman J at [80] and Chandrachud J at [144]), or from the 'Victorian morality' responsible for section 377 (Nariman J at [78]). Instead, the court emphasised the Constitution's protection of fundamental rights against 'the disdain of majorities, whether legislative or popular' (Misra CJ and Khanwilkar J at [161]; see also Chandrachud J at [142]). This consideration of constitutional purpose and objectives informs the broad characterisation of constitutional rights in *Navtej Singh Johar*.

In respect of article 14 of the Constitution (the right to equality), the court reiterated that any constitutionally-valid act of unequal treatment must both amount to a reasonable classification based on intelligible differentia and have a rational nexus with the legitimate constitutional object sought to be achieved. Every judge in *Navtej Singh Johar* found that section 377 did not satisfy this test. As Chandrachud J explained, section 377 amounts to an impermissible and arbitrary act of 'classification' between 'ordinary intercourse' and 'intercourse against the order of nature', given that no 'intelligible differentia' could be found (in respect of 'indeterminate

terms' like 'natural' and 'unnatural') to justify the distinction beyond mere moral distaste (Chandrachud J at [29]-[30]).

The court also found section 377 to be inconsistent with article 15 of the Constitution (prohibiting discrimination, including on the basis of sex). Notably, Chandrachud J's reasoning in this regard drew upon the court's prior recognition in *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 that article 15 prohibits policies or laws based upon stereotypical gender roles arising from traditional cultural norms. Chandrachud J recognised (at [46]) that section 377 both draws and upon and reinforces such stereotypes: 'Statutes like Section 377 give people ammunition to say 'this is what a man is' by giving them a law which says 'this is what a man is not.' To the extent that section 377 penalises relationships which defy 'the male/female divide' (Chandrachud at [47]), 'leads to the perpetuation of a culture of silence and stigmatisation' (at [52]) and thereby lends support to such traditional cultural notions, Chandrachud J found the section to be invalid.

In respect of article 19(1)(a) of the Constitution (the right to freedom of expression), the court found that the right to freedom of expression includes broader implicit rights to the expression of personal identity, including 'the right to choose a sexual partner' (Misra CJ and Khanwilkar J at [241]-[247]). To the extent that section 377 requires concealment and prevents expression of a person's sexual orientation, the section impermissibly restricts freedom of expression (Malhotra J at [17]). The court also found section 377 to be inconsistent with article 21 of the Constitution (the right to life and liberty), insofar as the section conflicts with that article's broader implicit guarantees of rights to dignity, privacy and individual autonomy.

No single judgment of any court can by itself overturn endemic social stigma and homophobia. But nor should the broader cultural significance of law and legal processes be overlooked. Section 377 gave legal force and validation to discriminatory attitudes, and in doing so helped to perpetuate those attitudes. The decisive repudiation of section 377 by the Supreme Court is an encouraging and inspiring spur towards the rejection of the values for which that section stood.

Author's note: Paragraph references are to individual judgments. Each judge's separate decision begins with a new paragraph [1].