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Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377

By *Kanad Bagchi*[*]

Abstract: What role does the Indian Constitution play towards the emancipation of the society's most marginalized and excluded? What vision does the Constitution espouse with respect to basic fundamental rights and freedoms? And what conception of inclusion and pluralism does the Constitution pursue in a society that remains deeply divided and disjointed? All these searching questions came to form a distinct part of the decision of the Indian Supreme Court when it was called upon to rule on the constitutional validly of Section 377 of the Indian Penal Code, 1860. Section 377, which for centuries created an atmosphere of criminalization, discrimination and disadvantage for LGBT+ peoples was declared unconstitutional to the extent that it prohibits consensual sexual acts between two adults, whether of a heterosexual or homosexual nature. Through 500 pages of judicial reasoning and four concurring opinions, the Court displayed an acute understanding of both the text and the spirit of the Indian Constitution. It understood that 'transformation' was at the heart and soul of the Constitution, which had the particular mandate of ushering far-reaching social change within the Indian society. This article brings out that focus and argues that through its decision the Court unleashed fully, the transformative potential of the Indian Constitution.

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There must come a time when the constitutional guarantee of equality and inclusion will end the decades of discrimination practiced, based on a majoritarian impulse of ascribed gender roles. That time is now.[1]

* Kanad Bagchi is a research fellow at Max Planck Institute for Comparative Public Law and International Law, Heidelberg. This article draws from a previous blog post titled "Decriminalizing Homosexuality in India as a Matter of Transformative Constitutionalism" published in the Verfassungs Blog. Available at https://verfassungsblog.de/decriminalising-homosexuality-in-india-as-a-matter-of-transformative-constitutionalism/.

1 Justice Chandrachud speaking for himself in *Navtej Johar v Union of India, Writ Petition* (Criminal) No. 76 of 2016 (decided in 6th September 2018, available at https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf, at para 53 (hereafter '*Navtej Johar'*).

https://doi.org/10.5771/0506-7286-2018-3-367
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I. Introduction

Although the wait was long and came after almost a decade of constitutional litigation, let alone centuries of systematic discrimination against the LGBT+ community, the decision of the Indian Supreme Court ('Court') in *Navtej Johar v Union of India*[2] marks a definitive departure in infusing a certain meaning and purpose to the Constitution of India especially when it concerns one of the most marginalized and excluded. Speaking unanimously, the Court held that Section 377 (hereafter S. 377) of the Indian Penal code, which criminalized "…carnal intercourse against the order of nature with any man, woman or animal…" in so far as it included same-sex acts between consenting adults, violates the constitutional mandate enshrined under the Fundamental Rights chapter, especially, Art. 21 (life and personal liberty), Art. 14 (equality and equal protection of laws), Art. 15 (non-discrimination) and Art. 19 (Freedom of expression). While on the face of it, S. 377 was neutral in its application to individuals irrespective of sexual orientation, the Court held that the *effect* of the law was determinative and disproportionately targeted persons belonging to the LGBT+ community. In doing so, the Court not only corrected a 'historical' injustice against a particular community,[3] but also raised some searching questions regarding the role of the Indian Constitution, especially in ordering social relationships in a country that remains deeply divided and disjointed on several aspects of life and community. At the deeper level, the debate was as fundamental as about the kind of polity that the Constitution envisions and how it seeks to resolve the conflict, inevitable as it is in diverse and hierarchical societies, between on one hand, the principles and ideals of the Constitution and on the other, the defining contours of public/social morality.

In a decision that is likely to be profoundly significant not just for the LGBT+ community, but also for rights litigation in general, the Court posited the Constitution as the focal point of emancipatory struggles both against a discriminatory state and against a prejudicial society. In this manner, I argue, the Court recognized and unleashed fully, the transformative potential of the Indian Constitution, that the founders of the same had originally imagined and fought for. Reading *Navtej Johar* through a transformative lens allows us to understand and live through this overarching philosophy of the Constitution and observe it as a text that speaks of justice and equality for even the furthest members of the community. This report encapsulates that promise and argues that the Supreme Court's intervention provides hope that 'transformation' in its most comprehensive meaning would acquire a renewed vigor and purpose, percolating into not just the law but also the minds and hearts of the Indian people.

2 *Navtej Johar*.

3 It is therefore not surprising that Judge Indu Malhotra ended her separate opinion in *Navtej Johar* by stating "*History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution*.", Opinion of Judge Indu Malhotra in *Navtej Johar* at para 20.

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II. Section 377, Colonial Vestiges and the Long Walk to Equality

Alien to a land that did not subscribe to either the 'sin' or criminality of homosexuality, Section 377[4] embodied the ethos of Judeo-Christian morality and found its way into the Indian Penal Code, 1860 through its principal drafter, Thomas Babington Macaulay. Macaulay's revulsion to any conception of sexual intercourse outside of a penal-vaginal context was so strong that he preferred to keep the offence of 'unnatural sex' vaguely worded rather than having a public discussion over its specific manifestations.[5] As a result, S. 377 and what amounts to "against the order of nature" has been subject to varying interpretations depending on the particular disposition of the judge and court in question.[6] It is instructive to note here that British colonial attitudes towards same-sex sexual acts was also extended to several former colonies, in effect through similarly worded penal provisions.[7] Through the operation of Art. 372,[8] S. 377 continued to be in the statute book long after India's independence from British colonial rule and became a tool for the persecution of sexual minorities in the country. While indeed criminal prosecution against the LGBT+ community did not comprise a significant number, the effect of the S. 377 was to subjugate and condemn an entire population as 'criminal' and as a consequence, remove both the protection of the state and insulate the community from public and social life "…forcing them to live in hiding, in fear, and as second class citizens…".[9] In this manner, colonial vestiges, ethos and morality seeped into and fed the most conservative sections of the society, legitimized by state action and the threat of criminal sanction.[10] As Judge Chandrachud noted:

4 Section 377 Indian penal Code reads: "**Unnatural offences**": "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*"

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

5 See generally, Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals" The Economic and Political Weekly Vol. 41 (2006); The Court in *Navtej Johar* also notes the same in Judge Chandrachud Opinion para 30.

6 See for instance the cases of *Lohana Vasantlal Devchand v The State*, (1968) 9 CLR 1052; *Fazal Rab Choudhary v State of Bihar*, (1982) 3 SCC 9; *State of Kerala v Kundumkara Govindan*, (1969) CriLJ 818 etc; See also in this regard, Shamnad Basheer, Sroyon Mukherjee and Karthy Nair, Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law, NUJS Law Review Vol, 2 (2009).

7 CNN, "The Homophobic Legacy of The British Empire" September 12, 2018, <https://edition.cnn.com/2018/09/11/asia/british-empire-lgbt-rights-section-377-intl/index.html>.

8 Article 372 (1) of the India Constitution reads: "…*all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority*.".

9 Opinion of Judge Chandrachud in *Navtej Johar* at para 24.

10 On how law influences social relations see John Sebastian, "The opposite of unnatural intercourse: understanding Section 377 through Section 375", Indian Law Review Vol. 1 (2018).

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> *"…This provision, understood as prohibiting non-peno vaginal intercourse, reflects the imposition of a particular set of morals by a colonial power at a particular point in history. A supposedly alien law, Section 377 has managed to survive for over 158 years, impervious to both the anticolonial struggle as well as the formation of a democratic India..."*[11]

Social momentum against S. 377 started gaining ground since the late 1980s and prominently came into focus through gay rights protests around health rights organized by the AIDS Bhedbhav Virodhi Andolan.[12] "Less than Gay" came to be one of the first reports that systematically documented the persecution and discrimination faced by the LGBT+ community both against the state and the society.[13] Several cumulative occasions thereafter arose in the public domain where LGBT+ issues came to acknowledged and debated.[14] The Law commission of India followed suit and through its 172nd Report[15] to the Government of India recommended the deletion of S. 377 after having initially rejected that proposition in 1971.[16] Despite this visible momentum, parliament never took up the opportunity to either debate or gather the numbers to amend the penal code.[17] The task inevitably therefore fell on the judiciary.

Navtej Johar has a long genealogy comprising different sites of struggle and denial for the LGBT+ community. A struggle that was characteristic of progress marked by two steps forward and one step back. In 2009, the Delhi High Court[18] was seized with the question of the constitutional validity of S. 377 on account of a petition filed by the Naz foundation, a non-governmental organisation (NGO) using the public interest route.[19] Claims of dignity, identity, privacy and non-discrimination as against the LGBT+ community formed part of

11 Opinion of Judge Chandrachud in *Navtej Johar* at para 14.

12 See Vidya Krishnan, "How the LGBTQ rights movement in India gained momentum", The Hindu July 14th 2018 <https://www.thehindu.com/society/its-been-a-long-long-time-for-the-lgbtq-rights-movement-in-india/article24408262.ece>; See also generally *Danish Sheikh* The Road to Decriminalization: Litigating India's Anti-Sodomy Law, Yale Human Rights and Development Journal Vol. 16 (2013), pp 104-132, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com&httpsredir=1&article=1117&context=yhrdlj (hereafter *Sheik*).

13 AIDS Bhedbhav Virodhi Andolan – ABVA, "Less than Gay: A Citizens′ report on the status of homosexuality in India", New Delhi 1991.

14 For an overview see *Sheikh*, , note 12.

15 172nd Report of the Law Commission of India on Review of Rape Laws (March 2000), <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

16 42nd Report Law Commission of India on the India Penal Code, 1860 (June, 1971), <http://lawcommissionofindia.nic.in/1-50/Report42.pdf>.

17 Even some private member bills could never see the light of the day. See The Print, "In Parliament, Shashi Tharoor's valiant fight to change section 377" January 8th 2018, <https://theprint.in/politics/parliament-shashi-tharoor-valiant-fight-change-section-377/27435/>.

18 *Naz Foundation v. NCT of Delhi and Others* 160 (2009) DLT 277 (hereafter "*Naz Foundation*").

19 For a brief overview on public interest litigation in India see, Shylashri Shankar, "Descriptive overview of the Indian Constitution and the Supreme Court of India" in: Oscar Vilhena/ Upendra

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the several legal briefs before the court. In a remarkably nuanced and carefully worded decision, Chief Justice AP Shah and Dr. Justice Muralidhar speaking for the Court read down S. 377 to exclude from its scope same-sex consensual relations between adults in private. Primarily, the Delhi High Court rejected the government's case that LGBT+ peoples posed a risk to community health and that the state was permitted to enforce public morality through criminal law. *Naz foundation* was bold in the way it entrenched the right to privacy under the Indian Constitution and afforded a distinct place to 'dignity' in claims based on denial and violation of fundamental rights. The reasoning of the High court was singularly praised for its methodological rigor, interpretive technique and judicial craftsmanship. The decision immediately created ripples across the political spectrum and while it represented a high point in the emancipatory struggle for the LGBT+ community, the decision was also severely castigated by religious groups[20] and other conservative sections of the society. It was clear that *Naz foundation* is likely to be only the first battle in long drawn series of litigations.

True to that, *Naz foundation* was immediately appealed before the Supreme Court which resulted in the Court hearing the set of challenges to S. 377 *de novo*. In what was a complete reversal of the Delhi High Court order, the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*[21] held that S. 377 was constitutional and in this regard, the *Naz Foundation* decision was "legally unsustainable". In a decision that represented a near bankruptcy of judicial reasoning,[22] the Court turned the clock back to pre-2009 and recriminalized homosexuality in India. In essence, the Supreme Court found that S. 377 neither discriminates on the basis of sexual orientation nor is it arbitrary in its application to the LGBT+ community.[23] Instead, the Court left it for the parliament to decide on the nature and contours of the provision as a matter of popular will. For many, this was a particularly low point for the supreme court and especially for the emancipation and struggle for the marginalized communities. The poor quality of judicial reasoning, coupled with wholly inconsistent and incoherent set of propositions came to be severely criticized not only in

Baxi/ Frans Vilijoen (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa, Pretoria 2013.

20 See The Wire, "A Look Back At Those Who Aided, and Hindered, the Fight Against Section 377" September 6th 2018, <https://thewire.in/lgbtqia/lgbtq-sc-section-377-homosexuality>.

21 *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC. 1 (hereafter *Koushal*).

22 I borrow the term from a very engaging conversation that I had with (Late) Prof. Dr. Kumar Kartikeya , KIIT law School, Bhubaneswar, way back in 2014 in the wake of the Koushal decision. One of the biggest criticism of the Kaushal decision has been with respect to how the reasoning of the court was entirely absent and in several cases wholly illogical and incoherent.

23 For instance see the Courts reasoning in *Koushal* "[T]hose who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute *different classes* [emphasis added] and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification".

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academia,[24] and within the LGBT+ community, but also in subsequent decisions of the Supreme Court itself.[25]

From this point on, the battle for LGBT+ rights was increasingly perceived to be an uphill one. On one hand, the Supreme Court being the court of last instance allowed reconsideration of its decision only under very limited circumstances and thus several review petitions were summarily dismissed for failing to cross that threshold. Litigation thereafter turned towards the hearing of a curative petition that was filed before the SC as a matter of last resort. While that curative petition[26] was pending, two unrelated Supreme Court rulings and an independent writ petition however, changed matters entirely and turned in a significant way, the tide in the favor of the LGBT+ community. In 2014, the Supreme Court decided the case of *National Legal Services Authority v. Union of India*[27] declaring that people belonging to the transgender community enjoyed fundamental rights under Part III of the Indian Constitution, accepting several of the propositions that were originally argued in *Koushal*.[28] The Court in fact ordered that the State ought to take positive measures, including that of reservations and other legal instruments for the advancement of the transgender people who, as the Court acknowledged, were adversely affected by the operation of S. 377. Similarly, in 2017, the Supreme court handed down its seminal decision in *Justice K.S.Puttaswamy(Retd) v Union Of India and Ors* where it declared the Right to Privacy as a fundamental right under the Constitution.[29] In *Puttuswami*, Judge Chandrachud left no stone unturned in emphasizing that *Koushal* remains one of the two[30] 'discordant notes' in the histo-

24 As one author put it in the context of Art. 21 analysis of the Court "*Search in the judgment for an analysis of Article 21. You will find none. This is not just bad constitutional law. This is no constitutional law*." (Gautam Bhatia, "The Unbearable Wrongness of Koushal vs Naz Foundation" Indian Constitutional Law and Philosophy Blog, 11th December 2013, <https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/>; See also, Sujitha Subramanian (2015) The Indian Supreme Court Ruling in Koushal V. Naz: Judicial Deference or Judicial Abdication?, The Geo. Wash. Int'l L. Rev. Vol. 47 (2015), pp 711-762.

25 Especially in *Justice K.S.Puttaswamy(Retd) v Union Of India and Ors* Writ Petition (Civil) No. 494 of 2012 decided on 24th August 2017 (hereafter *Puttaswamy*), Judge Chandrachud took exception to *Koushal's* rationale that since the provision has been used to persecute only a 'miniscule' fraction of the country's population, it cannot be a ground in itself, to strike down the Section 377 as violative of fundamental rights.

26 A curative petition is essentially an exceptional remedy that is issued by the Supreme Court as a matter of last resort and was developed by the Supreme Court itself in the case of *Rupa Ashok Hurra vs Ashok Hurra & Anr* Writ Petition (civil) 509 of 1997 decided on 10th April 2002.

27 *National Legal Services Authority v. Union of India* (2014) 5 SCC 438 (hereafter *NLSA*).

28 For a fuller exposition see Siddharth Mohansingh Akali, Learning from Suresh Kumar Koushal v. Naz Foundation Through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements, Berkeley J. Gender L. & Just. Vol. 31 (2016), p. 121.

29 *Justice K.S.Puttaswamy (Retd) v Union Of India and Ors,* Writ Petition (Civil) No. 494 of 2012 decided on 24th August 2017.

30 The other being *ADM Jabalpur v Shivakant Shukla* (1976) 2 SCC 521, where the Court suspended the right to life and liberty under Article 21 during the continuation of Emergency.

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ry of the Indian Supreme Court and indicated clearly his disagreement in "…*the manner in which Koushal has dealt with the privacy – dignity based claims of LGBT persons on this aspect*…".[31]

All of these developments were finally reflected and argued in a separate writ petition filed by a group of LGBT persons directly before the Supreme Court challenging the constitutional validity of S. 377.[32] It is in this context that the correctness of *Koushal* formed the focal point of the debate before the Court and came to be expressly rejected and overruled as an unacceptable state of Constitutional law.

III. Transformative Constitutionalism and the Indian Constitution

The SC in *Navtej Johar* spoke through four concurring opinions, each arriving at the final outcome (unconstitutionality of S. 377) from different perspectives. Underlying their varying approaches however, was a constant theme and a central message that ran through all the pages of the decision. The four opinions were united in their vision that the Constitution was not simply a means to govern the organization of politics, but more importantly "project an idea of society".[33] As I argue in this section, the Court ascribed a transformative mandate to the Indian Constitution while being true to both the Constitutional text and more importantly its context and founding objectives. What was the founding philosophy of the Indian Constitution and in what ways did the Constitution seek to imagine a transformation of the Indian society?

The Indian Constitution was founded and resided within a particular social setting, that provided both its guiding ideology and its tools of operative functioning.[34] The Constitution was deeply reflective of the fact that inequality, hierarchy and prejudice transpires as much from State action as it does from societal sanctions, community conventions and private relationships.[35] In this sense, the Indian Constitution is not only a focal point of struggle that animates relationships between the state and the individual, but also provides a normative framework to structure relationships among individuals within the society. As against other

31 *Puttaswamy* para 128.

32 This was the *Navtej Johar* petition, that was filed under Art. 32 of the Indian Constitution directly challenging S. 377.

33 See Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, and Ximena Soley, "A Regional Approach to Transformative Constitutionalism" in: Armin von Bogdandy et. Al (eds.), Transformative Constitutionalism in Latin America, Oxford 2017 (hereafter 'Bogdandy et. al, 2017').

34 See generally, Uday S. Mehta, "Constitutionalism" in: Niraja Gopal Jayal/Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India, New Delhi 2010.

35 See *Prologue: The Past is a Foreign Country* in Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts (Forthcoming (Harper, 2019)). This is on file with the author. (hereafter *Bhatia*).

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traditional liberal constitutions of the time,[36] the framers of the Indian Constitution did not subscribe to the notion that limiting state power and protecting individual freedom are the primary or the only objectives of a Constitution. Instead, they had a particular vision and an identifiable mission: to weed out inequality, prejudice and discrimination in relationships of power that go beyond the state. The transformative potential in Indian Constitution is thus a conscious "…attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society."[37]

The Preamble to the Indian Constitution in addition to ideals of "liberty" and "equality" therefore puts emphasis on "Fraternity" as the levelling tool that would flatten relationship among individuals and both liberate and equalize individuals from their community, family and their religion.[38] The promise to "…bring about a fundamental alteration in the structure of Indian society ... to abolish every vestige of despotism, every heirloom of inorganic tradition…"[39] lies at the heart of the transformative dimension of the Indian Constitution. As Judge Dipak Misra notes in *Navtej Johar*:

> *"…Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism. The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution…"*[40]

The Indian Constitution is transformative also in the sense that it envisions an emancipatory pursuit and builds on the conviction that large-scale social change within a certain political system is possible through the process and instrumentality of the law.[41] Karl Klare, to whom is attributed the origins of the idea, thought of transformative constitutionalism in similar terms: "…an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[42] Change envisioned as a part of transformative constitutionalism does not merely tinker with peripheral transformations, but change that is central to the functioning of the society and polity. This approach of reading constitutions as containing a mandate to transform societies eschews formalism, pure positivism and le-

36 In the late 1940s there was hardly any concept of horizontal rights and in this regard, the Indian Constitution was in several ways a first of its kind, having no particular template to draw from. Important to remember that even the Universal Declaration of Human Rights was being draw up roughly at the same time as that of the Indian Constitution.

37 Opinion of Judge Chandrachud in *Navtej Johar* at para 138.

38 See *Bhatia*, note 35.

39 Statement by S. Radhakrishnan to the Constituent Assembly, as cited in *Bhatia*, note 35.

40 Opinion of Judge Dipak Misra in *Navtej Johar* para 95.

41 See Bogdandy et. al, 2017, supra note 33.

42 Karl E. Klare, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights Vol. 14 (1998).

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galism that characterizes classical liberal constitutionalism, exemplified by US constitutional approach.[43] It explicitly contains positive obligations for state functionaries to strive towards creating a just social order, where individual freedom, equal opportunity and dignity creates an environment for full realization of the human potential.

Examples of this vision are abound within the Indian Constitution. Thus the Indian Constitution contains the Equality code,[44] which on one hand, through Art. 14 guarantees formal equality before the law and in dealings with affairs concerning the State, while Art. 15 expressly outlaws discrimination on grounds, such as 'caste', 'sex', 'religion' that were historically a source of prejudice and disadvantage. Art. 16, takes this mandate further and specifically enjoins the state to take positive measures including 'reservations' in public posts and services under the state, for 'any backward classes of citizens', 'scheduled castes' and the 'scheduled tribes'. Finally, Art. 17 by abolishing the practise of 'untouchability' speaks to a certain past and a present and puts into the Constitution the promise to end centuries of discrimination, violence and injury against a significant section of the population – the outcasts and outlaws. Inherent in the logic of Equality code is the premise that certain groups and communities were cites of historical marginalization and exclusion, ordained by societal mores and sanctioned by State inaction. The Constitution therefore not only acknowledges this reality but obliges a more exacting and urgent endeavour on the State towards undoing such injustice. In this sense, the Indian Constitution is both "…profoundly diagnostic (of the past 'wounds') and therapeutic" in making a "…deeply-wounded society whole again."[45]

That apart, the Indian Constitution is explicit in prescribing positive state obligations with respect to several material and non-material aspects of life, health and well-being, contained as a separate chapter titled "Directive Principles of State Policy".[46] Although the DPSP are not enforceable directly before a court of law, they are nonetheless "…fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws…"[47] Moreover, over the years, the Supreme Court has consciously and expansively interpreted fundamental rights in a manner that relies on DPSP for infusing both meaning and substance to an otherwise siloed catalogue of negative rights.

43 For the proposition that Transformative Constitutionalism is not purely a global south phenomenon, see Michaela Hailbronner, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law Vol. 65 (13 November 2017), pp 527–565; For a critical stance on the north-south distinction with respect to Transformative Constitutionalism see, Michaela Hailbronner, Overcoming obstacles to North-South dialogue: Transformative constitutionalism and the fight against poverty and institutional failure Verfassung und Recht in Übersee 49 (2016), pp. 253-262.

44 A Combination of Articles 14, 15, 16 and 17 of the Indian Constitution.

45 See 'Introduction' in, Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (Oscar Vilhena, Upendra Baxi and Frans Viljoen. eds., 2013). Baxi, although spoke in the context of the South African Constitution, applies equally, to the Indian scenario.

46 See chapter IV of the Indian Constitution.

47 Directive Principles of State Policy, Article 37 of the Indian Constitution.

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IV. Navtej Johar and Transformative Constitutionalism

In declaring S. 377 to be unconstitutional, the Court explicitly recognized that for Constitutional rights to acquire a meaningful purpose for the marginalised communities, disciplining State action alone will not be sufficient. In this regard, the Court did not mince words when it stated that it is both, criminality of the law and the "silence and stigmatization" of the society towards the LGBT+ community that orchestrates the marginalization and the exclusion of the former. The fullest expression of this understanding was reflected in the way the Court articulated its vision of 'substantive' equality under art. 14 and reflected upon the sites of discrimination under article 15.

a) The vision of Substantive Equality

The promise of Equality contained within the twin mandate of Art. 14 - "equality before the law" and "equal protection of the laws" was historically interpreted by the Supreme Court to mean that the State is not prohibited from treating its citizens differently or unequally. However, such difference of treatment, to be constitutionally valid, had to be based *first*, on an "intelligible differentia" and *second*, such "intelligible differentia" ought to have a rational nexus with the legislative object that is sought to be achieved. This came to be known as the test of "reasonable classification".[48] Over the decades, a third criteria of the legislative objective itself being a constitutionally valid one was added to the two prong test under Art. 14. While the "reasonable classification" test continued to be upheld and applied by the supreme court to deal with several cases of unequal state action, it increasingly proved to be unsatisfactory with respect to complex cases of inequality, especially of an intersectional nature.[49] Thus, the claim to equality was reduced to the satisfaction of a certain prescription and a technique rather than any deeper analysis of the structural or material conditions of inequality affecting a class of citizens. The cause of formalism trumped any substantive review.

At the outset, *Navtej Johar* broke away from the tradition of confining Art. 14 to a simple classification test or a "mere formulae"[50] and instead the Court read Art. 14 as "…containing a powerful statement of values – of the substance of equality before the law and the

48 See *State of West Bengal v Anwar Ali Sarkar* 1952 SCR 284.

49 See Gautam Bhatia (2017) "Equal Moral Membership: Naz Foundation and the Refashioning of Equality Under a Transformative Constitution" Indian Law Review, Vol. 1, issue 2, pp 115 – 144.

50 Opinion of Judge Chandrachud in *Navtej Johar* at para 27. His exact words: "*Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights*.".

https://doi.org/10.5771/0506-7286-2018-3-367
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equal protection of the laws".[51] Judge Chandrachud went even further and held that Art. 14 encapsulated the promise of equality to individuals not only against an erring state, but "… it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence…".[52] Substantive equality therefore demands that any claim to equality advanced by a particular minority, in this case a sexual minority, has to be approached with a historical and social sensibility, mindfully aware of the "various forms of social subordination in India".[53] In this manner, the message from the Court was clear: that decades of discrimination meted out against the LGBT+ community arising from socially ordered heteronormative expectations and state sanctioned criminal law, explicitly requires positive measures by both the state and individuals – an obligation recognized and inherent in the substantive concept of Equality under Art. 14. "Carnal intercourse against the order of nature" therefore was not merely about prohibition of same-sex conduct, but a product of larger structural imposition arising from "…gender, caste, class, religion and community make[ing] the right to love not just a separate battle for LGBT individuals, but a battle for all." [54]

b) Non-discrimination on grounds of 'sex' and 'Sexual Orientation'

The thrust of 'substantive equality' and the 'equal protection' clause under Art. 14 perhaps comes out most fully in the Court's reasoning with respect to the specific grounds of non-discrimination under Art. 15 of the Constitution. Art. 15 reads: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." The crucial question before the Court was whether a discrimination based on 'sexual orientation' perpetuated by S. 377 can be understood as discrimination also on the basis of 'sex' under Art. 15. In answering that question, the Court was confronted with two sets of interpretational conundrums, both comprising the potential to recast the nature of non-discrimination jurisprudence in the country.

The intervenors argued in the first instance that S. 377 was not discriminatory in as much as prohibition on non-procreative sex (including oral and anal sex) applied to heterosexual couples as they did to homosexual couples. Secondly, S. 377 as the argument went, was neutral in its application and prohibited only certain 'acts/conduct' as opposed to criminalizing 'identities', as the petitioners had argued. The Court rather insightfully rejected both the contentions and argued that a 'formalistic' interpretation of Art. 15 that renders the "constitutional guarantee against discrimination meaningless" cannot be accepted. And it is 'formalism' that fails to take note of the 'effect' of the law, which alone is constitutionally relevant, as opposed to the objective of the legislator. Although, S. 377 is facially neutral,

51 Opinion of Judge Chandrachud in *Navtej Johar* para 27.
52 Opinion of Judge Chandrachud in *Navtej Johar* para 27.
53 Opinion of Judge Chandrachud in *Navtej Johar* para 32.
54 Opinion of Judge Chandrachud in *Navtej Johar* para 32.

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its 'effect' is to disproportionately target LGBT+ peoples as certain sexual 'acts/conduct' constitute a core aspect of their identity. In this sense, sexual conduct and sexual identity are not invariably separable and the cause of 'formalism' "…fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context." By criminalizing same-sex 'conduct', S. 377 perpetuates the criminalization of certain 'identities' and creates systematic disadvantage and denial to LGBT+ peoples who do not conform to conduct of a heterosexual nature.

Be that as it may, even if the 'effect' of the law is determinative and prohibition of 'conduct' can tantamount to criminalization of 'identities' what justifies the inclusion of 'sexual orientation' as a prohibited ground of discrimination under Art. 15? It is here that the Court drew significantly from its previous decision on *Anuj Garg vs Hotel Association*,[55] which was remarkably progressive in interpreting the various grounds of discrimination under Art. 15 as reflecting a certain inherent unifying ideology – as sites of historical discrimination.[56] Historical discrimination can have roots both in cultural and societal norms and are especially directed against entire classes of people. In this regard, disdain and discrimination against LGBT+ peoples arises from a certain stereotypical understanding of the role of 'sex' and gender norms that denies societal legitimacy to sexual conduct that is not heterosexual in nature. It is this relationship between 'heterosexual expectations of society' and State criminalization of homosexuality that the Court considered as unconstitutional under Art. 15. As Judge Chandrachud notes:

> *"In other words, one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles."*[57]

This argument of the Court is the fullest expression of the idea of intersectional discrimination where gendered ideas regarding the role of sex and heteronormative expectations of society regarding sexual orientation collide and perpetuate discrimination on equal terms. Article. 15 and the substantive vision of equality, the Court notes, affords complete constitutional protection to LGBT+ peoples on ground of sex and sexual orientation. Decidedly, it is this unwholesome nexus between State law and 'public morality' that transformative constitutionalism purports to break and imagine instead, "a transformation in the order of relations" among individuals, society and the State.

55 *Anuj Garg v Hotel Association* AIR 2008 SC 663.

56 See Gautam Bhatia (2017) "Equal Moral Membership: Naz Foundation and the Refashioning of Equality Under a Transformative Constitution" Indian Law Review, Vol. 1, issue 2, pp 115 – 144; Tarunabh Khaitan, "Reading Swaraj into Article 15: A New Deal for the Minorities", (2009) 2 NUJS Law Review 419; Tarunabh Khaitan, "Koushal v Naz: Judges Vote to Recriminalise Homosexuality" (2015) 78(4) *The Modern Law Review* 672.

57 Opinion of Judge Chandrachud in *Navtej Johar* at para 45.

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V. Looking Ahead: The Dictates of Constitutional Morality

This far reaching mandate of transformative constitutionalism to change perceptions within a society and build consciousness among its citizens, through legal means, undoubtedly presents a struggle to overcome resistance to entrenched social values. Undeniably therefore, transformation and change within societies, especially through the instrumentality of the law is going to be an incremental process.[58] Through which means and within what paradigm does one need to advance such transformation? The Court answers that it is only through the ideals of 'Constitutional morality' that the transformative vision of the Constitution fully comes alive.

It is important to note that the mandate of 'Constitutional Morality' was one of the most crucial points in the decision of the Delhi High Court in *Naz Foundation*. Essentially, the court was responding to the argument of the State, that popular morality can be a legitimate state purpose and the State has the right to enforce the same through the law. Rejecting the State's contention, the court responded critically that:

> *"…[P]opular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality…In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."*[59]

That being said, *Naz Foundation* did not specifically infuse much concreteness to the term 'Constitutional Morality' and it is here that the Supreme Court in *Navtej Johar*, advanced a slightly more nuanced understanding of the conception. The Court underlines that Constitutional morality is the means, the standard and in fact the "guiding spirit" to achieve transformation within the society. Referring to one of the founding members of the Indian Constitution, Dr. B.R Ambedkar, the Court identified constitutional morality in its substantive content as encapsulating the notion of 'diversity' and 'inclusiveness'.[60] Therefore, law and

58 In fact the founding members including Dr. Br. Ambedkar himself thought in similar lines "*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it*." (As cited in Andre Béteille, Constitutional Morality, Economic and Political Weekly Vol. 43 Oct. 4 - 10, 2008, pp. 35-42.

59 *Naz Foundation*, note 21.

60 See, Opinion of Judge Dipak Misra and A.M. Khanwilkar in Navtej Johar, para 253 (v): "*Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace*." Pratap Bhanu Mehta, What is Constitutional Morality, *Seminar: We the People* (2015), p. 615, <http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm>.

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in this case S. 377 which perpetuates discrimination and breeds inequality towards a certain social class, even if endorsed by 'public/social morality', fails the test of Constitutional validity. As the Court most pointedly states: "Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of Constitutional morality."[61] It is this principle of constitutional morality that governs both State action and citizen participation in realizing the transformational aims of the Constitution.

Transformative constitutionalism and Constitutional morality, in light of the Court's interpretation, are therefore mutually reinforcing paradigms, both contributing towards a more comprehensive set of rights protection under the Constitution. Both are geared towards expanding and promoting the distinct goal of transformation as envisioned under the Constitution and in this regard, consider the State as well as its citizens as equal participants in that process. The Court's reading of the two concepts in the present case is far reaching however. Realizing inclusiveness and pluralism, while rejecting systematic discrimination against vulnerable groups or minorities, echoes for change far beyond the present issue of LGBT+ rights.[62] It implies a more exacting probe of when and under what circumstances the State is allowed to restrict fundamental rights. Court's insistence of 'substance' over 'form' would entail a higher scrutiny of State legislation that tramples individual rights. The concept of 'legitimate State purpose' as circumscribing a certain right can no longer be merely a reflection of 'public/social' morality.[63] Moreover, the real import of transformative constitutionalism lies in positive measures that the State ought to take in bringing the Constitution closer to the most deprived and it will be interesting to see how that translates into a fuller interaction of the chapter on Directive Principles of State Policy and Fundamental Rights under the Constitution.

61 Opinion of Judge Dipak Misra in *Navtej Johar* para 116.

62 See in this regard, Tarunabh Khaitan, Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are, Indian Constitutional law and Philosophy (Blog 9th July 2018), available at <https://indconlawphil.wordpress.com/2018/07/09/inclusive-pluralism-or-majoritarian-nationalism-article-15-section-377-and-who-we-really-are/>.

63 As Judge Dipak Misra and A.M. Khanwilkar notes in *Navtej Johar*, para 119: "*The Court has to be guided by the conception of constitutional morality and not by the societal morality*." and para 253 (v): "…*Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law*…".

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