

# JOHAR v. INDIA 2018

*Case Digest*

*Prepared January 2019*

Human  
Dignity  
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# Johar v India, 2018 Case Digest

Last updated: 12.02.2018



[Johar v India. Writ Petition \(Criminal\) No. 76 Of 2016<sup>1</sup>](#)

## Supreme Court of India

**6 September 2018**

**Petitioners:** *Writ Petition No. 76: Navtej Singh Johar, Sunil Mehra, Ritu, Aman Nath and Ayesha Kapur*

*Writ Petition No. 572: Akkai Padmashali & Others*

*Writ Petition No. 88: Keshav Suri*

*Writ Petition No. 100: Arif Jafar*

*Writ Petition No. 101: Ashok Row Kavi & Others*

*Writ Petition No. 121: Anwesh Pokkuluri & Others*

**Respondent:** *Union of India through the Secretary of the Ministry of Law and Justice*

### Impleadment

**Applications:** *Voices Against 377  
Minna Saran  
Alok Sarin  
Nivedita Menon & Others  
Naz Foundation (Original petitioner before the Delhi High Court)*

**Intervenors:<sup>2</sup>** *Suresh Kumar Koushal  
Utkal Christian Foundation  
Apostolic Churches Alliance*

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<sup>1</sup> With WRIT PETITION (CIVIL) NO. 572 OF 2016, WRIT PETITION (CRIMINAL) NO. 88 OF 2018, WRIT PETITION (CRIMINAL) NO. 100 OF 2018, WRIT PETITION (CRIMINAL) NO. 101 OF 2018, `WRIT PETITION (CRIMINAL) NO. 121 OF 2018

<sup>2</sup> Arguing for the retention of s377.

Trust Gods Ministry  
H. P. Sharma

**Presiding:** Hon'ble Mr. Chief Justice Dipak Misra  
Hon'ble Mr. Justice A.M. Khanwilkar  
Hon'ble Mr. Justice R.F. Nariman  
Hon'ble Dr. Justice Dhananjaya Y Chandrachud  
Hon'ble Ms. Justice Indu Malhotra

**Constitutional law** – Fundamental Rights – Interpretation – Transformative

Constitutionalism – constitutional morality v. societal morality

**Constitutional law** – Fundamental Rights – Equality – whether s.377 violates equality before the law under Article 14 of the Constitution of India

**Constitutional law** – Fundamental Rights – Discrimination – whether ‘sexual orientation’ is encompassed within the prohibition of discrimination under Article 15 of the Constitution of India

**Constitutional law** – Fundamental Rights – Freedom of speech – Freedom of expression – whether sexual orientation falls within the scope of freedom of speech and expression under Article 19(1)(a) of the Constitution of India

**Constitutional law** – Fundamental Rights – Privacy – whether sexual orientation is protected within the right to privacy under Article 21 of the Constitution of India

**Constitutional law** – Fundamental Rights – Dignity – whether sexual orientation is afforded protection within the concept of dignity under the Constitution of India

#### **FACTUAL BACKGROUND:**

(a) Section 377 of the Indian Penal Code criminalises “*whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal.*” Whilst “*against the order of nature*” is not defined within s.377, the Indian courts have historically interpreted it to encompass sexual acts that are not for the purpose of procreation (*Khanu v. Emperor, AIR 1925 Sind 286*). Crucially, s.377 criminalised consensual sexual acts between those of the same sex and also heterosexuals but more than that it enabled the harassment and exploitation of the LGBT community to prevail.

- (b) A High Court of Delhi judgment in [\*Naz Foundation v. Government of NCT of Delhi and Others \(2009\)\*](#) declared that in so far as s.377 criminalised consensual sexual acts of adults in private, it was unconstitutional and violated Articles 21, 14 and 15 of the Constitution.
- (c) On appeal, a two-judge bench of the Supreme Court in [\*Suresh Koushal v. Naz Foundation \(2013\)\*](#) overturned the High Court of Delhi decision – affirming the constitutionality of s.377 and stating that the LGBT community comprised a only miniscule fraction of the total population.
- (d) Review Petitions of the Supreme Court decision in *Suresh Koushal* under Article 137 of the Constitution were filed by several groups including Naz Foundation, Voices Against Section 377 and, importantly, the Union of India itself. These were dismissed in January 2014. Several parties subsequently filed curative petitions in March 2014, a procedure developed through the common law, which enables the Supreme Court to exercise its inherent powers to review previous decisions in order to cure gross miscarriages of justice. These petitions were referred to a five-judge Constitutional Bench but were later superseded by fresh petitions challenging s.377.
- (e) In April 2014, the Supreme Court in [\*National Legal Services Authority v. Union of India\*](#) legally recognised that transgender people were to be treated as a “third gender” and their rights safeguarded under articles 14 (equality before law), 15 (prohibition of discrimination), 16 (equality of opportunity), 19(1)(a) (freedom of expression) and 21 (rights to life and personal liberty) of the Constitution. Importantly the Court held that under Articles 15 and 16 of the Constitution discrimination on the grounds of gender identity was included within “sex” discrimination as it is not just limited to biological sex of male or female. The Court stated that gender identity is an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. The right to choose one’s gender identity is integral to the right to lead a life with dignity and therefore fell within the scope of the right to life.
- (f) In August 2017, the Supreme Court in [\*K.S. Puttaswamy and Another v. Union of India and Others \(2017\)\*](#) took a critical approach to the reasoning in *Suresh Koushal* holding that *Koushal* was a ‘discordant note’ in the rights jurisprudence of the Supreme Court. In doing so, the Supreme Court determined both that the right to privacy is elevated to the status

of being a Fundamental Right within the protective scope of Article 21 of the Constitution of India and that “*sexual orientation is an essential attribute of privacy.*” [126 per Dr Chandrachud, J]

- (g) In the last few years, a number of petitions challenging the constitutionality of s.377 have been filed by members of the LGBT community in India. In 2018, the six writ petitions and impleadment applications (outlined above) were accepted by the Supreme Court. The first petition, *Navtej Singh Johar v. Union of India*, was accepted on January 8, 2018 and referred to a Constitutional Bench. The remaining five petitions and impleadment applications were then joined to this petition. Hearings were held from 10 to 17 July 2018.
- (h) On 11 July 2018, an [affidavit](#) was submitted on behalf of the Union of India, articulating the view that determining the constitutionality of s.377 should be left “*to the wisdom of this Honourable Court.*”

#### **REMEDIES SOUGHT:**

- A declaration to the effect that s.377 of the Indian Penal Code to the extent it penalizes consensual sexual relations between adults, is violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India;
- Declare that the Petitioners are entitled to equality before the law and equal protection of law, without discrimination on the basis of their sexual orientation, under Articles 14, 15 and 16 of the Constitution of India;
- Issue an appropriate writ, order or injunction prohibiting the Respondent, or through its officers, agents and/or servants from in any manner enforcing the law under Section 377 of the Indian Penal Code, 1860 in relation to consensual, sexual conduct between adults.

#### **ISSUES:**

1. Whether s.377 violates Fundamental Rights guaranteed under the Constitution of India.
2. Whether the Supreme Court’s decision in *Suresh Koushal & Another v. Naz Foundation & Others* (2013) was correct.

## **HELD:**

1. The Supreme Court unanimously held s.377 of the Indian Penal Code to be unconstitutional to the extent that it criminalises consensual sexual acts between adults – reading down the provision:

*“Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional.” [252 & 253(xvii) per Misra, CJI]*

*“We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.” [97 per Nariman, J]*

*“Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional.” [156(i) per Dr Chandrachud, J]*

*“It is declared that, insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution... The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.” [21(i) & (iii) per Malhotra, J]*

2. The Supreme Court determined that s.377 violates Fundamental Rights guaranteed by the Constitution of India – noting that *“the LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights.” [240 per Misra, CJI \*see also 156(ii) per Dr Chandrachud, J]* In particular, the Supreme Court found the Fundamental Rights guaranteed under **Articles 14, 15, 19 and 21** to be violated [95 per Nariman, J & 21(i) per Malhotra, J]:

### **Article 14 - Equality before the law**

- 2.1 The Supreme Court held that differential treatment by reference to sexual orientation violated the right to equal protection of law provided for by Article 14 of the Indian Constitution: *“discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.” [237 per Misra, CJI]*

- In determining the “*validity of Section 377 IPC on the anvil of Article 14*”, the Court considered a two-part test – namely, whether (i) the classification (“*against the order of nature*”) was based upon an “*intelligible differentia*”, and (ii) there was a “*rational nexus*” between the differentia and the purpose of the provision. [233 per Misra, CJI, 14.2 per Malhotra, J]
- The purpose of Section 377 was to penalise persons who indulge in carnal intercourse with the object to protect women and children. However, the Court noted that s.375 of the Indian Penal Code and the Protection of Children from Sexual Offences (or “POSCO”) Act already captured non-consensual sexual acts, whilst the “*distasteful and collateral effect*” of s.377 is that “*even ‘consensual acts’ which are neither harmful to children nor women and are performed by a certain class of people (LGBTs)... have been woefully targeted.*” [237 per Misra, CJI] Crucially, this failure to distinguish between consensual and non-consensual acts under s.377 was recognised by the Court as a “*dichotomy in the law*” and “*manifestly arbitrary*”. [14.7 & 14.9 per Malhotra, J \*see also 239 per Misra, CJI & 94 per Nariman, J]
- It was observed that the effect of s.377 is that it “*penalizes some forms of sexual expression among heterosexuals while necessarily criminalizing every form of sexual expression and intimacy between homosexuals.*” [28 & 31 per Dr Chandrachud, J & 14.3 per Malhotra, J] This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens was unconstitutional for being violative of Article 14. “*Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment.*” [Misra CJ and Khanwilkar J253(xv)].
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### Article 15 – Prohibition of discrimination

2.2 So far as non-discrimination and equality are concerned, Article 15 of the Indian Constitution contains a closed, exhaustive list of prohibited grounds of discrimination. Despite this, three members of the Indian Supreme Court (Justice Nariman, Justice Chandrachud and Justice Malhotra) found expressly that discrimination on grounds of “sex” was to be read as including discrimination on grounds of “*sexual orientation*” so as to violate Article 15 of the Constitution.

- The Supreme Court drew a link between the criminalisation of same-sex intimacy under s.377 and the prohibition of discrimination based on ‘sex’ under Article 15, by recognising that s.377 “*rests on deep rooted gender stereotypes*” [53 per Dr

**Chandrachud, J]** and “criminalizes behaviour that does not conform to the heterosexual expectations of society.” [44 per Dr Chandrachud, J] Dr Chandrachud determined that: “By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community, Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the ‘order of nature’. A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1).” [52 per Dr Chandrachud, J]

- Malhotra J recognised that the interpretation of ‘sex’ under Article 15 included discrimination based upon a person’s sexual orientation – reaching the view that, as such, LGBT people are “equally entitled to the protection afforded by Article 15.” [15.1-15.2 per Malhotra, J] For this finding, Malhotra J. referenced NALSA v. Union of India as well as the Verma Committee Recommendations where the court concluded that sex included sexual orientation. “Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their “sexual identity and character .... The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.” [15.1-15.2 per Malhotra, J]
- Justice Nariman drew attention to earlier decisions of the Supreme Court which had treated the term “sex” in Article 15 as embracing “gender identity and sexual orientation” (see [5, 49-54]), he cited comparative law treating discrimination on grounds of sexual orientation as discrimination on grounds of sex (see e.g. [38]), he endorsed the Yogyakarta principles as giving further content to Constitutional rights including Article 15, (see [88]) and held (at [95]) as follows: “The fact that only a minuscule fraction of the country’s population constitutes lesbians and gays or transgenders, and that in the last 150 years less than 200 persons have been prosecuted for committing the offence under Section 377, is neither here nor there. When it is found that privacy interests come in and the State has no compelling reason to continue an existing law which penalizes same-sex couples who cause no harm to others .... it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate state rationale to uphold such provision.”



## Article 19 – Freedom of Speech & Expression

2.3 All five Justices of the Court in *Johar* found that s. 377 of the Indian Penal Code violated the right to freedom of expression protected by Article 19 of the Indian Constitution.

- Chief Justice Misra held that “*Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression.*” [253 (vii) per Misra, CJI]
- Malhotra J. then pointed out that: “*LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377. Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay ‘in the closet’. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence. It also has an impact on their mental well-being.*” (para 17.1)
- In considering whether s.377 violates freedom of speech and expression under Article 19(1)(a) of the Constitution, it was necessary for the Supreme Court to examine whether it could be regarded as a “reasonable restriction” under Article 19(2) on the basis of “public order, decency or morality”. [245 per Misra, CJI] In doing so, the Chief Justice recognised that s.377 criminalises “private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality.” [245 per Misra, CJI] Indeed, he emphatically concluded that ““Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner...public decency and morality... cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community” [247, 253(xvi) per Misra, CJI \*see also 17.2 per Malhotra, J] As such, the Court held that s.377 violates Article 19(1)(a) of the Constitution. Notably, reference was also made the notion of a “right to intimacy” – including within this

the “*right to the choice of partner*” – and that the criminalisation of consensual same-sex relations under s.377 amounts to a denial of this right. [67 & 151 per Dr Chandrachud, J]

**Article 21 – Protection of Life and Personal Liberty (\*encompassing privacy, dignity and health)**

2.4 The court found that Section 377 violates the right of members of the LGBT community to dignity, identity, and privacy, all covered under Article 21 of the Constitution [Misra CJ, paragraphs 143, 229; Nariman J, paragraph 83; Chandrachud J, paragraphs 51 (at p. 66), 58; Malhotra J, paragraphs 13.1, 14.5, 16].

- **Privacy:** The Supreme Court held that “*the application of s.377 causes a deprivation of the fundamental right to privacy which inheres in every citizen.*” [58 per Dr Chandrachud, J] In reaching this view, the Court drew heavily upon the recent decision in *Puttaswamy and Another v. Union of India and Others* (2017), which “*elevated the right to privacy to the stature of fundamental right under Article 21 of the Constitution*” and recognised that “*sexual orientation is an essential attribute of privacy.*” [168 per Misra, CJI & 54 per Dr Chandrachud, J & 16.2 per Malhotra, J]
- The Court, in re-affirming *Puttaswamy*, asserted that “*emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution.*” [59 per Dr Chandrachud, J] It was further reasoned that “*as sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.*” [229 per Misra, CJI]
- In explaining the many facets of privacy, Malhotra J stated: “*The right to privacy is not simply the “right to be let alone”, and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation,*

*which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence.” (para 16.2)*

2.5 As such, the Court held that s.377 violates LGBT people's right to privacy under Article 21 of the Constitution. **[58 per Dr Chandrachud, J]**

- Dignity: The Supreme Court also acknowledged that a person's sexual orientation “is intrinsic to their dignity” **[148 per Dr Chandrachud, J]** and that “persons who are homosexual have a fundamental right to live with dignity.” **[97 per Nariman, J \*see also 132 per Misra CJI & 16.1 per Malhotra]** Accordingly, dignity was acknowledged as falling within the protective scope of Article 21 of the Constitution **[127 per Misra CJI]** and that the criminalisation of consensual same-sex intimacy under s.377 “prevents LGBT persons from leading a dignified life as guaranteed by Article 21.” **[16.1 per Malhotra, J]**
- Malhotra J. concluded that Section 377 violates the personal liberty and the right to live with dignity guaranteed to all citizens under Article 21: “Section 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without companion, or lead a closeted life as “unapprehended felons” **(para 16.1)**

2.6 Two judges found that s377 violates the right to health, because the criminalization of homosexual intercourse makes members of the LGBT community hesitate to seek medical advice and that they are therefore more susceptible to sexually transmitted diseases [Chandrachud J, paragraphs 76, 83, 84, 87, 92; Malhotra J, paragraph 16.3].

- Malhotra J. highlighted the fact that LGBT persons are entitled to the right to health: “LGBT persons being a sexual minority have been subjected to societal prejudice, discrimination and violence on account of their sexual orientation. Since Section 377

*criminalises “carnal intercourse against the order of nature”, it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community.”*  
(para 16.3)

3. The Supreme Court’s regressive approach in *Suresh Koushal v. NAZ Foundation* (2013) was overruled [253(xviii) per Misra, CJI, 96 per Nariman, J, 156(v) per Chandrachud, J & 21(iv) per Malhotra, J]. In doing so, the Court emphatically rejected as “constitutionally impermissible” and “fallacious” the reasoning articulated in *Suresh Koushal* that “the LGBT community comprised only a minuscule fraction of the total population” as a basis for upholding the constitutionality of s.377 [253(ii) & 253(viii) per Misra, CJI]. Instead, the Court powerfully asserted that “the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.” [253(viii) per Misra, CJI, 95 per Nariman, J & 19(ii) per Malhotra, J]

#### POINTS OF INTEREST:

- **On constitutional interpretation...**

The Supreme Court recognised the need for courts to interpret the Constitution in a progressive and dynamic manner in order to meet the aim of the Constitution which was to transform society, not to entrench and preserve the pre-existing values of the majority.

*“A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings.”* [82 per Misra, CJI]

*“The whole idea of having a Constitution is to guide the nation towards a resplendent future. 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.”* [95 per Misra, CJI]

*“The Constitution would become a stale and dead testament without dynamic, vibrant and pragmatic interpretation.”* [97 per Misra, CJI]

*“The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic*

*interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.” [253(iii) per Misra, CJI]*

*“Above all, our decision will speak to the transformative power of the Constitution.” [24 per Dr Chandrachud, J]*

- **On majoritarian morality v. constitutional morality...**

The Supreme Court emphatically rejected the notion that the protective scope of Fundamental Rights under the Constitution should be determined by reference to ‘*societal morality*’:

*“... it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality.” [119 per Misra CJI]*

*“In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty.” [122 per Misra, CJI]*

*“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. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.” [253(v) per Misra CJI]*

*“It will not be open for a constitutional court to substitute societal morality with constitutional morality.” [80 per Nariman, J]*

*“The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights,*

*among others, of 'discrete and insular' minorities." ... "Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes." [81 per Nariman, J]*

*"Constitutions are scripts in which people inscribe the text of their professed collective destiny. They write down who they think they are, what they want to be, and the principles that will guide their interacting along that path in the future." [138 per Dr Chandrachud, J]*

*"This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court." [144 per Dr Chandrachud, J]*

*"Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe." [146 per Dr Chandrachud, J]*

*"Modern democracies are based on the twin principles of majority rule, and protection of fundamental rights guaranteed under Part III of the Constitution. Under the Constitutional scheme, while the majority is entitled to govern; the minorities like all other citizens are protected by the solemn guarantees of rights and freedoms under Part III." [19(ii) per Malhotra, J]*

- **On international jurisprudence...**

The Supreme Court gave consideration to the substantial body of international jurisprudence on LGBT rights, from *Toonen v. Australia* (UN Human Rights Committee) and *Dudgeon v. United Kingdom* (European Court of Human Rights), to more recent developments in other domestic jurisdictions (Trinidad & Tobago, South Africa, Canada, Hong Kong, United States, Fiji, Ecuador, Nepal). Notably, reference was made to *Caleb Orozco v. The Attorney General of Belize* (2016). [113 per Dr Chandrachud]

- **On the impact of criminalisation...**

The Supreme Court acknowledged the far-reaching and harmful impact of the criminalisation of consensual same-sex intimacy under s.377:

*“Section 377 IPC... becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves.”* [247 per Misra, CJI]

*“Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.”* [6 per Dr Chandrachud, J]

*“Apart from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture. The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution.”* [51 per Dr Chandrachud, J]

*“The social ramifications of Section 377 are enormous. While facially Section 377 only criminalizes certain “acts”, and not relationships, it alters the prism through which a member of the LGBTQ is viewed. Conduct and identity are conflated. The impact of criminalising non-conforming sexual relations is that individuals who fall outside the spectrum of heteronormative sexual identity are perceived as criminals.”* [56 per Dr Chandrachud, J]

*“Section 377 has a significant detrimental impact on the right to health of those persons who are susceptible to contracting HIV – men who have sex with men (“MSM”) and transgender persons.” [84 per Dr Chandrachud, J]*

*“The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.” [149 per Dr Chandrachud, J]*

*“Section 377 criminalises “carnal intercourse against the order of nature” it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities... LGBT persons, and more specifically the MSM, and transgender persons are at a higher risk of contracting HIV as they lack safe spaces to engage in safe-sex practices. They are inhibited from seeking medical help for testing, treatment and supportive care on account of the threat of being ‘exposed’ and the resultant prosecution.” [16.3 per Malhotra, J]*

*“The LGBT persons deserve to live a life unshackled from the shadow of being ‘unapprehended felons’.” [20 per Malhotra, J]*

- **On homosexuality being natural...**

*“Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors.” [253(vii) per Misra, CJI]*

*“Sexual orientation is an innate attribute of one’s identity, and cannot be altered. Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality.” [13.1 per Malhotra, J]*

*“Sexual orientation is innate to a human being. It is an important attribute of one’s personality and identity. Homosexuality and bisexuality are natural variants of human sexuality.” [16.1 per Malhotra, J]*



- **On the colonial origins of s.377...**

The Supreme Court emphasised and explored the British colonial history underpinning s.377 of the Indian Penal Code [7-20 per **R.F. Nariman, J**] and 1-3, 14-22 per **Dr Chandrachud, J & 6 per Malhotra, J**]. In doing so, the Court made a number of powerful statements that are worth noting:

*“An archaic law which is incompatible with constitutional values cannot be allowed to be preserved.”* [247 per **Misra, CJI**]

*“The object sought to be achieved by the provision, namely to enforce Victorian mores upon the citizenry of India, would be out of tune with the march of constitutional events that has since taken place.”* [82 per **Nariman, J**]

*“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... Civilisation has been brutal.”* [2 per **Dr Chandrachud, J**]

*“Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence... Their entitlement should be as equal participants in a society governed by the morality of the Constitution. That in essence is what Section 377 denies to them. The shadows of a receding past confront their quest for fulfilment.”* [3 per **Chandrachud, J**]

*“An inquiry into the colonial origins of Section 377 and its postulations about sexuality is useful in assessing the relevance of the provision in contemporary times.”* [14 per **Dr Chandrachud, J**]

*“Indian citizens belonging to sexual minorities have waited. They have waited and watched as their fellow citizens were freed from the British yoke while their fundamental freedoms remained restrained under an antiquated and anachronistic colonial-era law – forcing them to live in hiding, in fear, and as second-class citizens.”* [24 \***Dr Chandrachud, J**]

*“Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation.”* [60 per **Dr Chandrachud, J**]

*“Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is a first step. The constitutional principles on which it is based have application to a broader range of entitlements. The Indian Constitution is based on an abiding faith in those constitutional values. In the march of civilizations across the spectrum of a compassionate global order, India cannot be left behind.”* [126 \*Dr Chandrachud, J]

*“A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial.”* [154 \*Dr Chandrachud, J]

*“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.”* [20 per Malhotra, J]