

SECTION 377: A GREATER TRANSFORMATION

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In its decision in *Navtej Singh Johar v. Union of India* last week, the [Supreme Court has finally struck down the colonial-era law](#) criminalising homosexuality and the lives of LGBTQ persons. In a 493-page verdict, with four concurring judgments, the court traversed the protections of fundamental rights in the Constitution to find that the provision violated the rights of LGBTQ persons to dignity, equality, privacy and expression.

The judges were unequivocal that Section 377 of the Indian Penal Code cavalierly [intruded into a zone of intimate decision](#) which is entitled to constitutional protection. As [Justice D.Y. Chandrachud put it](#), “the choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal.” And: “the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.”

The [opinion of the Chief Justice of India](#), Dipak Misra, invoked Johann Wolfgang von Goethe, Arthur Schopenhauer and John Stuart Mill to stress the right to develop one’s individuality against the demands of social conformity. In the context of LGBTQ persons — where the struggle is often to assert one’s personhood in an isolating, ostracising environment in which heterosexuality is the norm — this constitutional protection given to intimate choices against the dictates of societal conformity cannot be overstated.

The judges were also clear that the guarantee of equality at its heart was the guarantee of equal citizenship. The criminalising ambit of Section 377 violated this guarantee as it “singles out people, by their private choices” and “marks them as less than citizens — or less than human”.

The right to love: on Section 377 verdict

The harm of Section 377 was not just that it prohibited a form of intimate and personal choice but that it encoded a stereotypical morality which has deep-ranging social effects. As Justice Chandrachud put it, Section 377 “perpetuates a certain culture”, based on “homophobic attitudes” which make “it impossible for victims to access justice”. The right not to be discriminated against on grounds of one’s sexual orientation is violated by the prejudicial stereotypes about the LGBTQ community fostered by Section 377. It is for this reason as well that Section 377 was read down by the judges.

This constitutional guarantee of the right to develop one’s personhood and the right to equal citizenship is firmly anchored in the notion of constitutional morality, as referenced by Justices Misra, R.F. Nariman and Chandrachud. The denial to LGBT persons of the right to dignity is incompatible with the morality of the Constitution. As Justice Chandrachud put it, “there is an unbridgeable divide between the moral values on which it [Section 377] is based and the values of the Constitution.”

The idea that majority opinion should prevail over the right to dignity and liberty of the minority was explicitly rejected. As Justice Nariman put it, “it is not left to majoritarian governments to prescribe what shall be orthodox in matters of social morality.”

Full text of Supreme Court's verdict on Section 377 on September 6, 2018

By explicitly setting out the Court as a guarantor of minority rights, regardless of the opinion of “popular or legislative majorities”, the Court has signalled its determination to defend the Constitution. In a time when lynchings have become the order of the day and government remains a mute spectator, the role that the judiciary has to play in safeguarding the right to life of minorities of all stripes and hues cannot be overstated.

The logic of *Navtej Singh Johar* is anchored within what both Justices Misra and Chandrachud called “a transformative Constitution”. According to Justice Misra, “the purpose of having a constitution is to transform society” to “embrace therein” the “ideals of justice, liberty, equality and fraternity”. The mandate to transform society in allegiance to the Constitution is a task vested in the state, the judiciary and the citizen.

It is in this sense that we have to understand the work still to be done after this remarkable judgment. If a law has taken root in the social, cultural and legal consciousness, the challenge of extirpating the prejudice which the law has fostered is still immense. One has to only think of the prejudice and violence Denotified Tribes still face at the hands of the state and society even after the colonial-era Criminal Tribes Act was repealed in the late 1940s.

It is this immense task of combating the prejudicial attitudes encoded in Section 377 which has to continue. Justice Nariman was cognisant of this challenge and mandated the Union of India to give “wide publicity to the judgment” and conduct “sensitisation and awareness training for government officials and in particular police officials in the light of observations contained in the judgment”.

The implications of a transformative Constitution are wide ranging and its power can be harnessed by inter-caste, inter-religious and same sex couples, all of whom are battling a form of social morality which is at odds with the Constitution. In fact Justice Chandrachud called “the right to love not just a separate battle for LGBTQ individuals but a battle for us all”.

The court, through this decision, has harnessed the transformative power of the Constitution and amplified a way of thinking rooted in the values of respect for dignity, equality and fraternity. If this way of thinking, rooted as it is in the struggle against forms of discrimination perpetrated by a conservative social morality, becomes more widely accepted, India will be less of a majoritarian democracy and more of a form of constitutional democracy.

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