

THE SUPREME COURT TRANS-FORMED

Relevant for: Indian Polity & Constitution | Topic: Judiciary: Structure, Organisation & Functioning

The [decriminalisation of homosexuality](#) in the *Navtej Johar* judgment holds special relevance for transgender rights. Not only was Section 377 used disproportionately against transgender persons, the legal battle also took a new and positive turn from 2014 after the Supreme Court [recognised the right to gender identity](#) in *NALSA v. Union of India*. Therefore, it is only fitting that we bestow some attention to the contributions of the trans community to this outcome and examine how the judgment takes transgender rights forward.

When the Supreme Court in 2013 passed the *Koushal* judgment, overturning the [Delhi High Court judgment reading down Section 377](#) in *Naz v. Union of India*, the LGBTQ community faced a huge setback. The silver lining, however, was that the LGBTQ movement on the ground was growing rapidly, with social acceptance for LGBTQ concerns increasing. Transgender persons, however, continued to be the most marginalised and vulnerable group within the community. They were routinely arrested and harassed by police, sexually abused, and had to bear the brunt of criminal threats as they were on the streets forced into begging and sex work.

This changed with *NALSA*. In 2014, a bench of Justices K.S. Radhakrishnan and A.K. Sikri passed a judgment holding that transgender persons have the constitutional right to self-identify their gender as male, female or transgender even without medical re-assignment. The Supreme Court held that the rights to life, dignity and autonomy would include the right to one's gender identity and sexual orientation.

With the *NALSA* judgment, there was no looking back. This immediately gave new grounds, and indeed new hope, to revive the Section 377 challenge. In 2016, two fresh petitions were filed under Article 32 of the Constitution: the first by Navtej Johar and others, and the second by Akkai Padmashali, Umi and Sana, three transgender activists from Karnataka. Both petitions urged the Supreme Court to reassess the constitutionality of Section 377. This was also the first time that transgender voices were before the Supreme Court.

In 2017 came another big judgment in *Puttaswamy v. Union of India*, in which the Supreme Court said that [there is a constitutional right to privacy](#) inherent in the right to life, equality and fundamental freedoms. It went on to hold that the right to privacy specifically includes the right to have intimate relations of one's choice and the right to sexual orientation and gender identity, and that the *Koushal* judgment was incorrect.

After *Puttaswamy*, more petitions and interventions were filed against Section 377. Finally, the Supreme Court, in a five-judge Bench led by the Chief Justice of India, unanimously held in *Navtej Johar* that Section 377 was unconstitutional to the extent that it criminalises consensual relationships of any kind between adults, and overruled *Koushal*.

The impact of the *Navtej Johar* decision is unprecedented. Justice D.Y. Chandrachud recognised that Section 377 had consigned a group of citizens to the margins and was destructive of their identities, and held that lesbians, gay, bisexual and transgender persons have the constitutional rights to full and equal citizenship and protection of all fundamental rights.

The most far-reaching contribution is the elaboration on the right against non-discrimination on the basis of sex, guaranteed in Article 15 of the Constitution. The Supreme Court confirmed that as held in *NALSA*, 'sex' under Articles 15 includes discrimination on the ground of gender

identity. It went even further to say that discrimination on the grounds of 'sex' would also include discrimination due to sexual orientation or stereotypes. This means that being gender non-conforming or not adhering to society's 'norms' of gender roles, be it in the way you dress, speak or behave, cannot be a ground for discrimination. The main reasons for violence against trans persons is that they do not conform to gender roles. This inclusion of discrimination on the ground of sex stereotyping will go a long way in dismantling gender stereotypes not just for the LGBTQ community, but also for women.

In this way, with the *Navtej Johar* judgment, the court has gone far beyond the anti-sodomy judgments from around the world that were referred to it. By recognising these twin aspects of gender identity and sexual orientation, the court acknowledges the voices of the most vulnerable sexual minorities within the LGBTQ community and takes the stand that the Constitution protects the rights of all.

Jayna Kothari is founder of Centre for Law and Policy Research

Sign up to receive our newsletter in your inbox every day!

Please enter a valid email address.

Last week Ram Kadam, a BJP MLA from Maharashtra, told the men in an audience that if they were interested in women who didn't reciprocate the feeling,

Our existing notification subscribers need to choose this option to keep getting the alerts.

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com

Crack