The Supreme Court trans-formed
The ‘Navtej Johar’ judgment has created the conditions to dismantle gender biases in diverse ways

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 reconsidered 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.

Step by step
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 Padmeshali, 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 held that the rights to life, dignity and autonomy would include the right to one’s gender identity and 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.

Different minorities
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.

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