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# UNRAVELLING THE PARADIGM SHIFT: TRANSFORMATIVE CONSTITUTIONALISM THROUGH THE LENS OF NAVTEJ SINGH JOHAR JUDGMENT

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Sameeksha Singh Guru & Aakarsh Mishra, Dr. B.R. Ambedkar National Law University

## ABSTRACT

The doctrine of transformative constitutionalism has become central to contemporary Indian jurisprudence, emphasizing the Constitution's role in reshaping social structures and advancing substantive equality. This paper examines the Supreme Court's landmark judgment in *Navtej Singh Johar v. Union of India* as a pivotal expression of this transformative vision. By reading down Section 377 of the Indian Penal Code to decriminalize consensual same-sex relations, the Court not only corrected a historical injustice but also reaffirmed the Constitution as a dynamic, living charter committed to dignity, autonomy, and equal citizenship.

This paper tracks down the judicial evolution leading to this decision, contrasting the progressive reasoning in *Naz Foundation* with the regressive stance in *Suresh Kumar Koushal*. It then analyzes how the Constitution Bench in *Navtej* grounded sexual orientation within Articles 14, 15, 19, and 21, rejecting heteronormative assumptions and elevating constitutional morality above prevailing social prejudices. Through this interpretive shift, the Court recognized the inherent worth of LGBTQ+ identities and expanded the scope of fundamental rights to protect personal choice, privacy, and intimate association.

Post-*Navtej* developments are also examined, highlighting how various High Courts have relied on the precedent to affirm live in relationships, personal autonomy, and queer partnerships. These decisions demonstrate the judgment's catalytic effect, even as inconsistencies reveal the challenges of operationalizing transformative ideals across jurisdictions. Despite its monumental impact, the judgment represents only a partial realization of LGBTQ+ rights in India. Persistent gaps such as the absence of marriage equality, adoption rights, and anti-discrimination legislation continue to restrict the community's civil liberties. The Supreme Court's ruling in *Supriyo v. Union of India* underscores these limitations by deferring marriage recognition to the legislature.

**Keywords:** LGBTQ+ Rights, Constitutional Morality, Equality and Dignity; Fundamental Rights Sexual Orientation, Queer Jurisprudence Autonomy

Social Transformation.

## INTRODUCTION

The Constitution of India, in its very essence, is a living organ and thus with the passage of time, it lays down the path to bring legal reforms. The rights guaranteed by the Constitution of India are timeless in nature and are dynamic and require constant interpretation with changing times. Based on such interpretation, the Constitution of India, while imbuing its very essence and adhering to its basic structure, brings about a substantive change in the society and transforms its role among the people to institutionalise the changes caused in the society by the passage of time. This Transformative Constitutionalism shapes the institutions of the country and moulds the social threads among the people in consonance with the changing times.

Such a responsibility was laid down on the Judiciary to interpret the fundamental rights under the Constitution of India against criminalisation of the acts of consensual sexual intercourse between same-sex couples under Section 377 of the Indian Penal Code, 1860 (hereinafter referred to as the "IPC") as in the 20<sup>th</sup> century, such sexual minorities had started to emerge worldwide demanding equal civil rights to overcome the age-old oppression and injustice. After a series of judgments by the Indian Judiciary on the issues of homosexuality, the Supreme Court, in *Navtej Singh Johar v. Union of India*<sup>1</sup> eventually struck down Section 377 of IPC to the extent which criminalised consensual sexual intercourse between same-sex couples.

The Navtej Singh Johar judgment, delivered by the Supreme Court of India in 2018, stands as a watershed moment in the annals of Indian jurisprudence. Its significance transcends the confines of a mere legal ruling, for it heralded a profound transformation in the way the Indian Constitution is interpreted and applied. This landmark judgment, which struck down the draconian aspects of Section 377 of the Indian Penal Code, reverberated not only in the hallowed halls of the judiciary but also in the hearts and minds of millions across the nation. It was not merely a legal decree; it was a clarion call for a more inclusive, egalitarian, and forward-thinking India. It symbolised a departure from static, orthodox interpretations of the Constitution, towards an approach that recognises the living, breathing nature of this foundational document. This paradigm shift towards what scholars have termed "transformative constitutionalism" finds its crystalline expression in the Navtej Singh Johar

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<sup>1</sup>(2018) 10 SCC 1.

judgment.

Thus, when we discuss the Transformative Constitutionalism, we talk about the specific role played by the Constitution, and in this paper, we envision such transformation vis-à-vis the Navtej Singh Johar judgment and on the interpretation of Constitution of India for decriminalisation of consensual homosexual acts. This research endeavours to unravel the multifaceted dimensions of this transformation. It embarks on a journey through the intricacies of transformative constitutionalism in the context of Section 377 of IPC examining its theoretical underpinnings. The heart of this exploration, however, lies in the detailed dissection of the Navtej Singh Johar judgment itself. Through a meticulous analysis and legal reasoning, we seek to illuminate the profound impact it has had on the legal landscape of the nation.

## **TRAJECTORY OF TRANSFORMATIVE CONSTITUTIONALISM IN INDIA POST NAVTEJ SINGH JOHAR JUDGMENT**

Prior to this precedent, the acts of consensual sexual intercourse besides those between cisgender men and women were considered as unnatural offences in light of Section 377 of IPC. Consequently, the law prescribed punishment for the acts of sexual intercourse between homosexuals. In order to relieve the homosexual community from the barbarities of Section 377, a series of cases were instituted before different courts of the country including *Naz Foundation v. Govt. of NCT of Delhi*<sup>2</sup> in which the Delhi High Court, in 2009, advanced the cause of transformative constitutionalism and proceeded to decriminalise consensual sexual intercourse between the same-sex couples which was however, proscribed as an unnatural offence under the IPC. However, in 2014, this decision was overturned by the Supreme Court, in *Suresh Kumar Koushal v. Naz Foundation*<sup>3</sup>. Thereafter, as this matter reached before the senior most judges of the Supreme Court vide a curative petition, and simultaneously, various writ petitions were also filed before the Supreme Court seeking decriminalising the consensual homosexual acts among adults, the cases including *Navtej Singh Johar v. Union of India (supra)* along with various other writ petitions were referred to the Constitution Bench which were finally decided on 06<sup>th</sup> September 2018 whereby the Supreme Court decriminalised consensual sexual intercourse between homosexual adults by declaring the said interpretation of Section 377 of IPC as unconstitutional. The Supreme Court held that it violated the

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<sup>2</sup>2009 SCC OnLine Del 1762.

<sup>3</sup>(2014) 1 SCC 1.

fundamental rights of the members of the homosexual community guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. Thus, at this stage, it is relevant to understand whether the values of equality, liberty, dignity and inclusiveness which the Supreme Court has attempted to infuse within the society by the judgment in the Navtej Singh Johar case.

### **i. INFUSION OF VALUES OF EQUALITY, LIBERTY, DIGNITY AND INCLUSIVENESS IN THE SOCIETY**

While interpreting the Constitution, the Supreme Court has to duly consider the concept of transformative constitutionalism which primarily means that the Constitution aims at transforming the society as a whole instead of opting the majoritarian view. The Supreme Court, even in the Navtej Singh Johar case, proceeded with this norm and quenched the inner thirst of the Constitution for transforming the society by embracing the values of equality, liberty, dignity and inclusiveness.

The Navtej Singh Johar judgment rightly highlighted the concept of Transformative Constitutionalism and thereby aimed at eradicating the stigma that persists in the society with respect to the LGBTQ+ community. The judgment brought the issues of the community into focus and not only dealt with the legal aspects revolving around Section 377 of IPC but proficiently upheld the constitutional principles, fundamental rights of the community as well as their human rights. The precedent therefore addressed the aspects of the community's human rights advancing the cause of positive enforcement of the Constitution and its values.

While the questions of right to privacy and the interpretation of "sex" under Article 15 of the Constitution of India became the focal points of arguments in *Naz Foundation v. Govt. of NCT of Delhi*, the Supreme Court, in *Suresh Kumar Koushal v. Naz Foundation*, expressed its reservation in transplanting the Western experiences in India and thereby refrained themselves from protecting the rights of the homosexual community, but thereafter in 2018, the Supreme Court, in the Navtej Singh Johar judgment, categorically upheld the progressive nature of the Constitution of India and recognized its transformative and evolving nature. Justice Dipak Misra, the then Chief Justice of India, pertinently observed that the Indian Constitution fosters and strengthens the spirit of equality. He further observed that every person in the country enjoys equal rights which allows them to sustain and rather grow as an individual. The due weightage to one's individuality was given by Justice Misra and he assumed the responsibility upon himself, as a judge of the Supreme Court, to realise this constitutional vision of equal

rights in harmony with changing times.

The Navtej Singh Johar case was the first instance in which the focus was on direct violation of the fundamental rights by Section 377 of IPC and the petition was unanimously allowed by the Five-Judge Constitution Bench declaring portions of the law criminalising the consensual acts of intercourse between same-sex couples as unconstitutional. While overruling the Suresh Kumar Koushal judgment, the Supreme Court found that the criminalisation of consensual acts of sexual intercourse between same-sex couples violated their right to equality guaranteed by the Constitution of India. The Supreme Court found that such acts of carnal intercourse cannot be termed as a criminal offence and its criminalisation is itself arbitrary, irrational and manifestly unconstitutional. The Court proceeded to hold that in India, the LGBT people are entitled to all the rights guaranteed by the Constitution of India, especially the fundamental rights and the liberties protected by the Constitution of India. It was held that the choice of an individual to decide with whom they have to partner and their ability to find fulfilment in sexual intimacies must be protected. Further, such individuals have the right not to be subjected to discriminatory behaviour which is intrinsic to the constitutional protection of sexual orientation. It was thus held that the LGBT community is entitled to equal citizenship and protection under law, without discrimination. Therefore, the Supreme Court showcased the way as to how it can act as a catalyst for Transformative Constitutionalism.

The Constitution of India, having a dynamic, living and organic character and having the ability to change with time and transform the society in consonance with its needs, showcased this transformative characteristic even with respect to Section 377 of the IPC. The Supreme Court duly observed that the society has progressively transformed since the 19<sup>th</sup> century when the Code was first enforced. It was also highlighted that since the sexual minorities have been recognized and accepted in various legal spheres, however, the persistence of Section 377 hinders the very objectives of the Constitution for which the concept of transformative constitutionalism was applied.

Accordingly, the Supreme Court, as a constitutional court, viewed the Constitution of India as a transformative document, and have categorically performed their duties of protecting the fundamental rights of all individuals irrespective of their sex or sexual orientation. The Court even acknowledged the continuous progressive change that has occurred since 1860 when the Indian Penal Code was brought into force. In *National Legal Services Authority v. Union of*

India<sup>4</sup>, the Supreme Court has duly given the space for acknowledging and correcting the plight of sexual minorities, however, the barbaric consequences of Section 377 continued to prevail. The freedom attached to one's sexuality continued to be curtailed. Consequently, the fear in such individuals overpowered their desire for freedom in expressing their sexual orientation. Similarly, the Supreme Court highlighted that the question of freedom of choosing one's life partner as reflected in a catena of judgments of the Supreme Court including Shafin Jahan case<sup>5</sup> and Shakti Vahini case<sup>6</sup>. The Court reproduced the following observation made by the Supreme Court itself: -

*"It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible."*

The Supreme Court, has further observed in *Shakti Vahini* that:

*"When the ability to choose is crushed in the name of class honour and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large."*

Thus, the Supreme Court applied this concept to uphold the values and ideals imbued in the Constitution of India and followed this reformatory approach for transforming the society as a whole. It was thus duly noted that penalising homosexual conduct outrightly violates their fundamental right to life which includes the right to live a fulfilling life with dignity and the provision was therefore unconstitutional.

The Bench, while decriminalising the consensual homosexual intercourse between adults, underlined the principle of transformative constitutionalism in its entire reasoning and assured the concerned community that they can live a fearless life with freedom from state intrusion in

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<sup>4</sup>(2014) 5 SCC 438.

<sup>5</sup>*Shafin Jahan v. Asokan KM*, (2018) 16 SCC 368.

<sup>6</sup>*Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

their private matters especially in consensual intimacy. The Court further took a more sensitive stand to advance the assurance by acknowledging that the entire homosexual community had been subjected to oppression and denial of justice in India owing to its targeted legislations and various provisions of law such as Section 377 of the IPC. This is why there was an evident need of transformation and thereby the application of the principle of transformative constitutionalism which attempted to lead a social catharsis by infusion of the constitutional ideals.

One of the most significant roles played by the law of the land is to guide an individual's conduct in the society. The Navtej Singh Johar judgment performed this role by transforming the status quo that existed in the society by asserting the principle of transformative constitutionalism and the values of equality, liberty, dignity and inclusiveness. In this manner, the Supreme Court reiterated the essence of the Constitution reflecting its ideals to the rest of the society. The Constitution thereby played an essential role in questioning the persistent dominance of sexes and genders. The Constitution further played a transformative role to focus on resolving the issues raised by the homosexual community.

### **i. IMPACT OF THE PRECEDENT SET BY THE NAVTEJ SINGH JOHAR JUDGMENT**

The Indian judiciary has been dealing with the cases involving the issues of the homosexual community both prior to and post the Navtej Singh Johar judgment. However, a paradigm shift is evidently visible in the decisions of the subordinate courts after the precedent was set by the Supreme Court in Navtej Singh Johar. Since this precedent, several courts in the country have relied on it to protect the identities as well as the rights of the members of the homosexual communities. In this section of the paper, we will discuss some of these cases and how the precedent set by the Navtej Singh Johar judgment played its discourse.

One such decision came only days after the Navtej Singh Johar judgment when the Kerala High Court passed its judgment in a habeas corpus petition. One of the issues raised in the said petition was “whether persons of same gender were entitled to lead a live-in relationship?”<sup>7</sup> It is imperative to highlight that a live-in relationship goes beyond the realm of sexual intimacy and mere right of choosing a partner. The Kerala High Court, which adjudicating this case,

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<sup>7</sup>*Sreeja S. v. Commr. Of Police, 2018 SCC OnLine Ker 3578.*

primarily held that adults have the right to choose for themselves whether to marry or not and if yes then whom to marry. By no law or principle can State intrude in controlling this facet of an individual's life. The Court further highlighted that even if the parties are not competent to enter into the wedlock, it is their right to live together even outside the wedlock which is in essence a live-in relationship. The Kerala High Court, in this judgment, went beyond the conception of marriage.<sup>8</sup> Reliance was placed on the Navtej Singh Johar judgment to invoke the principle of constitutional morality. The High Court referred the explanation given in the Navtej Singh Johar judgment that sexual orientation is one of many biological phenomena which is completely natural and inherent in an individual and is controlled by the neurological and biological factors. It was held by the Supreme Court that "*The science of sexuality has theorised that an individual exerts little or no control over who he/she gets attracted to.*"

The Kerala High Court thus proceeded to reiterate that Section 377 had resulted in an unwanted collateral effect as even the sexual acts between adult members of the homosexual community that were consensual in nature have also been targeted even though no harm was caused to any individual or group of association. It caused clear discrimination against the LGBT community.

However, the Kerala High Court restricted itself to merely the abovementioned two observations of the Supreme Court in Navtej Singh Johar judgment. But as the first decision of a High Court in India post the Navtej Singh Johar judgment, the Kerala High Court advanced the cause of the rights of the homosexual community. Thus, on the basis of the principles discussed above, the High Court held that live-in relationships between lesbian couples does not offend any of the provisions of law and thereby it cannot be held as an offence in the eyes of law. The High Court not only allowed the petition but also acknowledged the liberty of the detenu to go along with her same-sex partner as desired by her. The High Court therefore settled the apprehension of non-recognition of lesbian relationship post Navtej Singh Johar judgment by extending the queer rights jurisprudence for recognition of lesbian relationship.

Thereafter, in 2019, the Calcutta High Court also dealt with a similar case of live-in relationship between a lesbian couple.<sup>9</sup> In this case as well, it was a habeas corpus petition filed by one of the partners for knowing the whereabouts of her detenu partner and sought her release. The

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<sup>8</sup>Ratna Kapur, *Multi-Tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law*, Vol. 4(1) Jindal Global Law Review, 36 (2012); *On marriage as a heteronormative institution*, see Ryan Conrad, *Against Equality: Queer Critiques of Gay Marriage* (2010).

<sup>9</sup>SSG v. State of West Bengal, WP 23120(W) of 2018 (Cal. H.C.).

Calcutta High Court not only allowed the petition but proceeded to go beyond the limits set by the Kerala High Court to protect the rights of the lesbian couple. The Calcutta High Court observed that consensual cohabitation is never illegal because Article 21 of the Constitution of India “*inheres within its wide amplitude an inherent right of self-determination with regard to one's identity and freedom of choice with regard to sexual orientation or choice of partner.*”<sup>10</sup> The Calcutta High Court further observed that this concept of self-determination is even protected under the scheme of constitutional morality. By moving beyond heteronormative conceptions of familial relations, and not once making essentialist or ‘immutability’ arguments, the Calcutta High Court presented a decision that respects queer identities and voices more.

Thereafter, a similar case was also decided by the Uttarakhand High Court in which the issue of cohabitation between lesbian couple was raised again.<sup>11</sup> The Uttarakhand High Court cited Kerala high Court’s order holding that the High Court holds the duty to respect one’s right to choose their partner. The Uttarakhand high Court had placed reliance on the principles of self-determination and identity inherent in Article 21 of the Constitution of India. However, even after the detenu who was an adult and had expressed her intention to cohabit with her partner, the High Court proceeded to grant an opportunity to the detenu’s family to present their case. Vide this order, the clear disregard of the values and ideals invoked in the Navtej Singh Johar judgment was reflected despite the binding nature of the precedent. The paternalistic approach of the High Court was alarming since no justifiable reason was given as to why the right of personal choice of an adult was required to be rebutted by her family.

One such case also came before the Orissa High Court on the similar question of cohabitation.<sup>12</sup> At the very outset, the High Court, in its judgment, recognized the preferred pronouns of the Petitioner who was a trans-man. In deciding the matter of cohabitation, the High Court allowed the same sex partners to have a live-in relationship for which, the High Court placed reliance on the Navtej Singh Johar judgment and particularly on judgment authored by Justice DY Chandrachud holding that the members of the LGBTQ+ community had the right to have a live-in relationship with a person of their choice irrespective of their gender. Moreover, the High Court also recognized the rights of a trans-man as a woman under the Protection of Women from Domestic Violence Act, 2005.

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<sup>10</sup>*Ibid.*

<sup>11</sup>*Madhu Bala v. State of Uttarakhand*, 2020 SCC OnLine Utt 276.

<sup>12</sup>*Chinmayee Jena v. State of Odisha*, 2020 SCC OnLine Ori 602.

It is evident that since the Supreme Court has set the precedent in the Navtej Singh Johar case, India has started witnessing a series of progressive judgments from the subordinate judiciary on the issues of the rights of members of the homosexual community. Even though the High Courts have restricted themselves from reviewing the complete literature as presented in the Navtej Singh Johar judgment and had omitted in recognizing various aspects of the fundamental rights of the members of the homosexual community, however, the paradigm shift and the transformation of the society, at least in terms of the law of the land, is evidently visible. The decision of the Supreme Court in Navtej Singh Johar has truly started a movement for the cause of Indian queer rights.

## CHALLENGES POST NAVTEJ SINGH JOHAR

The judgment in the Navtej Singh Johar case played a vital role in shifting public discourse around LGBTQ+ rights. It prompted widespread discussions, challenging existing prejudices and stereotypes. Activism within the LGBTQ+ community gained momentum, buoyed by the legal validation provided by the judgment. This newfound visibility and acceptance have contributed to a more inclusive and accepting societal environment. There seems to be also societal acceptance to some extent in the form of movies being made on the issue. Decriminalization has led to destigmatization associated with homosexuality in society and has instilled psychological as well as emotional security among homosexuals and other sexual minority groups.

However, despite the positive strides made, there remain persistent challenges. The full realization of LGBTQ+ rights, including issues like marriage equality and adoption rights, is still a work in progress. Discrimination and stigmatization persist in various forms, highlighting the need for continued advocacy and legal reform. Over the years, the changing legal status of individuals through various judgments on section 377 had affected the physical, emotional, mental, and professional well-being of millions. The coming out of their closets after the Delhi High Court's decision in Naz Foundation case and thereafter going back to their closets post Suresh Kumar Koushal had laid the path for harassment and exploitation. Before the Navtej Singh Johar judgment, there were numerous incidents of harassment of the LGBTQ+ community and in some cases even the homophobic officials of state authorities were also seen to have harassed such individuals and couples. Homosexual couples were subjected to extreme unscientific medical procedures for the so-called purpose of 'treatment'. In 1987, two

policewomen from Madhya Pradesh were also suspended from their positions for the sole reason that they married each other.<sup>13</sup> The members of the homosexual community even feared that they would be arrested if they show their true sexual orientation and preference openly in public.

Even though the Navtej Singh Johar judgment has reassured the faith on the homosexual community of the state, especially the judiciary, however, there is a long way ahead in acknowledging and recognizing various dimensions of the rights of the members of the homosexual community. At this stage, the ball is in the legislature's court to step in and frame laws which could improve the conditions for the homosexual community. There is still a need for creating haven for such individuals and couples.

One such attempt to recognize the rights of the homosexual individuals again reached the doors of the Supreme Court as a series of petitions were filed which were collectively decided in the case of *Supriyo v. Union of India*<sup>14</sup>. The issues raised in this case were whether the right to marry could be extended to the homosexual couples in India and whether they have the right to establish a family in the country. The Five-Judge Bench of the Supreme Court, after a marathon hearing on successive dates, reached at a landmark decision. The majority view comprising of three judges declined the right of legal recognition to same-sex marriages. It was held that the right of marriage is not a fundamental right and that it is for the Parliament to decide regarding the legalization of same-sex marriages. Furthermore, it was opined in the majority decision that Section 4(c) of the Special Marriage Act did not infringe upon the fundamental rights of the same-sex couples by only recognizing the provision of marriage for heterosexual couples.

The Supreme Court's ruling in *Supriyo v. Union of India* undoubtedly constitutes a significant setback for the LGBTQ+ community in India. The decision, which refused to grant legal recognition to same-sex marriage and placed the matter in the hands of the Parliament, was met with disappointment and frustration by advocates of LGBTQ+ rights. Thus, there is a long way ahead as mere decriminalization of Section 377 of IPC to the extent to allowing consensual sexual intercourse between adult same-sex couples does not mean recognition of other civil

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<sup>13</sup>Alok Hisarwala, *Why Indian Opponents of the same-sex verdict are so horrified at the US Verdict*, June 27, 2015, available at: <https://scroll.in/article/737216/why-indian-opponents-of-same-sex-marriage-are-so-horrified-at-the-us-verdict> (last visited on November 13, 2023).

<sup>14</sup>2023 SCC OnLine SC 1348.

rights of a homosexual person including the right to marry, the right to adopt and other matrimonial rights and obligations towards their partners.

## **CONCLUSION**

The Navtej Singh Johar judgment exemplifies the principles of transformative constitutionalism in action. It not only decriminalized homosexuality but also laid down a marker for a more inclusive, equitable, and progressive India. The judgment's impact extends beyond the legal realm, permeating societal attitudes and behaviors. While challenges persist, the Navtej Singh Johar judgment stands as a beacon of hope and progress, guiding India towards a more inclusive and rights-affirming future. The question which still persists is whether the decision in Navtej Singh Johar will actually transform the society and its view towards the homosexual people. It can be considered as the first step towards improving the position of the members of the LGBTQ+ community. However, only time will tell as to how the Constitution, the law and the precedent set by the Supreme Court would aid in achieving the transformative aim.