



Drawing a curtain on the past

Posted at: 14/09/2018

Highlights

- In a rousing address to the Constituent Assembly on November 25, 1949, Dr. B.R. Ambedkar laid out his transformative vision for the Constitution.
- The document, he said, ought to serve as a lodestar in the endeavour to make India not merely a political but also a social democracy.
- He saw liberty, equality and fraternity as principles of life, as a collective “union of trinity”.
- “To divorce one from the other,” he said, “is to defeat the very purpose of democracy.”
- Now, 71 years after Independence, these values that Ambedkar saw as integral to India’s republic, find new meaning in a remarkable judgment of the Supreme Court in **Navtej Singh Johar v. Union of India**.
- Not only has the court struck down the wretchedly wicked Section 377 of the Indian Penal Code, insofar as it criminalises homosexuality, but it has also recognised the Constitution’s enormous and extraordinary transformative power.
- In doing so, the court has provided us with a deep expression of democratic hope.
- And perhaps we can finally believe, as Nehru said, in his famous midnight speech, that “the past is over, and it is the future that beckons to us now”.

Macaulay’s shadow

- Plainly read, Section 377 punishes with imprisonment for life or for a term of up to 10 years any person who voluntarily has “carnal intercourse against the order of nature with any man, woman or animal”.
- Over the years, the term, “against the order of nature”, has been used to persecute members of the LGBTQ community, treating any non-procreative sexual act by them as acts of crime.
- Thomas Macaulay, the law’s drafter, despised the idea of even a debate on the legislation’s language.
- Like many other colonial-era laws, therefore, Section 377 was inserted with a view to upholding a distinctly Victorian notion of public morality.
- But post-Independence, the law remained on the books, as an edict that the Indian state saw as intrinsic to the enforcement of its own societal mores.
- The criminal law, the government believed, was a legitimate vehicle through which it could impose and entrench in society its own ideas of what constituted a good life.
- Societal morality, to it, trumped constitutional guarantees of equality and liberty.

Long road to freedom

- In July 2009, however, the Delhi High Court, in a judgment delivered by a bench

comprising Chief Justice A.P. Shah and Justice S. Muralidhar, rejected this vision, and declared Section 377, insofar as it criminalised homosexuality, unconstitutional.

- In the court's belief, the law was patently discriminatory.
- It offended not only a slew of explicitly guaranteed fundamental rights — in this case, Articles 14, 15, 19 and 21 — but also what the judgment described as “constitutional morality”.
- At the time this was a grand statement to make.
- Indeed, barely four years later, the Supreme Court reversed the findings in Naz, and rendered the judgment's radical vision nugatory.
- In a shattering verdict, the court, in Suresh Kumar Koushal, once again declared homosexuality an offence.
- LGBTQ persons, to the court, constituted only a “miniscule minority”, and they enjoyed, in the court's belief, neither a right to be treated as equals nor a right to ethical independence, a freedom to decide for themselves how they wanted to lead their lives.
- But now, in Navtej Singh Johar, the court has restored both the quotidian and the outstanding glories of the judgment in Naz.
- Unexceptionally, Section 377, it has found, infringes the guarantee of equality in Article 14, the promise against discrimination in Article 15, the right to free expression contained in Article 19, and the pledges of human dignity and privacy inherent in Article 21.
- But, perhaps, more critically, the court has taken inspiration from Naz in bringing to the heart of constitutional interpretation a theory that seeks to find how best to understand what equal moral status in society really demands, a theory that engages profoundly with India's social and political history.

Interpreting the Constitution

- The question of how to interpret a constitution, any constitution, is an age-old one.
- The Indian Constitution couches its guarantee of fundamental rights in abstract terms.
- For instance, the Constitution doesn't expressly tell us what equality, in Article 14, means. Does it mean merely a formal equality, or does it promise a more substantive equality, demanding the state's proactive participation?
- Until now, in the absence of a coherent theory of interpretation, judges have vacillated in answering such questions.
- But the four separate opinions in Navtej Singh Johar, written respectively by Chief Justice of India Dipak Misra and Justices R.F. Nariman, D.Y. Chandrachud and Indu Malhotra, collectively espouse an interpretive model that gives to India's history its full consideration.
- The idea, therefore, is, similar to what the South African courts have held, to eliminate all forms of discrimination from the social structure, and to usher society from degrading practices of the past into an egalitarian future.
- There is a danger, many believe, that this theory of interpretation could allow judges to turn into philosopher-kings, allowing them to impose their moral convictions on society.
- But, as Ronald Dworkin has observed, a strategy of interpretation which partakes a consideration of both text and history is really a “strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be”.
- Future disputes will certainly have to be guided by the court's general rule prescribed in Navtej Singh Johar.
- The court has already reserved its judgment in a number of cases that will tell us how it intends on applying this theory.

- Its decision in cases concerning the entry of women into the Sabarimala temple, on the practice of female genital mutilation of minor girls in the Dawoodi Bohra community, on the validity of the Indian Penal Code's adultery law, will all prove telling.
- Yet, much like the challenge to Section 377, the issues at the core of these cases are scarcely controversial as a matter of pure constitutional interpretation.
- Ultimately, therefore, the true value of Navtej Singh Johar will only be seen when the court sees this theory as integral to its ability to judge clashes between the naked power of the state and personal liberty, to cases such as the challenge to the Aadhaar programme, which seek to reverse the transformation that the Constitution brings.

The Hindu

