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Case Analysis

The many faces of dignity in *Navtej Johar*

Surabhi Shukla*

Constitutionality; Criminal liability; Human dignity; India; Same sex partners; Sexual behaviour; Sexual offences; Sexual orientation

Abstract

This case analysis explores the myriad ways in which the idea of "dignity" featured in the Navtej Johar *case before the Indian Supreme Court, which found that, in addition to other constitutional grounds, s.377 of the Indian Penal Code was unconstitutional to the extent that it criminalised non-heterosexual sexual relations between adults. A majority of the Court found that s.377 violated the right to dignity inherent under the right to life protection of art.21 of the Indian Constitution. This finding, in which dignity was imagined as self-worth, constituted but one of the ratio decidendi of the case. In total, however, four conceptions of dignity emerged: the first saw dignity as a change in thought process, the second equated dignity with individual characteristics of a person, the third imagined dignity as a background force which makes an individual "an individual" and the fourth equated dignity with self-worth. In addition to these conceptions, the judgment mentioned certain entitlements that emanated from dignity, including a right to health, a right to sexual privacy and a right to sexual orientation. Finally, some usages of dignity in this case linked it to other jurisprudential principles (e.g. the rule of law), but these did not have normative traction as the Court did not develop or fully explain these connections. I argue that while these linkages may provide avenues for the future development of the concept of dignity, connecting it to other values in normatively and functionally opaque ways may run the risk of depriving this concept of meaning.*

Introduction

The Indian Constitution does not enshrine a self-contained right to human dignity. Instead, the word "dignity" is used in three separate parts of the Constitution. The first reference is made in the Preamble to identify one of its purposes: "We the people of India … to secure to all its citizens … fraternity assuring the dignity of the individual … adopt, enact and give to ourselves this constitution."[1] The second reference occurs in the Chapter on Directive Principles of State Policy directing that State Policy give children the opportunity and facilities to develop freely under the conditions of freedom and dignity and safeguard them from exploitation, material and moral abandonment.[2] The third reference to dignity occurs in the Fundamental Duties Chapter and places a duty on all citizens to renounce practices which are derogatory to the dignity of women.[3] In none of these instances is dignity defined. Typically, the Indian Supreme Court has considered this concept under art.21 of the Constitution, which guarantees a fundamental right to life and personal liberty to all persons.[4]

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[1] Preamble, The Constitution of India 1950.

[2] The Constitution of India 1950 s.39(f).

[3] The Constitution of India 1950 s.51A(e).

[4] Article 21: No person shall be deprived of his life or personal liberty except according to the procedure established by law. (NB all references to art.21 are to this provision unless otherwise specified).

In *Navtej Johar*, decided on 6 September 2018, the Indian Supreme Court found s.377 of the Indian Penal Code, 1860 which criminalised "carnal intercourse against the order of nature", unconstitutional to the extent that it criminalised consensual non-heterosexual sex between adults. The decision was pronounced by a five-judge bench through four separate opinions. Although all found the impugned section to be unconstitutional, their reasoning was different. All opinions reiterated that dignity was a protected right under art.21 and a majority of the Court found that s.377 violated the dignity of an individual. This case analysis focuses on the uses and meanings of "dignity" in this judgment.

Before delving into the discussion, let us have a quick look at the history of the s.377 litigation in India, and how the case came before the Court in its present form (1). We will then look at the summary of arguments and the ratio of this case (2), and finally, shift our focus on the conceptions of, entitlements from and usages of dignity that emerge from the judgments (3).

(1) History of the litigation against s.377

> "377. Unnatural offences—Whoever voluntarily has *carnal intercourse against the order of nature* with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section." [Emphasis added].

As mentioned above, s.377 criminalised "carnal intercourse against the order of nature." It criminalised all participants in such "unnatural" acts, even if consensual. Facially, it applied to both same-sex and different-sex sexual relationships. However, it disproportionately impacted the lives of lesbian, gay, bisexual and transgender[5] (LGBT) persons, both because in popular imagination the section was thought to criminalise only "gay sex" and, given the private nature of the criminalised act, only those who were LGBT or perceived to be so came under the threat of prosecution and persecution. This population suffered a discriminatory and hateful treatment by society and s.377 only added a layer of criminality to their existence.

Litigation against this provision was first contemplated in India in the late 1980s after the outbreak of AIDS. The first legal challenge, which was eventually dismissed, was lodged in the Delhi High Court in 1994. The longest running case was brought by Naz Foundation, a non-government organisation working in the field of HIV/AIDS in India. *Naz Foundation v Govt of NCT of Delhi*[6] was filed in 2001, and in 2009 the Delhi High Court found s.377 unconstitutional to the extent that it criminalised adult consensual non-heterosexual sex. This decision was appealed to the Supreme Court (as *Suresh Kumar Koushal v Naz Foundation*[7]), and in 2013, a division bench of that Court reversed the High Court decision and found the section to be constitutional. This set off another set of legal challenges to get the highest court to reconsider its decision.

While these efforts were still in motion, a fresh writ petition was filed in the Supreme Court by LGBT persons alleging that s.377 violated their right to sexuality, sexual autonomy and the choice of a sexual partner. This, they argued, violated their fundamental right to life guaranteed under art.21, as well as the other legal grounds (summarised below). The Supreme Court decision in that petition, *Navtej Singh Johar v Union of India*,[8] dismissed the pending petitions in the *Koushal* matter (see above) and overturned the

[5] I use the term transgender in this case note to refer to all persons whose gender identity does not match with the sex assigned to them at birth. This definition is consistent with the Indian Supreme Court's understanding of the word transgender in *National Legal Authority v Union of India*, Writ Petition (Civil) No.400/2012 (hereinafter *NALSA*). This includes, but is not limited to, gender queer, gender non-binary, gender fluid persons, and the various regional names by which the population is known in India.

[6] Writ Petition (Civil) No.7455/2001 (hereinafter *Naz Foundation*).

[7] Civil Appeal No.10972/2013.

[8] Writ Petition (Criminal) No.76/2016 (hereinafter *Johar*).

2013 division bench ruling of the Supreme Court. It found s.377 unconstitutional to the extent that it criminalised adult consensual non-heterosexual sex.

(2) Summary of arguments and the ratio of the case

The petitioners (including those presenting interventions and accompanying petitions for the unconstitutionality of s.377) argued that s.377 violated several articles of the Indian Constitution. They argued that s.377:

- criminalised expressions of sexual orientation different from heterosexuality and so violated their right to dignity, autonomy and privacy, reputation, shelter; all of which were protected under the fundamental right to life under art.21[9];
- crippled the ability of LGBT persons to express their sexuality, choice of partner, romantic feelings and prevented them from acknowledging their relationship, which was a violation of the fundamental right to freely express oneself (art.19(1)(a))[10];
- furthered both open and insidious discriminatory attitudes towards this population;
- was vague as "carnal intercourse against the order of nature" was neither defined nor capable of definition. As such, the law was arbitrary and violated the fundamental right to equality (art.14)[11];
- did not criminalise, for example, the sexual relations of woman with a man, but criminalised the sexual relations of a woman with another woman. Thus, s.377 discriminated on the basis of sex in violation of the fundamental freedom from sex-based discrimination (art.15).[12]

The first respondent, Union of India, did not oppose the petition and left it to the wisdom of the Court to decide the legal fate of consensual same-sex relations in private.[13] God Ministries Trust, an NGO intervener, submitted that there was no liberty to abuse one's organs,[14] and that the acts criminalised under s.377 were such instances of organ abuse and derogatory to the dignity of human beings.[15] Further, those acts made one susceptible to AIDS which one cannot be granted a right to contract.[16] Finally, s.377 was consistent with ancient Indian legal principles,[17] and that finding the section unconstitutional would threaten the family system[18] and lure the young to perform homosexual acts for money.[19]

Intervener Suresh Kumar Koushal argued that India was culturally, economically and politically different from other regions of the world, and the decriminalisation of like provisions elsewhere did not provide a good reason for the same in India.[20] He also argued that all religions sanction same-sex sexual conduct.[21] Yet another intervener argued that striking s.377 down would take away the only criminal

[9] *Johar*, Writ Petition (Criminal) No.76/2016 at 16–17.
[10] *Johar*, Writ Petition (Criminal) No.76/2016 at 27. Article 19(1)(a) reads:
"19. Protection of certain rights regarding freedom of speech etc.
(1) All citizens shall have the right (a) to freedom of speech and expression."
[11] *Johar*, Writ Petition (Criminal) No.76/2016 at 25–26. Article 14 reads:
"Equality before law
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
[12] *Johar*, Writ Petition (Criminal) No.76/2016 at 26. Article 15 reads:
"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."
[13] *Johar*, Writ Petition (Criminal) No.76/2016 at 31.
[14] *Johar*, Writ Petition (Criminal) No.76/2016 at 32–33.
[15] *Johar*, Writ Petition (Criminal) No.76/2016 at 32–33.
[16] *Johar*, Writ Petition (Criminal) No.76/2016 at 34.
[17] *Johar*, Writ Petition (Criminal) No.76/2016 at 33.
[18] *Johar*, Writ Petition (Criminal) No.76/2016 at 34.
[19] *Johar*, Writ Petition (Criminal) No.76/2016 at 34.
[20] *Johar*, Writ Petition (Criminal) No.76/2016 at 35.
[21] *Johar*, Writ Petition (Criminal) No.76/2016 at 35.

recourse that a wife would have against her cheating bisexual husband.[22] Raza Academy, an intervener, argued that it could never be discriminatory to criminalise penetration into those parts of the body which were not meant for sex.[23] Therefore, s.377 only required treating a male as a male, a female as a female, and a transgender as a transgender.[24] The Apostolic Alliance of Churches and the Utkal Christian Council intervened, arguing that:

- s.377 did not offend art.14 because it merely defined an offence, leaving it to the State to decide who to penalise[25];
- sexual orientation was not a prohibited ground of discrimination under the Indian Constitution[26];
- the Yogyakarta Principles[27] on sexual orientation and gender identity did not constitute binding treaty obligations;
- if the Court were to read into s.377 a distinction of criminality dependent on consent then it would end up legislating, which it was not empowered to do[28];
- striking down s.377 would open the floodgates for same-sex marriages which would result in "social experiments with unpredictable outcomes."[29]

Since the judgment was delivered by a five-judge bench, in order to find the ratio decidendi of the case, three or more judges have to find that the same legal provisions have been violated, for the same reasons (the origins of this rule lie in common law). Accordingly, the ratio decidendi were as follows:

1) Section 377 violated art.14 because it created an indeterminate distinction between natural and unnatural forms of sex, classifying all consensual sexual activities between non-heterosexual persons as unnatural, based only on their sexual orientation. This distinction did not forward any legitimate state objective and was rooted only in prejudice. All forms of consensual sex between adults were natural.
2) Section 377 violated art.19(1)(a) because it crippled LGBT persons' freedom to express their sexuality and their choice of sexual partners, and these freedoms were implicit in the ambit of art.19.
3) Section 377 violated art.21 because it violated the fundamental right to privacy implicit in that Article. Privacy included the right to choose a sexual partner. Because s.377 placed unconstitutional impediments upon the exercise of this choice it violated art.21.
4) Section 377 violated art.21 because it violated the fundamental right to dignity (as self-worth) implicit in that Article.

(3) Analysing dignity in the *Navtej* writ

(a) Contextualising dignity in Navtej Johar

As dignity is not an explicitly guaranteed fundamental right under the Constitution the judiciary has tended to find it implicit within art.21, both generally and in relation to sexual orientation and gender identity cases. For example, in 2009, the Delhi High Court reiterated that dignity was a part of the Indian

[22] *Johar*, Writ Petition (Criminal) No.76/2016 at 36.
[23] *Johar*, Writ Petition (Criminal) No.76/2016 at 38.
[24] *Johar*, Writ Petition (Criminal) No.76/2016 at 38.
[25] *Johar*, Writ Petition (Criminal) No.76/2016 at 41.
[26] *Johar*, Writ Petition (Criminal) No.76/2016 at 42.
[27] Principles relating to sexual orientation and gender identity agreed upon by human rights experts in 2006. These principles have gained popularity as guiding principles in many parts of the world.
[28] *Johar*, Writ Petition (Criminal) No.76/2016 at 43.
[29] *Johar*, Writ Petition (Criminal) No.76/2016 at 44.

constitutional culture, and it meant recognising the worth of every individual and respecting their choices.[30] The Court reasoned that s.377 denied a person's core identity, voiding their dignity, which made the section unconstitutional under art.21.[31] Again, in the *NALSA* case, in which the Supreme Court clarified that all fundamental rights extended to transgender persons, it conceived of dignity as an inherent value under art.21[32] and had noted that self-determined sexual orientation and gender identity were basic aspects of dignity.[33] The *Navtej Johar* case built on those discussions and other relevant developments in constitutional jurisprudence, both in India and abroad.[34] However, it is important to note that dignity was not the only protected value discussed under art.21 in *Navtej Johar*. The judges noted that privacy and autonomy were also protected values under art.21 and discussed those concepts in their judgments. In fact, discussions on dignity, privacy and autonomy were interwoven and so that it was difficult to draw clear boundaries between them.

The judgment comprised four separate opinions. The first was written by Justices Misra and Khanwilkar, the second by Justice Nariman, the third by Justice Chandrachud, and the fourth by Justice Malhotra. What follows below is a critical description of the conceptions of dignity that emerge from the judgements. The discussion on dignity occurs at different sites of the decision, and sometimes the judges do not connect different conceptions. In that event I do not attempt to do so. Two opinions, those by Justices Misra and Khanwilkar and by Justice Malhotra devoted a clear space to developing possible conceptions of dignity, whereas the Nariman judgment primarily made references to prior usages of dignity in Indian case law. The Chandrachud judgment was a mix of prior references and conceptual development.

The judgment is 495 pages long. The Misra–Khanwilkar opinion spent eight pages on dignity whereas the Malhotra opinion spent six and a half pages on it. Therefore, fourteen and a half out of 495 pages were devoted to this concept: a relatively small proportion. The Misra–Khanwilkar judgment quoted older and recent Indian case law, cases from the European Court of Human Rights, and US and Canadian case law in support. The Malhotra relied on older and recent Indian case law, South African and US cases in developing her conception. Judges also variously relied on Yogyakarta Principles and international treaty obligations such as the Universal Declaration of Human Rights (UDHR).

(b) Four conceptions of dignity

(i) Dignity: A process of social change

Formulated by the Misra–Khanwilkar opinion, this conception began with the notion that human dignity had a special meaning in the context of sexual orientation litigation. The judges relied on an article written by Michele Fink[35] in which she quotes the American scholar, Martha Nussbaum to state that "dignity captures … the transition from 'disgust' to 'humanity'"[36]. This conception imagined a seemingly normative concept like dignity as a process of social change whereby what was not tolerated once might be tolerated now. Quoting Fink, the judgment stated that whereas, once, homosexual[37] persons were looked at with disgust and were considered unworthy of some rights, "there [was] increasing consensus"[38] that homosexual persons should no longer be deprived of citizenship rights that were available to heterosexual persons

[30] *Naz Foundation*, Writ Petition (Civil) No.7455/2001 at 26–28.
[31] *Naz Foundation*, Writ Petition (Civil) No.7455/2001 at 40.
[32] *NALSA*, Writ Petition (Civil) No.400/2012 at 68-69, 104.
[33] *NALSA*, Writ Petition (Civil) No.400/2012 at 16.
[34] Notably, *Justice Puttaswamy (Retd.) v Union of India*, Writ Petition (Civil) No.494/2012 in which the Supreme Court confirmed that privacy was a fundamental right under art.21 of the constitution and also made several important observations regarding sexual orientation and gender identity as a facet of privacy.
[35] Michele Fink, "The Role of Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective" (2016) *International Journal of Constitutional Law* 26.
[36] *Johar*, Writ Petition (Criminal) No.76/2016 at 81.
[37] I use the word homosexual here because the article from where this is conception is derived uses this word.
[38] *Johar*, Writ Petition (Criminal) No.76/2016 at 82.

(e.g. marriage) on the sole ground of their sexual orientation.[39] Arguably the reference to increasing consensus, in the absence of anything to the contrary, signified that the change occurred in the minds of the public. This conception further relied on Fink to note that once homosexuals achieved the status of "full humans" as a result of this change of mentality, tools like dignity functioned to translate the social change into a legal one. It is unclear whether Fink imagined the legal change to occur through new interpretations of old provisions or through new dignity-based legislation, though arguably it could be both. Therefore, three notable points emerged about this conception of dignity:

1) dignity could be acquired through social change;
2) it depended on public opinion, and
3) the newly acquired dignity status of subjects could be read or written into law.

(ii) Dignity: Respect for individuality and inseparable from human life

In this normative conception, found once again in the Misra–Khanwilkar opinion, dignity was inseparably linked to human life. It attached to a person at birth, as was shown by the judgment's recourse to art.1 of the UDHR: "All persons are born free and equal in dignity and rights."[40] To doubly reinforce the status of this value as inherent in all human beings, the opinion cited an article by Justice Michael Kirby, the Australian former judge, in which he stated that dignity applied to all individuals of the world; not just white persons, not just citizens, not just good persons. It applied also to traitors, to prisoners and to murderers.[41] This conception of dignity was distinct from the one mentioned above. In contrast to the understanding of dignity as a process, this conception of dignity was constant: persons did not become entitled to dignity only when a sufficient number of people saw them as "full humans". Instead, it was a value that attached at birth, and continued to attach till the end of life, even if a person had acted most inhumanely. The Court went so far as to state that without the preservation of dignity all other fundamental rights may not be fully realised.[42]

The opinion further stated that every human being had certain characteristics which were inherent and inseparable from them.[43] Although this part of the judgment was unclear, arguably, the judges sought to equate the individual characteristics of a person to the dignity of that person, that one was entitled to feel respect for those individual characteristics, and it was this entitlement that was a fundamental right under art.21. Therefore, there was a fundamental right to respect for dignity (i.e. individuality) of a person. As a collateral benefit of this fundamental right, the fundamental right to expression (art.19(1)(a)) was also facilitated, for when a person's individuality was respected, they were motivated to express themselves. This had other benefits as well: this atmosphere made peaceful co-existence possible and the administration of justice easy.[44] The ultimate benefit was that in such a society everyone was part of the social engineering process and individual space was not the exception, but the rule.[45]

The opinion cautioned that this conception should not be confused with "egotism or accentuated eccentricity."[46] Therefore, the judgment set the limits of dignity as individuality devoid of egotism or eccentricity. However, it did not give us any guidelines to identify those characteristics of a person that can be called their individuality as differentiated from those characteristics which could be classed as eccentricity.

[39] *Johar*, Writ Petition (Criminal) No.76/2016 at 82.
[40] *Johar*, Writ Petition (Criminal) No.76/2016 at 82.
[41] *Johar*, Writ Petition (Criminal) No 76/2016 at 82, citing Michael Kirby, "Human Rights Gay Rights" (2016) *Humane Rights* 5.
[42] *Johar*, Writ Petition (Criminal) No.76/2016 at 82–83.
[43] *Johar*, Writ Petition (Criminal) No.76/2016 at 83–84.
[44] *Johar*, Writ Petition (Criminal) No.76/2016 at 84.
[45] *Johar*, Writ Petition (Criminal) No.76/2016 at 84.
[46] *Johar*, Writ Petition (Criminal) No.76/2016 at 84.

(iii) Dignity: Provider of individuality and facilitator of choice

In this normative conception, once again propounded by the Misra–Khanwilkar judgment, dignity was perceived as a sacrosanct human right without which all other rights lost meaning and one's sustenance to the fullest extent seemed impossible. In other words, a person without dignity was like a king without a sceptre or a stage character without a spine.[47] Dignity was not synonymous with the individuality of a person, but it was the animating factor which gave meaning to that individuality, akin to a background force. In this conception, dignity facilitated choice and resisted interference.[48] From whom the interference must be resisted was not mentioned by the opinion but arguably this depends on the scope of the legal provision under which the right to dignity is being evaluated. Dignity facilitated choice, whether an orientation or an optional expression (the opinion seemingly avoided discussion on whether sexuality is inborn or chosen, at least in this section of the judgment) and judges were duty bound to remove any obstruction in the exercise of the same, otherwise they ran the risk of obstructing the free exercise of dignity and robbing an individual of this "natural and constitutional right."[49] On this basis, this opinion found that judges were duty bound to honour the choices (including sexual choices) of individuals so long as they were based on the consent of the others involved.[50]

(iv) Dignity: Self-worth

The normative conception of dignity as self-worth was evident in the Mishra–Khanwilkar opinion, the Malhotra opinion and the Chandrachud opinion. As a majority of the Court agreed that the fundamental right to dignity as self-worth was violated under art.21, it constituted one of the ratio decidendi of the case. The conception was borrowed from the Canadian case of *Law v Canada (Minister of Employment and Immigration)*[51], which held that a person or a group was said to possess human dignity when they experienced self-worth or self-respect. [52] This conception of dignity was concerned with physical and psychological integrity and empowerment,[53] meaning that harm to physical or psychological integrity or disempowerment could lead to a claim for a violation of dignity. The Canadian case further explained that dignity was harmed when unfair treatment was meted out on the basis of personal traits or circumstances which did not relate to individual needs, capacities or merits,[54] or when groups were ignored, marginalised or devalued.[55] By contrast, laws which were sensitive to the individual circumstances of a person and adjusted to accommodate those needs were dignity enhancing. This conception might lead one to ask whether dignity could only be used to shield oneself from unfair or demeaning treatment, or whether it could also require one to treat another in an integrity enhancing manner. For example, can one be required to perform a service for another under the command of dignity? Arguably, yes. This is exemplified by *Vriend v Alberta*[56] cited in the Chandrachud opinion. There, an employee alleged termination from his job because of sexual orientation. However, the relevant anti-discrimination statute did not include sexual orientation as a protected ground. Holding that the State had failed to provide a rational justification for the exclusion of sexual orientation as a protected anti-discrimination ground, the Canadian Supreme Court noted that such measures force people to live in secrecy, harm self-confidence and self-esteem and signal that gay persons are not worthy of protection. All of this has a potential to harm the dignity of an individual.[57]

[47] *Johar*, Writ Petition (Criminal) No.76/2016 at 85.
[48] This conception was also mentioned, though not explored by Justice Rohinton Nariman. *Johar*, Writ Petition (Criminal) No.76/2016 at 226.
[49] *Johar*, Writ Petition (Criminal) No.76/2016 at 85–86.
[50] *Johar*, Writ Petition (Criminal) No.76/2016 at 86.
[51] *Law v Canada (Minister of Employment and Immigration)* 1999 1 S.C.R. 497.
[52] *Johar*, Writ Petition (Criminal) No.76/2016 at 86.
[53] *Johar*, Writ Petition (Criminal) No.76/2016 at 86.
[54] Echoed by Justice D.Y. Chandrachud, *Johar*, Writ Petition (Criminal) No.76/2016 at 390.
[55] *Johar*, Writ Petition (Criminal) No.76/2016 at 86–87.
[56] *Vriend v Alberta* (1998) 1 S.C.R. 493.
[57] *Vriend v Alberta* (1998) 1 S.C.R. 493.

This conception of dignity was also echoed by the opinion of Justice Malhotra when she stated that as long as provisions like s.377 remained on the books, the lives of LGBT persons carried a taint of criminality which negatively affected their ability to participate freely in society.[58] It ostracised them socially and banished them to live lives as unapprehended felons. Due to this potential to harm the physical and psychological integrity of a person, s.377 offended the self-worth conception of dignity. Similarly, Justice Chandrachud adopted this conception when he wrote that s.377 sanctioned verbal harassment and homophobic attitudes towardsLGBT persons, instilled familial fear and restricted access to public spaces, which resulted in a loss of safe spaces and denial of dignity of LGBT persons.[59] To elucidate this point, he quoted the experiences of one of the petitioners:

> "While society, friends and family are accepting of my sexuality, I cannot be fully open about my identity and my relationships because I constantly fear arrest and violence by the police…Without the existence of this Section, the social prejudice and shame that I have faced would have been considerably lessened…the fact that gay people, like me, are recognized only as criminals is deeply upsetting and denies me the dignity and respect that I feel I deserve."[60]

However, this conception is incomplete. Future courts will have to consider how to balance competing dignities. Can it be argued that if the dignity of one party is offended by the refusal of some services, the dignity of the other party will also be offended if they are compelled to act? This is not a question that can be dismissed easily. Any court that wishes to adopt this conception of dignity will have to etch out certain criteria by which to weigh these competing dignities.

(c) Entitlements from dignity

In addition, in their various opinions, the judges noted that dignity gave rise to further entitlements. These entitlements were not linked to any particular conception of dignity in the discussions:

- the right to a self-defined sexual orientation and gender identity[61];
- to be free from discrimination on grounds of sexual orientation[62];
- the right to choose a sexual partner without fear of prosecution or social ostracism;
- to decide whom with to live and have a family[63];
- the right to marry a person of choice regardless of sex[64];
- sexual privacy which encompassed not just the ability to form consensual sexual relations in private spaces, but also the ability to have a sexual orientation different from the one that is societally expected[65];
- the right to health (mental and physical).[66]

(d) Unproductive usages of dignity

Finally, we come to those usages of the phrase dignity which were linked to other jurisprudential concepts, but the linkages were neither explored, nor signified any normative content or entitlement. On the one hand, they offered avenues for the future development of dignity as a normative idea, on the other, they

[58] *Johar*, Writ Petition (Criminal) No.76/2016 at 473–475.
[59] *Johar*, Writ Petition (Criminal) No.76/2016 at 327.
[60] Written Submission on Behalf of the Voices Against 377, in*Johar*, WP (CRL) No.76/2016 at 65.
[61] *Johar*, Writ Petition (Criminal) No.76/2016 at 214, 248, 332, 439.
[62] *Johar*, Writ Petition (Criminal) No.76/2016 at 213.
[63] Quoting *Jason Jones v The Attorney General of Trinidad and Tobago* Claim CV2017-00720.
[64] *Johar*, Writ Petition (Criminal) No.76/2016 at 401 in which Justice D. Y. Chandrachud quotes Justice Kennedy in the *Obergefell v Hodges* 576 US 2015.
[65] *Johar*, Writ Petition (Criminal) No.76/2016 at 215, 336–337.
[66] *Johar*, Writ Petition (Criminal) No.76/2016 at 348.

appeared to be strewn about in the judgment without explanation. There was no context, background or explanation provided to those usages. There is a danger in using dignity in this fashion because such usages could rob the concept of its meaning. As of now, we may not all quite agree on the normative content of the word "dignity" but there is agreement over the fact that dignity is something worthy of protection. There is a risk this agreement may be lost if the concept is not constructed in a meaningful, intelligible way that lawyers, judges and academics can employ to evaluate laws. I call these usages unproductive because they appear to have no normative consequence.

For example, at one point, the judgment noted that the rule of law required dignity without connecting this to any conception of dignity or illuminating how the rule of law should provide space for this idea.[67] Similarly, another part of the judgment noted that the constitutional value of dignity will not accept s.377,[68] but did not mention why. Another part asserted that equality, liberty and dignity were the edifice on which the Constitution was built,[69] but did not demonstrate how. Yet another part asserted that "affirmation of human dignity offers respect to the whole of society",[70] but did not elaborate how the whole society can gain by affirmation of dignity; neither did it note whose dignity needed to be affirmed for this result. Other examples of this imprecise use of dignity in the judgment include the idea that the rights of LGBT persons dwelled in dignity,[71] that recognising dignity was essential to sanctify life,[72] that dignity was realised only when life is lived with a "true sense of quality",[73] and that, "[t]he fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realisation of choice."[74]

Conclusion

Would the decision in the case have been the same without developing the conceptions of dignity found in the judgment? Technically, yes. As can be seen from the ratio decidendi above, the decision to find s.377 unconstitutional rested also on arts 14 and 19 and the privacy entitlement under art.21; dignity was not decisive to the outcome of the case. Under Indian constitutional jurisprudence, a section will be rendered unconstitutional if it flouts even a single provision of the Constitution. So, technically, the decision in the case would have been the same even if the judges had not delved into a dignity discussion. However, by engaging with a rich and varied discussion of this concept, this judgment provided several avenues for the further development of dignity. Even if each of these conceptions requires further finessing and harnessing a majority agreed on dignity as self-worth after finding that dignity was a protected value under art.21. However, if this, or the other conceptions of dignity are to provide the basis for future causes of action, the ingredients of dignity need to be further spelled out in legally demonstrable ways and the mode of resolution of competing dignity claims needs to be delineated.

[67] *Johar*, Writ Petition (Criminal) No.76/2016 at 269.
[68] *Johar*, Writ Petition (Criminal) No.76/2016 at 270.
[69] *Johar*, Writ Petition (Criminal) No.76/2016 at 292.
[70] *Johar*, Writ Petition (Criminal) No.76/2016 at 390 quoting *Dhirendra Nadan Thomas McCoskar v State* [2005] F.J.H.C. 500.
[71] *Johar*, Writ Petition (Criminal) No.76/2016 at 213.
[72] *Johar*, Writ Petition (Criminal) No.76/2016 at 222.
[73] *Johar*, Writ Petition (Criminal) No.76/2016 at 222.
[74] *Johar*, Writ Petition (Criminal) No.76/2016 at 226.