

ANACHRONISM OF SODOMY

by

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ABSTRACT

The landmark *Navtej Singh Johar v. Union of India (2018)*¹ Judgement had decriminalized consensual same-sex relationships in India, fundamentally altering an entire ambit of legal sexual orientations and intimacy. However, this jurisprudence gave rise to contradictory juxtaposition prevailing in Hindu marriage law, particularly Section 13(2) (ii) of the Hindu Marriage Act, 1955, which retains sodomy as a ground for divorce. This article examines the surge of legal incongruity resulting from this progression.

The following paper will focus on three foci: the thriving existence of sodomy as a matrimonial offense despite its decriminalization; the gendered construction of adultery; and impossibility of bigamy in same-sex relationships due to the absence of marriage equality thereby creating a void for spousal infidelity involving same- sex partners.

¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

I. Introduction

September 6th, 2018 unveiled the ultimate transformative judgements in *Navtej Singh Johar v. Union of India*, striking down a part of Section 377 of the Indian Penal Code (IPC), 1860. It held that criminalizing consensual same- sex relations between adults violates fundamental rights under Article 14,15,19 and 21 of the Constitution. Chief Justice Dipak Misra proclaimed that the Court observed criminalizing carnal intercourse is merely irrational, and manifestly unconstitutional.² The juncture received a widespread celebration, dissipating a legal stigma towards the LGBTQ+ community in India.

The doctrinal significance of *Navtej* extended well beyond the striking down of Section 377 itself. The Court invoked the concept of transformative constitutionalism, holding that the Constitution must be read as a living instrument capable of steering Indian society away from regressive social morality and towards constitutional morality, even where such movement runs contrary to majoritarian sentiment. Commentators have since observed that Section 377 of the IPC and Section 13(2)(ii) of the HMA share an identical Victorian juridical ancestry, both having emerged from the same colonial anxiety about non-procreative sex, so that the constitutional infirmity identified in the former is logically, if not yet formally, replicated in the latter. This structural kinship between the criminal and matrimonial provisions is precisely what generates the incongruity this article investigates.³

However, meagerly a judgment did not automatically supplant other laws present in the Indian Legal System, particularly the Hindu Marriage Act, 1955 (HMA). This provision allows wives to file for divorce if their husbands have been guilty of rape, sodomy or bestiality” since the solemnization of marriage.⁴ The normative is, that a man cannot be “guilty”, if it has already been

² Sarthak Sharma, 'Case Comment: Navtej Singh Johar and Ors V. Union of India' (*Academike, Lawctopus*) <<https://www.lawctopus.com/academike/case-comment-navtej-singh-johar-and-ors-v-union-of-india/>> accessed 7 July 2026.

³ Shaurya Mahajan, 'The Last Remnant of Section 377: Marital Offence of Sodomy' (*NLIU Law Review Blog*, 2024) <<https://nliulawreview.nliu.ac.in/blog/the-last-remnant-of-section-377-marital-offence-of-sodomy/>> accessed 7 July 2026.

⁴ Hindu Marriage Act 1955, s 13(2)(ii).

decriminalized. The prevalence of this code rooted in the Victorian moral code now poses a jurisprudential repugnancy in the post-judgement tenure of Navtej (supra).

Additionally, the Navtej's judgement debuts a greater inadequacy in Hindu marriage law concerning spousal fidelity and exclusivity; Adultery, as defined under Section 13(1)(i) of the HMA, is curbed to a heteronomy: "voluntary sexual intercourse with any other person than his or her spouse". Courts have had a recurring tendency to incline in interpreting this provision understated between persons of opposite sexes, rendering same-sex extramarital relationships legally invisible within the framework of matrimonial fault.

There is a forced lacuna now, despite the legality laid by constitutionality. Considering the situation of a man who engages in an intimate relationship with another man shall not be subject to invocation of adultery by his wife for the ground of divorce. In furtherance, the same will imply for Bigamy; she cannot claim Bigamy too due to non-recognition of same-sex marriages by the virtue of *Supriyo @ Supriya Chakraborty v. Union of India*.⁵ The husband falls into a pit of regulatory vacuum: legally insufficiently addressed to mental cruelty.

II. The Paradox

A. Section 13(2) of the HMA⁶ was birthed in the colonial matrimonial legislation that governed Christian marriages in British India. The Indian Divorce Act, 1869,⁷ based broadly on England's Matrimonial Causes Act, 1857, introduced sodomy as a ground for divorce available exclusively to wives. The legislative intent was simple: certain sexual acts by husband were deemed reprehensible commensuration of the dissolution of a marital bond.

This lineage can be traced with greater precision. Section 10 of the Indian Divorce Act, 1869 made sodomy, together with rape and bestiality, an aggravated fault upon which a wife alone, and not a husband, could seek dissolution of marriage, an asymmetry that mirrored the gendered logic of the English Matrimonial Causes Act, 1857 from which it was drawn. This colonial clause was

⁵ *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348.

⁶ Hindu Marriage Act, 1955, S. 13(2)

⁷ Indian Divorce Act, 1869, No. 4 of 1869.

subsequently transplanted, in substantially unaltered form, into other personal law statutes governing marriage in India, including provisions applicable to Parsi and, eventually, Hindu marriages. At no point in this chain of legislative transplantation was there any independent examination of whether continued reliance on a moral taxonomy of “natural” and “unnatural” intercourse remained appropriate, even as India's own criminal law began, decades later, to reconsider the same taxonomy under Section 377 of the IPC.⁸

The bifurcation was of two kinds: natural and unnatural, which was boiled down straight into the Section 377 IPC, criminalizing any intercourse against the order of nature with any man, woman, or animal. Both provisions are the testimony of the same moral code. The aftermath of fortifying the same into HMA reflected no substantive debate for retaining sodomy.

B. The Law has a logic. The Law is subject to a construed and statutory interpretation. Therefore, in order to understand the clause, the entirety of the sentence must be interpreted. Now, the word “guilty” under Section 13(2)(ii) HMA, “*the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality*” expressly demands criminal culpability. This interpretation was affirmed by the upholding causation laid down in *KV Revanna v Suseelamma* (1990)⁹ while vehemently emphasizing on corroboration. In *Statham v. Statham*¹⁰, the Court of Appeal held that a wife who had condoned her husband’s sodomy could not subsequently petition for divorce based on that conduct. The part and parceling of the criminal elements into the matrimonial proceedings.

This evidentiary threshold has been applied with considerable rigidity. Relying on *Statham*, the Karnataka High Court required that a wife alleging sodomy furnish evidence indistinguishable in cogency from that needed to sustain a criminal conviction, notwithstanding that the proceeding before her was a civil matrimonial suit ordinarily governed by the lower standard of preponderance of probability. This heightened threshold has since been enforced strictly on appeal: trial courts that granted a decree of divorce on the sodomy ground without insisting on corroborated, criminal-

⁸ Shaurya Mahajan, 'The Last Remnant of Section 377: Marital Offence of Sodomy' (*NLIU Law Review Blog*, 2024).

⁹ *KV Revanna v. Suseelamma*, AIR 1990 Kant 134.

¹⁰ *Statham v. Statham*, [1929] P 131 (Eng).

grade proof have been reversed, illustrating the persistence of a Victorian evidentiary architecture that treats a wife's uncorroborated testimony with a structural suspicion rarely replicated for other matrimonial faults, such as cruelty or desertion, where her testimony alone may suffice.¹¹

C. Abolition of “Unnatural Category”

The Supreme Court's judgment in *Navtej* fundamentally dismantled the natural/unnatural binary that undergirded both Section 377 IPC¹² and Section 13(2)(ii) HMA. Justice D.Y. Chandrachud observed that Section 377's effect was to "efface identities" of LGBTQ+ individuals by criminalizing consensual intimacy essential to their personhood.¹³ The Court held that all consensual sexual acts between adults are "natural" and constitutionally protected under Articles 19 and 21. With that foundation removed, the offence loses its matrimonial ground.

In the instance where the logical binding is considered, the “guilt” also surpasses a consensual spousal sodomy between a husband and wife. The Allahabad High Court took a similar view in a decision reported in 2024, endorsing a Madhya Pradesh High Court ruling that there was no scope for the offence of unnatural sex to arise between a husband and wife once consent is rendered immaterial by the marital rape exception. The presumption of consent is frivolous adjudicating to the fact that marital rape is not criminalized.¹⁴ A husband cannot get prosecuted for sodomy with his wife, negating the possibility of such guilt. This narrows down a woman's rights as well. Thus, there is impossibility of criminal guilt, for marriage presumes consent and sodomy is decriminalized.

This reasoning is not confined to matrimonial proceedings; it has migrated into the interpretation of the criminal law of unnatural offences itself. The Madhya Pradesh High Court, in *Umar Singhar v State of Madhya Pradesh*, held that once the marital rape exception removes a husband's liability for non-consensual penile-vaginal intercourse, the same logic must extend to acts falling within the erstwhile Section 377, since a wife's consent is rendered wholly immaterial within the marital relationship. The Uttarakhand High Court reached a similar conclusion in *Kirti Bhushan v State of*

¹¹ Shaurya Mahajan, 'The Last Remnant of Section 377: Marital Offence of Sodomy' (*NLIU Law Review Blog*, 2024), discussing *Nirmala v Anthony Raj* and the evidentiary standard applied in claims of spousal sodomy.

¹² Indian Penal Code, 1860, S. 377

¹³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, para 49 (per Chandrachud, J.).

¹⁴ Indian Penal Code, 1860, S. 375, Exception 2, now Bharatiya Nyaya Sanhita 2023, S. 63, Exception 2.

Uttarakhand. Yet the position remains judicially contested rather than settled: in 2025, in *Imran Khan @ Ashok Ratna v State of Uttar Pradesh*, the Allahabad High Court itself declined to follow this line of reasoning and held that non-consensual anal or oral intercourse by a husband upon his wife remains punishable under Section 377, reasoning that a wife retains an independent right to sexual autonomy and dignity that survives marriage. The doctrinal position on spousal sodomy is therefore presently split between High Courts, underscoring the urgency of legislative clarification rather than continued reliance on inconsistent, and at times contradictory, judicial interpretation.¹⁵

D. The solution

Peers and reviews have discussed the abolition of Section 13(2)(ii), which admittedly has merit however creates a risk gap for wives subjected to forced anal sex. A more nuanced reform would reside in replacing the word “sodomy” with non-consensual acts causing physical and psychological harm”, aligning with the contemporary understanding of sexual violence while eliminating Victorian moral judgements about “natural” and “unnatural sex”.

Comparative experience lends some support to this reformist proposal. England and Wales, the very jurisdiction whose Matrimonial Causes Act, 1857 supplied the template for the Indian provision, had by 1973 abandoned the itemised catalogue of matrimonial offences altogether. Following the Law Commission's 1966 recommendation that fault-based grounds be abolished in favour of a single, unified test, the Divorce Reform Act, 1969 (later consolidated into the Matrimonial Causes Act, 1973) replaced sodomy, cruelty and other named offences with the broader and morally neutral ground of “behaviour such that the petitioner cannot reasonably be expected to live with the respondent,” evidencing the underlying irretrievable breakdown of the marriage. India's own Law Commission proposed an analogous shift towards irretrievable breakdown as a ground for divorce as early as 1978, a recommendation that Parliament has never enacted. The persistence of Section 13(2)(ii) is, in this sense, not merely an oversight attributable

¹⁵ 'Applicability of Section 377 IPC against the Husband Having Non-Consensual Unnatural Intercourse with His Wife' (*LawSayLogic*, 8 August 2024) <<https://lawsaylogic.wordpress.com/2024/08/08/applicability-of-section-377-ipc-against-the-husband-having-non-consensual-unnatural-intercourse-with-his-wife/>> accessed 7 July 2026; Suchita Shukla, 'Non-Consensual Unnatural Sex By Husband Punishable Under Section 377 IPC: Allahabad High Court' (*Verdictum*, 8 May 2025) <<https://www.verdictum.in/court-updates/high-courts/allahabad-high-court/imran-khan-ashok-ratna-v-state-of-uttar-pradesh-2025ahc71784-1576506>> accessed 7 July 2026.

to the recency of *Navtej*, but a symptom of a longer legislative reluctance to abandon the fault-based, morally taxonomic architecture of matrimonial law altogether.¹⁶

III. Rhetorical Operation of Adultery.

A. Adultery had been decriminalized under the IPC. Although the definition under HMA for Adultery as a ground for divorce is solidified by “has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse”, with regards in construing this as an act on opposite sex. It conceals a conceptual limitation interpreted by the scholarly and judicial ambit. In *M.R.G.L.J Valisher v. Smt. Ramola Vailshery and Ors*,¹⁷ “In the absence of any special definition in the Act adultery means consensual sexual intercourse between married person and another person of the opposite sex during the subsistence of the marriage.”

B. Moving on from the rhetoric and to the actuality of construction, the clause explicitly states “sexual intercourse”. From the logic of depriving “sodomy” (between a husband and wife) from rape, derived from the justification and emphasis on the words that sodomy is included within the meaning of “sexual acts” merely means that since the ground for adultery is by far restricted to “sexual intercourse”, which is further by far not defined. Thus, a wife cannot claim adultery against her husband even in the presence of adultery committed by the husband.

This persistence of a heteronormative definition in matrimonial law is rendered still more anomalous by developments in the criminal law of adultery itself. In *Joseph Shine v Union of India*, decided only weeks before *Navtej*, a five-judge bench of the Supreme Court struck down Section 497 of the IPC, holding that the criminalisation of adultery rested on a patriarchal conception of a wife as her husband's property and was accordingly violative of Articles 14, 15 and 21 of the Constitution. Significantly, the Court in *Joseph Shine* left undisturbed the civil consequence of adultery as a fault ground for divorce, distinguishing between the constitutionally

¹⁶ House of Commons Library, *No-Fault Divorce* (Briefing Paper SN01409) <<https://researchbriefings.files.parliament.uk/documents/SN01409/SN01409.pdf>> accessed 7 July 2026, summarising the Law Commission's 1966 recommendation (Cmnd 3123) to abolish itemised matrimonial offences, given effect by the Divorce Reform Act 1969 and consolidated in the Matrimonial Causes Act 1973.

¹⁷ *M.R.G.L.J Valisher v. Smt. Ramola Vailshery and Ors* (1997), AIR1997KANT341

impermissible criminalisation of consensual sexual conduct and its continued relevance to the matrimonial relationship. The same distinction between criminal decriminalisation and continued civil relevance operates, structurally, in the sodomy context discussed above; yet whereas the definition of adultery has at least been judicially and legislatively confined to opposite-sex conduct without ambiguity, the absence of any equivalent judicial clarification for sodomy leaves that ground in a considerably more unsettled state.¹⁸

The foretasted provisions don't limit to create a vacuum for women, but also men. A married Hindu woman engages in an intimate relationship with another woman. Her husband seeks divorce on the ground of adultery. Again, under orthodox interpretation, no adultery has occurred.

The practical consequence of this interpretive gap is not merely theoretical. The Supreme Court's own observations in *Supriyo @ Supriya Chakraborty v Union of India* acknowledged that the absence of legal recognition for queer relationships leaves same-sex partners without access to a wide range of civil incidents of marriage, extending well beyond matters of adoption or inheritance to the very fault-based remedies, such as adultery and cruelty, that different-sex spouses may invoke against an unfaithful partner. Where a spouse's extramarital relationship is with a person of the same sex, the aggrieved spouse is left to rely exclusively on the residual and evidentially demanding ground of cruelty discussed later in this article, since neither adultery nor bigamy, properly construed, captures the wrong.¹⁹

C. In fact, due to the lack of legality to queer-marry, India reveals substantial statistics as to lavender marriages. Interestingly, we can observe this derivation from an intricate decorum via another viewpoint: Bigamy. The HMA's prohibition of bigamy under Section 11 provides that any marriage is void at the time of solemnization if either party had a living spouse. The new superseding BNS and the old IPC both recognize this. This established a bizarre asymmetry in addressing same sex extramarital relationships. A married man who enters a second opposite-sex marriage commits bigamy which is both a civil and criminal offense. But a married man who

¹⁸ Arya Senapati, 'Case Analysis: Joseph Shine v Union of India' (*iPleaders Blog*, 2024) <<https://blog.ipleaders.in/case-analysis-joseph-shine-v-union-india/>> accessed 7 July 2026.

¹⁹ Swarnali Sen, 'Case Summary: Supriyo v Union of India' (*The Legal Quorum*, 7 May 2026) <<https://thelegalquorum.com/case-summary-supriyo-v-union-of-india/>> accessed 7 July 2026, noting the absence of any civil status for same-sex unions notwithstanding the Supreme Court's affirmation of the dignity of queer relationships.

wishes to formalize his relationship with a male partner cannot commit bigamy because Indian law does not recognize same-sex marriages following *Supriyo @ Supriya Chakraborty v. Union of India* (2023).²⁰

The criminal law reform undertaken through the Bharatiya Nyaya Sanhita, 2023 has done nothing to disturb this asymmetry. Section 82 of the BNS, which replaced Section 494 of the IPC, retains bigamy as a gender-neutral offence in form, punishable with imprisonment of up to seven years, extending to ten years where the first marriage is concealed from the second spouse. Yet this formal gender neutrality is illusory in the present context, since the offence is defined entirely in relation to a second “marriage,” a status that, per *Supriyo*, remains constitutionally and statutorily unavailable to same-sex couples. The reform of the criminal code has therefore left wholly untouched the specific incongruity identified in this article: a different-sex extramarital marriage is punishable, while a functionally identical same-sex extramarital union, however committed or long-standing, attracts no equivalent sanction or remedy whatsoever.²¹

IV. Addressal

Now, given that these provisions cannot be invoked, how does HMA exactly address them? The answer lies in Section 13(1)(a), which permits divorce if a spouse has “after the solemnization of the marriage, treated the petitioner with cruelty”. In *Samar Ghosh v. Jaya Ghosh* (2007)²², the court laid down illustrative aspects including “Extramarital affairs whether or not amounting to adultery.” She would need to demonstrate that the relationship caused her mental suffering, damaged her dignity, or made it unreasonable for her to continue living with her husband. However, the viability of this scenario remains on several factors like Evidentiary burden and Loss of categorial clarity.

The Doctrine of condonation bears another implication: the forgiveness of matrimonial offense by an aggrieved spouse. If a spouse continues cohabitation after discovering adultery or cruelty, courts may infer condonation, barring divorce petitions based on that conduct. Therefore, a wife

²⁰ *Supriyo @ Supriya Chakraborty v Union of India*, 2023 SCC OnLine SC 1348.

²¹ LawRato, 'BNS Section 82 - Marrying Again During Lifetime of Husband or Wife' (*LawRato.com*) <<https://lawrato.com/bharatiya-nyaya-sanhita/bns-section-82>> accessed 7 July 2026.

²² *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

discovering a husband's relationship with a man may perhaps unintentionally paint a picture of condonation on a lack of legal remedy and recourse.

Several jurisdictions have grappled with similar questions about how adultery should be defined in an era of evolving understandings of sexuality and gender. The French *Code Civil* defines adultery gender-neutrally, making no distinction based on the sex of the extramarital partner. Similarly, Canadian courts interpreting adultery under the *Divorce Act* have held that the essence of adultery is "voluntary sexual activity which betrays the commitment made in the marriage vows," regardless of whether the third party is same-sex or opposite-sex.

The comparative and historical material canvassed above suggests that incremental judicial reinterpretation of individual fault grounds, however doctrinally sound, is unlikely by itself to resolve the structural incongruity this article has traced. India's Law Commission recommended as early as 1978 that irretrievable breakdown of marriage be introduced as an independent ground for divorce under the HMA, precisely so that courts would no longer need to strain the language of inherited, morally taxonomic fault grounds, such as sodomy and adultery, to accommodate relationships and harms that those grounds were never drafted to address. Successive governments have declined to act on this recommendation for over four decades. In its absence, courts are left to perform, through strained statutory interpretation of cruelty under Section 13(1)(i-a), the very legislative task that Parliament has left undone.²³

IV. Conclusion

The *Navtej Singh Johar* judgment was a watershed moment for constitutional rights, affirming that dignity, autonomy, and equality extend to all persons regardless of sexual orientation. Yet its transformative potential remains unrealized in Hindu marriage law, which continues to embody Victorian-era moral judgments about "natural" sex, heteronormative definitions of infidelity, and gendered assumptions about marital relationships.

The article has argued several contradictions that are not limited to technical glitches but also requisite foundational amendments. They reflect a deeper structural heteronormativity embedded

²³ Law Commission of India, *The Hindu Marriage Act, 1955 and the Special Marriage Act, 1954: Irretrievable Breakdown of Marriage as a Ground of Divorce* (Report No 71, 1978), recommending a shift away from itemised fault grounds towards a unified breakdown standard, a recommendation that remains substantially unimplemented.

in Hindu Marriage law. Resolving them requires all tools of doctrinal consistency, as well as realigning the meaning of marriage as an institution.



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