Constitutional Studies
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Lecture 3
Case Studies

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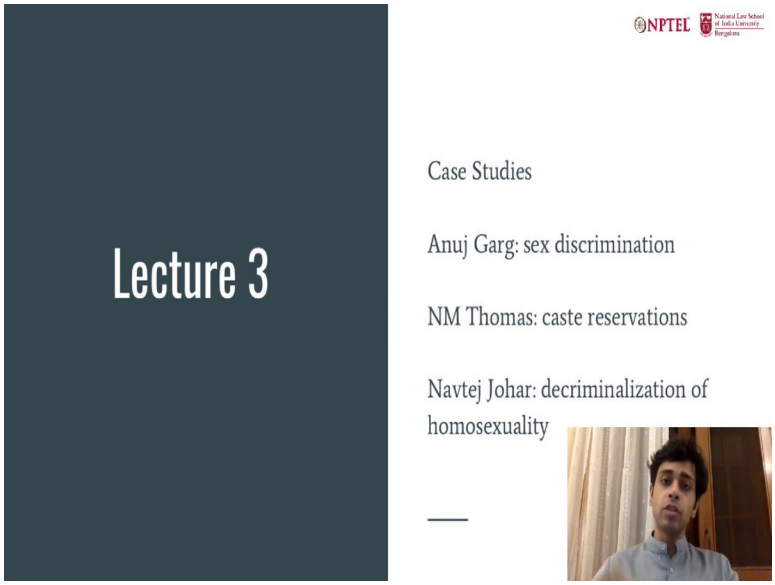

Hello, everyone, and welcome to the third and final lecture of week 6 of the Constitutional studies course. This week, we have been exploring the right to equality under the Constitution. And in the first two lectures, we had the opportunity to go through the various provisions contained in parts three and four of the Constitution and see what they say about the right to equality. We also had the opportunity to unpack the principle of equality itself. As we saw the word equality is in fact not a single concept, but rather a banner under which come a number of different concepts, some of which sit well together, and some of which do not.

In this lecture, what we are going to do is to go through three case studies, these are cases decided by the Supreme Court of India, to see precisely how these provisions and these philosophical principles have applied in real world scenarios and what kinds of debates and tensions and conflicts the court had to deal with while trying to decide whether the case before it fit the constitutional notion of equality, or of inequality.

The three cases we will be going through in this lecture are the case of *Anuj Garg versus the hotel association of India*, which is a 2008 case of the Supreme Court, which concerns sex discrimination, we will then go through a very famous judgment of 1975 by the name of *NM*

Thomas versus the state of Kerala, which concerns caste reservations and specifically reservations for Scheduled Caste and Scheduled Tribe communities.

Finally, we will come to the very famous and recent decision of the Supreme Court in *Navtej Johar*, which is a successor to the much debated *Naz Foundation* judgment of the Delhi High Court, which concerns the decriminalization of homosexuality under the Indian Penal Code.

I hope that by going through these three very different cases, we are able to see the different ways in which the principle of equality has come up in before the Supreme Court. And hopefully this will also allow us to examine the situations that we come across in daily life and see whether they comport with the constitutional ideal of equality or not.

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So, let us jump straight into the first case, which is the case of *Anuj Garg versus the hotel association of India*. Now, Anuj Garg is a very interesting case, which concerns the Punjab Excise Act. Now, the Punjab Excise Act was passed in 1914 and till 2008, which is when this case was decided it had raised no eyebrows and no issue was raised with the Act.

Now, what the Act basically said was in section 30, that no person who is licensed to sell any liquor or intoxicating drug for consumption shall employ or permit to be employed, any man under the age of 25 years, or any woman in any part of such premises in which such liquor or intoxicating drug is consumed by the public.

Now, if you note here, the prohibition is on employing men under the age of 25 years or any women, there is no age limit, above which women can be employed. So, this is basically a

blanket ban on employing women, in restaurants, in bars, in hotels, or in any other establishments where liquor or any other intoxicating drugs are being sold for consumption.

Now, as you can imagine, the hospitality industry and the service industry have grown in India since especially the 1990s in a big way, and therefore, excluding women from this entire economic segment is a big blow to any career prospects that women may have. And so this problem really came alive in the 1990s and 2000s, which explains perhaps why this law was only challenged much later.

Another reason why this law was not challenged earlier is an issue that we all ought to keep in mind, which is that the concept of equality of sexes was actually unknown in 1940. Now, today, if we read the news and indeed in our public conversations in our daily dialogues, the idea of equality between the sexes, the idea that women can enter the workplace, even if they are raising a family, the idea that both men and women can play an equal part in raising the family, that the man may not be the sole breadwinner of the family.

As, we saw on the Babita Puniya case, the idea that the various gender stereotypes that go with women, that they are effeminate, that they cannot operate in aggressive environments, that they cannot be in leadership positions, all of these ideas are now beginning to be debunked.

But this movement is relatively new, and so we have made a lot of progress. But as it is with all movements, it is going to take time. And it is interesting, that despite all the talk today, there are still provisions on the books, which are, which do not allow for the equality of men and women.

Coming back to the case, the basic question that we have to ask is; why were these women excluded? Now, there were two basic reasons. The first reason was that women, so the petitioner, so the state felt in this case, are not fit for such jobs. Jobs, such as delivery of liquor or any other intoxicating drugs are usually jobs which are performed by men. Now, the reasons for this are not entirely clear, it seems to us that today, women are just as at home, working in a bar as they are in a multinational company. And, so we are not exactly sure why this stereotyping of women will work, but anyway, that was the case.

The second is the idea of paternalism, which is that the state knows better, what is for women. Now, the concept of paternalism is a concept where the state says that we know

better what it is to live a good life to live a valuable life, we know better than the citizen himself or herself. So the state makes this decision.

Now, we often do this for our children and for our wards, because they are not yet of thinking age, because they are not yet mature. And therefore for a 10 year old, the decisions are made by the parents, for a mentally challenged individual, the decision may be made by the person who is in charge of that person's life. Now, in those situations, it is understandable.

The question that we have to consider here is; can the state employee this argument of paternalism in respect of women? So, constitutionally, the two questions we must consider are does section 13 of the Punjab Excise Act pass the test of Articles 14 and 15. Article 14, if you remember, contains a clause which guarantees the equal protection of the laws, which means, as we saw earlier, that there must not be any class legislation.

Article 15 makes this even more explicit, it says there must specifically not be any class legislation, which makes a distinction between the male class and the female class. So the question in this case is, is the classification between men and women reasonable in this case, can the state legitimately exclude one sex from working in such establishments? Now, I have already slightly prejudged the question in my excitement.

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But the Supreme Court has held that women cannot be excluded. Now, it may seem to us that this is perhaps an obvious decision. But it is important for us to understand what were the reasons given by the Supreme Court because the reasons will then help us understand how

these principles must apply in many other aspects of life as well and not just cases which are perhaps as clear or as obvious as the Anuj Garg case.

Now, the court said there is no reason why women are not fit to work in such establishments in 21st century India, the burden of proof that is to say; the fact that women must be excluded is something that the state must demonstrate, the state must give reasons as to why women must be excluded in this case. That is why there is a classification between men and women, which has some rational nexus to the objective of this legislation, which is the exclusion of women from working in such establishments.

So, that is the, as we saw the legal test, in this case, is the legal test satisfied, the legal test is not satisfied because the two reasons offered by the state stereotyping and this idea of romantic paternalism simply do not stand up to scrutiny because they are not reasonable ways of differentiating between men and between women.

Now, the court here noted something very important, which I am going to read out, as you will see, I have put an extract there. The court noted that "the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate, and such legislations definitely deserve deeper judicial scrutiny. And, it is for the court to review that the majoritarian impulses rooted in a moralistic tradition do not impinge upon individual autonomy."

Now, this is a very heavy sentence. So, let me just unpack it a little bit for you. The first point the court makes is that the primary difference between men and women is a biological difference, now this is very obvious. But, does that biological difference translate into a social difference? As we discussed in the case of maternity and paternity, there is a biological difference between men and women, which means that women may require a longer maternity leave rather than men who apply for a paternity leave. So there is a biological difference there.

But does that biological difference then translate into a social difference, by which we have imposed some cultural norms upon women, we have said that women must necessarily raise the family, that women if they raise the family cannot be a part of the workforce, that women

given that the way they are suited, that they are effeminate, that they are not suited for aggressive environments, cannot serve in establishments, for example, that serve alcohol.

So, that is the first point that the court makes, that we must always be very careful whether the distinction between men and women is a biological distinction, or a social distinction. I am sure that as we all look in all our lives, we will see many instances in which we ourselves, and many people we know, make differences between men and women, not on biological terms, but on social terms.

Now, I am not saying that all social distinctions are wrong. But it is important for us to be conscious of the fact that there are social distinctions that we make. And then we must ask ourselves; do these social distinctions stand up to scrutiny, are they reasonable in today's day and age? So, that is the first part of that sentence.

The second part of that sentence is that this combination of social and biological determinants may find expression, and popular legislative mandate. And it is for the court to review that the majoritarian impulses rooted in a moralistic tradition do not impinge upon individual autonomy.

The point the court is trying to make here is that often, these social norms are not norms held by just one individual here or one individual there, rather they have strong social backing, they in fact, may be the predominant moral traditions of a society. It will not be completely wrong to say that in many parts of India, the social traditions, the moral traditions that a large section of Indian society believes in, will limit women to the home, we exclude them from the workplace, we will make sure that even when they enter the workplace, they do not do so on equal terms on facilitative terms.

And, so the role of the court is to see that this popular legislative mandate, this popular social opinion, which has translated into law, through the normal democratic principle of majority, does not impinge upon individual autonomy, it does not matter in other words, whether the majority believes it to be right or so, there are some things that we simply cannot take from any individual, a man or a woman. And it does not matter whether the majority of the country or in fact, everyone in that country except for that one individual believes that to be the case.

The primary principle as we saw in the Indian Constitution in chapter 3 is one of individual freedom and autonomy. And the principle of equality makes sure that none, that no category of individuals have their autonomy impinged, because of any majority impulse, which tries to

create two classes of society. One who can lead a free life one who can lead a life that is just and fair, and another category; which must relegate itself to inequality to a life of unfairness. And this point is very important that the court steps in to protect individual autonomy even if the opposite side, the opposite scale contains a majority social opinion. This as we will see also in the *Navtej Johar* case is a critical point. So, this is the Anuj Garg case.

And as we can now see, the three principles of equality that come into play in this case are first the stereotyping principle that women must not be stereotyped. The second is the group subordination principle. Because you have these oppressive social norms that Supreme Court noted, which apply to women as a group, and make sure that they remain suppressed, that they remain subjugated.

And the third is the status and distributive equality that comes into play. That is women must have equal status as they have social respect and dignity as members of the workforce, that they must not be subject to some kind of romantic paternalism where they cannot decide for themselves what is good and bad.

And the second is the distributive equality; that women must be allowed to enter the workforce to make a living, and to earn money on equal terms with men. And if we follow a legislation such as the Punjab Excise Act, they will necessarily be denied access to career opportunities to professional advancement.

And, so we see how various philosophical principles actually come within a single case, within a single Article of the Constitution. In this case, Article 50, to, in this case, support the final conclusion. As we will see, in the next case, it may not always be that the various principles that come under the banner of equality support the same conclusion, they may often be at loggerheads, but in this case, they support each other. So this was the Anuj Garg case.

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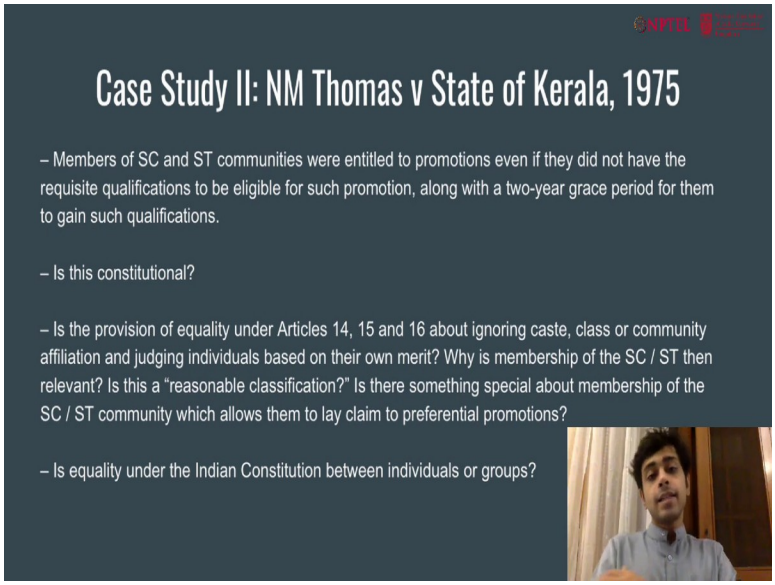

The next case study is that of NM Thomas versus the state of Kerala. Now, I would like to remind everyone that the Constitution of India in 1950 did not actually contain any provision for reservations not just for other backward classes, but not even for Scheduled Caste and Scheduled Tribe communities.

The provisions which allow for such reservations are Article 15, clause 4 and Article 16, clause 4 as we saw in the last lecture. These Articles allow for special arrangements for the promotion of the welfare of socially and educationally backward classes like the Scheduled Caste and Scheduled Tribe communities. These were as an interesting side introduced by Pandit Jawaharlal Nehru as the first Amendment to the Constitution in 1951.

Now, what happened was that in a particular legislation, the government allowed that members of the SC and ST communities were entitled to promotions, even if they did not have the requisite qualifications to be eligible for a promotion, along with a two year grace period, so that they could gain such qualifications. So, the question before the court essentially was; is such a classification constitutional?

In other words, the usual rule under Article 14, 15 and 16 of the Constitution is that we cannot create classes on the basis of caste, the state cannot discriminate on the basis of caste, the state cannot say; that I belong to one caste community, I belong to a Brahmin community, while this individual belongs to a Dalit community and therefore, I will discriminate between them. That was the base principle of Articles 14, 15 and 16. They wanted the state to ignore

caste, to ignore class, to ignore any community affiliation and instead judge individuals based on their own merit, whatever that merit is.

So, the question was; does not such a provision violate that guarantee? Why is it that members of the SC and ST community can have such a jump over other individuals of the general category when it comes to such promotions, why can they be given preferential treatment? Is this a reasonable classification to make?

The basic question that we have to now grapple with is essentially, what is known as the issue of formal and substantive inequality. Do we say that the Indian constitution wants formal equality? So, we do not distinguish between members of this caste and of that caste? Or does the Indian constitution want substantive equality, which is that the state can distinguish between members of this cast and that cast, if that classification results in real equality on the ground?

In other words, is equality under the Indian constitution only between individuals, no matter what their caste affiliation is? Or is it possible for the Indian constitution to also look at the group affiliation of any individual under certain circumstances? Now, this as we all know, from perhaps our own lives, if we are in any government employment, or definitely from the various debates that happen on television channels or in the parliament, we all know that this is a very difficult, very thorny and very controversial issue in India on which there are very strong opinions. So, how can we think about this question in a riff, in a nuanced and careful manner.

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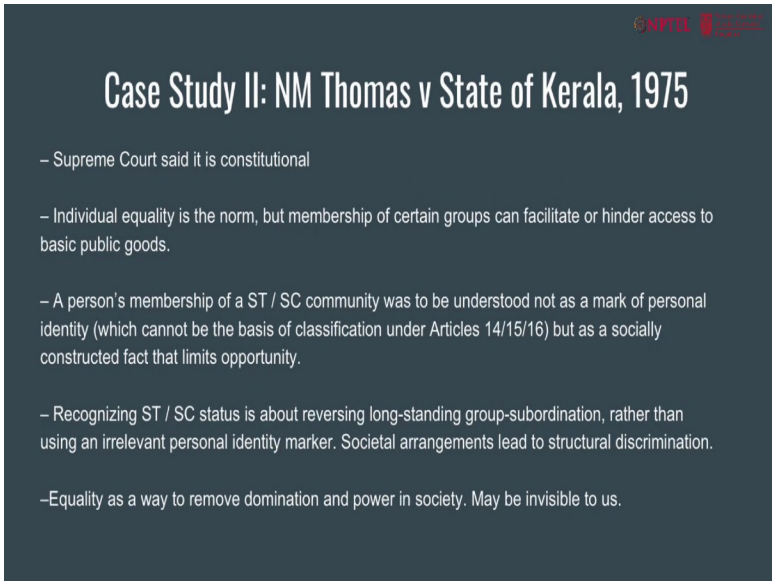

Now, the court in this case said that this provision is constitutional. Now, why did the court say this? What were the reasons that the court gave? And how can these reasons help us better understand the principle of reservations and of caste discrimination? The court started with the simple and very important point that individual equality is the norm. Usually, the constitution looks at the individuals and their merit and their suitability for whatever is the job in question for the entrance exam or for anything else that is the norm.

But, in certain instances, membership of the group is important. Why is this? This is because, in some instances, membership of a certain group can either facilitate or hinder your access to some basic public goods, in actual reality as a social fact this happens. So then the court said that, if in reality, the social fabric is so made, that membership of a certain category of a certain grouping means that my access to certain resources is either facilitated or hindered, then the Constitution and the courts and the government can look to membership of that community in order to make sure that such individuals whose access is hindered are facilitated.

That is to say, a person's membership of the Scheduled Caste, or Scheduled Tribe community is not a mark of personal identity. It is not as though because you are off a Brahmin group, or of a Dalit group that you can say that I am entitled to something, rather your Dalit status indicates that you are part of a social grouping, which is part of a larger structure in society where as a socially constructed fact, your opportunities are in reality limited.

In other words, this is the point of substantive or formal equality. A formal equality argument will say that it does not matter whether you are of this caste community, of that caste community, we must be blind to caste. And that indeed was till 1975, the position, the Supreme Court had taken. The Supreme Court said, we do not care whether you belong to this caste community or that caste community under Article 14, 15 and 16. Unless obviously, you fall within some specific exceptions in Articles 15, clause 4 and 16 plus 4, but that is not the rule.

In 1975, the court said hang on; the malady of caste discrimination has existed for very long in India. And the point of reservations is not to have become an exception to equality, such that we tolerate reservations, rather the point of reservations is to recognize that these groups, that these communities have had a long standing, period, exclusion from opportunity and from civic life.

And therefore, the utility of the Scheduled Caste and Scheduled Tribe labels is to make sure that we can dismantle the structural arrangements that lead to structural discrimination that we can do away with this social fabric, which means that only individuals of a certain caste grouping actually have the possibility in reality in real life, to be able to access the opportunities.

So, if I create a legislation as we discussed earlier, which says that no matter who you are, no matter to which caste category you belong, I will apply the same rule and this same rule requires that you must have a fantastic knowledge of English in order to enter the college. Now, it so happens that a large majority of members of the Dalit community do not have high standards in English, whereas members of the upper caste communities do have that standard in English.

Now, as a result of this, that test will select more members of the upper caste and will exclude members of the Dalit community. Now, the test is caste blind. The test is saying I am looking at merit, I am looking at whether you are good at English or bad at English and fair, that is a correct position to take. But what is happening in reality is that your knowledge of English then becomes a proxy for whether you belong to a Dalit community or a upper caste community. Now, that is the problem that we have to face.

How do we make sure that we use these caste identities in a way that tries to address the underlying social fabric which leads to discrimination? Indeed, it is with that in mind that the Supreme Court said that let us not ignore the elephant in the room, let us not hide from what is an obvious fact on the ground, that members of certain communities are excluded through the social processes from gaining access to jobs, and we cannot be blind to it. We cannot believe that our ignorance somehow justifies somehow means that we are not complicit in that exclusion itself.

The court noted that reservations and the principle, reservations are part of the principle of equality. They are not exceptions to the principle of equality. They are in fact, its manifestation. Recognizing Dalit identity is a way to remove domination and power in society, is a way to make sure that those different social processes that are invisible to us normally become visible.

It is a way to make sure that the Dalit identity is no longer an identity, which is a cause of shame, of exclusion and of oppression. Rather, it is a category by which individuals can lay

claim to a right to participate equally in society and a right to participate equally in this case, matters of employment. It is a recognition of the fact that a severe past injustice was done. And then the effects of that past injustice are still continuing. It is a way to make sure that we can truly break free from the past.

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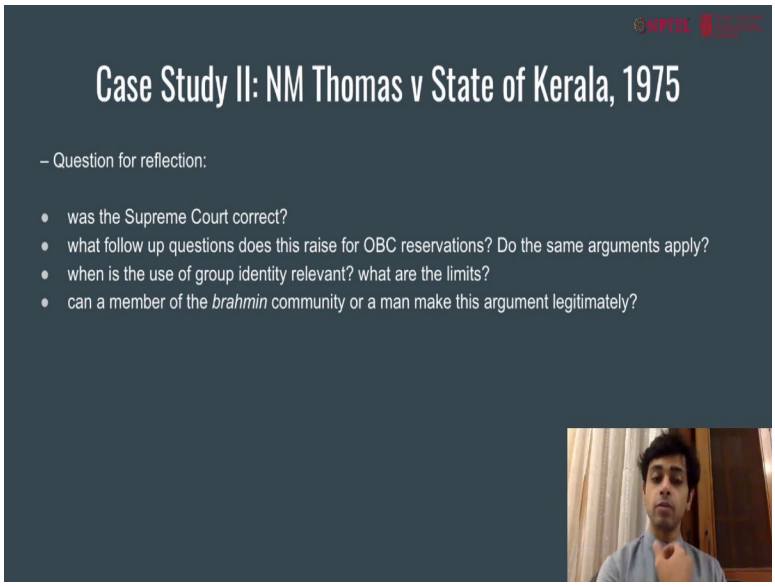

So, the questions I am going to leave you now with for reflection is the following. The Supreme Court took a certain position, I have argued for a certain position. But, I hope that having understood some of the underlying principles of equality, you are able to reach your own analysis and your own conclusions about whether the Supreme Court was correct?

Was the Supreme Court right to say that we must look at Dalit caste identity at the identity of Scheduled Caste or Scheduled Tribe? Was the Supreme Court right to say that the principle of equality is usually based on individual merit? But can in these exceptional circumstances look at the principle of group subordination? That is the question which I would hope that all of you engage with and try to come to your own understanding about.

The second question is, well, this was about Scheduled Caste and Scheduled Tribe reservations. Now, these are communities which were subject to long standing and absolutely devastating oppression, both economically and socially. They were excluded from the wealth and resources of society, but also were treated as second rate individuals, who are treated as often as animals, who are treated without the requisite dignity and respect that is due to them.

Does this principle, do these arguments also apply to the OBC category? Now, the OBC category are individuals who are economically and educationally backward, they are the

Other Backward Classes. So, what we are looking at is whether they, their class status is something which entitles them to reservations. They have not faced inequality, they have not face the kind of social humiliation that Scheduled Caste, Scheduled Tribe community have faced, yet as we saw the Mandal commission suggested and now it is a part of our constitutional law that OBC reservations are very much possible.

So, do these same arguments about group subordination, about using caste identity as a way to free yourself from discrimination, do the same arguments also apply to OBC reservations, or is there a difference between the two? I am not going to give you an answer. I am not going to give you my argument. But I hope that with everything that we have done in this week, you can assess the argument and the issue in a more nuanced and hopefully, socially sensitive way.

The last question I will leave you with is, which is a question that has often come up is; well if the Dalit community is using its identity, can not a Brahmin, member of a Brahmin community, of an upper caste community also make these arguments legitimately? Now, the one thought that I would like for you to keep in mind when you consider this question is the principle of group subordination, the principle of looking at group membership, when we are looking at the equality clause was a principle that was tied to removing domination and therefore ensuring equality.

We allow Dalits and women to claim membership of the group as Dalits or as women, because they would dominate it. And therefore, they can now use their identity to break free of that domination and become equal, not to further that inequality. Can members of the Brahman community also make that argument legitimately? This is a question which again, you must consider. So this was the case of NM Thomas versus state of Kerala, which concerns caste reservations.

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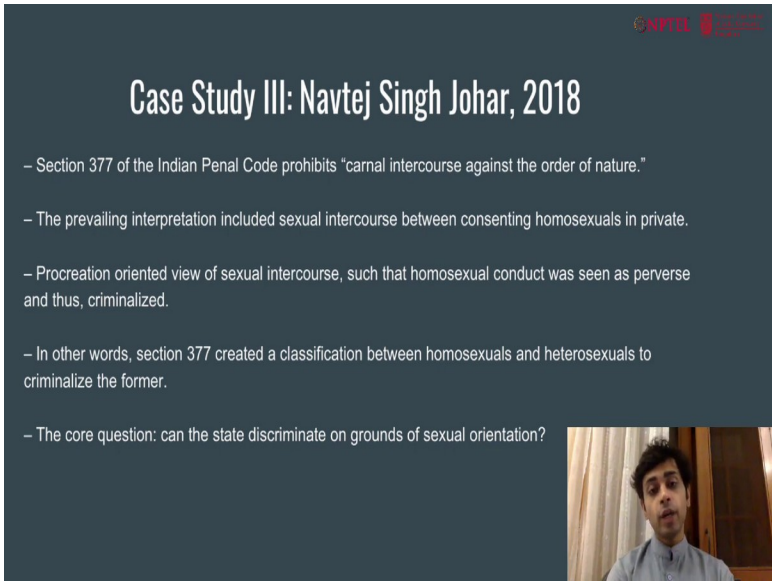

The final case is one that perhaps most of you would have heard of, because it was all over the news some time ago, and this is the case of Navtej Singh Johar, which concerns the decriminalization of homosexuality under the Indian Constitution. Now, Article 377 of the Indian Penal Code used to prohibit carnal intercourse against the order of nature. This is a very complicated term, but the prevailing interpretation was that this phrase included sexual intercourse between consenting homosexuals in private.

In other words, the interpretation was that the natural purpose of sexual intercourse is procreation. And obviously, since homosexual conduct is not for purposes of procreation, it was seen as perverted. And therefore, it was criminalized. It was thought that homosexual conduct in other words, is against the order of nature.

The question which we have to therefore discuss is; can we create a distinction, a classification between homosexuals on one side and heterosexuals on the other side? And criminalize homosexuals, while we do not obviously criminalize heterosexual activity? Can the state in other words discriminate on grounds of sexual orientation?

Now, this was a very divisive issue in India, and led to, at least in at the time led to many opinions being floated about. And some of you may have, in fact, participated in the debates at that time, and may have strong views on this matter. So let us now see what the Supreme Court said. And again, I hope that, aside from just digesting what the Supreme Court said, we are also able to use this to see whether in our opinion, the Supreme Court was right or was

wrong. And to come to our own understanding and our own judgments on this issue, which are hopefully more nuanced and more reflective than when we started this course.

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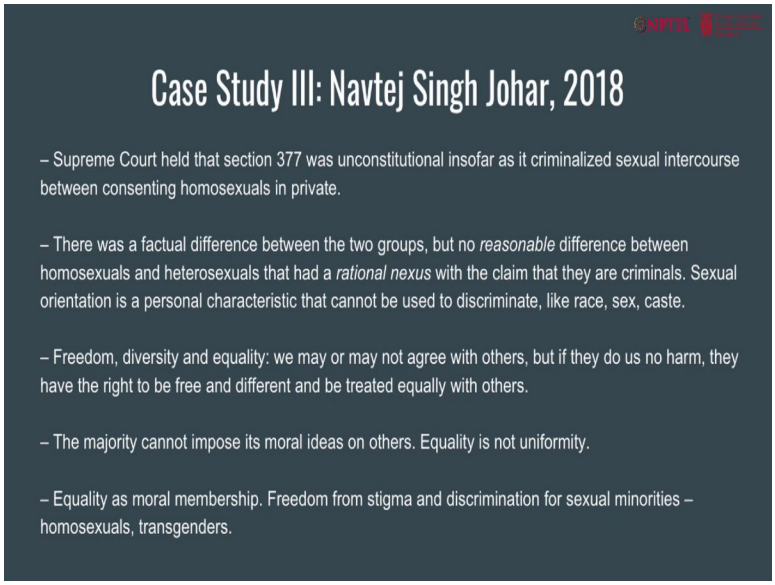

So, the Supreme Court, as many of you will know, held that section 377 was unconstitutional insofar as it criminalized sexual intercourse between consenting homosexuals in private, that is to say that, to the extent that section 377 said that there is a difference between heterosexuals and homosexuals, and that homosexual conduct is sexually perverted, that law is unconstitutional. We cannot distinguish between or differentiate between these two categories on the basis of sexual orientation, it is not allowed.

So again, the question is, what was the classification and did it have a rational nexus to the objective? The classification was homosexuals and heterosexuals that is sexual orientation. And the question is, does this classification have a reasonable nexus to criminalization? Can we say that homosexuals are sexually perverted in that, when they engage in sexual intercourse, it is not for the purpose of procreation and therefore should be criminalized?

Now, obviously, there is a factual difference between the two groups. But again, do we look at the factual difference and make the claim that there is a difference in reason, a difference that we can claim that makes one category criminals. And, Supreme Court said that we cannot do that. Now, why did the Supreme Court say this? The Supreme Court said this with for three reasons.

And these reasons are for freedom, diversity and equality. The basic argument the Supreme Court made was, we may or may not agree with others, we may or may not agree, personally

or as a community, whether members of the homosexual community are doing something right or wrong, we may have social opinions on it, we may have cultural opinions on it, we may have religious or theological objections to it. But that does not mean that as a matter of constitutional law, that we can impose our majority opinion on this minority community. After all, they are doing us no harm, and they have the right to be free and different and be treated equally with others.

In other words, the majority, as we saw also in the Anuj Garg case, cannot impose its moral ideas on others. We cannot say that because this is what I believe. And this is what the majority of society believes, that I can impose this view and opinion on anyone else, I am free to hold that opinion, I am free to air that opinion, I am free to discuss with my friends, I am free to take whatever measures I can within my sphere of influence. But I cannot impose my ideas on others and definitely not on paying off punishment under criminal law. That is not something a liberal society which prides individual liberty can do.

In other words, we want an equal society. But equality does not mean uniformity. Equality does not mean that the majority community decides, well, this is the correct idea, or this is the correct moral formulation. And everyone must abide by it. Equality rather is about diversity. It is about having diverse viewpoints, diverse opinions, diverse ways of living life, diverse answers to some of the most basic and fundamental questions, such as how we choose to associate with our friends, what kind of partners we choose, and so on and so forth.

So, therefore, the Supreme Court held in what is a revolutionary decision that the vision of equality that the Constitution has in mind looks to not social morality, but rather to constitutional morality. It looks to a morality (())(38:32) the constitution establishes, which is a morality of diversity and of freedom. Again, what the supreme court also said, and we are coming back now to identifying the philosophical principles that were actually used in making these arguments was the idea that equality in this case operates as moral membership.

If you remember, this was one of the philosophical principles of equality that we spoke about the idea of moral membership. If means that as a human being, I have the right to live my life the way I want. And I am to be considered an equal moral member of society having basic minimum respect and dignity that is owed to me. Sexual minorities, however in this country's have long face stigma and discrimination in their private lives and also in their public lives.

The homosexual community, for example, has often faced great abuse as has the transgender community. But both these communities and indeed any other sexual minority are entitled to claim equality with other members of the community, not because they are human beings, and they have the right to be different and yet be treated equally as equal members of the Indian society and Indian polity. Therefore, the Supreme Court's view was one of ensuring that as Indians, we have a inclusive and equal society, a society that allows everyone to participate to the greatest extent possible, and that the power of the state to legislate does not turn into a power to discriminate.

With this, dear students we end this week's lectures on the right to equality. I hope that you have enjoyed these lectures and that you have gained some insight into how to think about the right to equality and the various ways and the myriad issues that concern the right to equality, not just at the level of the Supreme Court and of the Parliament, but also in our daily lives. With that, we will end this week's lectures, and in the next week, we will be looking to another set of fundamental rights namely the right to life and liberty. Thank you very much for listening in.