

Analysis on the India verdict of Navtej Singh Johar and Ors Vs Union of India

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ABSTRACT:

LGBT community includes lesbian, gay, bisexual and transgender and Section 377 introduced in 1861 criminalises sexual activities against the order of the nature including gay sex. This ban has been challenged by five high profile petitioners who says that they have been living in the fear of being punished and that section 377 is against Article 14 which is equality before law, Article 15 which outlaws discrimination and Article 19 which gives freedom to form associations. The Supreme court while hearing the case has observed that we cannot wait for majoritarian government to decide on law if it violates Fundamental rights. The petition has come from various members of LGBT community including Sangeet Natak Academy Award winner Navtej Johar, journalist Sunil Mehra, Restaurateur Ritu Dalmia, Neemrana Hotel chain co-founder/ chairman Aman Nath and business woman Ayesha Kapoor. This verdict lay the foundation for future battles as to how people are affected and not being able to report the crimes. section 377 of Indian Penal code was refers to unnatural offences under law i.e., intercourse against the nature and it was said to be unscientific in nature. Act committed under section 377 shall be punished with imprisonment for life or imprisonment which may be extend to 10 years, or shall also be liable to pay a fine. This section infringes the right to equality, dignity, fraternity, life liberty and non-discrimination of the people of LGBT community. The core values of constitution of India consists of these basic rights and since the times are changing so it's the responsibility of judiciary and legislature to change or modify the old laws, after all it's a British law and it is over 150 years old. India is one of the most religiously and ethically diverse nations in the world and there are diverse religion, age, sex and other backgrounds so decriminalising section 377 is the foundation of democracy. It preserves the right of equality, right to dignity and privacy of LGBT community. The court decriminalises and read down the section 377 of Indian Penal code and said it is illegal and unconstitutional in nature.

I. BACKGROUND OF THE CASE

The issue was first objected by NGO Naaz Foundation and section 377 was declared unconstitutional at that time but it was challenged in 2014 in the case of Suresh Kumar KoushalvsNaaz foundation¹ overturned or overruled the Delhi High court's decision. Finally the recent petition was filed in 2016 by the SangeetNatak Academy Award winner NavtejsinghJohar.²The Supreme court today partially struck down section 377 of Indian Penal Code. In the legal terms the Supreme court read down or diluted the provisions of section 377. The Justices said that section 377 of Indian Penal Code has been partially struck down that is it will not apply to consensual same sex acts between homosexuals, heterosexuals and lesbians but section 377 will apply to sexual acts without consent of one of them. This has to be seen in context on how we define rape in India under section 375 of Indian Penal Code. Section 375 which is the rape laws which governs are not gender neutral. The Indian law essentially considers rape to be a crime perpetrated by a man against a woman who is not his wife. Now if section 377 were to be totally struck down then there would be no redressal of victims of sodomy. Only

¹ Suresh Kumar Koushal&AnrvsNaz Foundation &Ors on 11 December, 2013

² <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>, last access 15th march, 2019(02:00pm)

a woman remember can invoke section 375 of the Indian Penal Code which defines as the offence of rape and a woman too generally cannot invoke unless she is raped by a man who is not her husband. Now having laws which are gender neutral is the ideal situation and laws which recognise individual rights and not just gender specific rights but till that happens the read down or the dilution of section 377 is great news as it has decriminalised consensual relations between homosexuals, heterosexuals and the lesbians as the court said. If the citizens fundamental rights is violated then the courts are supposed to protect those fundamental rights. In this case they have done it but they have delayed it. There are many criticism against this verdict and this that homosexual behaviour is a deviation. There are many shades of opinion regarding homosexual behaviour in belief of religious spectrum. They think homosexuality is a deviant behaviour and not variant behaviour. All four judgements, five Justices found allocated grounded this decision in equality, dignity, fraternity, life liberty and non- discrimination and all these are core values of the Constitution of India. Since times are changing, laws also have to change accordingly after all it's a British Law and over 150 years old.³Our own wisdom in receiving and accepting everything which was imposed upon us by the colonial rulers as sacrosanct so, not just this law but several other legislations perhaps need visitation. It's surprising that the fundamental tenure of the constitution which was set on 26th January, 1950 is being applied to a Victorian provision for the very first time in this manner in 2018 perhaps it should have been done earlier. This provision need not have been applied in the very first place to consenting homosexual adults because it's not as the whole section needs to be struck down and it is capable of being interpreted differently but the fact that it has certain sense perhaps needed this judgement to clearly say that this shall not be used in this manner and henceforth. And this judgement makes the country rejoicing. The doctrine of Progressive Realisation of rights that the justices spoken about has role to play in these types of cases. The society is ready for this decision and Supreme court waited for too long is fact that Supreme court cannot pronounce such verdicts unless there is a society consensus. Using constitutional law as Grundnorm or touchstone that should be the principle for delivering any judgement. When the court actually comes up with a well thought of decision when the court delivers kind of rigorous judgements then the citizen must gave credit and celebrate the decision of court. This country which consists of very long term fights against injustices and at this particular moment there are some people's movement and have the Supreme court which is actually weighing in the side of constitution. When the court actually does its job and it's done it beautifully then it is grateful, gracious and thoughtful for citizens to actually celebrate the court. The Supreme court with a majority of 5:0 unanimous verdict decriminalised the consensual sex between the homosexual adults. The Justices said it violates the right of equality, right to dignity and privacy of LGBT community.⁴

³ http://orinam.net/377/wp-content/uploads/2013/12/sec377_summary_Gowthaman.pdf, last access 10th March, 2019(07:13pm)

⁴ <https://barandbench.com/wp-content/uploads/2018/09/Section-377-Judgment-Supreme-Court.pdf>, last access 12th March, 2019(09:01pm)

II. JUDGEMENT

Former chief Justice of India Justice Deepak Mishra said, “In the garb of social morality, the members of the LGBT community must not be outlawed or given a step motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher.”⁵ Justices disagreed the concept that there is anything unnatural and unscientific among homosexual adults. The liberty under law includes the respect for individual choice and therefore criminalizing consenting intercourse between homosexuals under section 377 of Indian Penal Code is irrational and manifestly arbitrary. The Five judge constitution bench includes Chief Justice Deepak Mishra, Justice D.Y.Chandrachud, A.M.Khanwilkar, Justice InduMalhotra, Justice RohintonNariman gave judgement against the colonial era law.⁶ The petition was filed by KeshavSuri, the Executive Director of the LalitSuri Hospitality Group and the NGONaaz Foundation filed a review petition against the Supreme Court’s 2013 judgement which re-criminalised homosexuality that overturned Delhi High court’s verdict of 2009 that held section 377 illegal.⁷ The section 377 is against Article 14 which is equality before law, Article 15 and dignity of the people of LGBT community.⁸

LGBT community and others welcomed Supreme Court’s judgement decriminalising consensual gay sex asserting that the historic verdict granted them a basic human rights but also acknowledging that complete equality was still some distance away. Five judges constitutional bench of the Supreme Court unanimously decriminalise a part of 150 years old colonial law under section 377 of Indian Penal Code which criminalises consensual unnatural sex prompting joy tears, hugs and dancing across the country. Activists, members of LGBT community, politicians welcomed the verdict which also said society cannot dictate a sexual relationship between consenting adults with many cutting cakes and unfurling the rainbow flag.⁹

⁵ <https://www.bloombergquint.com/law-and-policy/section-377-verdict-history-owes-an-apology-to-the-lgbt-community-says-supreme-court#gs.lnbpwd>, last access 11th March,2019(12:10am)

⁶ <https://www.thehindu.com/news/resources/full-text-of-supreme-courts-verdict-on-section-377-on-september-6-2018/article24880713.ece>, last access 12th March,2019(09:12pm)

⁷ <https://economictimes.indiatimes.com/news/politics-and-nation/sc-delivers-historic-verdict-heres-everything-you-need-to-know-about-section-377/articleshow/65698429.cms?from=mdr>, last access 13th March,2019(07:16pm)

⁸ The constitution (One Hundred and First Amendment) Act, 2016

⁹ <https://timesofindia.indiatimes.com/india/rainbow-flags-come-out-of-closet-as-lgbtq-community-celebrates-historic-verdict/articleshow/65706958.cms>, last access 10th March, 2019(01:12pm)