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Navtej Singh Johar & Ors. v. Union of India: Interpreting Section 377 of IPC 1860

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ABSTRACT

The paper titled 'Navtej Singh Johar & Ors vs. Union of India: Interpreting Section 377 of Indian Penal Code, 1860' contemplates the understanding of homosexuality in the pretext of jurisprudence and its interpretation. Homosexuality has been a taboo subject in India since early but the LGBT community was recognized of their rights in this particular case. This paper analyzes the stance of the Indian judiciary on Section 377 of IPC, 1860 through a timeline of cases having the same judicial backdrop thus forming a foundation for this judgment. It also analyzes how constitutional morality took the place of societal morality in the pretext of jurisprudence in this judgment. An overview has been given concerning paramount criminal law theories of eminent legal philosophers which eventually takes the stand that Section 377 has no jurisprudential basis. This paper has also sought to cater the application of interpretation of statutes on the current judgment. Finally, this paper aspires to forward suggestions which would enlighten the objectives sought in the said case and concludes that true meaning of dignity and freedom is still to be achieved by our beloved LGBT community.

Keywords: Homosexuality, Article 21, Section 377, Indian Penal Code, Decriminalization.

I. INTRODUCTION

The topic of this paper is connected with the most controversial and stigmatized aspect of the Indian society i.e. Homosexuality. In Navtej Singh Johar & Ors. Vs Union of India,² the apex court of our country passed a unanimous judgment of decriminalizing section 377 of the Indian Penal Code³. The judgment marked an end of an era where biasness on the basis of gender identity and sexual orientation holds no place. It gave a feeling of inclusivity to the members of LGBT (Lesbian, Gay, Bisexual and Transgender) community.

Section 377 of IPC, 1860 reads as “*Unnatural offences -Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with*

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² Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

³ The Indian Penal Code, 1860, S. 377, No. 45, Acts of Parliament, 1860(India).

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.*⁴

The judgment was given by Chief Justice Dipak Misra, Justice Rohinton Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra on September 6, 2018 where they declared section 377 unconstitutional insofar as it is pertinent to consensual intercourse between two adults of same sex and had overruled the judgment given in Suresh Kumar Koushal case⁵. The above mentioned bench while delivering this judgment recognized the Fundamental Rights guaranteed to the most marginalized and secluded citizens of our country. They acknowledged the basic human rights to the homosexual and LGBT Community which surpassed a moment of celebration and acceptance in the Indian society. In this case, the dynamic stance of Indian Judiciary is a sight to behold as the interpretation of Section 377 of IPC 1860⁶ has paved the way for a revolutionary, reformative and visionary India.

(A) Statement of Problem

In this research paper, the researcher contemplates the understanding of homosexuality and Section 377. Here, the researcher would like to forward the stance of the Indian judiciary on this section through a timeline of cases having the same judicial backdrop thus forming a foundation for the judgment. Secondly, the researcher will analyze how while interpreting the section, constitutional morality took place of societal morality in the pretext of jurisprudence. Finally, this paper aims to bring forward the suggestions which would further the objective sought in the said case.

(B) Scope of study

The ambit of the study is to present a clear understanding between homosexuality and criminal law theories given by legal philosophers. It presents whether there is any jurisprudential basis of Section 377. It further aims to provide some measures which needs to be taken by the legislature in light of this judgment. Thus, it lays a background for further research.

II. UNDERSTANDING HOMOSEXUALITY & SECTION 377 OF IPC, 1860

Homosexuality refers to the *morbid sexual passion* between people of the same gender⁷. As

⁴ Supra note 3

⁵ Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors., (2014) 1 SCC 1

⁶ Supra note 3.

⁷ Tanuj Modi, Analysis of Section 377 of Indian Penal Code, 1860, Legal Services India Blog, (Feb 21, 2021,

sexual orientation, it talks of a pattern of behavior or disposition to experience romantic affection from the same sex. Homosexuality in India has been a subject considered taboo until the Supreme Court delivered this judgment. It captivates a personal feeling of romance and affection for someone with the identical gender and a social identity based on that fondness. People sharing such fondness are also sharing a common community where individuality is not discriminated on the basis of their biological sex. Such community is a home for those millions of people who have lived under fear from their family or relatives. It is a community free from any kind of hatred, restriction and impairment. In this community, the members do not live double lives and is free to practice their sexual orientation based on their own choice. Such community is known as LGBTQ Community which stands for Lesbian, Gay, Bisexual and Transgender and Queer community.

Here, it is noteworthy that it is a western concept which was earliest declared unlawful by the colonial legislation in the 19th century. It had put homosexuality under unnatural sex and hence declared it against the command of nature which has its stance in the Christian bible. According to Lord Macaulay⁸, this revolting topic was such a subject on which nothing could be inserted on any text as it could give rise to public discussion which eventually would have costed injury to the morals of the community.

This law criminalized the consensual sexual act held in private between two adults of whatever sexual orientation thus making homosexuality unlawful and declaring it as an unnatural offence. *This arbitrary law does not differentiate between public and private acts or consensual and non consensual act therefore does not consider relevant factors such as age, consent, nature of act or scope of harm*⁹. Hence, targeting a minor community of gays deemed to be considered as criminals.

III. CHRONOLOGY OF CASES UNDER SECTION 377 IN THE INDIAN JUDICIARY

Here, the researcher would put forward the stance of the Indian Judiciary on section 377 through a timeline of cases having the same judicial backdrop thus forming a foundation for this judgment. There are five landmark cases which eventually helped in bringing justice to the LGBTQ Community. They are the following:

2:12 AM) <http://www.legalserviceindia.com/legal/article-679-analysis-of-section-377-of-indian-penal-code-1860.html>

⁸ Report on the Indian Penal Code; see V Dhagamwar Law, power and justice (1992)117

⁹ Supra note 5

- Naz Foundation V. Government of NCT Delhi, 2007¹⁰: An Indian NGO, Naz Foundation, working for people suffering with HIV/ AIDS had filed a writ Petition in the High Court of Delhi challenging the constitutional validity of section 377 of Indian Penal Code, 1860¹¹. The petitioner alleged that this section of IPC is a clear violation of fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Indian Constitution. The NGO had filed this writ petition on the pretext that it was working for tackling the spread of HIV/ AIDS which was hindered because of the discrimination with the LGBTQ Community. It is a clear infringement of right to life and personal liberty guaranteed under Article 21. *Furthermore, they alleged that the Right to non discrimination on the ground of sex under Article 15 should not be read restrictively but should also include sexual orientation*¹². Since they faced assaults, harassments and abuse by public authorities, it forced them to live a life without any fundamental right. People due to this law would fear to step forward for treatment and homosexuality would be driven to go underground.

The Ministry of Home Affairs submitted its legal opinion stating that this section criminalizes sexual abuse against children, fills up the gap in rape laws of the country and if removed, it would favor such neglecting behavior which is against public interest and morals of the Indian society. Whereas, the Ministry of Health and Family Welfare argued in favor of the NGO expressing that section 377 of IPC is against the prevention and treatment of HIV/AIDS.

In 2009, the Delhi High Court conveyed a landmark judgment *as a victory for equality and social justice but also in terms of its robust legal reasoning the Delhi high court concluded that Section 377 IPC, insofar as it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Indian Constitution.*¹³ The high court propounded that any differentiation under article 14 must be fair and just based on reasonable norms and having prudent relation with the objective sought. Further, this legislation targeted a particular community and regarded all gay men as criminals thus violation of Article 14.

Here, it is vital to note that in 2009, the Election Commission of India gave ‘Other’ as an option to choose between the genders on the ballot forms for the transgender community. Earlier, they could only choose between man and woman.

- Suresh Kumar Koushal v. Naz Foundation, 2013¹⁴: The decision in the case of Naz Foundation was questioned in the Supreme Court of India stating that the Delhi High Court’s

¹⁰ Naz Foundation v. Government of NCT of Delhi, (2009) 3 SCR 1.

¹¹ Supra note 3.

¹² Supra note 5.

¹³ Supra note 5.

¹⁴ Supra note 5.

decision had severe error while declaring Section 377 decriminalized. The appellants stated that the statistics showing Section 377 severely affecting the spread of HIV/AIDS were insufficient and fraudulent. Also, if this is allowed then the social structure and institution of marriage will also be adversely affected in the Indian society. They argued that it was for the parliament to determine on the legislation and was not the work of the judiciary. The respondents, whereas, stated that the Constitution of India is a living document hence it should take the changing views of the society in consideration. They argued that this particular section had deprived the LGBTQ community of their full moral citizenship.

On 13 December 2013, the apex court recriminalized Section 377 justifying that there is no clear violation of the constitution as it does not segregate any particular section of people but it just holds certain act as an offence. The court regarded the LGBT community only as a ‘*miniscule*’ part of India. The court said, since the section has been misused by the police authorities, it doesn’t mean it is ultra vires of the Constitution. *It concluded that Section 377 does not suffer from the vice of unconstitutionality with no further elaboration.*¹⁵

- National Legal Services Authority v. Union of India & Ors., 2014¹⁶: On 15th April, 2014, the Supreme Court identified the transgender community as a third gender and held that the right to express one’s identity in a non-binary gender was an essential part of freedom of expression. It directed the states to also promote health policies for the transgender community, to give legal status to their gender so that there is equal protection of their legal rights and eventually to remove this social stigma. It had a reference of international human rights standards, particularly ‘Yogyakarta Principles,’ which states: “*Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.*”¹⁷ It was a ray of hope for the LGBTQ community as well.

- Justice K.S. Puttaswamy v. Union of India, 2017¹⁸: On August 24, 2017, the nine judges’ bench of the Supreme Court of India, presided by J. Chandrachud, unanimously recognized that *the Constitution guaranteed the right to privacy as an intrinsic part of the right to life and personal liberty under Article 21.*¹⁹ The CJI stated that the court has the liability to correct the wrong done earlier in the case of Suresh Kumar Koushal. This case rejected the idea of minuscule minority and held that sexual orientation is an indispensable part of privacy for

¹⁵ Supra note 5.

¹⁶ National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438 .

¹⁷ NLSA vs Union of India, Global Freedom of Expression, Columbia University, <https://globalfreedomofexpression.columbia.edu/cases/national-legal-services-authority-v-union-of-india/>

¹⁸ Justice K.S. Puttaswamy vs Union of India, Writ Petition (Civil) No. 494 Of 2012

¹⁹ Puttaswamy v. India, Freedom of Expression, Columbia University, <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/>

an individual which is now guaranteed as a fundamental right under article 21 of the Constitution. It also paved the ultimate way for the judgment in the Navtej Singh Johar case²⁰.

- Navtej Singh Johar & Ors. v. Union of India, 2018²¹: On September 6, 2018, the Supreme Court bench presided by J. Dipak Misra, upheld the decision in Naz Foundation case, overturned the decision in the Suresh Koushal case and gave the historical judgment supporting homosexuality. Navtej Singh Johar, the petitioner in this case, is a dancer and an LGBT member. *He filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Article 21 of the Constitution of India.*²² The petitioner argued that the said section was violative of Articles 14, 15, 19 and 21 of the Constitution and hence challenged the 2014 judgment.

The Union of India, respondent, stated that they have left this matter on the ‘wisdom of the honorable court’ but some interveners argued that homosexuality would derogate the ‘constitutional concept of dignity’, that it would also increase the spread of HIV/AIDS in the country, that it is harmful to the institution of marriage prevalent in this country and that it may infringe *Article 25 of the Constitution i.e. Freedom of Conscience and Propagation of Religion*.

The court supported the decision of NLSA case of 2014 and held that gender identity is inherent to the dignity of a person and if the court denies that then it would be an infringement of one’s dignity. Considering the judgment in K.S. Puttaswamy case of 2017, the court held that to consider LGBT Community as a minority of the population and on that particular ground if the court denies them right to privacy then it is a total infringement of their fundamental rights. They held section 377 of IPC, 1860 as an unreasonable restriction against Freedom of Expression since ‘*consensual carnal intercourse in private does not in any way harm public decency or morality*’. The court affirmed that “*intimacy between consenting adults of the same sex is beyond the legitimate interests of the state*” and *sodomy laws violate the right to equality under Article 14 and Article 15 of the Constitution by targeting a segment of the population for their sexual orientation*.

Recently, these issues have been rightly brought forward by a petition filed by two same sex couples in the Delhi High Court on September 2020. They sought to get married under Special Marriage Act, 1954 and other one to legalize their marriage under Foreign Marriage Act, 1969.

²⁰ Supra note 3.

²¹ AIR 2018 SC 4321

²²Navtej Singh Johar vs Union of India, Global Freedom of Expression, Columbia University, (Feb 21, 2021, 2:22 am) <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>.

²³Since they could marry in a foreign land but the Indian Consulate could not register their marriage under FMA, 1969 as the law does not recognize same sex marriage. They contended that the Consulate's decision to not register their marriage under FMA, 1969 has violated their fundamental rights under articles 14, 15, 19 and 21 of the Constitution guaranteed to the LGBT community by the Supreme Court in Navtej Singh Johar case.

IV. CONSTITUTIONAL MORALISM TAKING PLACE OF SOCIETAL MORALISM IN THE PRETEXT OF JURISPRUDENCE

The hon'ble court made use of theories to interpret section 377 in its true sense. Here, the researcher will analyze how constitutional moralism took place of societal moralism in the pretext of jurisprudence for which the judgment elaborates many of the criminal law theories which are mentioned below:

(A) Utilitarian Theory

For that we have to take reference of Bentham's Utilitarian Theory. According to him, '*all punishments are in itself is evil*'²⁴. He views that punishments should only be laid down so that it removes a bigger evil. Bentham advocated for reforms in sodomy laws since early and held homosexuality as *if viewed outside the realms of morality and religion, is neutral behavior which gives the participants pleasure and does not cause pain to anyone else.*²⁵

He gave three main principles which need to be tested for sodomy laws. They are: (i) if they produce any primary mischief, (ii) if they produce any secondary mischief i.e. harm to the stability and security of society, (iii) if they cause any danger to society.

For the first principle, he stated that two adults consenting for homosexual acts is a source of pleasure for them and it does not involve any harm to anyone else. He had only involved 'willing partners' in this preview. For the second principle, he stated that homosexuality does not cause any secondary harm as it only involves those who choose to perform such activity. For the last principle, he argued that *since homosexual activities in themselves do not cause any harm, there is no danger even if they have a domino effect on other individuals.*²⁶ Thus, sodomy laws failed the tests on all the principles given by Bentham.

²³ Soibam Rocky Singh, Pleas by two same sex couples for getting married, recognition of marriage: HC seeks Centre's stand, The Hindu, New Delhi, October 15, 2020 (03:41)IST, <https://www.thehindu.com/news/cities/Delhi/pleas-by-two-same-sex-couples-for-getting-married-recognition-of-marriage-hc-seeks-centres-stand/article32851053.ece>.

²⁴ Jeremy Bentham, "Offences Against One's Self" (Louis Crompton Ed.), Columbia University.

²⁵ Ibid.

²⁶ Ibid.

(B) The Harm Principle

Johan Stuart Mill's exposition 'On Liberty' advances 'The Harm Principle', according to which, the State can sanction into an individual's private life only if any harm is led upon others or if the action is 'other-affecting'²⁷. He classified conducts in the following ways:

- (i) Self- regarding which are those conducts which do not affect the society and is only related to oneself. These conducts should not be a matter of permit either by the State or by the society.
- (ii) Those conducts causing harm only to some but involve no legal rights violation should only be put for public condemnation and is therefore not a matter of sanction by the state.
- (iii) Those conducts which violates the legal rights of others should be put as a matter of sanction by the state and public criticism.

Thus, his principle acted as a negative tool limiting those criminal laws that used to punish actions which are perceived to be immoral but is not harmful. Hence, sodomy laws criminalize the self regarding conducts which here should not be made as a subject of permit either by the state or the society.

(C) Debate over Lord Devlin and Hart's Morality

Lord Devlin's view on legal moralism was vigilant through his lecture 'The Enforcement of Morals' in 1959²⁸ which was totally against the report of The Wolfenden Committee set up to consider the penalization of homosexuality. According to Lord Devlin, society holds its stability together if there is a 'universal common morality'. Thus, society has the power to decide on the matters of morality and also can make use of law to reinforce it. He stated that a society would break down due to lack of morality. *Devlin proposed that the common morality or "collective judgment of the society" should be ascertained taking into consideration the "reasonable man"*²⁹. Thus, Devlin's theory of morality can be considered to be a stabilizing factor for a society where a societal moralism is guiding the law enforcement and punishment is to be given to those who try to destabilize such society by practicing something immoral.

H.L.A. Hart was totally in opposition of Lord Devlin's framework. He stated that there is no common morality holding a society together. According to him, "*law is morally relevant,*" but "*not morally conclusive.*"³⁰ He argued that in the context of homosexuality, it is totally a matter of 'private morality' as it constitutes private sexual acts and since it's a private matter the

²⁷ John Stuart Mill, *On Liberty*, (Elizabeth Rapaport ed), Hackett Publishing Co, Inc (1978).

²⁸ Sir Patrick Arthur Devlin, "The Enforcement Of Morals" Oxford University Press (1959).

²⁹ Ibid.

³⁰ William Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy", *Marquette Law Review*, Vol. 67 (1984).

society holds no interest or law therefore no control over it. He further elaborates to pen in 'majoritarian morals' under Section 377. He states that such majoritarian morals are imposed upon the minority even though if it means societal cohesion and this is exactly what had happened to this section.

Thus, Hart's apprehension of 'critical morality' leads to a more characterized framework of Devlin's 'common morality'. Taking view of all the criminal law theories and legal philosophers, it is observed that constitutional moralism holds a much higher place than societal moralism. Thus the court rightly interpreted that Section 377 was in a way used to suppress the community of a minority of gays and classified such minority as criminals for their private 'self- regarding conducts'. Criminalization of sexual homosexual acts in reality holds no jurisprudential basis and hence was rightly repealed by the bench.

V. APPLICATION OF INTERPRETATION OF STATUTES

The hon'ble Supreme Court had interpreted section 377 of IPC, 1860 using the golden rule of interpretation to delete any kind of injustice which would not have been possible by a mechanical interpretation of the provision. It had regarded sexual orientation as a ground equivalent to sex in Article 15 of the Constitution. The court had also got rid of the doctrine of presumption of constitutionality of pre colonial laws while interpreting. It had not presumed a Victorian law to be constitutional. The doctrine of severability held the section to be invalid to the extent it criminalizes the consensual homosexual acts between adults in private and the other rest of the part was left enforceable and thus valid.

VI. SUGGESTIONS

The author would also like to suggest some measures which would further the objective sought in the Navtej Singh Johar case. The judgment had only provided for decriminalization of the relationship of the same sex couples but it has not provided anything for their marriage and other legal recognitions unlike US or Australian marriage laws. The legislature needs to further this objective by making legislation for legal recognition of their marriage and other rights which heterosexual couples enjoy anyway. There is no provision regarding these issues under Special Marriage Act, 1954 or any other Family Laws in India. The same sex couples have nowhere to look for starting up a family. Hence, the legislature needs to provide for a law legalizing same sex marriages in India. It also needs to provide for registration of their marriage, adoption rights, surrogacy rights, maintenance rights, right to inherit property of the partner, right to perform final rituals after partner's death, right to benefit from family health plans under employment of a partner, right to make immediate decision under partner's health

crisis and most importantly right to enjoy marital privileges like any other couple.

VII. CONCLUSION

The bench in Navtej Singh Johar case has rightly produced an expansive view of the judgment while bringing sexual orientation under freedom of expression and also considering it as an integral part of right to privacy. It also establishes precedential value to those countries having similar Victorian law. Though the judgment was passed two years ago, LGBT community still aspiring for a law under which they can be legally married, they can adopt, they can inherit property or they can be guardians. The judgment talked about love but the legislature still lacks to provide any legal notion as to how the same sex couples can ascertain such love among themselves. This paper has rightly examined the stance of Indian Judiciary through a timeline of cases to understand homosexuality and section 377. It has also examined different legal philosophies of eminent jurists to look for any jurisprudential basis of section 377 and through such thoughts of different jurists, this paper found no jurisprudential basis of section 377. Lastly, we understood that there are still stigmas faced by the LGBT Community for which they need a comprehensive legislation dealing with same sex marriages. This paper has also forwarded suggestions for the various problems faced by the LGBT community and which could also possibly enhance the objectives sought in this particular judgment. Hence, the Navtej Singh Johar case holds a much higher place for the subject concerning rights of the same sex couples in future. Thus, our beloved LGBT community is still to achieve freedom and dignity in true sense.
