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# Navtej Singh Johar v. Union of India

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DESHNA DESAI<sup>1</sup>

## ABSTRACT

*Section 377 of IPC has been in the headlines since a long time for its questionable constitutional validity. Section 377 criminalizes consensual sex between same sex individuals. Homosexuality has been viewed as a stain in the society and the community has always been caught in the clutches of discrimination, inhumane behaviour, and torture only because of their sexual preferences being different from the rest of the country. Over the past several decades, the homosexual community is struggling hard and fighting in order to achieve the basic human and the fundamental rights guaranteed to all the individuals of the country in all aspects of the society. There have been a ton of debates against section 377 for it being in opposition with the articles 14, 15 and 21 which guarantee the fundamental rights of equality, non-discrimination, freedom of expression to every citizen of the country. The Navtej Singh Johar case has proved to be a landmark judgement as the Hon 'ble Supreme Court of India unanimously held that section 377 which criminalized carnal intercourse as an unnatural offence and was punished with 10 years of imprisonment as unconstitutional. This judgement has led the foundation of the rights of the homosexual.*

**Keywords:** Section 377 of IPC, LGBTQ, Discrimination, Fundamental Rights.

## I. INTRODUCTION

The decision of the writ petition which was filed by Navtej Singh Johar in 2018 is one of the most significant decisions of the Hon'ble Supreme Court of India as it held Section 377 of the IPC unconstitutional.<sup>2</sup> Section 377 was decriminalised as far as it criminalised consensual sexual conduct between adults of same sex. The court reversed its decision in Suresh Kumar Koushal case. The court gave out its judgement that LGBT people in India are entitled to all constitutional rights. The judgement also made note that LGBT community is entitled to equal citizenship and equal protection under law without any discrimination. This judgement however could not put a total stop to the struggle which was faced by LGBT community for their rights but it gave them a respectable position in the society the importance of which was

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<sup>2</sup> The Indian Penal Code, 1860, § 377, No.45, Acts of Parliament, 1860 (India).

clearly reflected by the campaigners cheering outside the court.

## II. HISTORY

Section 377 was taken from the Buggery Act of 1533. It defined homosexuality as unnatural offences and against the will of the god. The very first Law Commission brought this law in IPC 1860. In India, the fight to decriminalize section 377 has been going on since a very long time. Navtej Singh Johar case is not the first case in India which dealt with the rights of the homosexuals. There have been 2 important precedents which dealt with the issue. In 1994, an NGO named AIDS Bhedbhav Virodhi Abhyan filed a petition before the Delhi High Court in order to decriminalize section 377 which was dismissed in the year 2001.

Later in the *Suresh Kumar Koushal v NAZ Foundation Ors*<sup>3</sup> in the year 2013, the Hon'ble Supreme Court held that section 377 is constitutional and such acts as unnatural in nature and shall thus be punished.

## III. FACTS OF THE CASE

There were already several curative petitions pending before the apex court against the *Suresh Koushal* judgement. On 27<sup>th</sup> April 2016, 5 people including Dancer Navtej Singh Johar, Journalist Sunil Mehra, Chef Ritu Dalmia, Hoteliers Aman Nath and Keshav Suri and a businesswoman Ayesha Kapur filed a writ petition in the apex court for scrapping down the Section 377 of the IPC as far as it criminalized consensual sex between same-sex individuals as this section was directly violating their fundamental rights..

Section 377 of the IPC categorised consensual sexual intercourse between same sex people as an “unnatural offence” which is “against the order of nature” and prescribes a punishment of imprisonment for a period of 10 years. The petitioners stated that the issues raised by them differed from those pending in the curative petition.

The questions put before the court were:-

- Whether Section 377 is violative of article 14 and article 15 of the constitution by allowing discrimination on sexual orientation and gender identity?<sup>4</sup>
- Whether Section 377 is violative of right to expression under article 19(1) (a)?<sup>5</sup>
- Whether Section 377 is violative of right to autonomy and dignity under article 21 of the constitution?<sup>6</sup>

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<sup>3</sup> *Suresh Kumar Koushal v Naz Foundation & Others*, Civil Appeal No. 10972 of 2013.

<sup>4</sup> INDIA CONST. art. 14, art. 15.

<sup>5</sup> INDIA CONST. art. 19, cl. 1 (a).

<sup>6</sup> INDIA CONST. art. 21.

- Whether the judgement of the Hon'ble Supreme Court was rational in understanding the morality as social morality in the Suresh Kaushal case?

The petition was first placed before Justice S.A. Bobde and Justice A. K. Bhushan. However later an order was passed to post this matter before the then Chief Justice of India since a curative petition was already pending before the constitution bench.

After the hearing ended on 17 July 2018, the court reserved its verdict and asked both the parties to submit a written statement. On 6 September 2018, the court gave its unanimous decision which overturned the 2013 Suresh Kumar Koushal v. Naz Foundation decision.

#### **(A) Arguments from the petitioner side**

The petitioners argue that section 377 had a very chilling effect on various fundamental rights as guaranteed by the Indian Constitution.

Homosexuality, bisexuality is a natural thing and criminalising it would contribute to infringement of an individual's right to privacy. It criminalises an action which is supposed to be done privately and in no ways will harm the morals of the society and thus violates the right to dignity, autonomy and privacy protected by the Right to Life under article 21.

It disables the LGBT community to express their sexuality, choice of partner and their feelings which is a violation Fundamental right to expression provided under article 19 (1) (a).

Section 377 is also violative of Article 14. Article 14 provides the fundamental right to equality. Section 377 criminalises sexual relations between same individuals; however it does not criminalise sexual relations between opposite gender. Section 377 discriminates a particular community on the basis of sex which is prohibited under Article 15.

#### **(B) Arguments from the respondent side**

The respondents argued that fundamental rights guaranteed by the constitution do not guarantee the citizens an absolute right. It does come with certain reasonable restrictions. They contended that if section 377 is ruled out to be invalid, the household structure will be shattered and there are chances where people will see this as commerce and use it for money.

Homosexuality is something which is not accepted by the religions and thus decriminalization of section 377 will lead to an infringement of Article 25 as it will raise objections against all the religion practices in India. The social, cultural and economic identity of the nations which decriminalized homosexuality is far different from multi-ethnic and diverse nation like India. Striking down the section would open many other gates which would be mere social experiments which unpredictable outcomes.

Individuals engaged in such practices are highly prone to contract AIDS and increase the victims of AIDS in the country.

Section 377 is not violative of Article 14 as it just specifies an offence and mentions its punishment, leaving it on the state to decide whom to penalise.

As far as the section concerns article 15, it was argued that article 15 forbids discrimination based on sex and not based on sexual orientation. Sexual orientation is not a ground of discrimination under the constitution. Even the Yogyakarta principles did not constitute binding treaty obligations.

#### **IV. FINDINGS OF THE COURT**

The court held that the criminalisation of sexual acts between consenting adults violated the right to equality guaranteed by the constitution of India. The court ruled that the LGBT people are entitled to all constitutional rights protected by the constitution of India irrespective of the size of their community. The judgement also made note that the LGBT community is entitled to equal citizenship and protection under law, without discrimination and Section 377 was violative of the fundamental rights.

For the question on the rationality of Suresh Kaushal case, the court held that the view regarding LGBT community people are in minority was not proper. The size of the people belonging to the community doesn't matter. Anything that matters is that they are the citizens of our country and are equally protected under Fundamental rights of Constitution of India.

Section 377 is violative of article 19(1) (a) which establishes unreasonable restrictions in the name of public morality. Consensual intercourse between same sex adults in private does not harm public decency or morality.

Section 377 of IPC has failed to make a distinction between consensual sexual acts and non-consensual sexual acts, and thus the SC declared it arbitrary as it has become a weapon to target the LGBT community which leads to discrimination and unequal treatment. The state has nothing to do with the intimacy between 2 consenting adults of the same sex. Section 377 nothing but violates article 14 and 15 by unreasonably discriminating a particular set of population on the basis of their gender and their sexual orientation, which is a ground parallel to sex under article 15(2) which prohibits discrimination based on sex.

After the privacy judgement in Puttaswamy, the right to privacy has been raised as the fundamental right.<sup>7</sup> The court was of the view that if one person prefers sex with the same

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<sup>7</sup> Justice K. S. Puttaswamy v Union of India, (2017) 10 SCC 1.

gender which is consensual and does not harm the other, then interference with their matter will be violation of their right to privacy and thus violative of article 21. Right to live with dignity is also recognised under the article and Section 377 is clearly opposite of it by criminalising the identity of a person based on their sexuality.

The LGBT community is forced to live according to society and is exposed to harsh discrimination and humiliation. Even the law commission in its 142<sup>nd</sup> report had expressed its desire of deletion of Section 377 as its motive was to criminalize non- consensual sex and child abuse and after the insertion and amendment of Section 375 to Section 376E, there is no need for Section 377.

The court held that the choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right to not be subjected to any discrimination are inherent from the constitutional protection of sexual discrimination.

The court declared Section-377 as unconstitutional as it violates *Articles 21, 14 and 15* of our Constitution but it will continue in cases of non-consensual penile non-vaginal sex and penile non-vaginal sex which involves minors i.e. a person below 18 years of age.

## **V. JURISPRUDENTIAL ASPECT OF THE JUDGEMENT**

The constitution of India guarantees the fundamental rights to the citizens of India. It is well established by the various precedents that the rights guaranteed as fundamental rights are dynamic in nature and it would be totally incorrect to restrict them into a static interpretation because they are of transformative and evolving nature.

As discussed earlier, the argument based on the number of people being very less in the LGBT community was baseless. It is very much clear that the fundamental rights are guaranteed to each and every citizen of India and not to a particular community. The court has correctly pointed out that the idea of number in this context is meaningless.

Transformative Constitutionalism is the ability of the constitution to adapt and transform with changing times. This principle places an onus on the judiciary, being the guardian of the constitution to uphold the values of the constitution.

The concept of constitution morality is also very important as it aims at creating diverse and inclusive society in accordance to the principles of constitutionalism.

Section 377 has a very negative effect on the community. Its main motive was to protect women and children from being abused and harassed but consensual carnal intercourse performed by the LGBT community is not injurious and non-consensual acts have already been referred to

as an offence by insertion of Section 375 and it clearly implies that Section 377 is discriminative towards a particular Section of the society. If such treatment is allowed to continue, then the Indian courts which are the protector of the fundamental rights of the citizen would be failing in discharge of their duty. The Courts have to keep a check on the necessities of the minority, whose rights are in question and who have been subjected to humiliation and discrimination by the society as well as the state.

Thus even in the view of constitutional morality, Section 377 is invalid.

Right to choice comes with certain reasonable restrictions however, the right of choosing a partner for intimate relations is completely a matter of personal choice which cannot be restricted. Public order, and decency and morality impose reasonable restrictions on the Fundamental right of expression. However any act done which is decent enough and is not obscene does not disturb the public order.

## **VI. AUTHOR'S OPINION**

This judgement is undoubtedly one of the historical judgements. Finally, after putting in so many efforts the LGBT community was successful enough in making a noticeable position in the society. However, to live freely and comfortably will still be difficult because of the orthodox mindset of the people in the country. Nevertheless, this is just the start. There are many rights which the LGBT community should get but are deprived of them. The rights for marriage, adoption are must in order to live a 'normal' life. The judgement sowed the seeds for the same. It is the need of the hour to implement proper legislation in order to provide equal citizenship to every individual irrespective of their community.

## **VII. CONCLUSION**

Around 123 countries in the world have never penalized homosexuality and it is remarkable that India is now a part of it. The Hon'ble Supreme Court by way of its judgement reiterated its pace with changing times. This judgement has changed the lives of many people and saved them from the inhumane behaviour and discrimination of the society. However, they are still subjected to discrimination and deprived of various rights as there is no proper legislation which addresses the issue. It is the need of the hour to frame a legislation which should impose obligations of equality and non-discrimination of all the citizens.

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