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## NAVTEJ SINGH JOHAR VS. UNION OF INDIA: A STEP TOWARDS INCLUSIVITY OF SEXUALITY

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### INTRODUCTION:

Identity is central to one's being. Identity and Individuality is irreplaceable as it the essence of life. Without individuality life has no substance. The natural identity of a person is inherent, instinctive and therefore, should not be looked down upon. However, due to societal restrictions and narrow mindset of people living in it, some aspects of one's natural identity is despised and deemed unacceptable. In the case of National Legal Services Authority vs. Union of India which declared Transgenders as the Third gender, gender identity was recognized as a fundamental part of life. It was held that gender identity is a "innate sense" of being male, female, transgender or of any other gender across the spectrum.<sup>1</sup>

In the judgement of Navtej Singh Johar vs. Union of India, the Supreme Court discusses the issue of sexuality of a person, sexual autonomy and choice of sexual partner. It is argued that choice of sexual interest, autonomy and sexuality of a person is inherent and is part of Right to Life under Article 19 and 21 of the Constitution of India. Further, Right to choose sexual partner is a matter of Right to live with dignity. Hence, criminalising sexual autonomy in case of same sex relationships is in conflict with the enjoyment of Fundamental rights and is unconstitutional.<sup>2</sup>

### SUMMARY OF FACTS:

Section 377 of the Constitution of India<sup>3</sup> criminalizes carnal intercourse which is "against the order of nature" with any woman, man or animal and provides that any offender shall be punished with a punishment of Life imprisonment or imprisonment extending to ten years and shall also be imposed a fine. Previously, in the judgement of Naz Foundation and Government of NCT of Delhi, the Delhi High Court stated that consensual sexual acts between adults must

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<sup>1</sup> Navtej Singh Johar vs. Union of India, WRIT PETITION (CRIMINAL) NO. 76 OF 2016, 3

<sup>2</sup> *Id.* at 9

<sup>3</sup> The Indian Penal Code, §377, No. 45, Acts of Parliament, 1860 (India).

be excluded from the scope of Section 377, since it targets homosexual persons and negatively affects the enjoyment of their right to life. Hence, this 2009 judgement essentially decriminalised homosexuality. Though it has limited effect and may be put to an end by the Parliament. However, it is a landmark judgement towards ending the discrimination and unfair treatment meted out against persons belonging to the LGBTQ+ community.<sup>4</sup>

This judgement was, in 2013 overruled by the Supreme Court in the case of Suresh Kumar Koushal vs Naz Foundation. It stated that only a small percentage of the people belong to the LGBTQ community and further, only a few people have been actually prosecuted under Section 377. Hence, this cannot be enough reason to declare a section unconstitutional and violative of Articles 14, 15 and 21 of the Indian Constitution. The differential treatment subjected to the LGBTQ community is not mandated or explicitly indicated in the section. The misuse of the section by the police or any other agency does not decide the constitutionality of the section. But, it can be open to amendments by the Parliament to help reduce or remove the prejudicial behaviour against the LGBTQ community. In case of the issue of Article 21, the supreme court has not extensively discussed the applicability of the article to section 377. The judges, however, specified that the legislature has the power to amend or remove the section as it deems desirable.<sup>5</sup>

When this judgement was challenged in 2016, the three-judge bench recommended that the issue must be discussed before a larger bench. Hence, the matter was argued before a five-judge bench. The petitioner, in the 2018 judgement was Navtej Singh Johar, a dancer who is a part of the LGBTQ community. He in 2016 filed a Writ Petition asking for Section 377 to be declared unconstitutional. Further, he appealed for the recognition of the sexual autonomy, choice of sexual interest and the right to sexuality under Section 21 of the Constitution of India. The respondent was the Union of India and some other religious and political organisations. The government picked a neutral view, leaving the decision to the “wisdom of the court”.

## **LEGAL ISSUES:**

The following issues arose and were discussed in the case:

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<sup>4</sup>Anjaneya Das, “Gay and Transgender Rights in India: Naz Foundation v. Government of NCT of Delhi”, Womenslinkworldwide, <https://www.womenslinkworldwide.org/en/files/1264/article-gay-and-transgender-rights-in-india-naz-foundation-v-government-of-nct-of-delhi.pdf>

<sup>5</sup>Suresh Kumar Koushal and another v NAZ Foundation and others, Civil Appeal No. 10972 of 2013

1. Whether Section 377 is violative of Article 19(1) or not?
2. Whether Section 377 violative of Right to life, liberty and privacy under Article 21 or not?
3. Whether Section 377 violates Right to Equality under Article 14?
4. Whether Section 377 enables discrimination which is violative of Article 15?
5. Whether Section 377 of the Indian Penal Code is unconstitutional or not?

### **IDENTIFICATION OF PARTIES:**

The parties of the case is as follows:

Petitioners side: Navtej Singh Johar (Dancer), Ritu Dalmia (Chef), Sunil Mehra (Journalist), Ayesha Kapur (Businesswoman), Keshav Suri and Aman Nath (Hoteliers).

Respondents side: Union of India through the Ministry of Law and Justice

### **SUMMARY OF ARGUMENTS:**

#### **PETITIONER'S SIDE:**

The Petitioner argued that Homosexuality, bisexuality or any other sexualities are natural and expression or inclination of two consenting persons who are legally allowed to express such consent. Homosexuality is not a disease but a product of natural expression and free thinking in a person. Therefore, criminalising homosexuality is against the dignity and the ability of free decision making in a person pertaining to his personality and natural inclination. It limits the Freedom of person to choose a sexual partner, to that of a procreative concept which means only people belonging to the opposite sexes of the gender binary can come together in order to facilitate fulfillment of the reproductive purpose. This conservative approach does not recognise the inherent or innate tendencies of a person or consensual acts between two consenting adults who happen to belong to the same sex. It limits the fulfillment of a person's expression of inborn desirability or "sense of commonalities" while choosing a partner of interest and relationship building with that person, hence, stifling the Freedom of Expression guaranteed under Article 19(1)(a) of the Constitution of India. According to American Psychological Association, sexual orientation of a person is a natural tendency or condition.

Though Same Sex relationships are lesser in number, it does not negate the fact that it is similar to that of attraction in the opposite sex relationships and are naturally equal to the same.<sup>6</sup>

It is argued in court that the Section 377 has a “chilling effect” on Section 19(1)(a) which guarantees freedom of expression which also includes the right of persons belonging to the LGBTQ community to express their sexuality and sexual orientation, to express romantic and sexual interest towards a person of their attraction.<sup>7</sup> Also, the petitioner argued that Section 377 is an unreasonable restriction and cannot be placed under Article 19(2) of the constitution which deals with reasonable restriction to the freedom of speech and expression.<sup>8</sup> In the judgement of *Khusboo v. Kanniamal*, it was stated by the court that the law should not be used in a way where it has a chilling effect on the Freedom of expression of people.<sup>9</sup> It was also argued before the court that Section 377 was violative of Article 19(1)(c) of the constitution as it denies the petitioners the right to association. Persons belonging to the LGBTQ do not avail benefits from the organisations that provide help to sexual minorities out of fear of social consequences and state action.<sup>10</sup>

Since Section 377 is a criminal provision, the result of which it deprives the LGBTQ Community, the Right to Reputation which falls under the ambit of Right to Life and Liberty under Article 21 of the Constitution. It makes people wary about speaking openly about their sexuality out of apprehension that they would become vulnerable to crimes such as extortion and be denied state amenities and protection.<sup>11</sup> In the case of *Kishore Samrite v State of U.P.*<sup>12</sup>, reputation is part of personal security and must be protected under Article 21 of the Constitution. Also, in the case of *Shakti Vahini*, it has been declared by the court that the right to choose one’s life partner is a matter of an individual’s personal liberty.<sup>13</sup>

The LGBTQ Community comprises of only 7-8 percentage of the total population. The state should protect these individuals who are stigmatised in society due to their sexuality and sexual orientation which is a natural or innate part of their being. They need more protection due to the attitude of society towards them in order for them to live without fear. Also, right to privacy

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<sup>6</sup> Navtej Singh Johar vs. Union of India, WRIT PETITION (CRIMINAL) NO. 76 OF 2016, 7

<sup>7</sup> *Id.* at 10

<sup>8</sup> *Id.*

<sup>9</sup> *S.Khusboo v Kanniammal and Ors.*, (2010) 5 SCC 600

<sup>10</sup> *Supra* note 6, at 11.

<sup>11</sup> *Id.* at 11

<sup>12</sup> *Kishore Samrite v. State of U.P.*, (2013) 2 SCC 398

<sup>13</sup> *Shakti Vahini v. Union of India and others*, (2018) 7 SCC 192

is a very important part of human existence and enjoyment of other Fundamental rights. Section 377, which is not a reasonable restriction, violates right to privacy as the inherent choice of sexuality is of a personal matter and discretion of an individual.

Further, Section 377 violates Article 14 of the Constitution since the Section is vague as in that the definition and meaning of Carnal Intercourse and Against the order of nature is nowhere given in neither the Indian Penal code nor the section itself or in any other law. The petitioners have argued that there is no reasonable classification or intelligible Differentia betwixt natural and unnatural sexual act as long as its consensual. It also violates Article 15 since the section is discriminatory towards the sex of the sexual partner of the person. Non-consensual acts with the opposite sex, however, in case of same sex relationships, even if the act is consensual, the persons are penalised unfairly.<sup>14</sup> Therefore, Section 377 violates Articles 14,15,19 and 21 of the Indian Constitution and penalises persons belonging to a particular sexual orientation which feeds into the prejudicial attitudes of the state and society in general against such persons.

#### **RESPONDENT'S SIDE:**

The respondents side argued that the right to privacy under Article 21 is not unbridled and is subject to restrictions. This right cannot be misused. These sexual acts leads to abuse of one's organs and no person has the personal liberty to do so.<sup>15</sup> Such acts are undignified and is deprecatory to the Constitutional right to dignity. Section 377 is relevant morally and constitutionally and it takes note of the ancient Indian legal systems and principles.<sup>16</sup> Since every society and country is based on different values and historical situations, it is imperative that those values must be respected and be abided by all persons belonging to that country or society.<sup>17</sup>

Further, it was argued by the respondents that persons indulging in unnatural sexual practices which is subject to penalty under Section 377 makes them more susceptible to harmful diseases such as HIV/AIDS. Homosexual persons are more vulnerable of contracting HIV/AIDS than heterosexual persons. The Right to privacy must not extended to the situation where persons can potentially harm themselves. If Section 377 is declared unconstitutional, family structure and institution of marriage will negatively affected. Increasing homosexual activity for money

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<sup>14</sup> Supra note 6, at 11.

<sup>15</sup> *Id.* at 12

<sup>16</sup> *Id.* at 13

<sup>17</sup> *Id.*

would lead to corruption in the minds of young generations.<sup>18</sup> Decriminalising homosexuality would affect religion. Article 25 should also be taken into consideration. Sexual acts of unnatural nature could potentially hurt or injure persons engaging in it.<sup>19</sup> Since, the objective of criminal law is protection of individuals, decriminalising homosexuality would lead to injurious sexual acts between persons that in turn would defeat the objectives of criminal law.<sup>20</sup>

### **DECISION:**

It was unanimously declared by the five-judge bench of the Supreme Court that Section 377 of the Indian Penal Code, 1860 in situations where private and consensual carnal intercourse among two consenting individuals is involved. As long as public order and decency is maintained, no sexual act private in nature shall be penalised. The Court declared that Section 377 violates Articles 14, 15, 19 and 21 of the Constitution. This landmark judgement overruled the judgement given by the supreme court itself in the case of Suresh Kumar Koushal v. Naz Foundation in 2013. However, non-consensual acts with a man, woman and any sexual act involving an animal against “the order of nature” was still criminal.

### **SUMMARY OF JUDGEMENT:**

The court referred to the NALSA judgement to reiterate that gender identity is inherent and innate in a person. It is a natural inclination of a person. Restricting the right to natural choice of gender identity is violating the right to life and liberty under Article 21. Section 377 is also violative to one’s dignity and privacy. The right to privacy under article 21 also includes the right to be left alone. Justice Indu Malhotra has further included the concept of “Spatial and Decisional privacy”.<sup>21</sup> Hence, the persons belonging to the LGBTQ community have the right to perform sexual acts in private and the state should not intervene in that. Section 377 is also violative to the freedom of expression guaranteed under article 19(1)(a). Laws and their application should not have a chilling effect on the freedom of expression of the person. Private sexual acts between two consenting adults also do not affect public morality and decency.

Intimate acts between consenting adults belonging to the same sex is beyond the purview of the interests of the state. The laws relating to Sodomy violate Article 14 and 15 of the

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<sup>18</sup> *Id.* at 13

<sup>19</sup> *Id.* at 13

<sup>20</sup> *Id.* At 15

<sup>21</sup> *Id.* at 217

constitution as it targets a particular section of the society of a particular sexual orientation. The court relied upon the Judgement of *Shakti Vahini vs. Union of India*<sup>22</sup> to state that an adult has the right to choose their own life partner and this choice is part of individual liberty of a person.

Then Chief Justice, Dipak Misra discussed the principles of Transformative constitutionalism which states that the constitution must be a guide to progressive change in society. Constitutional morality would be placed above social morality in order to secure the rights of the LGBTQ community who are the sexual minority and often face social stigma. The legislative history of section 377 was also discussed where it was stated that the society prevailing at the time has long transformed into a progressive society, hence, it is of no use to keep an outdated law like that of Section 377. The Court directed that the government and the law enforcement agencies must treat sexual minorities equally without any prejudice. If section 377 still prevails the situation of HIV/AIDS among homosexual people will worsen as they will have no access to proper healthcare. Discrimination against same-sex relationships should not be present at all and the law must be change to include the needs and protection of the LGBTQ community. They must be granted equal rights in all situations to that of the other citizens of India.

### **CRITICAL ANALYSIS:**

This landmark judgement has been very critical to ensure equal treatment of LGBTQ persons. The principle of Transformative Constitutionalism in this situation has been successful in reducing, to certain extent the stigma present with belonging in the LGBTQ community. It has played a vital role in acceptance of same-sex relationships in the society. The judgement has rightfully declared Section 377 of the IPC unconstitutional as it targets a particular sexual orientation and stifles them of their Freedom of Expression. Even if a small section of society is involved, any law that subjugates the rights of even a small number of persons should be declared unconstitutional. It is not an excuse to keep a discriminatory law prevalent in the society. Hence, the judgement has provided Justice to LGBTQ persons to some extent, however, the society has still a long way to go to completely and in an open-minded fashion accept such relationships and people.

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<sup>22</sup> Supra note 13