

*The very existence of Section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated .*

## **[CASE BRIEF] Navtej Singh Johar vs Union Of India through Secretary of Ministry Of Law And Justice**

**Case name:** Navtej Singh Johar vs Union Of India through Secretary of Ministry Of Law And Justice

**Case number:** WRIT PETITION (CRIMINAL) NO. 76 OF 2016

**Court:** The Hon'ble Supreme Court

**Bench:** Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice Rohinton Fali Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra

**Decided on:** 06.09.2018

**Relevant Act/Sections:** Section 377 of the Indian Penal Code, 1860, Articles 14, 15, 19, and 21 of the Constitution of India

### ➤ **BRIEF FACTS AND PROCEDURAL HISTORY:**

1. The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860. Section 377 was titled 'Unnatural Offences' and stated that-
  - i) *Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with 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.*

2. The issue in the case originated in 2009 when the Delhi High Court, in the case of *Naz Foundation v. Govt. of N.C.T. of Delhi* 160 Delhi Law Times 277, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex. In 2014, a two-judge bench of the Supreme Court, in the case of *Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1*, overturned the Delhi HC decision and granted Section 377 “the stamp of approval’. When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter.

➤ **ISSUES BEFORE THE COURT:**

1. Whether Section 377 violates Article 14 and 15 by allowing discrimination on the basis of "sexual orientation" and "gender identity"?
2. Whether Section 377 violates the fundamental right to expression under Article 19(1)(a) by criminalizing the gender expression of persons belonging to the LGBTQI+ community?
3. Whether Section 377 violates right to autonomy and dignity under Article 21 by penalizing private consensual acts between same-sex persons?
4. Whether the rationale of the Supreme Court judgment in the Suresh Kaushal case sound in its understanding of morality as social morality?

➤ **RATIO OF THE COURT:**

- 1) The Petitioner in the present case, *Navtej Singh Johar*, a dancer who identified as part of the LGBT community, 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 Art. 21 of the Constitution of India .
- 2) Furthermore, he sought a declaration that Section 377 was unconstitutional. The Petitioner also argued that Section 377 was violative of Art. 14 of the Constitution as it did not define “carnal intercourse against the order of nature” leaving scope for ambiguity. There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex.

- 3) Among other things, the Petitioner further argued that Section 377 was violative of Art. 15 of the Constitution since it discriminated on the basis of the sex of a person's sexual partner, it infringed the rights under Article 19 since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of 'a certain choice or manner of living'.
- 4) The petitioners highlighted that the rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprise 7- 8% of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity. They contended that a person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed with a stigma. The impact of sexual orientation on an individual's life is not limited to their intimate lives but also impacts their family, professional, social and educational life.
- 5) As per the petitioners, such individuals need protection more than the heterosexuals so as to enable them to achieve their full potential and to live freely without fear, apprehension or trepidation in such a manner that they are not discriminated against by the society openly or insidiously or by the State in multifarious ways in matters such as employment, choice of partner, testamentary rights, insurability, medical treatment in hospitals and other similar rights arising from live-in relationships which, after the decision in **Indra Sarma v. V.K.V. Sarma [Criminal Appeal No. 2009 of 2013]** , is recognized even by the Protection of Women from Domestic Violence Act, 2005 for various kinds of live-in relationships. The same protection, as per the petitioners, must be accorded to same sex relationships.
- 6) The court observed Section 377 operates in a vastly different manner for two classes of persons based on their "sexual orientation" i.e. the LGBT persons and heterosexual persons. Section 377 penalises all forms of non penile-vaginal intercourse. In effect, voluntary consensual relationships between LGBT persons are criminalised in totality. The import and effect of Section 377 is that while a consensual heterosexual relationship is permissible, a consensual relationship between LGBT persons is considered to be 'carnal', and against the order of nature.
- 7) Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the basis

of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.

- 8) In **National Legal Services Authority v. Union of India & Ors. (2014) 5 SCC 438** this Court *granted equal protection of laws to transgender persons. There is therefore no justification to deny the same to LGBT persons.* A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality. It was also stated that both gender and biological attributes constitute distinct components of sex.
- 9) The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes includes one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 15 and 16, therefore includes discrimination on the ground of gender identity. The expression sex used in Articles 15 and 16 is not just limited to biological sex of male and female, but intended to include people who consider themselves neither male nor female.
- 10) In **Common Cause (A Registered Society) v. Union of India and Anr., (2018) 5 SCC 1**, this court observed that *Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality.* LGBT persons have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression.
- 11) The court stated that an examination of Section 377 IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality.

- 12) Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution. People have the right to express their self-identified gender by way of speech, mannerism, behaviour, presentation and clothing, etc. The Court also noted that like gender identity, sexual orientation is integral to one's personality, and is a basic aspect of self-determination, dignity and freedom. The proposition that sexual orientation is integral to one's personality and identity was affirmed by the Constitution Bench in *K.S. Puttaswamy v. Union of India (2017) 10 SCC 1*. Denying the LGBT community its right to privacy on the ground that they form a minority of the population would also be violative of their fundamental rights.
- 13) Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults.
- 14) It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature. Sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will. The choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice, and an expression of their autonomy and self-determination.
- 15) The mere fact that the LGBT persons constitute a "miniscule fraction" of the country's population cannot be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country who are equally entitled to the enforcement of their Fundamental Rights guaranteed by Articles 14, 15, 19, and 21.
- 16) The conclusion that had upheld the constitutionality of Section 377 in case of **Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. (2014) 1 SCC 1** had to be overruled. Once it is brought to the notice of the Court of any violation of the Fundamental Rights of a citizen, or a group of citizens the Court will not remain a mute spectator, and wait for a majoritarian government to bring about such a change by way of an amendment. The Court finally held that-

*The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.*

➤ **DECISION HELD BY COURT:**

1. In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.
2. It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion. ii. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re- opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.