

CASE COMMENT: NAVTEZ SINGH JOHAR AND OTHERS v UNION  
OF INDIA, WRIT PETITION CRIMINAL NO. 76 OF 2016

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**INTRODUCTION**

On 6<sup>th</sup> September 2018, the bench of five judges of the Supreme Court of India partially struck down Section 377 of Indian Penal Code, 1860. Section 377, which criminalized carnal intercourse against the order of nature was declared unconstitutional in so far as it criminalized consensual sexual conduct between adults of the same sex. The petition was filed by Navtej Singh Johar and thereby he challenged Section 377 of IPC on the grounds of violation of constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination. The court found Section 377 to be violative of Article 14, Article 19 and Article 21 of the Constitution of India. The court declared that consensual sexual activity between adults is not a criminal offence now, regardless of sexual orientation and gender identity. But, non- consensual sexual activity between LGBT persons and also sex with minors continues to be criminal activity. The court also upheld provisions in Section 377, IPC that criminalize sexual acts performed on animals or non- consensual acts. The five judge bench consisted of Justice Dipak Misra, Justice Ajay Manikrao Khanwilkar, Justice DY Chandrachud, Justice Indu Malhotra, Justice Rohinton Nariman. All the judges reached an effective conclusion as the decision delivered by them was unanimous. However, the judgment was plural in the sense that they gave an opportunity of different reasons for reaching the conclusions.

## FACTS OF THE CASE

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 (Section 377) insofar as it applied to the consensual sexual conduct of adults of the same sex in private. Section 377 was titled ‘Unnatural Offences’ and stated that “[w]hoever 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.”

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<sup>1</sup>, 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<sup>2</sup>, overturned the Delhi HC decision and granted Section 377 “the stamp of approval” [p. 11, para. 9]. 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.

While the aforementioned judgments were the main, there were other cases that are to be mentioned. In instances where men were sexually abusing boys by making them perform both oral and anal sex, such cases were read into section 377 and rigorous punishment of 6 years imprisonment along with a fine was imposed.<sup>3</sup> In another such case, where owing to the fact there was consensual intercourse between a young boy and a man, the rigorous imprisonment was reduced to a period of 6 months.<sup>4</sup> A man and a young girl were punished under section 377 read with section 511, for fellatio.<sup>5</sup> In a case where the father had oral intercourse with a friend of his young daughter, it was held that such an act was against the order of nature, due to which he was imposed a fine of Rs. 1,000.<sup>6</sup>

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

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<sup>1</sup> 111 DRJ 1 (2009)

<sup>2</sup> (2014) 1 SCC 1

<sup>3</sup> Childline India Foundation and another v. Allan John Walters and Others, (2011) 6 SCC 261.

<sup>4</sup> Fazal Rab Choudhary v. State of Bihar, (1982) 3 SCC 9.

<sup>5</sup> Lohana Vasantlal Devchand v. State, AIR 1968 Guj 258

<sup>6</sup> Calvin Francis v. State of Orissa, 1992 1 OLR 316.

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 (Constitution). 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 (Right to Equality Before the Law) because it was vague in the sense that it did not define “carnal intercourse against the order of nature”. [p.25, para 26] There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex. Among other things, the Petitioner further argued that (i) Section 377 was violative of Art. 15 of the Constitution (Protection from Discrimination) since it discriminated on the basis of the sex of a person’s sexual partner, (ii) Section 377 had a “chilling effect” on Article 19 (Freedom of Expression) since it denied the right to express one’s sexual identity through speech and choice of romantic/sexual partner, and (iii) 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.” [p. 22, para. 21] The Respondent in the case was the Union of India. Along with the Petitioner and Respondent, certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case.

The Union of India submitted that it left the question of the constitutional validity of Section 377 (as it applied to consenting adults of the same sex) to the “wisdom of the Court”. [p. 270, para. 8] Some interveners argued against the Petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the “constitutional concept of dignity” [p. 32, para. 39], that such acts would increase the prevalence of HIV/AIDS in society, and that declaring Section 377 unconstitutional would be detrimental to the institution of marriage and that it may violate Art. 25 of the Constitution (Freedom of Conscience and Propagation of Religion).

## **ISSUES OF THE CASE**

1. Whether Sec 377 of IPC is violative of Right to Equality under Art 14 of the constitution?
2. Whether Sec 377 is violative of Freedom of Speech and Expression under Art 19 of the Constitution?
3. Whether Sec 377 is violative of Right to Life with dignity and privacy under Art 21 of the Constitution?
4. Whether discrimination based on sexual orientation under Sec 377 makes it violative of Art 15 of the Constitution?
5. Whether Sec 377 is arbitrary as it makes consensual relationship a crime on th ground of it being against the order of nature?

## ANALYSIS OF THE CASE

### Constitutional Aspects

#### 1. Article 14

So as to demonstrate that Article 14 is violated, Sec. 377 should be made up to the twin test – that is, the arrangement that exists must be established on comprehensible differentia and that the differential must be liable to a nexus that is looked to be accomplished by the provision.<sup>7</sup> The order is that of the one between the LGBTQ+ people group and others. At the end of the day, it is between 'unnatural sexual intercourse' and 'natural sexual intercourse'. The basis behind this grouping depends on the way that the arrangement looks to shield women and kids from such 'unnatural' intercourse. This nexus is objective, yet the insurance is as of now unequivocally ensured to women under Section 375 and to youngsters under the Protection of Children from Sexual Offences Act. This segment, aside from ensuring such assurance, is additionally in charge of the one condemning on the whole the lives of the LGBTQ+ people group. This area is in charge of more backwardness as opposed to dynamic reasoning. Consequently, plainly this area disregards Article 14. At the point when there is any law (inside the importance of Article 13) that is discretionary, at that point that law is to have violated the new doctrine of Article 14, that is the Doctrine of Arbitrariness'. The segment, had it avoided non-consensual acts between people, its nexus would have been exceptionally self-evident. In any case, this segment neglects to take in the matter of assent itself – that is, it avoids sexual acts between consensual grown-ups as well. This is a proportion of assertion and henceforth violative of Article 14.

#### 2. Article 15(1)

D.Y.Chandrachud, J.provides the light in which Art. 15 is to be changed. As indicated by him, any demonstration is violative of Art. 15 just when the separation depends on any of the grounds as determined in Art. 15(1). However, this infringement is confined to just the grounds that are determined in the Article, over which it is viewed as an infringement of Art.14. To substantiate, there grounds referenced in Art. 15(1), are "religion, race, standing, sex, place of birth" as it were. In case of any separation

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<sup>7</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

emerging out of any of the grounds or a blend of any of the grounds referenced here, at that point just Art. 15(1) is pulled in. Then again, on the off chance that there is segregation on any of the grounds referenced, alongside some different ground(s), at that point Art. 15(1) isn't pulled in. The word 'sex' given in Article 15(1) looks to incorporate the gender personality of a person as well as the sexual identity.<sup>8</sup> D.Y.Chandrachud, J. mentioned it to be the right position because of which Section 377 was held to have been violative of Article 15(1), on grounds of oppression the LGBTQ+ people group.

### 3. Article 19(1)(a)

Article 19(1)(a) tries to ensure the Fundamental Right of Freedom of Speech and Expression. This right isn't outright in nature and is liable to sensible confinements given under Article 19(2). Decency and morality are held to be a couple of the sensible confinements, with the presumption of an objective and consistent limit.<sup>9</sup> The accompanying case brings up the issue of whether public order and morality can be named as reasonable restriction according to Art. 19(2). Individuals are so startled of society's badgering and shunning that they decide not to communicate to the degree of living a falsehood. At the point when the very presence has been made an untruth, one can just say that Article 19 is damaged for those people. The case held that a unreasonable restriction was forced upon the LGBTQ+individual's freedom of expression just as the freedom to choose a partner.

### 4. Article 21

Article 21 while discussing individual freedom additionally contains different understood rights, for example, right to individual dignity, right to choose and right to privacy. The right to life and personal liberty can't be translated without the right to dignity. Respect, life, and personal liberty are joined ideas which are all ensured under Article 21. Indeed, the right to live with respect has been perceived in the UDHR. Section 377 has denied the LGBTQ+ people group of their respect. In addition, Section

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<sup>8</sup> National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438

<sup>9</sup> S. Khushboo v. Kanniammal and Anr., (2010) 5 SCC 600.

377 encroaches on the person's entitlement to protection just as held in the Puttuswamy case. This is on the grounds that the right to pick and the declaration of such decisions are twin rights perused into Article 21, which the network is being denied of. Article 21 ensures another guarantees right – that is, the right to health and healthcare. The LGBTQ+ people group isn't allowed this previously mentioned right. This people group experiences different psychological illness, for example, sorrow and self-destructive propensities. The individuals from this network are unfit to look for the suitable medicinal services because of the shame connected to the same. D.Y. Chandrachud, J adds to the idea of ideal to medicinal services, by saying that separated from the Constitution of India ensuring the equivalent, India is involved with numerous global understandings, through which this privilege is perceived. A portion of the bargains and contracts that India is a signatory to is ICESCR (where Art. 12 is about the equivalent) and UDHR. Whenever physical and psychological wellness of Indians appears to be very outlandish for some, there is certainly no sexual health guaranteed to the individuals from the LGBTQ+ community.<sup>10</sup> Sec. 377 has put a damper on the right to health for the individuals from the LGBTQ+ people group. Owing to the previously mentioned rights being influenced, it is built up that Sec. 377 violates Art. 21.

## 5. Yogyakarta Principles

Another point of view that has been conveyed to fore is that of the Yogyakarta Principles.<sup>11</sup> In the judgment that is wrote by RF Nariman, J, the significant rights and how Section 377 violates the equivalent was clarified. They are as per the following:

These standards have defined what a sexual orientation is, and have explicitly referenced that sexual introduction need not be constrained to any sex (the inverse, the equivalent or all). The primary guideline of the Yogyakarta unequivocally expresses that every single person paying little mind to their sex and sexual personality are to be given an equivalent ideal to make the most of their human rights, which the State should advance. The second guideline expresses that there ought to be correspondence and not separation among individual dependent on either their sex or their sexual character. The

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<sup>10</sup> World, Health Organisation, 'Gender and Human Rights: Defining Sexual Health', 2002

<sup>11</sup> Yogyakarta Principles on the Application of Law in Relation to Issues of Sexual Orientation and Gender Identity

presence of Sec. 377 has put a damper on this. In the event that the LGBTQ+ people group individuals are still aggrieved for their personality, at that point the equity as ensured by these standards, isn't secured. Truth be told, it is expressly expressed that in case of any presence of correctional arrangement that deny consensual sexual movement between such people, that arrangement should be canceled. The third rule expresses that nobody should be compelled to experience any medicinal methodology or compelled to suppress their way of life as a lawful need for influencing their change. The pertinence of this announcement is that lawfully, one can't achieve a law in the Parliament influencing the same. The LGBTQ+ people group has been unequivocally ensured appropriate to life and ideal to security as the fourth and fifth principles respectively. There are directions given to the State just as to how to advance just as control the same. Ironically, the nineteenth right determined is with respect to right of the right to speak freely and articulation for the LGBTQ+ people group. This rule expresses that the network must be permitted to express their personality anyway they may like, Art. 14, Art. 15(1), Art 19(1)(a) and Art. 21 are obviously reflected in these standards.

## **Philosophical Aspects**

### **1. Transformative Constitutionalism**

Transformative Constitutionalism includes changing the Indian culture with the goal that the beliefs as cherished in the Preamble of the Constitution are embraced in the type of equity, freedom, balance, and clique. Our Constitution specifically can be proclaimed as a standout amongst the best instances of change, for there have been different alterations to the Constitution to make up for lost time with the regularly evolving occasions. Different decisions in different locales have suitably portrayed the significance of transformative constitutionalism. This idea must be given acknowledgment and significance now, for the general public has changed enormously in the last one hundred and fifty-eight years (since IPC was established in 1860). The NALSA judgment has assumed an essential job in delivering changes in the lives of the transgenders. Be that as it may, the general public still harbors negative considerations with respect to the individuals from the LGBTQ+ people group. Taking motivation from the in advance of referenced case, one can say that it is conceivable to change the

view of the general public through this judgment too. Both these occasions are instances of how transformative constitutionalism has an impact in changing the general public by ensuring that key rights are accessible to every one of the general population.

## 2. Constitutional Morality

Sacred ethical quality stems from the Constitution and is another impression of the standards as indicated by the Constitution of India (in the Preamble). Every individual is extraordinary and the general public overall is conceded opportunity to be so in such manner. Be that as it may, some of the time, the greater part in the general public has a viewpoint that specific angles must be in a specific way, and if there should arise an occurrence of contrasts, the general public all in all excludes the individual/individuals who is/are unique. One such 'distinction' that isn't endured is the LGBTQ+ people group. This is against Art. 14, as cherished in the Constitution. The ethical quality of the Constitution ensures that separation of any kind by the lion's share should be ceased. Sacred ethical quality ought to beat open profound quality just to guarantee equity just as every single other perfect that the Constitution represents.<sup>12</sup> Besides, any arrangement that misses the mark regarding maintaining sacred profound quality would be proclaimed unlawful, similar to the case with Sec. 377.

## 3. Dignity

Another philosophical guideline connected for this situation is that of the idea of pride. This is ensured through Art. 21 of the Indian Constitution, to the degree that human life is lost without respect. However, respect is something a great deal more significant than a large portion of the occasions it is beyond the realm of imagination to expect to connect an able definition to the equivalent. What is presently viewed as the Magna Charta of the world, the UDHR has its first article giving prime significance to poise. Michele Finck in his book, has given a canny elucidation of how the pride of the LGBTQ+ people group is undermined. He says that when one attributes nobility to a gay individual, at that point the individual's viewpoint changes from 'disturb' to 'mankind'. This is a genuine proclamation that mirrors the reality with respect to how

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<sup>12</sup> Government of NCT of Delhi v. Union of India and Ors., 2018 (8) SCALE 72

much the network accordingly is denied of. At the point when there is a criminal arrangement that disregards the pride of a LGBTQ+ individual, the law is only letters, without the soul. The majority of this is pertinent for the LGBTQ+ people group individuals in our nation.

#### 4. Indirect Discrimination

D.Y. Chandrachud, J. draws out a significant idea of 'circuitous segregation'. This is characterized by an order of the European Parliament, as an arrangement that achieves a detriment for individuals having a place with a specific sex, except if there is a genuine purpose behind such an arrangement, for example, governmental policy regarding minorities in society<sup>13</sup>. On account of Sec. 377, there is no real reason and the individuals from the LGBTQ+ face an inconvenience with this area. Obviously, the individuals from this network face roundabout separation as well.

### **INTERPRETATION OF THE CASE**

This judgment is a new breath of air for the LGBTQ+ people group. They are at long last lawfully permitted to act naturally. To feel that the whole network was not permitted to act naturally as far as their sexuality and subsequently quell the equivalent for such a large number of years currently is immense. They needed to confront the injury of being 'in the storage room' for an exceedingly prolonged stretch of time, for they realized that after turning out they would be tormented and shunned. They knew the cold-bloodedness of the general public, particularly when somebody accomplishes something that is against the ethics of the said society. The brutality of the general public isn't only reflected in the psychological injury. There is a physical viewpoint to it, which would be equivalent to serious maltreatment. The general public's response may have even prompted a few suicides. A few people were disregarded explicitly in light of the way that they turned out with respect to their sexual inclinations because of the impact of one punitive arrangement – Sec. 377.

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<sup>13</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006

A significant truth that will be noted is that the area has not been totally struck down. The area still denies brutishness. It has likewise decriminalized the sexual relations between the consenting grown-ups of the LGBTQ+ people group. As the word utilized may be 'grown-ups,' unmistakably this segment is as yet pertinent of a wide range of sex between minors.

This choice is the initial step that is taken towards bringing the status of the LGBTQ+ people group part to an equivalent status with that of a non-LGBTQ+ part. It has took into account the LGBTQ+ people group individuals to pick a sexual accomplice of their decision. Through this choice, the separation that is looked by these individuals is gotten out. This judgment is required to realize changes to these individuals as far as training, work, strategies in these establishments and so on. Voyagers are likewise individuals who ought to be considered, for this judgment presently implies that when same sex couples land in India for the travel industry, they can't be rejected a visa on the said ground.

In spite of the fact that this judgment has numerous positive outcomes, there still are angles that must be tended to, for example, marriage, separate, selection, guardianship, progression, and so forth. As per the respondents, the announcement of the illegality of Sec. 377 would result in the breakdown of the whole organization of marriage. The Hon'ble Justices have depended on different decisions of different locales that has legitimized marriages amongst the LGBTQ+ people group members. The impact has not been negative to the foundation of marriage, because of which a protected suspicion can be taken for the equivalent in our nation. The judgment temporarily discusses gay marriage. In its passing substance, it alludes to the reasoning of the establishment of marriage. It neglects to address different parts of family law.

Another angle that the judgment has not tended to is that of assault laws or sexual violations against this network. On the off chance that consenting sexual relations between individuals from the LGBTQ+ people group is presently legitimate, at that point the assault laws ought to be revised to suit this significant change. The law should change to suit the way that the attacker isn't a man and the unfortunate casualty isn't a lady.

## **CONCLUSION**

The case of Navtej Johar has decriminalized Sec. 377 as far as sexual intercourse between consenting adults of the LGBTQ+ community is considered. This case allowed for the identities of various people of the LGBTQ+ community to be backed by law across the country. This section reflected the narrow and biased opinion of the drafters of the Indian Penal Code, 1860 – Lord Thomas Babington Macaulay. In fact, the current British Prime Minister is said to have spoken out against the outdated law that criminalizes the actions of the LGBTQ+ community. She apologized for the existence of the ancient statute during colonization, which victimized an entire community. Some of the colonized countries continue to have such a law in place, while some have gone ahead by allowing the LGBTQ+ members marriage rights, adoption rights, etc. This judgment is the start of a new beginning – one that is absolutely necessary, not only for the members of the LGBTQ+ community but also for constitutional morality.