

NAVTEJ SINGH JOHAR & ORS. V UNION OF INDIA THR. SECRETARY MINISTRY OF LAW AND JUSTICE

Summary

Historians have long argued that homosexuality was not prohibited in pre-colonial India.¹ Many religious scriptures and mythical texts in India describe homosexuality in detail, most portraying it as a natural occurrence.² Homosexual sex was criminalized by the British Raj through its enactment of Section 377 of the Indian Penal Code.³ Even though Section 377 is facially neutral, it had a disparate impact on queer couples.⁴ In a landmark judgment, seventy years after independence, the Supreme Court of India decriminalized consensual intercourse between adult same-sex couples, deeming Section 377 a violation of the Constitution.⁵ In its decision, the Supreme Court of India focused on the importance of individual identity and its constitutional protections.⁶

Procedural history

In July 2009, the Delhi High Court first deemed portions of Section 377 unconstitutional in *Naz Foundation v. Govt. of NCT of Delhi*.⁷ Soon, various religious groups and individuals challenged this judgment, and the Supreme Court of India overturned the Delhi High Court in 2013 in *Suresh Kumar Koushal v. Naz Foundation*,⁸ explaining that this matter should be left to the Parliament. The matter of Section 377 was introduced in the Parliament in 2015, where it was rejected. The Supreme Court then announced in 2018 that it would reconsider its decision in *Suresh Kumar Koushal v. Naz Foundation*. Finally, in September 2018, through its judgment in *Navtej Singh Johar & Ors. v. Union of India Thr. Secretary Ministry of Law and Justice*, the Supreme Court struck down portions of Section 377 that criminalized consensual intercourse between same-sex couples.⁹

Issues in the Case

1. Does Section 377 violate the Right to Equality under Article 14 of the Constitution by engaging in arbitrary classification?
2. Does Section 377 violate Freedom of Speech and Expression under Article 19 of the Constitution?

¹ Vikas Pandey, *Why legalising gay sex in India is not a Western idea*, BBC NEWS (Dec. 31, 2018) <https://www.bbc.com/news/world-asia-india-46620242>

² *Id.*

³ Pandey, *supra* note 1.

⁴ *Naz Foundation v. Govt. of NCT of Delhi* (2009) 111 DRJ 1, at para 94.

⁵ *Navtej Singh Johar & Ors. v. Union of India Thr. Secretary Ministry of Law and Justice* (2018) https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

⁶ *Id.*

⁷ (2009) 111 DRJ 1

⁸ (2014) 1 SCC 1

⁹ See *Navtej Singh Johar v. Union of India* (2018)

https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

3. Does Section 377 violate the Right to Privacy and the Right to Life with Dignity under Article 21 of the Constitution?
4. Does Section 377 engage in discrimination prohibited by Article 15 of the Constitution?

Analysis of the Issues

1. *Does Section 377 Violate the Right to Equality Under Article 14 of the Constitution by Engaging in Arbitrary Classification?*

The right to equality under Article 14 of the Indian Constitution states that all persons are equal before the law.¹⁰ If a statute treats a class of individuals unequally based on suspect classification, it will face judicial scrutiny.¹¹ A classification created by a statute is suspect if it targets a discrete and insular minority. The Court noted that “discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the ‘mainstream’.”¹² However, the Constitution does allow the legislature to create some laws that classify individuals,¹³ if such laws fulfill two requirements: first, the classification made by the law must be founded on “intelligible differentia” (i.e. the classification must be based on a reasonable distinction), and second, such “differentia” must have a rational nexus with the objective of that law.¹⁴ If a law fails to meet these two requirements, it is deemed to be arbitrary and thereby violative of the right to equality.

The Court in its judgment here tested Section 377 under these two constitutional requirements. First, for the reasonability of its classification the court discusses how Section 377 was historically intended to classify and penalize those who engage in homosexual acts by proscribing “intercourse against the order of nature.” For Section 377 to be upheld as constitutional, the government must clarify the difference between ordinary intercourse and “intercourse against the order of nature.” In *Suresh Kumar Koushal v. Naz Foundation*¹⁵ (“Naz”) (the previous case where the Supreme Court dealt with Section 377), the government could not formulate any uniform test to identify which acts were ordinary intercourse and which were “intercourse against the order of nature.”¹⁶

When Section 377 was written, procreation was considered as the sole purpose of intercourse and any deviation from such intercourse, such as intercourse between same sex couples (and thereby homosexuality), was thought of as “unnatural.”¹⁷ But, the court explains, homosexuality is no longer considered “unnatural” in today’s society, citing a statement by

¹⁰ *Id.* at 144. *All page numbers for *Navtej Singh Johar v. Union of India* (2018) are based on the page numbers of the PDF (hyperlinked above).

¹¹ *Id.* at 60.

¹² *Id.* at 104.

¹³ *Id.* at 144.

¹⁴ *Id.* at 144–45.

¹⁵ 2014 1 SCC 1

¹⁶ *Navtej Singh Johar v. Union of India* (2018) at 293–94.

¹⁷ *Id.* at 19

the American Psychological Association.¹⁸ Therefore Section 377's classification between natural and unnatural sex is no longer valid.

Under the second constitutional requirement, the government must explain what legitimate objective it intends to achieve through this classification and how the classification is tailored to achieve that objective. The Court points out that the proscription of consensual sex between same-sex couples under Section 377 is not based on any rational criteria.¹⁹ Consensual sex between competent adults cannot be tagged as "intercourse against the order of nature."²⁰ Furthermore, the language of Section 377 fails to distinguish between homosexual and heterosexual acts and inadvertently criminalizes consensual sex between both categories of individuals.²¹ The Court states that as long as Section 377 penalizes consensual sexual acts of competent adults, it is arbitrary.²²

The Court concludes by comparing Section 375 to Section 377. Section 375 classifies and penalizes only non-consensual sex.²³ Section 375 states that consensual sex between competent consenting adults is not penal.²⁴ This renders Section 377 anomalous and unsustainable.²⁵ Therefore, the Court concludes, Section 377 is unconstitutional because it creates an arbitrary classification and violates the right to equality of LGBTQ individuals.

2. *Does Section 377 Violate Freedom of Speech and Expression Under Article 19 of the Constitution?*

The freedom of speech and expression under Article 19 of the Constitution protects the right to freely express one's thoughts and opinions.²⁶ However, this right is not absolute, the legislature can place restrictions of "decency and morality" on it.²⁷ For these restrictions to be constitutional, they must be "reasonable restrictions" under Article 19.²⁸ Restrictions that are arbitrary and excessive in nature are not reasonable and are deemed unconstitutional.²⁹

Here, Section 377 seeks to prohibit private acts of consenting adults. Such private acts cause no public disturbance or harm to public decency and morality.³⁰ To the extent that LGBTQ individuals engage in public displays of affection, such acts cannot be penalized unless they amount to public indecency and have the potential to disrupt public order.³¹ Therefore, Section 377 creates overbroad and unreasonable restrictions on the freedom of speech and expression of the LGBTQ community.³² Section 377 targets homosexuals based on an archaic

¹⁸ *Id.* at 94.

¹⁹ *Id.* at 462–64.

²⁰ *Id.* at 463.

²¹ *Id.* at 293.

²² *Id.* at 148.

²³ *Id.* at 136.

²⁴ *Id.* at 138.

²⁵ *Id.* at 138.

²⁶ *Id.* at 483.

²⁷ *Id.* at 150.

²⁸ *Id.* at 149.

²⁹ *Id.* at 149–50.

³⁰ *Id.* at 151.

³¹ *Id.* at 152.

³² *Id.* at 152.

majoritarian disdain towards this minority from the British era. The Constitution requires that the freedom of expression be protected against such oppressive majoritarian beliefs forced onto marginalized communities.³³ Recently, the Court in *National Legal Services Authority v. Union of India*³⁴ (“NALSA”) established that transgender persons have the right to express their identity freely.³⁵ As a result, Section 377 violates Article 19 of the Constitution.

3. *Does Section 377 Violate the Right to Privacy and the Right to Life and Dignity Under Article 21 of the Constitution?*

The right to privacy, implied in the right to life and liberty under Article 21 of the Constitution, protects individual autonomy.³⁶ Under the principle of autonomy, individuals have sovereignty over their body, as well as the autonomy to engage their body in intimate acts with another in private spaces.³⁷ An individual’s exercise of sexual autonomy includes the “right to choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue.”³⁸ Such “choice of sexuality is at the core of privacy”³⁹ and such autonomy is an essential part of an individual’s dignity and identity.⁴⁰

Here, Section 377 infringes on this autonomy by criminalizing consensual sexual acts of competent adults, thereby violating the right to privacy and dignity under Article 21.⁴¹ Supporters of Section 377 argue that because Section 377 only infringes on the rights of a “miniscule fraction of the country’s population” (the LGBTQ community), the law need not be struck down.⁴² But, the Court explains, such an argument is not a sustainable basis for denying constitutional rights.⁴³ The right to privacy has been deemed as a fundamental right because it is not limited to the majority population and its exercise does not hinge on its favorableness amongst majority of the population.⁴⁴ By taking away the protection of if this right from the LGBTQ community, we force them to conform to majoritarian views and stereotypes of sexuality.⁴⁵ Such oppression is a violation of the LGBTQ community’s fundamental right to privacy and dignity. Therefore, the court concludes, Section 377 is unconstitutional.

³³ *Id.* at 77.

³⁴ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

³⁵ *Navtej Singh Johar v. Union of India* (2018), at 484.

³⁶ *Id.* at 96-97

³⁷ *Id.* at 476-77.

³⁸ *Id.* at 345.

³⁹ *Id.* at 337.

⁴⁰ *Id.* at 477.

⁴¹ *Id.* at 473.

⁴² *Id.* at 103.

⁴³ *Id.* at 103.

⁴⁴ *Id.* at 103-04

⁴⁵ *Id.* at 339-41.

4. Does Section 377 Engage in Discrimination Prohibited by Article 15 of the Constitution?

Article 15 of the Constitution prohibits discrimination on the basis of race, religion, caste, sex, or place of birth⁴⁶ and guarantees equal protection to all citizen. In *NALSA*,⁴⁷ the Court extended this protection to sexual orientation.⁴⁸ The court explained that sexual orientation forms an inherent part of an individual's identity and must be protected against discrimination.⁴⁹ The Constitution will not stand behind the "discrimination against a politically disempowered minority based on the prejudices of a majority."⁵⁰

Here, Section 377 discriminates on the basis of sexual orientation because it criminalizes consensual sexual acts between competent adults of the same sex.⁵¹ Supporters of Section 377 contend that Section 377 targets all "intercourse against the order of nature," irrespective of sexual orientation.⁵² But the Court rejects this argument because in *Naz*, the Court found that Section 377 targeted specific sexual acts and highlighted certain identities.⁵³ Even though the law was facially neutral, it had a disparate impact on same-sex couples.⁵⁴ The court explained that the enforcement of Section 377 targeted same-sex couples and condemned them as criminals because they did not conform to the majoritarian conception of sexual relations.⁵⁵ Through its enforcement, Section 377 persecutes members of the LGBTQ community and pushes them into obscurity.⁵⁶ Therefore, Section 377 violates the Constitution by engaging in discrimination based on sexual orientation.

Conclusion

The five-judge bench in a unanimous decision reasoned that discrimination on the basis of sexual orientation violates the right to equality, that criminalizing private consensual sex between competent adults was violative of the right to privacy, dignity, and freedom of expression, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the society. Justice Malhotra concluded by stating that history owes an apology to the LGBTQ community for the delay in upholding of their rights.⁵⁷

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⁴⁶ *Id.* at 464.

⁴⁷ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

⁴⁸ *Id.* at 464–66.

⁴⁹ *Id.* at 152

⁵⁰ Tarunabh Khaitan, *Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (2018). *Navtej Singh Johar v. Union of India* (2018), at 323.

⁵¹ *Navtej Singh Johar v. Union of India* (2018), at 447–48.

⁵² *Id.* at 315.

⁵³ *Id.* at 460–61.

⁵⁴ *Naz*, at para 94

⁵⁵ *Navtej Singh Johar v. Union of India* (2018), at 334.

⁵⁶ *Id.* at 326–27.

⁵⁷ *Id.* at 493.

Acknowledgements

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