

**CASE COMMENT: NAVTEJ SINGH JOHAR AND ORS V UNION OF INDIA**

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**Devika P V\*****INTRODUCTION**

A hundred and fifty-eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfilment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them. To engage in carnal intercourse against 'the order of nature' risked being tucked away for ten years in jail.<sup>1</sup>

Eighty-seven years after the law was made, India gained liberation from a colonial past. But Macaulay's legacy - the offence under Section 377 of the Penal Code - has continued to exist, Gays and lesbians, transgenders and bisexuals continue to be denied truly equal citizenship seven decades after Independence. The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the Constitution. That in essence is what Section 377 denies to them.<sup>2</sup>

Navtej Singh Johar v. Union of India is a landmark judgment by the Supreme Court of India that has significantly altered the legal and social landscape for the LGBTQ+ community in India.

The Supreme Court of India on September 6, 2018, decriminalised consensual homosexual acts between adults striking down Section 377 of the Indian Penal Code (IPC) to the extent it criminalized such acts.

This judgement marks the culmination of the LGBTQ+ community's decades-long battle against marginalisation and discrimination, leading not just to a legitimisation of alternate sexual identities, but a broad-based understanding of the trappings of gender identity, and its role in an individual's life. In that sense, the judgement is germane also to jurisprudence, philosophy and politics.<sup>3</sup>

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<sup>1</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [372]

<sup>2</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [373]

<sup>3</sup> Shradha Chaudhary, 'Navtej Johar v. Union of India: Love In Legal Reasoning' (2019) 12 NUJS L. Rev. 2

## FACTS OF THE CASE

The Hon'ble Supreme Court on 6th September 2018 finally scraped down section 377, a big roadblock in the lives of the LGBTQ+ community for more than a century in the case of Navtej Singh Johar v. Union of India.<sup>4</sup> This case started when a writ petition was filed in 2016 by five petitioners namely Navtej Singh Johar (renowned Bharatanatyam dancer and a Sangeet Natak Akademy awardee), Sunil Mehra (journalist and storyteller), Ritu Dalmia (celebrity chef), Aman Nath (writer, hotelier and architectural restorer), and Keshav Suri (hotelier)<sup>5</sup> to declare Section 377 of the Penal Code to be unconstitutional. But the actual battle began from the case of Naz Foundation v Govt of NCT of Delhi which among several dismissed petitions, was the only one that was finally heard by the Delhi High Court (on the order of the Supreme Court) in 2006 as a matter of public interest.<sup>6</sup>

Naz Foundation (a sexual health NGO) challenged the constitutionality of Section 377 of the Indian Penal Code under Articles 14, 15, 19 and 21 before the Delhi High Court. The Foundation's main contention was that the police had weaponised the provision, which impeded efforts aimed at preventing the spread of HIV/AIDS. The Naz Foundation also argued that the provision was being misused to punish consensual sex acts that are not peno-vaginal.<sup>7</sup>

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Finally, in 2009, the Delhi High Court in the case Naz Foundation v. Govt. of NCT of Delhi<sup>8</sup> held that Section 377 of IPC imposed an unreasonable restriction over two adults engaging in consensual intercourse in private. Thus, it was in direct violation of their basic fundamental rights enshrined under Articles 14, 15, 19 and 21 of the Indian Constitution.<sup>9</sup>

The Supreme Court in Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors<sup>10</sup>, reversed the judgment of the High Court and held that Section 377 of the IPC did not lead to any considerable discrimination, since LGBTQ+ persons constituted a minuscule portion of the

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<sup>4</sup> Rajat Gupta, 'Rights of LGBT People in India: Navtej Singh Johar v. Union of India' (2021) 1(2) MyLawman Socio Legal Review < <https://mslr.pubpub.org/pub/i15d4bkk/release/1> > accessed 19 July 2024

<sup>5</sup> Shraddha Chaudhary, 'Navtej Johar v. Union of India: Love In Legal Reasoning' (2019) 12 NUJS L. Rev. 4

<sup>6</sup> Shraddha Chaudhary, 'Navtej Johar v. Union of India: Love In Legal Reasoning' (2019) 12 NUJS L. Rev. 3

<sup>7</sup> 'Constitutionality of Section 377 IPC' (*Supreme Court Observer*, 16 June 2023)

<<https://www.scobserver.in/cases/navtej-singh-johar-v-union-of-india-constitutionality-of-section-377-ipc-background/>> accessed 19 July 2024

<sup>8</sup> *Naz foundation v Govt of NCT of Delhi* [2009] SCC OnLine Del 1762 (Del.HC)

<sup>9</sup> Rajat Gupta, 'Rights of LGBT People in India: Navtej Singh Johar v. Union of India' (2021) 1(2) MyLawman Socio Legal Review < <https://mslr.pubpub.org/pub/i15d4bkk/release/1> > accessed 19 July 2024

<sup>10</sup> *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors* [2014] 1 SCC 1 (INSC)

population, and the power and responsibility to decriminalise the provision lay with the Parliament.<sup>11</sup>

Reviews that were filed against the aforesaid judgment, including by the Union of India, were dismissed by this Court. Meanwhile, the Supreme Court delivered an important judgment *National Legal Services Authority v. Union of India*<sup>12</sup> which construed Articles 15 and 21 of the Constitution of India as including the right to gender identity and sexual orientation, and held that just like men and women, transgenders could enjoy all the fundamental rights that other citizens of India could enjoy. Thereafter, in *K.S. Puttaswamy and Anr. v. Union of India and Ors*<sup>13</sup> a nine-judge Bench of this Court unanimously declared that there is a fundamental right of privacy which enured in favour of all persons, the concomitant of which was that the right to make choices that were fundamental to a person's way of living could not be interfered with by the State without compelling necessity and/or harm caused to other individuals.<sup>14</sup> This judgment laid the foundation for the *Navtej Singh Johar v. Union of India*.

## LEGAL ISSUES

“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?

Whether Section 377 violate AArticles14 and 15 by allowing discrimination on the basis of “sexual orientation” and “gender identity”?

Whether Section 377 violate the right to autonomy and dignity under Article 21 by penalizing private consensual acts between same-sex persons?”<sup>15</sup>

## OBSERVATION OF SUPREME COURT

The Supreme Court, while observing the judgment in *Suresh Kumar Koushal*, noted that the two-judge Bench in the case had been guided by social morality leaning on majoritarian

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<sup>11</sup> Shraddha Chaudhary, ‘Navtej Johar v. Union of India: Love In Legal Reasoning’ (2019) 12 NUJS L. Rev. 3

<sup>12</sup> *National Legal Services Authority v. Union of India* [2014] 5 SCC 438 (INSC)

<sup>13</sup> *K.S. Puttaswamy and Anr. v. Union of India and Ors* [2017] 10 SCC 1(INSC)

<sup>14</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [273,274]

<sup>15</sup> ‘Constitutionality of Section 377 IPC’ (*Supreme Court Observer*, 16 June 2023)

<<https://www.scoobserver.in/cases/navtej-singh-johar-v-union-of-india-constitutionality-of-section-377-ipc-background/>> accessed 19 July 2024

perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality.<sup>16</sup>

The judges observed that Section 377 of IPC was founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. The order of nature that Section 377 speaks of is not just about non-procreative sex but is about forms of intimacy which the social order finds “disturbing” which brings forth the various forms of transgression present. Thus, a re-imagination of this order would not only be about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community.<sup>17</sup>

The judges observed that this section has been destructive of an identity that is crucial to a dignified existence — Sexual acts between consenting adults of the same gender constitute one facet, albeit an important aspect, of the right asserted by homosexual persons to lead fulfilling lives.<sup>18</sup>

The Court analysed the constitutionality of Section 377 on the bedrock of the principles enunciated in Articles 14, 15, 19 and 21. The Court relied on the *NALSA* judgment, which granted equal protection of laws to transgender persons, to reiterate that sexual orientation and gender identity were an integral part of a person’s personality, and the *Puttaswamy* judgment, which recognised the interrelationship between privacy and autonomy and stated that the right to sexual orientation was an intrinsic part of the right to privacy. The Court further discussed the Yogyakarta Principles on Gender Identity and Sexual Orientation and the U.K Wolfenden Committee Report, 1957, which abolished penal offences involving same-sex consenting adults amongst many other international comparative references.<sup>19</sup>

The Court also relied on its judgment in *Shakti Vahini vs. Union of India & Ors.* ((2018) 7 SCC 192), and *Shafin Jahan vs. Asokan K.M* (AIR 2018 SC 1933) to reaffirm that the right to choose a life partner was a feature of individual liberty and dignity protected under Articles 19 and 21 and referred to principles stated in *Shayara Bano vs. Union of India and Ors.* ((2017) 9

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<sup>16</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [13]

<sup>17</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [A]

<sup>18</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [B]

<sup>19</sup> (*Navtej Singh Johar and Ors. vs. Union of India*) <<https://privacylibrary.ccnlud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-uo-i-and-ors>> accessed 19 July 2024

SCC 1) to hold that Section 377 was irrational, arbitrary and violative of Article 14 as it made consensual relationships in private spaces a crime and subjected the LGBT community to discrimination and unequal treatment. Moreover, the Court used the maxim “et domus sua cuique est tutissimum refugium” which translates to “a man's house is his castle” to hold that Section 377 was disproportionate and unreasonable for restricting LGBT persons’ right to freedom of expression and choice as the restrictions did not protect public order, decency or morality.<sup>20</sup>

Chief Justice Misra (on behalf of himself and J. Khanwilkar) relied on the principles of transformative constitutionalism and stated that “constitutional morality should prevail over social morality [p. 79, para. 121] to ensure that the human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government.

J. Nariman in his opinion analyzed the legislative history of Section 377 and said that Victorian morality was long gone and gave directives to publicize the judgment so as to eliminate the stigma faced by the LGBT community.

J. Chandrachud in his opinion recognized that though Section 377 was facially neutral, its “effect was to efface identities” [p. 328, para. 51] of the LGBTQ+ community. He stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to achieve equal protection and to grant the community “equal citizenship in all its manifestations” [p. 270, para. 7].

J. Malhotra stated that the right to privacy does not only include the right to be left alone but also extends to “spatial and decisional privacy” [p. 476]. and concluded her opinion by stating that history owes an apology to members of the LGBTQ+ community.”<sup>21</sup>

## DECISION

The Court concluded that sexual orientation was natural, innate and immutable. It held that 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-

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<sup>20</sup> (*Navtej Singh Johar and Ors. vs. Union of India*) <<https://privacylibrary.ccgnlud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-uo-i-and-ors>> accessed 19 July 2024

<sup>21</sup> ‘Navtej Singh Johar v. Union of India’ (*Global Freedom of Expression*, 4 November 2023) <<https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>> accessed 19 July 2024

determination. Further, the court held that although the LGBT community constituted a sexual minority, they were equally protected under Part III of the Constitution.<sup>22</sup>

It was declared that in so far as Section 377 criminalises consensual sexual acts of adults, it is violative of Articles 14, 15, 19, and 21 of the Constitution. It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.<sup>23</sup> The judgment in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*<sup>57</sup> was overruled<sup>24</sup>

## ANALYSIS

*Navtej Singh Johar v. Union of India* is a landmark judgement in Indian legal history. Section 377 of the IPC by criminalizing "carnal intercourse against the order of nature," had systematically marginalized and discriminated against the LGBTQ+ community. Due to this, the Supreme Court's intervention played a pivotal role in reconciling the legislative vacuum and societal norms with constitutional mandates.

An important part of the judgement is the distinction between constitutional morality and social morality. Constitutional morality, the guiding principle, prioritises the protection of fundamental rights and the promotion of justice, even if it contravenes prevailing social norms. The judges emphasized that social morality, which is often rooted in prejudice and ignorance, should not dictate the rights and freedoms of individuals. By decriminalizing consensual homosexual acts, the court upheld constitutional morality, prioritizing the values of equality, dignity, and justice.

The Supreme Court's judgment in *Navtej Singh Johar* has far-reaching implications. It sets a precedent for the judiciary's role in addressing legislative gaps wherein the court reflected a proactive stance in bridging the legislative inertia that existed despite public calls for reform. This judgement is one among many towards ensuring the protection of fundamental rights. It signals a shift towards a more equitable and just society.

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<sup>22</sup> (*Navtej Singh Johar and Ors. vs. Union of India*) <<https://privacylibrary.ccnlud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-uo-i-and-ors>> accessed 19 July 2024

<sup>23</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [645.1]

<sup>24</sup> *Navtej Singh Johar v Union of India* [2018] 10 SCC 1 (INSC), [645.4]

## CONCLUSION

In conclusion, the Navtej Singh Johar v. Union of India case marks a turning point in the struggle for LGBTQ+ rights in India. By decriminalizing consensual homosexual acts, the Supreme Court affirmed the principles of equality, dignity, and justice. While this judgment is a monumental step towards fostering a more inclusive and just society, it is just a foundation. Major issues, such as the legalization of same-sex marriage, still need to be addressed to close the societal, economic, and political gaps faced by these marginalized communities.

