

Decision in Navtej Singh Johar V. Union of India AIR 2018 SC 4321 by the Supreme Court of India A March towards Safeguarding “Dignity” of LGBT Community: An Analysis

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Abstract:

377. 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. **Explanation.** — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The above section under Indian Penal Code has come under a Judicial scanner where the petitioners have highlighted that the rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprises 7-8 % of the population of India need recognition and protection. Sexual orientation is an integral part and innate facet of every individual and his individualism shall not be viewed as stigma. The impact of the sexual orientation in an individual's life is not limited to their intimate lives but also impacts on their family and all contours of life. Such sexual minorities need more protection than the heterosexuals so that they will have a purposeful living and quenching every thirst of life as others. They will not be discriminated in the employment, insurability, medical treatment, education and most precisely on choosing life partners in their life. The Supreme Court on the touchstone of golden triangles i.e., fundamental Rights under Art 14,19 and 21 therefore have tested this long-lasting pursuit for dignity by this minority community and observed that the consensual sexual acts by the adults in private doesn't violate sec 377 of IPC. Any such sexuality not tainted by duress or coercion, never attract sec 377 of IPC. However, sec 377 IPC will be attracted if such offending act was done without consent by such adults or carnal acts against minors, and acts of bestiality.

The author would like to make analysis of the above verdict that how it has contributed in enhancing and highlighting the “dignity” of LGBT citizenry in India.

Key words - Unnatural Offence, Dignity, Fundamental Rights, Sexual Minority, LGBT...

Introduction: -

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a **SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC** and to secure to all its citizens:

JUSTICE, social, economic and political; **LIBERTY** of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do **HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION**

From the above pledge taken by we the people of India it is abundantly apparent that this pledge was taken by the people of India. The people want at the same time that in this sovereign India the socialist, democratic and republic State will *secure to all its citizens* the most cherishable rights for purposeful and fruitful life i.e., Justice on every front may it be social, economic or political. At the same time, it was also realized that *Justice* is impossible unless the people have been conferred with a right to *liberty* in every facets and dimensions of life viz expression, belief, faith and worship. The thought was also given to this aspect that life is impossible unless everyone has been conferred with *Equality* in every form of his/her living or living conditions.

Not only this the Constitution makers have emphasized on the very important ornaments of human life in its pledge under Preamble viz. *fraternity* with an *assurance of dignity* of individual which is in furtherance of *unity and integrity* as one nation. (Italics emphasized)

Preamble itself was interpreted by the Supreme Court once as not a part of the Constitution, however Court observed it as *a key to open the mind of the makers* but cannot be enforceable.¹ However this malady has been cured by the Apex Court in *Kesavananda Bharati ... vs State Of Kerala And Anr.* in 1973² where thirteen Judges Bench when sat together upheld Preamble itself as the *Basic Structure* of the Constitution and therefore certainly a guideline for all further provisions under the Constitution of India. Therefore, as per the present topic in hand we can say that it is once and for all times clear that every word preached under the Preamble is a guideline for every Institution functioning under the Constitution while obliging their Constitutional and legal duties towards the people of India. Right to "Dignity" therefore is certainly a conferred right on every individual under our Constitution. For the present topic in hand in the above background the author would like to stress upon the importance of "Dignity" under the Preamble of the Constitution while discussing the views of Hon'ble Supreme Court in the titled case of this paper.

Brief note on sec 377 IPC and interpretation by the Court:

Section 377 of the Indian Penal Code, introduced during British rule of India, criminalizes "carnal intercourse against the order of nature". It means that sexuality only in the form of heterosexual penile-vaginal intercourse is permissible and acceptable to the society and any other form other than this is a tabu. Till recent times it was an offence of grave nature against the body of the individual and hence punishable with life imprisonment or up to ten years of imprisonment. A petition was filed in 1994 by *AIDS Bhedbhav Virodhi Andolan* before the Delhi High Court where the issue mostly concerned with the Tihar jail authorities refused to supply condoms to inmates despite the known prevalence of homosexual activity between the inmates and risk of exposure to HIV infection. The matter relates with sec 377 IPC itself but

¹ Re Berubari case AIR 1960 SC 845

² AIR 1973 SC 1461

the Court has refused to consider the relief sought and dismissed the matter.³ It was in *Naz Foundation (India) Trust*,⁴ the challenge was given to section 377 of IPC, in Delhi High Court in 2001 whereby they have sought apart from other relief that the government must legislate on homosexual intercourse between consenting adults and protect their fundamental rights as enshrined under the Constitution. A Division Bench of Chief Justice Ajit Prakash Shah and Justice S Muralidhar said: “*We declare that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution*”. However, the court ruled, “*the provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors*”. (Italics supplied).”

“Navtej Singh Johar V. Union Of India” - A March towards safeguarding Dignity of LGBT Community:

In this backdrop let us discuss the above cited case decided by the Court on this contesting issue since long pending on the dais of the Apex Court where a fight for the right have been claimed by the sexual minority class of LGBT.

In this reference case the Court has taken within its lap the whole scenario of the LGBT class and discussed thoroughly their rights on the touchstone of Art 14,19 and 21⁵ of the Constitution of India. The Bench was led by Chief Justice Dipak Misra along with R.F. Nariman, A.M. Khanwilkar, Dr. D.Y. Chandrachud and Indu Malhotra JJ. Let us analyze the views of the concurring judges on the various points raised by the Petitioners and Respondents.

A) Chief Justice Dipak Misra (for himself and on behalf of A.M. Khanwilkar):

Lordship while supporting the private acts of the adults including LGBT community has emphasised on this maxim “*Domus sua cuique est tutissimum refugium*” means man’s house is his castle. It was observed further that the sec 377 doesn’t meet criteria of proportionality and violative of fundamental right of freedom of expression and even a right to choose sexual partner. Further Lordship observed that LGBT constantly face social prejudice, disdain and subjected to shame. Liberty is a linchpin of our Constitutional values, enables individuals to define and express their identity and individual identity has to be acknowledged and respected. Right to ‘dignity’ has been recognised as human right on international front and it is an inseparable facet of the individual where reciprocal respect from others for his/her individuality is deserved. So, every individual has freedom to survive without any unreasonable restrictions on the ground of decency and morality. Consensual sex by the homo or heterosexual adults in private space does not harm public decency or morality. But any engagement of man or woman with animal as per sec 377 is constitutional and shall remain an offence and at the same time done by two individuals without consent of any one of them would invite penal liability.⁶

³ <http://14.139.60.114:8080/jspui/bitstream/> (visited on 4th March 2021)

⁴ [WP(C)7455/2001]

⁵ Art 14- Right to Equality; Art 19- Right to Freedom and Art 21- Right to life and personal Liberty.

⁶ (See paras 245,247,248,249,251,252,253 of the Judgment)

B) Dr. D.Y. Chandrachud J.:

The Hon'ble Justice observed that sec 377 provides for rule by law instead of rule of law. Rule of law simply means equality, liberty and dignity in all facets. Sec 377 consigned citizens to margins and is destructive. By imposing sanctions on consenting adults involved in sexual relationship, it has lent authority of state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to anguish of closeted identities. Sexual orientation has become target for exploitation, if not blackmail, in networked and digital age. These LGBT have constitutional right to equal citizenship in all manifestations. Sexual orientation is recognized and protected by the Constitution. Sec 377 is unconstitutional in so far it penalizes consensual relationship between adults of same gender. Sex doesn't relate only to an idea of procreation, to deny LGBT community full expression of right to sexual orientation is to deprive them of their entitlement to full citizenship under Constitution. It is necessary to incorporate in right to privacy the "sexual privacy." Gender based minorities cannot live in fear and in its quest for equality and equal protection of law, Constitution guarantees to them equal citizenship and they must be given freedom from fear and find fulfilment in intimate choices. So sec 377 criminalizing same sex is unconstitutional.⁷

C) Indu Malhotra J.

Sexual orientation is innate to human being. Homosexuality and bisexuality are natural variants of human sexuality. Sec 377 insofar as it curtails personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with partner of their choice, in safe and dignified environment, is violative of Art 21. Sexual orientation is immutable, since it is innate feature of one's identity, and cannot be changed at will. Sec 377 criminalizing voluntary sexual relations between LGBT persons of same sex in private, discriminates against them on basis of their "sexual orientation" which is violate of their fundamental rights guaranteed by Arts.14,19 and 21 of the Constitution. The fact that LGBT constitutes "miniscule fraction" of Country's population cannot be ground to deprive them of their Fundamental Rights under Part III. LGBT community are citizens and their fundamental rights under Arts. 14,15,19, and 21. So, consensual sex of adults under sec 377 violates Fundamental rights guaranteed as above however any such act without free consent or done by coercion and duress must be criminalized and hence sec 377 will continue to govern non consensual sexual acts against adults, all acts of carnal intercourse against minors and acts of bestiality.⁸

D) R.F. Nariman J.

The Hon'ble Judge observed that penalizing consensual gay sex, is manifestly arbitrary. It was observed that gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalized. Sec 377 of IPC must be held as capricious and irrational. Roping the persons for life imprisonment seems clearly disproportionate and therefore it violates Art 14 and 21 of the Constitution.

⁷ Paras 359,360,361,409,410,411,412,415,420,429,445,503,509 of the judgment

⁸ Paras 525,526,528,530 of the judgment

Moreover, when in 2013 Art 375⁹ was amended which has included anal and certain other kinds of sexual intercourse between man and woman, which would not be criminalized as rape if it was between consenting adults, it is clear that sec 377 continues to penalize such sexual intercourse, anomalous position would result. When it is noticed that privacy interest come in and same sex couples who do not cause any harm to others then intervention by the State vide legislature penalizing them certainly amounts to violation of Arts.14,15,19 and 21.

All the Hon'ble Judges have concurred upon one thing that any sexual act done by two consenting adults in their privacy either heterosexuals or LGBT, then State shall not intervene in that and therefore Sec 377 IPC as far as prescribing punishment for such act certainly unconstitutional as it provides blanket coverage on all such sexual acts. Homosexuality and carnal intercourse performed between consenting adults as per choice does not make it against the order of nature and includes all sexual acts not intended for purpose of procreation.

While concluding the Hon'ble judges observed that "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism and they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. The misapplication of provision of Sec 377 certainly proves violative of Art 14 and also it discriminates on the basis of 'sex' and hence violative of fundamental right under Art 15. Art 21 is violated because right to live with dignity and privacy has been shattered by this provision of Sec 377. The LGBT certainly therefore deserves the life with dignity as it a class by itself.

It was finally observed by the judges while overruling judgment in *Suresh K Kausal & Anr. V. Naz Foundation & ors*¹⁰ and allowing the Writ Petition that, Sec 377 so far it criminalizes consensual sexual acts of adults (i.e., persons above the age of 18 years who are competent to consent) un private, is violative of Articles 14,15,19 and 21. Provided, consent is free and voluntary in nature and devoid of any duress or coercion. Sec 377 will continue to govern non consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.

Conclusions:

Therefore, the issue arisen in the case was very precisely and with all justification has been answered by the Hon'ble Judges. Person with some of the other disability when we consider must be remedied on the support of Fundamental Rights guaranteed to the individual by the Constitution vide Art 14,15,16, 19 and 21 so that he would have a life of bliss and not of dependency. The State should make out every policy under the Directive principles¹¹ stretchable to the person living a life in the remotest corner of India. He/she should be able to join in the main stream of the society so that he shall see and enjoy aspect of life as a citizenry of India.

It is not in the hands of any human that in which form he would step into in this world? But it is certainly in the hands of State to frame rules, regulations and Laws extending nothing but Justice and equal opportunity to every individual and here his

⁹ Section 375 of IPC defines rape

¹⁰ AIR 2014 SC 563

¹¹ Part IV of the Constitution Of India

personal limitations or weakness viz. physical, mental, psychological disorders etc. shall not prove an impediment in his positive enjoyment of life. This lacuna in his/her life shall be taken care by the law. In the protection of society and majority State cannot pay blind eye towards those who are minority be reasons of such limitations as stated above and certainly 'sexuality' is also one of the ingredients of that. Such sexual disorder which person got by birth therefore shall not be shunned but the State and the society at large must see this 'class' with all kind of compassion. So, makers of the Constitution have taken this care by making a reasonable classification of such class or individual vide Art 14 so that Equality will be a truth for such a person with any such physical or sexual disorder he/she can survive with others. Art 19,21 are the additional gems which guarantees freedom and right to life to such an individual with any such physical disorders and limitations including sexual orientation or desire.

The judicial activism certainly contributed in giving status and opportunity to such people and the great illustrations are enrolment of Satyashi Sharmila as an Advocate from Tamil Nadu, Joyita Mandal becomes first transgender Judge in Islampur, West Bengal and Swati B.Baruah became the first transgender Judge in Assam. Recently an issue has arisen before the Delhi High Court on same sex marriage. It was claimed by petitioners that same sex marriage must be permissible under Hindu Marriage Act and Special Marriage Act and it was one of the facets of Human rights. Sec 5 of HMA never differs in between Hetro and Homosexual couples and therefore right of same sex couples to marry should be recognized under the Act. But Centre opposed by saying that any changes to the existing laws on marriage to recognise same sex marriages, would cause "a complete havoc with the delicate balance of personal laws in the country". Petitioner cannot claim same sex marriage as a fundamental right ¹²

So apart from all these happenings around and surround in this issue the Supreme Court in explicit term protected the LGBT community by conferring upon them right to privacy in the matters of their sexuality and its orientation in any form provided it does not affect public order because sexuality is very much a facet protected under Art 14,15,19 and 21 as a fundamental right to life. The Preamble also supports this proposition because the pledge is very apparently taken by the people of India that they will *secure to all its citizens—Justice and liberty with Equality* in all situations. So also, the pledge for *fraternity* we have taken with *an assurance of dignity* of which utmost care was taken by the Hon'ble judges while upholding the rights of the LGBT against Sec 377 of IPC.

Therefore, the author would like to conclude that the pledge taken by the people would prove futile unless assurance for dignity is guaranteed to every individual by his/her societal acceptance in any form of his/her survival. We could not achieve the most desired pledge in the Preamble i.e., *unity and integrity* of the nation in reality unless we pay attention and acceptance to every miniscule class or individual because society and Nation is nothing but cluster of this all and hence the judgment in hand for analysis is certainly an assurance to all those who are out of stream but are brought within by decriminalizing the draconian provision under sec

¹² <https://www.thehindu.com/news/national/same-sex-marriages-will-cause-havoc-says-govt/article33935252.ece> (visited on 4th March 2021)

377 on the point of sexuality which is much recognized right of human. However, the Court also observed what is permissible in privacy cannot be displayed publicly and so the societal order cannot be tarnished for the claim of one right because you are eligible for rights only if duties are followed at first instance.