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Navtej Singh Johar & Ors. v. Union of India, (2018) 10 SCC 1

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I. ABSTRACT

The Supreme Court of India, in *Navtej Singh Johar v. Union of India*, addressed the constitutional validity of Section 377 of the Indian Penal Code, which criminalized consensual sexual acts between adults of the same sex. The petitioners, comprising individuals from the LGBTQ+ community, contended that Section 377 infringed upon their fundamental rights under Articles 14, 15, 19, and 21 of the Constitution.

The Court unanimously held that Section 377, to the extent it criminalized consensual sexual conduct between adults, was unconstitutional. It emphasized that sexual orientation is an inherent aspect of identity and that the right to privacy and dignity is fundamental. The judgment overruled the previous decision in *Suresh Kumar Koushal v. Naz Foundation* and reaffirmed the principles laid down in *Naz Foundation v. Govt. of NCT of Delhi*.

This landmark decision marked a significant step towards ensuring equality and non-discrimination for the LGBTQ+ community in India, aligning the nation's legal framework with constitutional morality and human rights principles.

II. KEYWORDS

Transgender Rights, Legal Recognition, NALSA Judgment, Gender Identity

Particulars	Details
Case Name	Navtej Singh Johar & Ors. v. Union of India
Citation	(2018) 10 SCC 1
Case Filing date	27 April 2016,

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The constitution bench formation date	8 January 2018
Date of Judgment	6 September 2018
Bench	Dipak Misra (CJI), A.M. Khanwilkar, D.Y. Chandrachud, R.F. Nariman, Indu Malhotra
Petitioners	Navtej Singh Johar, Sunil Mehra, Ritu Dalmia, Aman Nath, Keshav Suri, Ayesha Kapur
Respondent	Union of India

III. PRIMARY DETAILS OF THE CASE

A. General Details

- Court Name: Supreme Court of India
- Case Number: Writ Petition (Criminal) No. 76 of 2016
- Jurisdiction: Constitutional Bench
- Type of Case: Writ Petition (Criminal) No. 76 of 2016 under Article 32 of the Constitution.

B. Specific Details

- Nature of Petition: Challenge to the constitutional validity of Section 377 IPC
- Legal Provisions Involved: Articles 14, 15, 19, and 21 of the Constitution; Section 377 of the IPC
- Previous Related Cases: Naz Foundation v Government of NCT of Delhi [2009] SCC OnLine Del 1762, (2009) 160 DLT 277; Suresh Kumar Koushal v. Naz Foundation (2013)

C. Prosecution Witnesses & Defence Witnesses

- Not applicable as this was a constitutional challenge and not a criminal trial.

IV. BRIEF FACTS OF THE CASE

Section 377 of the Indian Penal Code (IPC), enacted during British colonial rule in 1861, criminalized "carnal intercourse against the order of nature." Although not explicitly mentioning homosexuality, it was interpreted over time by Indian courts to include all forms of non-peno-vaginal intercourse, effectively targeting consensual same-sex relationships between adults. The law imposed a punishment of imprisonment for life or up to ten years, along with a fine.

In 2001, the Naz Foundation, a non-governmental organization, filed a public interest litigation in the Delhi High Court, challenging the constitutionality of Section 377. In 2009, the Delhi High Court, in *Naz Foundation v. Govt. of NCT of Delhi*, held that Section 377 was unconstitutional to the extent that it criminalized consensual sexual acts between adults in private. The Court ruled that the provision violated fundamental rights guaranteed under Articles 14 (equality before law), 15 (non-discrimination), and 21 (right to privacy and dignity) of the Constitution.

However, this progressive ruling was overturned in 2013 by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*. The Court held that only a minuscule fraction of the population was affected by Section 377, and that it was up to the legislature, not the judiciary, to amend or repeal the law. This reinstated the criminalization of same-sex relationships and drew widespread criticism both in India and internationally.

Following the 2017 Supreme Court judgment in *Justice K.S. Puttaswamy v. Union of India*, which declared the right to privacy as a fundamental right, several prominent LGBTQ+ individuals—including Navtej Singh Johar, Sunil Mehra, Ritu Dalmia, Aman Nath, Keshav Suri, and Ayesha Kapur filed a fresh petition on 27 April 2016 under Article 32 of the Constitution. They contended that Section 377 infringed upon their constitutionally protected rights to equality, non-discrimination, freedom of expression, dignity, and privacy.

This petition led to the formation of a five-judge Constitution Bench on 8 January 2018 of the Supreme Court, which revisited the constitutional validity of Section 377 in light of the right to privacy and evolving societal norms. The bench unanimously concluded that criminalizing consensual sex between adults of the same sex violated the Constitution of India and declared that part of Section 377 unconstitutional.

V. ISSUES RAISED IN THE CASE

- Whether Section 377 IPC, in criminalizing consensual sexual acts between adults of the same sex, violates Articles 14, 15, 19, and 21 of the Constitution.
- Whether the right to privacy, as recognized in *Justice K.S. Puttaswamy v. Union of India*, encompasses the right to sexual orientation and choice of sexual partner.

VI. ARGUMENTS ADVANCED BY THE PARTIES

A. Petitioners' Arguments

- **Violation of Article 14 – Right to Equality:** The petitioners argued that Section 377 of the IPC was arbitrary and unreasonable, thereby violating Article 14 of the Constitution, which guarantees equality before the law and equal protection of the laws. They asserted that the law unfairly targeted a specific class of individuals – LGBTQ+ persons – without any rational nexus to a legitimate state objective. The law treated consensual homosexual conduct among adults the same as non-consensual acts or bestiality, thereby failing the test of reasonable classification and equality.
- **Violation of Article 15 – Prohibition of Discrimination:** Petitioners claimed that Section 377 violated Article 15(1), which prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. While the term "sex" traditionally referred to biological distinctions, the petitioners urged the Court to adopt a broader, purposive interpretation to include sexual orientation. By criminalizing behavior intrinsic to the identity of LGBTQ+ individuals, Section 377 led to systemic discrimination, stigma, and marginalization.

- **Violation of Article 19(1)(a) – Freedom of Expression:** The law, they argued, chilled the free expression of one's identity, particularly one's sexual orientation, by fostering an environment of fear and criminality. The freedom of expression under Article 19 includes the freedom to express one's gender and sexuality, whether through behavior, association, or appearance. Section 377 thus operated to suppress the authentic identity and speech of LGBTQ+ persons.
- **Violation of Article 21 – Right to Life and Personal Liberty:** The petitioners contended that the right to life under Article 21 includes the right to dignity, autonomy, privacy, and intimacy. They relied on the Puttaswamy judgment (2017), which upheld the right to privacy as intrinsic to personal liberty. Criminalizing consensual sexual acts among adults in private infringed upon this right and denied individual the ability to live a life of dignity. The continued existence of Section 377, even if rarely enforced, cast a "chilling effect" on the LGBTQ+ community and legitimized violence, discrimination, and social exclusion.
- **Impact on Health and Safety:** It was further submitted that criminalization hindered access to healthcare, particularly in HIV/ AIDS prevention efforts, by driving the LGBTQ+ community underground and discouraging them from seeking medical or legal assistance.

B. Respondent's Arguments (Union of India)

- **Neutral Stance by the Government:** In a notable departure from earlier litigation, the Union of India chose not to oppose the petitioners. Instead, the government filed an affidavit stating that the matter was best left to the wisdom of the Court. The Centre clarified that it would not defend the constitutionality of Section 377 in so far as it applied to consensual acts between adults in private. However, the government urged that acts involving minors, non-consensual acts, and bestiality must continue to remain criminalized under the residual portion of Section 377.

- **Preservation of Morality vs. Constitutional Morality:** While some earlier arguments (in past cases) had focused on public morality, the petitioners, supported by intervenors and amici curiae, responded by urging the Court to uphold constitutional morality over majoritarian social morality. The Union did not directly contest this distinction in the present case, leaving the interpretative burden to the judiciary.

VII. EVIDENCE PRODUCED BY THE PARTIES

Since *Navtej Singh Johar v. Union of India* was a constitutional challenge rather than a fact-based trial, the case was not grounded in conventional evidentiary submissions such as witness testimony or documentary evidence. Instead, the arguments were primarily built upon legal precedents, judicial reasoning, and constitutional interpretation.

However, the petitioners and intervenors submitted various supporting materials and legal authorities, which served as persuasive references in highlighting the real-life implications of Section 377 on the LGBTQ+ community.

VIII. JUDICIAL PRECEDENTS

A. The petitioners relied heavily on prior landmark cases

- *Naz Foundation v. Government of NCT of Delhi*, 2009 SCC OnLine Del 1762 (which first decriminalized consensual same-sex relations).
- *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (which overturned *Naz Foundation*).
- *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1 (which upheld the right to privacy as a fundamental right under Article 21).

B. International Jurisprudence and Human Rights Instruments

References were made to decisions from other jurisdictions such as:

- *Lawrence v. Texas*, 539 U.S. 558 (2003), where the U.S. Supreme Court struck down laws criminalizing homosexual conduct.

- The Yogyakarta Principles, which affirm the application of international human rights law in relation to sexual orientation and gender identity. Justice Nariman and Justice Chandrachud cited these principles to reinforce that non-discrimination and protection of LGBTQ+ rights are part of evolving global human rights norms
- **Amicus Curiae and NGO Reports:** Reports and affidavits filed by NGOs, human rights organizations, and expert amici (such as mental health professionals and child rights advocates) were presented to show the adverse social, psychological, and health-related impacts of criminalizing homosexuality. These highlighted the discrimination, police abuse, social ostracism, and barriers to healthcare faced by LGBTQ+ individuals under the shadow of Section 377.
- **Constitutional Commentary:** Arguments were substantiated by constitutional scholars and legal commentaries emphasizing the principles of constitutional morality, transformative constitutionalism, and progressive interpretation of fundamental rights.

Thus, while no direct factual evidence was produced in the traditional trial sense, the Court had before it a rich array of legal materials, scholarly references, and human rights documents, which contributed significantly to the interpretative analysis and eventual ruling.

IX. JUDGMENT

In a historic and unanimous verdict delivered on 6th September 2018, the five-judge Constitution Bench of the Supreme Court of India held that Section 377 of the Indian Penal Code, in so far as it criminalized consensual sexual acts between adults in private, was unconstitutional and violative of fundamental rights enshrined in the Constitution.

A. Structure of the Judgment

The decision comprises four concurring opinions:

- Chief Justice Dipak Misra, writing on behalf of himself and Justice A.M. Khanwilkar
- Justice Rohinton F. Nariman, separate concurring opinion
- Justice D.Y. Chandrachud, separate concurring opinion
- Justice Indu Malhotra, separate concurring opinion

X. KEY CONSTITUTIONAL FINDINGS

A. Sexual Orientation as an Innate Trait

All four opinions recognized that sexual orientation is a natural and immutable attribute of human identity, and criminalizing it amounts to invidious discrimination.

Such criminalization violates:

- Article 14 (Right to Equality)
- Article 15 (Prohibition of Discrimination)
- Article 21 (Right to Life and Personal Liberty)

Justice Nariman emphasized that any discrimination based on an inherent characteristic like sexual orientation is unconstitutional per se (¶18, p. 96).

B. Right to Privacy, Dignity, and Autonomy (Article 21)

Relying on the landmark Puttaswamy v. Union of India (2017) ruling, the Court reaffirmed that:

- The right to privacy includes the right to sexual autonomy and identity.
- The state has no legitimate interest in regulating private consensual acts of adults.

Justice Chandrachud observed that Section 377 "inflicts harm by targeting identities rather than conduct" (¶11, p. 151), thereby infringing the dignity and personhood of LGBTQ+ individuals.

C. Freedom of Expression (Article 19(1)(a))

The Court held that expressing one's sexual identity is an essential form of self-expression, and criminalizing such expression violates freedom of speech under Article 19(1)(a).

Justice Misra noted that "denial of self-expression is inviting death", equating the suppression of identity with denial of existence (¶212, p. 117).

D. Constitutional Morality over Social Morality

The Bench unanimously emphasized that constitutional morality—not social or majoritarian morality—must govern judicial interpretation. Constitutional values must prevail even when they contradict entrenched societal norms.

Justice Chandrachud described constitutional morality as a "normative value that must trump social morality when it contravenes fundamental rights" (¶57, p. 169).

E. Judicial Redress of Historical Wrongs

In a deeply poignant and widely quoted statement, Justice Indu Malhotra acknowledged the injustices historically faced by the LGBTQ+ community, observing: "History owes an apology to the members of this community and their families." (Navtej Singh Johar, (2018) 10 SCC 1, at ¶20, p. 264). The Court recognized the role of constitutional courts in correcting such long-standing wrongs.

F. Partial Retention of Section 377

The Court clarified that Section 377 would remain in force for acts involving:

- Non-consensual sexual acts
- Sexual acts involving minors
- Bestiality

Thus, the provision was **read down**, not struck down in entirety.

G. Overruling and Affirming Precedents

The Court:

- **Overruled:** *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1
- **Affirmed in Substance:** *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762; (2009) 160 DLT 277

H. Use of International Jurisprudence & Yogyakarta Principles

A notable feature of the judgment is its engagement with international human rights standards:

- Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were explicitly referred to and relied upon.
- Justice Nariman and Justice Chandrachud cited these principles to reinforce that non-discrimination and protection of LGBTQ+ rights are part of evolving global human rights norms (¶15, p. 94; ¶65, p. 173).

Comparative references were also made to judgments from the United States, South Africa, the United Kingdom, and the European Court of Human Rights, emphasizing that constitutional democracies must protect the rights of all minorities.

The judgment is a landmark affirmation of human dignity, constitutional values, and personal liberty. It places India in the ranks of progressive constitutional jurisdictions that recognize and uphold LGBTQ+ rights. The Court's approach—grounded in constitutional morality, privacy, dignity, and global human rights principles—sets a strong precedent for inclusive constitutional interpretation.

XI. RATIO DECIDENDI

A. Analyzing Issue No. 1: Constitutionality of Section 377 under Articles 14 and 15

The Supreme Court held that Section 377 IPC, insofar as it criminalized consensual sexual conduct between adults, was violative of Article 14 (equality before law and equal protection of laws) and Article 15 (prohibition of discrimination on grounds of sex).

The Court ruled that:

- The provision lacked a rational nexus to a legitimate state aim and failed the test of reasonable classification under Article 14, as it arbitrarily targeted a specific group – LGBTQ+ individuals – without a compelling justification.
- The term “sex” in Article 15 was interpreted purposively to include sexual orientation, aligning with evolving jurisprudence on equality and non-discrimination.
- Criminalizing consensual same-sex relations-imposed stigmatization and inequality, thereby violating the principle of substantive equality and dignity of the individual, which are intrinsic to the constitutional ethos.

B. Analyzing Issue No. 2: Right to Privacy and Personal Liberty under Article 21

Drawing from the landmark ruling in Justice K.S. Puttaswamy (Retd.) v. Union of India, the Court held that privacy is a fundamental right, and that includes the freedom to make intimate personal choices, such as choosing one's sexual partner.

It ruled:

- Section 377 infringed the autonomy, dignity, and bodily integrity of individuals, violating the right to life and personal liberty guaranteed under Article 21.
- The law criminalized the core of one's identity, rendering individuals' second-class citizens, which was incompatible with a liberal and transformative Constitution.
- The Court emphasized that the state has no role in policing private consensual acts among adults and that doing so is a violation of constitutional freedoms.

This ratio formed the binding legal foundation of the judgment, which declared that consensual homosexual acts between adults could no longer be penalized under Section 377, reinforcing the primacy of individual rights and constitutional morality.

XII. OBITER DICTUM

Among the most poignant and widely quoted remarks from the judgment came from Justice Indu Malhotra, who stated, “History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries.”

This statement, though not binding in law, is a powerful moral and jurisprudential reflection on the role of the judiciary in rectifying historical wrongs. It acknowledges that the criminalization of same-sex relationships under Section 377 IPC not only caused legal harm but also contributed to deep-rooted social stigma, exclusion, and emotional trauma for generations of LGBTQ+ individuals in India.

Other obiter observations across the concurring opinions include:

- Justice D.Y. Chandrachud emphasized the concept of constitutional morality, arguing that the rights of minorities must not be sacrificed at the altar of majoritarian social morality.
- Justice R.F. Nariman highlighted the importance of dignity and autonomy as foundational values of the Indian Constitution, stating that Section 377 treated LGBTQ+ individuals as "unapprehended felons".

These reflections underscore the Court's broader intent to affirm the humanity, dignity, and citizenship of LGBTQ+ individuals, and to frame the Constitution as a living document capable of addressing social evolution and moral justice.

XIII. COMMENTARY

The Supreme Court's decision in *Navtej Singh Johar v. Union of India* stands as a watershed moment in Indian constitutional jurisprudence, marking a decisive break from colonial-era morality and affirming the fundamental rights of sexual minorities. The judgment reasserts the role of the judiciary as a guardian of constitutional morality, especially in protecting marginalized communities whose voices have often been silenced or ignored in the democratic process.

By reading down Section 377 of the IPC, the Court not only decriminalized consensual same-sex relationships but also affirmed the legitimacy of queer identities, thereby addressing the psychological, social, and legal discrimination faced by the LGBTQ+ community. This decision significantly shifted the narrative from tolerance to acceptance and from legality to dignity.

The Court's reliance on the Puttaswamy ruling to link privacy, autonomy, and sexual orientation demonstrates a progressive interpretative approach, aligning Indian jurisprudence with international human rights principles, such as those articulated in the Yogyakarta Principles and decisions by courts in South Africa, the United States, and Europe.

Importantly, the judgment creates a jurisprudential foundation for future advancements in LGBTQ+ rights, including anti-discrimination laws, same-sex marriage, adoption, and gender identity protections. It sends a strong signal that constitutional values must evolve with society, and that personal liberty, identity, and love are central to human dignity.

XIV. AUTHOR'S COMMENT

The judgment in *Navtej Singh Johar v. Union of India* exemplifies the transformative potential of constitutional interpretation in advancing social justice and human dignity. By invalidating the colonial-era criminalization of consensual same-sex relations, the Supreme Court reaffirmed that the Constitution is a living document designed to safeguard individual autonomy and minority rights, even in the face of entrenched societal prejudice.

While this decision is a monumental stride toward recognizing LGBTQ+ rights, it represents only the beginning of a broader journey. True equality will require comprehensive legislative action, including anti-discrimination laws, recognition of same-sex partnerships, and protective frameworks in education, employment, and healthcare. Simultaneously, social transformation is essential to combat stigma and foster acceptance.

The ruling signals a progressive and inclusive vision of Indian democracy, but its full impact depends on continuous advocacy, political will, and public awareness. Courts can lay the foundation, but it is through collective institutional and civic effort that the promise of constitutional equality can be fully realized.

XV. JUDGMENTS OVERRULED / SURPASSED

- Suresh Kumar Koushal v Naz Foundation (2014) 1 SCC 1
- Overruled to the extent it upheld the constitutionality of Section 377 IPC in criminalizing consensual sexual conduct between adults of the same sex.
- The Supreme Court in Navtej Singh Johar held that the reasoning in Koushal failed to consider constitutional values of equality, dignity, and privacy, and incorrectly minimized the rights of a vulnerable minority based on societal morality.
- The Court also criticized the Koushal judgment for relying on the notion that the LGBTQ+ population was too small to warrant constitutional protection, a view it deemed inconsistent with fundamental rights jurisprudence.

XVI. REFERENCES

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- *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (India).
- *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).
- *Shah Bano Begum v. Union of India*, AIR 1985 SC 945 (India).
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- *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (India).