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**NAVTEJ SINGH JOHAR & OTR. v. UNION OF INDIA THR.
SECRETARY MINISTRY OF LAW & JUSTICE, 2018**- Shivani Sharma¹**ABSTRACT**

In 2018, **Navtej Singh Johar**, an award-winning Bharatnatyam exponent and choreographer, along with **Sunil Mehra**, a journalist, **Ritu Dalmia**, hoteliers **Keshav and Aman Nath**, and businesswoman **Ayesha Kapur**, filed a writ petition in the supreme court.

In their petition, the main issues were regarding rights of LGBTQ+ communities as they were being harassed and were treated unequally in society. The issues revolved around how the Indian penal code defined their partners' sexual preferences as a crime as well as defined punishments. As a result, it penalised the other genders' preferences.

Even though this was not prohibited in the constitution, nor was it defined under prohibition, as per the constitution it provides every individual equal right, but still other gender orientations were harassed as a result of the Indian penal code ultra-virusing the constitution, and since any law which may ultra-virus the constitution has become void, the case was filed and was ordered in favour of the petitioners.

In Indian society, it is very difficult to adjust as a woman even though it is a second gender. Women have to face discrimination and peer pressure to be a homemaker idol. Amongst all that, this case has bloomed and has set different bench marks in the entire history of society, culture, as well as common and traditional ideology of Indian society.

So now let us see how the landmark judgement by the supreme court was taken up as well as how the petitioners managed to take up the walk for such a crucial judgement.

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Keywords- Section 377, Indian Constitution, Homosexuality, Suresh Kumar Kaushal V. Naz foundation, Delhi High court.

FACTS OF THE CASES:

Section-377 of Indian penal code, categorizes consensual sex between homosexuals as “unnatural offence”. It criminalizes such acts between homosexuals as offence, violating the rights of such minority communities which constitute India’s population only up to 7-8%. It discriminates on the grounds of sexual orientation, preferences which are analogous to prohibited ground of sex. *Section-377 of Indian penal code* was challenged in court before in **Suresh Kaushal & Anr. Vs. Naz Foundation & ors**². *Section-377 of Indian penal code* also violates *Article- 14, 15 & 21* of the *Indian constitution*. **Supreme Court** in case of **Suresh Kaushal & Anr. Vs. Naz Foundation & ors.** passed judgement vaguely stating that the decision of decriminalization of consensual unnatural sex between homosexuals should have been made by parliament & not court. The court can only do so if it is proved that law infringes constitutional provisions beyond any reasonable doubts. It also highlighted that there have been less than 200 cases reported in near 150 years that forms sound basis for *Section-377* of Indian penal code is ultra-virus to *Article- 14,15 & 2*. In conclusion for ³**Suresh Kaushal & Anr. Vs. Naz Foundation & ors.**, **Supreme court** said that *Section- 377* does not suffers from the vice of unconstitutionality. Hence, the judgement so given was challenged in case of **Navtej singh V. Union of India**.⁴

ISSUE RAISED:

1. Whether *Section- 377* of the *Indian penal code* violates *Article 14 & 15* of the *Indian constitution*?
2. Whether *Section- 377* of the *Indian penal code* violates *Article 21* of the *Indian constitution*?

² [Suresh Kumar Koushal v. Naz Foundation - Wikipedia](#)

³ Supra

⁴ [Case Comment on Navtej Singh Johar v. Union of India - iPleaders](#)

<https://www.bing.com/ck/a?!&&p=c47b4a76203e75d6JmltdHM9MTY2MTQ1Mzk4MiZpZ3VpZD05OWY5Yjc1NC1jYjMxLTQ1NmYtYmY3NC02OGY4ODE0MjdmZjgmaW5zaWQ9NTE5NA&ptn=3&hsh=3&fclid=135a6788-24a8-11ed-aea5-ddcb44ed3db8&u=a1aHR0cHM6Ly9ibG9nLmlwbGVhZGVycy5pbj9jYXNlLWNvbW11bnQtbmF2dGVqLXNpbmdoLWpvaGFyLXYtdW5pb24taW5kaWEv&ntb=1>

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3. Whether *Section- 377* of the *Indian penal code* unconstitutional or not?

JUDGEMENT:

The Supreme court struck down the 158 years old law on homosexuality that made carnal intercourse against order of nature of criminal offence.

The judgement diluted section 377 stating that it does violates the principles of equality before law as there is no equal rights provided to such communities which means LGBTQ community are not been treated as equal to other gender communities.

The court overruled Suresh Kaushal case 5 and declared Section 37 as unconstitutional as it violated Article 14, 15, 19 and 21 of the constitution.

The judgement partially diluted section 377 stating section 377 violates Article 15 as it discriminates also as per section 377 unnatural sex between man & woman are offensive & that did create a bias on sexual orientation basis.

The judgement stated that section 377 also violates Article 19, that is Right to freedom, as people of LGBTQ communities had to face discrimination within the society, people also treated them like they were mentally ill & had bias against them due to which this all impacted the personal growth and hence this restricted their freedom.

Section 377 also violated Right to Privacy that is under article 21 as due to section 377 engaging in carnal intercourse which is unnatural and offence due to which it restricted person's partners denial preference and hence hindered personal liberty to choose life partner.

The *Supreme Court* Judgement bench consisted of Judges as **Dipak Mishra, RF Nariman, DY.Chandrachud and Indu Malhotra.**

The Judgement stated that *Section 377* altogether ultra-virus *Article 14,15,19 and 21*, hence *section 377* was partially declared void and was limited to penalizing *bestiality* and *non-consensual unnatural* sex amongst human.

CRITICAL ANALYSIS

Arguments presented by petitioner:

Homosexuality, bisexuality and *other such sexualities* are equal in nature & hence, are not of choice. It is not a mere illness, and treating or curing it are terms that destroy the dignity of

⁵ Ibid.

people who hold such sexualities. *Criminalizing* it destroys *person's dignity*, creates *discomfort* regarding gender identity and also effects personal growth & other essential desires. It invades the *right to privacy* under *Article 21*. Because *LGBTQ* communities comprise 7–8% ⁶of the total population & are discriminated therefore; they need protection to live freely like other sexualities. Transgender people, even after recognition, often face inequality & their consensual activities are treated as an offence. The petitioner seeks scrapping off *section 377* of the Indian penal code as it criminalizes consensual sex amongst *LGBTQ* communities & should only be limited to criminalising bestiality & non-consensual acts. The petitioner also propounded the *section 377* violates the *Article – 14, 15, 19 & 21* of Indian constitution. Due to lack of improper classification in natural & unnatural sex, the *section- 377* violates *Article 15* of constitution. The said terms are nowhere defined, which makes them vague in nature. The section also violates *Article 15* of the Constitution as it also includes sexual orientation & *Section 377* creates bias in sexual preferences of the partner's sexual partner.

Arguments given by the respondent:

The respondent argues in favour of *Section 377*, claiming that the section only addresses organ abuse and other acts that are undignified, interrogatory, and can amount to constitutional wrong or immorality. The respondent also states that there are certain rights already available to the Transgender community under *NALSA*⁷ & that the reliefs that are asked by the petitioner can result in transgressing the concept of public morality. Furthermore, *Section 377* becomes more relevant because *homosexuals* who engage in those acts are more likely to contract *HIV*, and thus the right to privacy should not be extended for the same. Declaring *Section 377* unconstitutional would only destroy the family system, the institution of marriage, and the country's social and cultural heritage. *Section 377* does not violate the constitutional rights of any person as it is the duty of the state to set reasonable restrictions to protect the citizens from something very offensive & injurious. It does not violate *Article 14* as the state has the power to identify the category to define under reasonable classes. The section only defines an offence & its punishment. *Article 15* only prohibits discrimination of sex as gender and not as sexual orientation.

⁶ [India's health systems exclude LGBTQ+ people. This needs to change \(indiatimes.com\)](https://www.indiatimes.com)

⁷ [Rights of Transgender communities](https://www.indiatimes.com)

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CONCLUSION

As *Section 377* prohibited carnal intercourse which were against the order of nature with any man, woman, & animal, if any person is accused of doing so than they would be punished with life imprisonment or with imprisonment of either description from term maybe extended to ten years and along with fine. Before the judgement we can see in the facts that it has also been mentioned by petitioner itself that this goes beyond the choice. Like, if a person a person chooses to do so it is their choice to indulge in such activity, but *section 377* not only defines it as an offence but also penalizes it which is ultra-virus to constitution's *Article 14 Right to equality*, & *Article 15*, Prohibition of discrimination regardless of gender, caste, etc. *Article 21*, Protection of life & personal liberty. Since it is not the choice of people themselves to be born as Straight, Bisexual or Transgender, *section 377* invades the constitutional Rights to privacy and also discriminates on the basis of sexual preferences. As a result, people belonging to the *LGBTQ* community have to face shame and discrimination from other members of society, which also hinders the growth of the personality of a person and creates a sense of discomfort to live in such an environment.

Homosexuals make up 7-8% of the population, and despite being a minority, they contribute to

⁸ supra

and are a part of India, so they are citizens as well. The *Indian constitution* extends to the whole of India and to every citizen of it. Hence, any law which is ultra-virus to the constitution is void in nature. Hence, as highlighted in the case of *Navtej Singh Johar vs. Union of India*⁹, section 377 of the *Indian penal code* penalises carnal intercourse, which is unnatural in nature with man, women, and animals, and hence classifies significant punishment for the same.

Firstly, it is the choice of a person and their sexual preferences.

Secondly, since it is not the choice of a person to determine a person's sexual orientation, it should not be regarded as a mere offence. *LGBTQ* should also be categorised as a sexuality.

Thirdly, the *section 377* should have criminalised carnal intercourses up to bestiality and non-consensual unnatural sex, since it should be up to people to do something or anything or not.

Fourthly, moving to the points that have been kept from the respondent side that, scraping off the *section 377* will also lead to moral public wrong and will ruin the institution of marriage, so in the bible it has already mentioned and also these such texts can also be seen through the ancient craving of historical monuments.

Finally, *Section 377* violates *Articles 14, 15 & 21*, which means that the *Indian penal code* is ultra vires the *Indian constitution*, so *Section 377* is unconstitutional. Hence, it was declared as void in nature.

⁹ **Ibid**