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## CASE COMMENT: NAVTEJ SINGH JOHAR V. UNION OF INDIA THR. SECRETARY & MINISTRY OF LAW & JUSTICE (2018)

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**CITATION:** [2018] 7 S.C.R. 379

**BENCH:** Hon'ble Mr. Chief Justice Dipak Misra, Hon'ble Dr. Justice D.Y. Chandrachud, Hon'ble Mr. Justice R.F. Nariman, Hon'ble Ms. Justice Indu Malhotra

**JUDGEMENT:** 06 September 2018

### I. INTRODUCTION

As per **S.377 of the Indian Penal Code, 1860**<sup>1</sup>, any person voluntarily indulging in carnal intercourse **against the order of nature** with any man, woman or animal, shall be punished in accordance with the corresponding provision and held criminally liable. In the present case, the constitutional validity of the aforementioned provision was challenged before the Supreme Court of India with specific emphasis being made on coitus between partners belonging to the same sex. In its unanimous decision, the constitutional bench spearheaded by Dipak Misra, CJ., the court quashed its earlier ruling in the *Suresh Koushal* case<sup>2</sup>, thereby, striking down the constitutional validity of S.377 of the Indian Penal Code, 1860. The reasoning of the court behind such a decision took into consideration the infringement of the fundamental rights faced by the citizens of India belonging to the *LGBTQIA+* community and the fact that the view taken by the court in the *Suresh Koushal* case was impermissible as it stood in conflict with the court's decision in the present case. This case continues to be a landmark judgement in a number of Law textbooks and is considered of utmost importance by many eminent jurists as it provides answers with corresponding reasoning as to the procedure of dealing with the identity crisis of the people belonging to the *LGBTQIA+* community.

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<sup>1</sup> Indian Penal Code, 1860, § 377, No.45, Acts of Parliament, 1860 (India).

<sup>2</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

## II. CONTEXTUAL BACKGROUND

- (a) S.377 of the Indian Penal Code (IPC), primarily authored by *Thomas Babington Macaulay* and enacted in 1860, criminalized ‘cardinal intercourse against the order of nature’ and was often manipulated to target and punish acts which constituted consensual homosexuality between adults.
- (b) As per the bare act of IPC, the provision is as follows;

### **S.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.*

- (c) As early as 2009, the Delhi High Court, in the case of *Naz Foundation v. Government of NCT of Delhi*<sup>3</sup>, ruled against the very purpose of this provision for which it was resorted to and decriminalized consensual homosexual acts between adults, holding that Section 377 **violated the fundamental rights to equality, privacy, and dignity** under the Indian Constitution.
- (d) Overruling the aforementioned judgement of the Delhi High Court, the Supreme Court (SC), in the case of *Suresh Koushal* (supra), reinstated S.377 and reasoned that it was up to the Parliament, not the judiciary, to amend the law. Thereby upholding the **doctrine of separation of powers**.
- (e) In the present matter, a writ petition was filed by Navtej Singh Johar and four others representing the *LGBTQIA+* community which challenged the constitutionality of S.377 on the grounds that it violated their fundamental rights.

## III. LEGAL ISSUES

1. Whether S.377 of the Indian Penal Code, 1860 which criminalizes ‘cardinal intercourse

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<sup>3</sup> Naz Foundation v. Government of NCT of Delhi, 2009 (6) SCC 712.

against the order of nature’ including but not limited to **homosexual acts is constitutionally valid?**

2. Whether **consensual coitus** between partners of same-sex **imposes any type of criminal liability** within the purview of S.377 of IPC?
3. Whether S.377 **violates** any of the following rights conferred by the Constitution of India (COI) to its citizens;

•**Art.14** — Right to Equality

•**Art.15** — Right to non-discrimination

•**Art.21** — Right to Life and Personal Liberty, Right to Privacy

•**Art.19(1)(a)** — Freedom of Speech and Expression

4. Whether the **view** taken by the Supreme Court which **reinstated the original interpretation** and criminalized homosexuality between adults under S.377 as per the **doctrine of separation of powers** in **Suresh Koushal (supra)** is liable to be **overruled?**

#### IV. DOCTRINES & RULES

##### 1. Doctrine of *Constitutional Morality*

This doctrine refers to the principles and values enshrined in the Constitution, such as equality, liberty, and justice, which must prevail over traditional moral standards and societal prejudices.

##### 2. Doctrine of *Proportionality*

This doctrine requires that a law must not impose excessive restrictions on fundamental rights and must remain proportionate to its purpose.

##### 3. Doctrine of *Severability*

This doctrine empowers the court to declare void only the unconstitutional part of the law while leaving the rest of it intact.

#### **4. Doctrine of *Separation of Powers***

This doctrine is a constitutional law principle that divides the government's functions among the *legislature, executive and judiciary*.

#### **5. Doctrine of *Progressive Realization of Rights***

This doctrine emphasizes the fact that the constitution must evolve as per the changing societal norms in order to properly serve the people of this day and age while also adhering to the change in international human rights.

#### **6. Doctrine of *Stare Decisis***

This doctrine binds the lower courts by the orders and judgements delivered by the higher courts as per the hierarchy.

#### **7. Principle of *Transformative Constitutionalism***

This principle personifies the Constitution as a living document that must be interpreted in order to address historical injustices and promote social change.

#### **8. Principle of *Inclusivity***

This principle upholds the idea of law and policies being inclusive of all individuals, regardless of their sexual orientation, gender identity, or any other characteristics.

#### **9. Art. 21 of COI<sup>4</sup> — *Right to Privacy***

As per the judgement delivered in *Justice K.S. Puttaswamy (Retd.) v. Union of India (2017)*<sup>5</sup>, this right can be inferred under Art.21 of the COI and constitutes the right to make intimate choices without state interference.

#### **10. Art. 14 of COI<sup>6</sup> — *Right to Equality***

This article of the Indian Constitution guarantees to all its citizens equality before law and

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<sup>4</sup> INDIA CONST. art. 21.

<sup>5</sup> Justice K.S. Puttaswamy vs. Union of India, (2017) 10 SCC 1.

<sup>6</sup> INDIA CONST. art. 14.

equal protection of law.

#### **11. Art. 15 of COI<sup>7</sup> — *Right to Non-Discrimination***

This article of the Indian Constitution prohibits discrimination on grounds of religion, race, caste, sex, or place of birth.

#### **12. Art. 21 of COI<sup>8</sup> — *Right to Life and Personal Liberty***

This article of the Indian Constitution guarantees the right to life and personal liberty, including but not limited to the right to live with dignity.

#### **13. Art. 19(1)(a) of COI<sup>9</sup> — *Right to Freedom of Speech and Expression***

This article of the Indian Constitution guarantees the right to freedom of speech and expression, including but not limited to the right to express one's identity and intimate choices.

### **V. PETITIONER'S CONTENTION**

The petitioners contended that the section in question stigmatized and discriminated against them based on their sexual orientation, thereby violating their rights to dignity, privacy, freedom of expression and equality. They argued that the members of the *LGBTQIA+* community were treated as criminals for their sexual orientation, the expression of their identities and autonomy in intimate relationships was being suppressed which constituted a direct attack on the community's fundamental rights. They relied on the *Justice K.S. Puttaswamy* (supra) judgement which established the right to privacy as a fundamental right inferred under Article 21 of the COI. It was further contended that the operations of S.377 was in conflict with international human rights principles, judgements from other jurisdictions were cited for the same. Furthermore, the doctrine of constitutional morality was highlighted, which upheld the values of equality, dignity, and liberty over prevailing societal prejudices and outdated modern standards.

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<sup>7</sup> INDIA CONST. art. 15.

<sup>8</sup> INDIA CONST. art. 21.

<sup>9</sup> INDIA CONST. art. 19, § 1, cl. g.

## VI. RESPONDENT'S CONTENTION

It was submitted on behalf of the respondents that persons who indulge in homosexuality are at much greater of a risk of contracting HIV/AIDS which, in turn, was supported by statistical data which shewed the percentage of prevalence of AIDS is found to be greater in quantity in homosexuals than in heterosexuals, therefore, the right to privacy must not enable people to put their health in jeopardy. Further arguments made by the respondents and other intervenors involve the detrimental affect on marriages in India, giving our consideration to **Art.25**<sup>10</sup> of the COI, and the fact that S.377 is not limited to consensual homosexuality but also extends to forced penile non-vaginal coitus between adults as per the *Iqbal Singh Marwah*<sup>11</sup> case.

## VII. SUMMARY OF JUDGEMENT

- **The Suresh Koushal (supra) conundrum** — In his judgment, Dipak Misra, CJ. took note of the reasons which led the Delhi high court to declare S.377 of IPC violative of Art.14,15 and 21 in the case of *Naz Foundation v. NCT of Delhi* (supra). The high court preferred an expansive interpretation of 'sex' so as to include prohibition of discrimination on the ground of 'sexual orientation' and further delineated that COI reflects the value of inclusiveness, thereby, holding that where a society displays inclusiveness, the people belonging to the *LGBTQIA+* community can be assured a life of dignity and non-discrimination. The aforementioned judgement was quashed post being challenged in the case of *Suresh Koushal* (supra) before the SC, since the *LGBTQIA+* community constituted a mere fraction of the Indian population. However, in light of the present population data, reviewing the *Koushal* judgement is of utmost importance.
- **Transformative Constitutionalism** — It was observed in the *N.M. Thomas* case<sup>12</sup> that the purpose of drafting a whole constitution is to 'transform the nation' and this grail is the "fundamental pillar of transformative constitutionalism". It has been realized by the SC time and again that static interpretation of the COI would impede it's spirit while witnessing a fast social and economic change in the society. Therefore, courts have earnestly acted as the *sentinel on qui vive* for defending individual's rights irrespective of their sex, choice and

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<sup>10</sup> INDIA CONST. art 25.

<sup>11</sup> *Iqbal Singh Marwah and another v. Meenakshi Marwah and another*, (2005) 4 SCC 370.

<sup>12</sup> *State of Kerala and Anr. v. N.M. Thomas and Ors.*, AIR 1976 SC 490.

sexual orientation.

- **Constitutional morality and perspective of human dignity** — A morality embedded into the COI must act as the guiding light when interpreting the document, which highlights strict adherence to its core principles. Therefore, the *LGBTQIA+* community ‘must not be outlawed or given step-motherly treatment’. As regards to human dignity, it has been duly acknowledged by the COI under Art.21 and thus, must be preserved whenever the occasion arises.
- **Doctrine of progressive realization of rights** — This doctrine is evidence of the dynamic and changing nature of the COI and, in turn, reminds us of its rigid yet flexible form shaped by the constituent general assembly. A constitution is ever-growing as it is the physical embodiment of the spirit of the nation, and is influenced by past experiences in order to shape a better future.
- **The Litmus test** — While citing relevant precedents, it was observed that S.377 fails to qualify the criteria of proportionality in the test laid down in the corresponding authorities which upholds the value of ‘morality and decency’, and is violative of Art.19(1)(a) of the COI, including the right to choose a sexual partner.

## VIII. ANALYSIS

In order to punish, protect and govern the citizens of a nation, the judicial system must strictly adhere to the principles of natural justice as well as be familiar with the idea of what the framers of the country’s constitution actually desired from their document. As regards the present case, the doctrines referred to and rules followed by the SC while deciding the case not only reflects the harmonious approach of the court in dealing with the matter, but is also evidence that interpretation of law must be reasonable towards the general public, as provided for in Art.14 of the COI.

The contention pleaded by the petitioners in this case was anything but unreasonable as due exercise of fundamental rights was prayed for before the court and the violation of the same was pleaded against before it. Treating someone as a criminal due to mere difference in sexual orientation is a direct attack on the dignity of an individual as well as his social standing. The

COI expressly provides against such treatment in its third part which was correctly interpreted by the high court of Delhi in the *Naz Foundation* case.

The SC's act of reversing the judgement of the high court considering the low population of the *LGBTQIA+* community at the time stands unjustified as a person must not be denied his rights merely owing to low population of the people who demand the same. The SC too, has provided precedents from its own archives where fundamental rights were given due importance and any right inferable from the text of the COI shall be guaranteed to the citizen as any other explicit right. The relevant precedents include the *Justice K.S. Puttaswamy* (supra) judgement along with the *NALSA* case<sup>13</sup> which recognized the rights and affirmed the identity of transgender persons who, in turn, belong to the *LGBTQIA+* community.

Moreover, the arguments put forth by the respondents and other intervenors appears to be somewhat right in the eyes of law as they intend to preserve the Indian culture and the way of nature, that is, the way humans were designed by the omnipresent. Furthermore, the main argument from the respondents revolved around the contraction of HIV/AIDS which was shown to have greater prevalence in homosexuals rather than heterosexuals. The COI provides for reaching a consensus which benefits all and restores order, therefore, in order to prevent any STD outbreak, a neutral stance could have been considered, that is, instead of outrightly pleading for no change in the *status quo* of the impugned section, one may plead for increasing the awareness of contraceptives as the prevalence of STDs may be lesser in heterosexuals but is not entirely absent.

As per the judgement of the constitutional bench in this case, Mr. Dipak Misra, CJ. has mentioned that;

*“The primary objective of having a constitutional democracy is to transform the society progressively and inclusively.”*

This statement summarises the entire reasoning behind the judgement and upholds the true nature of the COI which was desired by its framers.

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<sup>13</sup> National Legal Services Authority vs Union Of India & Ors, AIR 2014 SC 1863.



**IX. VERDICT**

Taking into consideration the aforementioned judgement given by the constitutional bench and the arguments put forth by both the parties to the case, it can be held that the SC, in all its wisdom, has rightly provided for the criminalization of the impugned section, that is, S.377 of the IPC, 1860. The working desired and provided for by the framers of the COI is the 'rigid yet flexible' nature of the document and as the society undergoes significant transition from the one age to another, the law of the land shall change with it and establish itself in a way fit to govern the people of the 'transitioned era', maintaining their dignity and privacy.