

SUPREME COURT RECOGNIZES RIGHTS OF THE LGBT COMMUNITY

1. INTRODUCTION

On September 6, 2018, the Supreme Court of India in *Navtej Singh Johar and Ors. v. Union of India* (the “**Navtej Johar Case**”),¹ struck down parts of Section 377 of the Indian Penal Code, 1860 (“**Section 377**”)² which criminalized sexual intercourse *against the order of nature*. The Supreme Court, effectively, allowed sexual intercourse between consenting adult members of the lesbian, gay, bisexual and transgender (“**LGBT**”) community.³

2. BACKGROUND

Section 377 was a law which sought to criminalize homosexual activity and all other sexual activities which were not connected to *procreation*. This law has been criticized for discriminating against, and disproportionately affecting, the LGBT community, and for not being in tune with *modern morality*. In fact, in 2009, the Delhi High Court⁴ struck down Section 377 for being contrary to *constitutional morality*. However, in 2013, a 3-judge bench of the Supreme Court⁵ overturned the decision of the Delhi High Court and upheld the validity of Section 377.

3. ANALYSIS

There were 4 separate, concurring judgements which struck down Section 377 to the extent that it criminalized consensual intercourse between adults. The primary grounds under the Constitution were: (i) Right to equality under Article 14; (ii) Right against discrimination under Article 15; (iii) Right to freedom of speech and expression under Article 19; and (iv) Right to privacy under Article 21.

3.1 Right to Equality

The right to equality under Article 14 requires equal treatment of all citizens before law. While it allows for a distinction to be drawn between different categories of individuals, it also mandates that such a distinction must be based on *intelligible differentia*, and must have a rational nexus with the object sought

¹*Navtej Singh Johar and Ors. v. Union of India*, available at

https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf.

² Section 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 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.]”

³The part of Section 377 which criminalizes non-consensual intercourse and sexual intercourse with children and animals, still remains in force.

⁴*Naz Foundation v. Government of NCT of Delhi and Others*, available at http://clpr.org.in/wp-content/uploads/2016/06/Naz_Foundation_vs_Government_Of_Nct_Of_Delhi_And_..._on_2_July_2009.pdf.

⁵*Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*, available at http://www.oscpcr.nic.in/sites/default/files/Suresh_Kumar_Koushal_%26_An_r_vs_Naz_Foundation_%26_Ors_on_11_December,_2013.PDF.

to be achieved. The Supreme Court held that there was no *intelligible differentia* between people “*who supposedly engage in ‘natural’ intercourse and those who engage in ‘carnal intercourse against the order of nature’*”.

3.2 Right against Discrimination

Article 15 prevents the State from discriminating against any citizen only on the grounds of sex, religion, race, caste, or place of birth. This provision was previously interpreted to mean that discrimination, which is not *only* on the grounds mentioned above, is permitted. In the Navtej Johar Case, the Supreme Court moved away from this narrow view and held that *any* ground of discrimination, whether direct or indirect, which is founded on a particular understanding of the role of the sex, constitutes *discrimination* under Article 15. This way, the Supreme Court expanded the prohibited grounds of discrimination under Article 15 to include *sexual orientation*, and, therefore, Section 377 was held to be discriminatory under Article 15.

3.3 Right to Freedom of Speech and Expression

Article 19 allows for the freedom of speech and expression to all citizens. The Supreme Court noted that *consensual carnal intercourse* among adults in a private space does not, in any way, harm public decency or morality. Consequently, Section 377 does not qualify as a *reasonable restriction* on an individual’s freedom of speech and expression.

3.4 Right to Privacy

Article 21 provides for the protection of life and personal liberty as a fundamental right. Over the years, the Supreme Court has interpreted this right to include the right to live with dignity; the right to privacy; and the right to autonomy. The Supreme Court found Section 377 to be in violation of these constitutional rights.

4. INDUSLAW VIEW

This historic judgement finally, although belatedly, puts India in the list of almost 150 countries⁶ where homosexual activity is legal. The decriminalization of sexual intercourse between *all consenting adults* was an eagerly anticipated first step towards recognizing the rights of the LGBT community in India.

It will be interesting to see if the legislators and courts go further in recognizing other civil rights, including allowing same-sex couples to marry and adopt children, and the right against discrimination, particularly for employment and housing. 46 countries have recognized same-sex marriage, and 42 countries have given same-sex couples the right to adopt children. Further, almost 100 countries have recognized the importance of *substantive equality*, and have sought to prevent discrimination against the LGBT community with respect to housing and employment.

Another very interesting perspective from this landmark judgment is that it remains to be seen if the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 will be amended to make it a gender-neutral law. While progressive corporations in India have internal gender-neutral anti-sexual harassment policies in place, the legislation however at the moment covers only women who are subjected to sexual harassment at the workplace.

⁶Please refer to <http://www.equaldex.com/> for detailed statistics on the global status of the rights of the LGBT community.

Lastly, while the Supreme Court briefly discussed the aspect of civil rights, the scope of the judgement is restricted to Section 377. The entire country perhaps now waits, with hopeful expectation, to see whether the LGBT community will be granted civil protections that other heterosexual individuals ordinarily enjoy.

Authors: Avik Biswas | Savithran Ramesh

Sector: Government & Regulatory

Date: September 18, 2018

DISCLAIMER

This alert is for information purposes only. Nothing contained herein is, purports to be, or is intended as legal advice and you should seek legal advice before you act on any information or view expressed herein.

Although we have endeavored to accurately reflect the subject matter of this alert, we make no representation or warranty, express or implied, in any manner whatsoever in connection with the contents of this alert.

No recipient of this alert should construe this alert as an attempt to solicit business in any manner whatsoever.