

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 2 | Issue 2

2020

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Same Sex Marriage Case Comment on Navtej Singh Johar Case

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ABSTRACT

Since, marriage is a union between two individual (who become and husband and wife) but now the society today consider gay marriage as sick and this is the reason Gay marriage is one of the issues where society refuse to accept or to deal with it and also LGBT people are not entitled to some of the constitutional rights such as article 14,15 and Article 19 including Right to life of constitution.

We will be also discussing about the cases on same sex marriage which is Naz Foundation v. Govt. of N.C.T. of Delhi Naz Foundation v. Govt. of N.C.T. of Delhi and Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choose of a sexual partner to be part of the right to life guaranteed by Art. 21 of the Constitution of India (Constitution).

There are 13 countries where same sex marriage is accepted and what must be considered is that each and every have our own free will we can do whatever we want to do and by denying gay marriage we are discriminating gay people.

CASE TITLE: Navtej Singh Johar & Ors V. Union of India, Thr. Secretary, & Ministry Of Law And Justice²

I. INTRODUCTION

Gay marriage - it's not about two people being gay: it's about two people who love each other and who have decided to commit to each other for the exact same reasons any other couple would get married³

If we talk about a marriage it is a union between two individual (who become and husband and wife) or we can say that it is the process by which two people make their relationship,

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² writ petition (civil) no. 572 of 2016, Writ petition (criminal) no. 88 of 2018, Writ petition (criminal) no. 100 of 2018, Writ petition (criminal) no. 101 of 2018, Writ petition (criminal) no. 121 of 2018

³ Luke Macfarlane Quotes. (n.d.). BrainyQuote.com. Retrieved March 29, 2019, from BrainyQuote.com Web site: https://www.brainyquote.com/quotes/luke_macfarlane_830849

public, official and permanent.

But now the society today tends to stick to what they know and hold on to the familiar as most of the people consider homosexuality a sin it further weakens the traditional values essential to our society and this could be the reason that when any unfamiliar comes along the society resists acceptance, instead they dismiss the issue by denying its existence. Unfortunately, gay marriage is one of the issues where society refuse to accept or to deal with it and this may all because of they don't know how to approach it or for whatever reason the society has chosen to ban gay marriage

The parents were the one who chose who their children are going to marry based on a person character, family background and therefore same sex marriage is new to us all.

Same sex marriage (LGBT), also known as gay marriage, is a marriage between the people of the same sex, either as a secular civil ceremony or in a religious setting and LGBT people in India face many difficulties as society refuse to accept them may be because of the manner they live and since we all are entitled to many constitutional rights and are also protected by the constitution of the India but LGBT people they are not entitled to some of the constitutional rights such as article 14 which talks about Right To Equality Before Law, article 15 which talks about Protection from Discrimination and Article 19 which talks about freedom of expression and also Right to life

II. FACTS OF THE CASE

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 (Section 377) insofar as it applied to the consensual sexual conduct of adults of the same sex in private.

The issue in the case originated in 2009 when the Delhi High Court, in the case of Naz Foundation v. Govt. of N.C.T. of Delhi⁴, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex.

In 2014, a two-judge bench of the Supreme Court, in the case of Suresh Kumar Koushal v. Naz Foundation⁵, overturned the Delhi HC decision and granted Section 377 “the stamp of approval”.

When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter.

⁴ WP(C) No.7455/2001

⁵ CIVIL APPEAL NO.10972 OF 2013

The Petitioner in the present case, Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choose of a sexual partner to be part of the right to life guaranteed by Art. 21 of the Constitution of India (Constitution).

Among other things, the Petitioner further argued that

- (i) Section 377 was violative of Art. 15 of the Constitution (Protection from Discrimination) since it discriminated on the basis of the sex of a person's sexual partner,
- (ii) Section 377 had a "chilling effect" on Article 19 (Freedom of Expression) since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and
- (iii) Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of "a certain choice or manner of living."

The Respondent in the case was the Union of India. Along with the Petitioner and Respondent, certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case.

III. ISSUES RAISED

- 1) Was the rationale of the Supreme Court judgment in the Suresh Kaushal case sound in its understanding of morality as social morality?
- 2) Whether Section 377 violates Article 14 and 15 by allowing discrimination on the basis of "sexual orientation" and "gender identity"?
- 3) Whether Section 377 violates right to autonomy and dignity under Article 21 by penalizing private consensual acts between same-sex persons?
- 4) Whether Section 377 violates the fundamental right to expression under Article 19(1) (a) by criminalizing the gender expression of persons belonging to the LGBTQI+ community?

IV. JUDGEMENT

The five-judge Bench (Chief Justice Dipak Misra, Justice Rohinton Nariman, Justice DY Chandrachud and Justice Indu Malhotra), partially struck down Section 377 IPC, decriminalising same-sex relations between consenting adults. The Court has upheld provisions in Section 377 that criminalise non-consensual acts or sexual acts performed on

animals.

The four judges unanimously cited fundamental rights violations in reading down Section 377. They found that Section 377 discriminates against individuals on the basis of their sexual orientation and/or gender identity, violating Articles 14 and 15 of the Constitution. Further, they ruled that Section 377 violates the rights to life, dignity and autonomy of personal choice under Article 21. Finally, they found that it inhibits an LGBT individual's ability to fully realize their identity, by violating the right to freedom of expression under Article 19(1)(a). Reference was made to Court's recent judgements in *NALSA* (recognised transgender identity) and *Puttaswamy* (recognised fundamental right to privacy).

Justice Malhotra spoke about the fundamental right to health, which flows from the right to life in Article 21. She pointed out that the stigma associated with being LGBT forces LGBT individuals to live closeted lives. This, in turn, denies LGBT individual access to adequate healthcare. She expressed grave concern about the high incidence of HIV/AIDS and other sexually transmitted diseases in LGBT communities across India.

V. JUDGEMENT ANALYSIS:

A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society. Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution, and amend our laws in a way which will cater to the needs of society.

Section 377 of the IPC bears the heading "unnatural offences" and it penalizes carnal intercourse which is against the order of "nature". Some of the judges, therefore, asked themselves what was meant by the word "natural". Chief Justice Misra and Justice Malhotra held that a person's sexual orientation itself is natural. Justice Chandrachud wrote that there are shortcomings in the conceptual categories of "natural" and "unnatural", merely because something is natural does not mean that it is desirable (e.g., death), and just because something is unnatural (e.g., a heart transplant) doesn't mean that it ought to be criminal "The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of

progressive interpretation, accommodates and addresses the realities of modern life."⁶ Keeping this mind a change was in order and it is necessary to commend the supreme court on its judgement.

Under the classification test, a law falls foul of Article 14 if it either classifies people into categories without applying an intelligible differentia, or if the object sought to be achieved by the law doesn't bear any rational nexus with the intelligible differentia.

In many spheres, the sexual minorities have been accepted. They have been given space after the NALSA judgment but the offence punishable under Section 377 IPC, as submitted, creates a chilling effect. The freedom that is required to be attached to sexuality still remains in the pavilion with no nerves to move. The immobility due to fear corrodes the desire to express one 's own sexual orientation as a consequence of which the body with flesh and bones feels itself caged and a sense of fear gradually converts itself into a skeleton sans spirit.

Two judges found that it violates the right to health, because the criminalization of homosexual intercourse makes members of the LGBTQI community hesitate to seek medical advice and that they are therefore more susceptible to sexually transmitted.

However, Section 377 of the IPC has not entirely been struck down. It still covers bestiality and non-consensual intercourse. The Judgment does not advert to the distinction between consenting adults engaging in sexual intercourse, and sexual acts which are without the will, or consent of the other party. A distinction has to be made between consensual relationships of adults in private, whether they are heterosexual or homosexual in nature.

Just like other fundamental rights, the right to privacy is not an absolute right and is subject to reasonable restrictions. Any restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality.

This gives rise to a paradoxical situation since Section 377 criminalises LGBT persons, which inhibits them from accessing health-care facilities, while the Mental Healthcare Act, 2017 provides a right to access mental healthcare without discrimination, even on the ground of 'sexual orientation.

The mere fact that the LGBT persons constitute a "miniscule fraction" of the country's population cannot be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country who are equally entitled to the enforcement

⁶ Re: Same Sex Marriage, [2004] 3 S.C.R. 698

of their Fundamental Rights guaranteed by Articles 14, 15, 19, and 21.

VI. OPINION

Individual's right to express himself is guaranteed under monumental document that is Constitution of India. And recently in Navtej's case court cited the statement of wolf Gang, by which we can determine the extent of expression of individual which court approves. "I am what I am, so take me as I am".⁷ And Apex court in same case stated that our constitution is living document and emphasized on it by stating that "for it has been created in such a manner that it can adapt to the needs and developments taking place in the society."⁸ So court didn't do nothing wrong while declaring s.377 of IPC as unconstitutional instead it recognizes what has to be. And court in adultery's case quashed the stereotypes thought that "women is chattel of men". The stereotypes thought prevails in society, however it should be abolished because it prevents individual from, enjoying his/her fundamental rights guaranteed under part three of our constitution. If we talked about the same sex marriage or LGBT relationship, they are also enjoying their rights while having in relationship because Chanadrachud J. recognized view of Martin Siegel, according to him "act of engaging in sexual activity can be interpreted as being expressive"⁹. And right to express is guaranteed under Article 19(1) (a). Though there are opinions that recognition of same sex marriage may be call as invitation to chaos in society, but it doesn't mean that hammering it absolutely will be appropriate option, every individual has its own identity and it should be preserved. Relationship is not all about sex, it is more than that, having partner of integrity, upon whom you can trust, who cares you, who helps you to be yourself and be with you in every part of your life. And many believes that it is western thought and accordingly presume it to be absolutely wrong, but it is fondness which arise within individual. And if we talked about whether it should be penalizing or not court explicitly stated that

"Love and sexual life were intimate concerns, and they should not be made subject to criminal law".¹⁰

And if we take cognizance of article 21 of Indian constitution, according to it every individual has right to life. And it doesn't mean mere animal existence¹¹ If we are denying the self-expression, we are violating the right mentioned above because right "to live as he/she wants" is part of life. Law which restricts individual from enjoying the right

⁷ AIR 2018 SC 4321

⁸ Ibid

⁹ AIR 2018 SC 4898,

¹⁰ Ibid 5

¹¹ Cite yourself please

mentioned should be reasonable, but s. 377 is not reasonable because we can punish anyone for stealing, theft but we cannot punish what she/he is, it is absolutely absurd.

Thus, court while recognizing same sex marriage as legal, took the right step because every individual come to this world with some identity, and reason behind to preserve it, is that it is identity or nature what make us different from each other, without identity life of individual has no meaning.

“No one can escape from its identity”.

VII. CONCLUSION

We are becoming diversely knowledgeable therefore we have to adjust traditions to match the world we live in today and the knowledge we have and if not adjust traditions we shall make new traditions. In being able to adjust traditions and come up with new traditions we shall become more accepting of same sex marriage. This all your opinion- not research.

We have to stop and consider this people as they are not doing anything wrong, they are just being who they are. Gay cannot help the way they feel and also, they did not choose to be gay, they are born gay. There are 13 countries where same sex marriage is accepted and what must be considered is that each and every have our own free will we can do whatever we want to do and by denying gay marriage we are discriminating gay people. We are always enforcing equality in our society and yet we are not treating gay people equally by not allowing them to marry or receive benefits that any traditional couples will receive when they marry
