

# Supreme Court Decriminalised Section 377 of Indian Penal Code: Socio – Legal Perspective

Dr. Arshi Pal Kaur  
Assistant Professor, Department of Laws,  
Guru Nanak Dev University, Regional Campus  
Gurdaspur, Punjab, India

**Abstract:** Section 377 of the Indian Penal Code is intended to punish the offence of sodomy, buggery and bestiality. Homosexuality or sexual inversion is sexual attraction of one person to another of the same sex, leading to physical contact and sexual pleasure. The Delhi High Court on July 9, 2009 had decriminalised homosexuality among consenting adults. In which High Court declares that it is the violation of Article 14, 15 and 21 of the Constitution of India. Therefore, the bench of the Chief Justice of Delhi High Court Mr. Justice AP Shah and Justice S Murlidhar declares, section 377 of Indian Penal Code in so far as it criminalises consensual sexual acts of adults in private is violative of Articles 21, 14, and 15 of the Constitution. Thereafter, in the year 2013 the Supreme Court overruled the judgement of the Delhi High Court and again re-criminalising homosexuality. In *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*, the Supreme Court observed “the Constitution is a living character; its interpretation must be dynamic.” Therefore it is necessary to understand the Constitution in a manner which intricate and advances modern reality.

**Keywords:** Homosexuality, arbitrary, unreasonable, Living Character, Transformative Constitutionalism

## INTRODUCTION

Section 377 of the Indian Penal Code is intended to punish the offence of sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman or by a man or woman in any manner with an animal. <sup>1</sup> This section deals with unnatural carnal intercourse against the order of nature. It consists of penetration per anus. Consent of the parties here is immaterial and the party consenting is equally liable as an abettor. <sup>2</sup> Recently, Supreme Court’s five judges Constitution Bench headed by Chief Justice of India Mr. Justice Dipak Misra, Justice Indu Malhotra, Justice D Y Chandrachud, Justice R F Nariman and Justice A M Khanwilkar in its landmark judgement, which was pronounced on September 6, 2018 legalised same sex relations between consenting adults. <sup>3</sup> This research paper analyses the changing socio legal dimensions of section 377 of Indian Penal Code in light of the recent Supreme Court’s verdict.

## ANALYSIS OF ILLEGALITY OF HOMOSEXUALITY IN INDIA

Section 377 of Indian Penal Code deals with the unnatural offence. It says that a person, who voluntarily does carnal intercourse against the order of the nature with any man, woman or animal shall be punished with imprisonment of either description for a term, which may extend to ten years with fine; It explains that penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.<sup>4</sup>

As in rape so also in an unnatural offence even, the slightest degree of penetration is enough and it is not necessary to prove the completion of the intercourse by the emission of seed.<sup>5</sup> Under Sexual Offences Act, 1967 buggery is no longer an offence in England if committed in private between two consenting adults of and above the age of 21. <sup>6</sup> This Act has, however, been criticised even in England as negating States “right to suppress a social vice”. <sup>7</sup> The word ‘sodomy’ generally denotes intercourse *per anum* by a man with a man or with a woman or with an animal. <sup>8</sup> Sodomy may be either homosexual or heterosexual. In case the parties are of same sex, it will be termed as homosexual and if the parties are of opposite sex, it will be called as heterosexual. Consent unlike rape is not a defence to the charge. The person affecting the intercourse is known as the agent and the other party as the patient. Homosexual practices in private

between consenting males above the age of 18 years is no more an offence in England and other western countries. However, it is an offence in India and most of South Asian Countries.<sup>9</sup>

Bestiality is a type of buggery, the offence of a human of either sex having unnatural sexual relations with an animal per anum or per vaginam.<sup>10</sup> Section 377 is wide enough to include a woman as well. Hence, a woman is also liable for committing unnatural offences under this section. However, the section is not attracted if either a man or a woman with an inanimate object does the act.<sup>11</sup> The term lesbianism means unnatural sexual practices between women, so called from the poetess Sappho of Lesbos, who is said to have gathered a group of women about her. It has probably never been criminal in the UK, unless probably in circumstances affronting public decency, but an imputation of lesbianism is actionable as defamatory.<sup>12</sup>

Homosexuality or sexual inversion is sexual attraction of one person to another of the same sex, leading to physical contact and sexual pleasure. Male homosexuality or sodomy is a widespread phenomenon and is not infrequent where groups of men are isolated for long period from all women, e.g. in prison, on shipboard, but not confined to such circumstances. The causes are obscure, whether biological or psychological. The social dangers involved are considerable, including corruption of young persons, blackmail, and psychological disturbance. For long male homosexuality was strongly socially reprobated and criminally punishable as a form of buggery.<sup>13</sup>

Incest is intercourse with a near relation. It is an act, which is prohibited. Heterosexual relations between persons within a culturally or legally defined kinship group are prohibited. Such prohibitions are almost universally found in human societies and have generated extensive sociological and psychological literature. It is usually thought that genetic considerations underlie this taboo. The general principle is that sexual relations are prohibited between persons so related that marriage between them is not legally permissible.<sup>14</sup>

## JUDICIAL ATTITUDE TOWARDS THE ILLEGALITY OF HOMOSEXUALITY

Where a highly educated person committed this offence, the Supreme Court having a regard to his loss of service and other consequences to his career following the offence let him off with a sentence of two months imprisonment.<sup>15</sup> In *Fazal Rab Chodhary v. State of Bihar*<sup>16</sup> the accused was charged for committing an unnatural offence upon years imprisonment was reduced to six months. It was held that in judging the depravity of the action for determining quantum of sentence, all aspects of the matter having a bearing on the question of nature of offence must be considered. In *Brother John Antony v. State*,<sup>17</sup> the petitioner a sub-warden of a Boarding Home was alleged to have committed unnatural offence with the inmates. The acts committed by the petitioner fell in two categories such as insertion of the penis into the mouth of the victim boy and doing the act of incarnal intercourse upto the point of ejaculation of semen into the mouth and manipulation and movement of the penis of the petitioner whilst being held by the victim boys in such a way as to create an orifice like thing for making the manipulated movements of insertion and withdrawal upto the point of ejaculation of semen. It was held that both the above categories of acts fall within the sweep of unnatural carnal offences under section 377. I

In *Mihir v. State of Orissa*<sup>18</sup> The accused committed unnatural offence with a minor girl who gave minute details of the offence and he was found reliable. The conviction of the accused under section 377 was confirmed but considering that he had a broken family life and belonged to lower strata of society, his sentence of rigorous imprisonment for three years was reduced to two years. In *R v. Fernandes*,<sup>19</sup> the accused who had been convicted of indecent assault on a boy aged 14 years, appealed against conviction. He pleaded guilty but a written basis of plea was submitted to the lower court stating his belief that the complainant was 18 years old at the time of offence. The Crown indicated that it did not accept that he had held that belief, and the jury had not tried the issue. The crown had to prove that he did not have a genuine belief as regards the age of the complainant. It was held that the accused's true belief was triable in view of *R v. K*<sup>20</sup> and he was entitled to the verdict of a jury on that issue. He had not had that opportunity and there was therefore the risk of injustice if the conviction was upheld.<sup>21</sup>

The House of Lords in *Kneller Ltd. v. Director of Public Prosecution*<sup>22</sup> has held that notwithstanding the legalisation by the Sexual Offences Act, 1967, of legalizing homosexual practices in private between consenting parties (adults) above the age of 21 (now 18 years), agreement to encourage such practices continue to be common law crime of conspiracy to corrupt public morals punishable in law. The appellant published a magazine, "The international Times" which contained on inner pages columns of advertisement headed 'Males', most of the advertisements were inserted by homosexuals for the purpose of attracting

persons who would indulge in homosexual activities. The magazine had a circulation of 30000 copies. The appellants were convicted for conspiracy to corrupt public morals by means of the advertisements. House of Lords affirmed the conviction and held that the appellants by means of advertisements have induced the readers thereof to meet those persons inserting such advertisements for the purpose of sexual practises taking place between such male persons and to encourage readers thereof in such practices, with intent thereby to debauch and corrupt the public morals of youth as well as of subjects.<sup>23</sup> The question whether homosexuality is legalized is a difficult and complicated issue.

## JUDICIAL DEBATE ON THE CONSTITUTIONALITY OF SECTION 377 OF INDIAN PENAL CODE

The Delhi High Court on July 9, 2009 had decriminalised homosexuality among consenting adults. The High Court further asserted that it is the violation of Article 14, 15 and 21 of the Constitution of India. Therefore, the bench of the Chief Justice of Delhi High Court Mr. Justice AP Shah and Justice S Murlidhar declares, "*section 377 of Indian Penal Code in so far as it criminalises consensual sexual acts of adults in private is violative of Articles 21, 14, and 15 of the Constitution.*"<sup>24</sup> Thereafter, in the year 2013 the Supreme Court overruled the judgement of the Delhi High Court and again re-criminalising homosexuality.<sup>25</sup> After that curative petition was filed by the *Naz Foundation* in the year 2016 before the Supreme Court. In *Justice K. S Puttaswamy (Retd.), and another's v. Union of India and others*,<sup>26</sup> the Supreme Court declares the right to privacy is a fundamental right. In this regard, "*The Supreme Court asserted that sexual orientation is an "essential element of identity. The rights of lesbian, gay, bisexual and transgender population are "real rights which is founded on sound constitutional doctrine".*"<sup>27</sup> The Law Commission of India in its 172<sup>nd</sup> report also gives recommendations regarding the deletion of section 377 of IPC.<sup>28</sup>

### 1. *Naz Foundation v. Government of NCT of Delhi and others*

#### ● *Section 377 of IPC Violates Article 14, 15 and 21 of The Constitution*

In *Naz Foundation v. Government of NCT of Delhi and others*,<sup>29</sup> Delhi High Court in the 87<sup>th</sup> Para of the judgement asserted

*"Union Governments stand regarding the retention of Section 377 of IPC in order to cover consensual sexual acts between adults in private on the ground of morality is unacceptable."*

The 88<sup>th</sup> Para of this judgement declares:-

*"The scope, content and meaning of Article 14 of the Constitution have been the subject matter of intensive examination by the Supreme Court in a catena of decisions. The decisions lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation."*

The 90<sup>th</sup> the Para of this judgement declares that "petitioner's contention before the court is that public morality is not come within the ambit of criminal law and therefore section 377 of Indian Penal Code does not have any legitimate purpose. However, Section 377 of IPC draws no difference between acts, which are engaged within the public sphere and private sphere. Furthermore, there is also no distinction between the consensual and non-consensual acts between adults, because consensual sex between adults in private domain does not cause any harm to the public morals. Therefore, the public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification as prescribed under Article 14 of the Constitution of India. However, the homosexual community considered as a class under section 377 of the IPC and is motivated by an animus towards this vulnerable class of people. The Union Government's stand in this regard is that the object of section 377 of IPC is to protect women and children as well as to prevent the dangers of spread of HIV/AIDS. Section 377 of IPC also enforces the societal morality against homosexuality."<sup>30</sup> The 92<sup>nd</sup> Para of the above-mentioned judgement declares:-

- **Section 377 of Indian Penal Code was based on a conception of sexual morality specific to Victorian era:** "It is clear that Section 377 of IPC, whatever its present pragmatic application, was not enacted keeping in mind instances of child sexual abuse or to fill the lacuna in a rape law. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and



sinfulness. In any way, the legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private.”<sup>31</sup>

- **To analyse the cause of public health by criminalising the homosexual behaviour :** “The second legislative purpose as prescribed under section 377 of IPC is to analyse the cause of public health by criminalising the homosexual behaviour. As already held, this purported legislative purpose is in complete contrast to the averments in NACO's affidavit. NACO has specifically stated that enforcement of Section 377 of IPC adversely contributes to pushing the infliction underground; make risky sexual practices go unnoticed and unaddressed. Section 377 of IPC thus hampers HIV/AIDS prevention efforts.”<sup>32</sup>
- **Section 377 of IPC is arbitrary and unreasonable:** “Lastly, as held earlier, it is not within the constitutional competence of the State to invade the privacy of citizen's lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interests "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 of IPC and its purpose is to criminalise private conduct of consenting adults, which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity.”<sup>33</sup>

Therefore, the Delhi High Court further held in Para 98 of the above-mentioned judgement that “the discrimination caused to MSM and gay community is unfair and unreasonable as it violates Article 14 of the Constitution of India.”<sup>34</sup>

The 108<sup>th</sup> Para of this Judgement declares Article 15 of the Constitution provides-

*“Prohibition of sex discrimination, which implies the right to autonomy and self-determination. Therefore, a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.”*<sup>35</sup>

The Court further declares that

*“The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.”*<sup>36</sup>

In *Naz Foundation v. Government of NCT of Delhi and others*,<sup>37</sup> Delhi High Court in the 131<sup>st</sup> Para of the judgement elaborately analysed the concept of life of dignity and non-discrimination.

- **Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are:** The Court in 131<sup>st</sup> Para asserted “*Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. Nehru spoke so passionately of this as ‘spirit behind the Resolution’.* In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is anti-thesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”<sup>38</sup>
- **Section 377 of IPC is violative of Articles 21, 14 and 15 of the Constitution:** The Court in Para 132<sup>nd</sup> of this judgement “*declares that Section 377 of IPC which criminalises consensual sexual activities of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.*” On the other hand, High Court held section 377 of IPC is valid where non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors.<sup>39</sup>

## 2. *Suresh Kumar Koushal & Ors. v. Naz Foundation & Ors.*

- **Section 377 of the Indian Penal Code which cannot ultra vires the provisions of Articles 14, 15 and 21 of the Constitution**

In *Suresh Kumar Koushal & Ors v. Naz Foundation & Ors.*<sup>40</sup> The Delhi High Court judgment *Naz Foundation v. Government of NCT of Delhi and others*<sup>41</sup> was challenged before the Supreme Court. In this case, Supreme Court asserted-

“Acts which fall within the purview of Section 377 of IPC can only be determined with reference to the act itself and to the circumstances in which it is executed. This Court further opined that Section 377 IPC would apply irrespective of age and consent. Section 377 IPC does not criminalize a particular people, identity, or orientation. It only identifies certain acts which, when committed, would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”<sup>42</sup>

The 71<sup>st</sup> Para of *Navtej Singh Johar & Ors. v. Union Of India and others, Thr. Secretary Ministry of Law and Justice*<sup>43</sup> the Supreme Court analyses its earlier stand on section 377 in *Suresh Kumar Koushal & ors. v. Naz Foundation & Ors.*, in which Court stated that

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 IPC suffers from the vice of arbitrariness and irrational classification.”<sup>44</sup> The Court further observed that “while reading down Section 377 of the Indian Penal Code, it cannot be overlooked that only a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender and in last more than 150 years, less than 200 persons have been prosecuted under Section 377 of the Indian Penal Code which cannot, therefore, be made a sound basis for declaring Section 377 IPC ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.”<sup>45</sup>

### 3. *Navtej Singh Johar & ors. v. Union of India Thr. Secretary Ministry of Law and Justice*<sup>46</sup>

In this landmark judgement, the Supreme Court quoted the *Johann Wolfgang von Goethe* in which he said “I am what I am, so take me as I am” and Court also quoted *Arthur Schopenhauer* in which he stated, “No one can escape from their individuality”.<sup>47</sup> With this Supreme Court “criticising the draconian laws which is based on a conservative notion of morality and asserted that every individual has freedom of right to privacy and a right to live with dignity. Hence, Supreme Court decriminalises sex between consenting homosexual adults.”<sup>48</sup>

- **The Constitution Is A Living Character; Its Interpretation Must Be Dynamic**

The Supreme Court analyses in the 90<sup>th</sup> Para of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>49</sup> that “in the authority of *NALSA* the rights of transgenders as a third sex was recognized which is very important for the democratic state like ours. This case recognised the human rights as a constitutional guarantee of right to life and liberty with dignity. The court further observed in 90<sup>th</sup> Para of this judgement:-

➤ **The Constitution is a living character:** “The Supreme Court observed “*the Constitution is a living character; its interpretation must be dynamic.*” Therefore it is necessary to understand the Constitution in a manner which intricate and advances modern reality.”<sup>50</sup>

➤ **Transgenders are human beings and therefore they have right to enjoy their human rights:** The Supreme Court further observed that

“*Indian Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These Transgenders, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.*”<sup>51</sup>

- **The Concept of Transformative Constitutionalism**

The Supreme Court analyses in the 96<sup>th</sup> Para of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>52</sup>, the concept of transformative Constitutionalism means the Constitution which would meet the recent social realities. The Preamble to our Constitution also embraces the ideals of justice, liberty, equality and fraternity which itself recognises the concept of transformative constitutionalism. Transformational Constitutionalism helpful to transforms the Indian society in the modern day social realities. In the Indian Constitution, the concept of transformative constitutionalism indicates the ability to adapt and transform the Constitution with the changing needs of the society. Therefore transformative constitutionalism factor makes our Constitution a living and organic document.<sup>53</sup> Therefore, the Supreme Court declares

*“Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future”<sup>54</sup>*

- **Constitutional Morality Cannot be Martyred at the Altar of Social Morality**

The Supreme Court analyses the concept of constitutional morality in the 111-124<sup>th</sup> Para of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>55</sup>, which are as follows:-

- **The Constitutional Morality cannot be defined in the Strait- Jacket Formula:** The concept of constitutional morality could not be confined only to the observance of the core principles of constitutionalism. Therefore, the constitutional morality is an important apparatus in the hands of the State for the betterment of each and every individual citizen of the State.<sup>56</sup>
- **The Constitutional Morality can be achieved through the loyalty of State:** The Preamble of Indian Constitution also affirms the objectives of Justice, Liberty, Equality and Fraternity, which can only be achieved through the commitment, and loyalty of the three organs of the State (*Legislative, Executive, and Judiciary, because all these organs affirms the concept of constitutional morality*<sup>57</sup>) to the principle of constitutional morality.<sup>58</sup>
- **The Constitutional Morality prevails over the Social Morality:** The Constitutional Court has to be guided by *“the conception of constitutional morality and not by the societal morality.”*<sup>59</sup> It must be ensured by the constitutional courts by way of judicial engagement and creativity that *“the constitutional morality always prevails over the social morality”*.<sup>60</sup>
- **The LGBT Community Must Not be Given a Step-Motherly Treatment:** The Supreme Court affirms that in the name of social morality step-motherly treatment must be allowed to the LGBT Community. It is the duty of the Constitutional Courts to protect the fundamental rights of the LGBT community.<sup>61</sup>

- **The right to live with dignity has been recognized as a human right and a fundamental right**

The Supreme Court analyses the concept of constitutional morality in the 125-137<sup>th</sup> Para of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>62</sup>, with the reference of number of landmarks earlier judgements of this Court such as Common Cause (A Regd. Society) case, Maneka Gandhi’s case. The court affirms that the right to live with dignity is a fundamental right as enshrined under Article 21 of the Constitution as well as this right has also been recognised as a human right by number of international instruments. The Supreme Court in Para 138 clearly point out that

*“In the sphere of sexual orientation, the constitutional courts have laid emphasis on individual inclination, expression of both emotional and physical behaviour and freedom of choice, of course, subject to the consent of the other.” A biological engagement, in contradistinction to going to a restaurant or going to a theatre to see a film or a play, is founded on company wherein both the parties have consented for the act. The inclination is an expression of choice that defines the personality to cumulatively build up the elevated paradigm of dignity. Be it clarified that expression of choice, apart from being a facet of dignity, is also an essential component of liberty. Liberty as a concept has to be given its due place in the realm of dignity, for both are connected with the life and living of a persona.”*<sup>63</sup>

- **Sexual orientation is one of the many biological phenomena**

The Supreme Court elaborately discussed the concept of sexual orientation in the 139-148<sup>th</sup> Para of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>64</sup>. The Supreme Court in Para 140<sup>th</sup> observed that *“every human being has certain basic biological characteristics and acquires or develops some facets under certain circumstances.”* These biological characteristics are homosexuality, bisexuality and heterosexuality.<sup>65</sup> The Court further stated in Para 148<sup>th</sup> of this judgement that *“individual’s inherent orientation influences his/her emotional behaviour in order to seek intimacy in the same gender and such behaviour may bring two persons together in a biological pattern. Therefore, such behaviour can be treated as consensual activity and come within the purview of consensual choice.”*<sup>66</sup>

- **The right to privacy vis-à-vis Section 377 of IPC**

The Hon’ble Supreme Court laid down new dimensions of right to privacy in *Justice K. S Puttaswamy (Retd.), and another’s v. Union of India and Others*<sup>67</sup>. On August 24, 2017 A nine-judge Constitution Bench



of the Supreme Court in this case observed that right to privacy is inalienable and basic right which is covered under the right to life and liberty. Therefore, this right is inherently protected because it is derived under the Part III of the Constitution of India. In this Judgement the then Chief Justice of India Justice J.S Khehar asserted that the Court had overruled its own earlier eight –judge Bench and six Judge Bench judgements of *M.P Sharma and Kharak Singh case* which was pronounced in the year 1954 and 1961 respectively.<sup>68</sup> In *Justice K. S Puttaswamy (Retd.) and another's v. Union of India and Others*<sup>69</sup> the Supreme Court elaborately analyse the aspect that the right to privacy is a natural and inalienable right with the assistance of various international instruments such as *American Declaration of Independence 1776, Declaration of the Rights of Man and of the Citizen, 1789*. In *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>70</sup> Supreme Court elaborately analysed the constitutional validity of section 377 of IPC with special reference to right to privacy as a fundamental right under Article 21 of the Constitution recently has been pronounced in the *Justice K. S Puttaswamy (Retd.), and another's v. Union of India and Others*<sup>71</sup>, which are as follows:-

- **Individual Autonomy:** In *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>72</sup> Supreme Court elaborately analysed in the Para 149 that individual autonomy has a significant place within the ambit of right to privacy as proclaimed under *Justice K. S Puttaswamy case*. Court further observed, “Individual’s autonomy is an expression of self-determination. Hence, such self –determination covered within its ambit sexual –orientation and declaration of sexual identity and therefore, such an orientation considers an individual’s autonomy is innate to him/her.”<sup>73</sup> Furthermore, the Court declares the autonomy principle indicates that individual has sovereignty over his or her body.
- **The LGBT community also has a basic right to companionship:** In *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>74</sup> Supreme Court elaborately analysed in the Para 155 that under Article 21 of the Constitution an individual also has a right to a marriage of union under Article 21 of the Constitution. It means such companionship includes physical, mental, sexual, and emotional. Therefore, the LGBT community also have a basic right of companionship. However, such companionship must be consensual, without any force and coercion. More importantly, such companionship does not violate the fundamental rights of other person.
- **Sexual orientation is an essential attribute of right to privacy:** Para 163 of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>75</sup>, Supreme Court declares sexual orientation is an essential element of right to privacy. The Court ruled that discrimination on the basis of sexual orientation is not according to the spirit of Constitution. The Court observed:-
 

*“The Court was of the view that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”*<sup>76</sup>
- **Section 377 IPC in its present form violates a fundamental right protected by Article 21 of the Constitution:** Para 176 of *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>77</sup>, Supreme Court declares Section 377 of IPC violates fundamental rights of an individual as prescribed under Article 21, 14 and 19 of the Constitution.
- **A Comparative Analysis of the offence of Rape and Unnatural offences**

Para 205-223 of the *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*<sup>78</sup>, Supreme Court draws a comparative analysis of Section 375 and 377 of IPC. The Court declares Section 375 of IPC is a gender specific provision for the protection of women and in this section, only a man can commit the offence of rape. Para 212 of this judgement declares that on the other hand, Section 377 is gender-neutral provision because it uses the word ‘whosoever’.<sup>79</sup>
- **Against the order of nature:** The Supreme Court declares that the expression ‘against the order of nature’ has not been defined under section 377 of IPC as well as in any other provision of IPC. The Court declares that :-
 

*“The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it against the order of nature”*.<sup>80</sup>

- **Section 377 violates LGBT Community's Article 14 of the Constitution:** The above-mentioned judgement, the Supreme Court declares, "Section 377 of IPC in the present form draws discrimination and unequal treatment to the LGBT community and therefore, section 377 of IPC violates Article 14 of the Constitution."<sup>81</sup>
- **Section 377 fails to make a distinction between non- consensual sexual acts and consensual sexual acts:** In Para 239<sup>82</sup> of the above-mentioned judgement declare that Section 377 fails to make a distinction between non- consensual sexual acts and consensual sexual acts between competent adults in the private sphere. Such acts in the private sphere do not harmful to the society. Therefore, section 377 of IPC only a weapon to harass the members of LGBT community by subjecting them to harassment by discrimination and unequal treatment. Therefore, section 377 of IPC is liable to be partially struck down due to the violation of Article 14 of the Constitution of India in view of the law laid down by *Shayara Bano*.<sup>83</sup>
- **Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution:** Para 241 of the *Navtej Singh Johar & Ors. v. Union of India and others, Thr. Secretary Ministry of Law and Justice*,<sup>84</sup> Supreme Court ruled that section 377 of IPC in its present form violates Article 19(1) (a) of the Constitution because LGBT Community also has fundamental rights of freedom of speech and expression and their own choices. Supreme Court clearly declares  
*"Consensual carnal intercourse among adults it may be homosexual or heterosexual within the private sphere does not in any way harm the public decency or morality."*<sup>85</sup>

## CONCLUSION

Supreme Court in a landmark verdict decriminalised consensual gay sex. The Supreme Court reversed its own decision and held that Section 377 is irrational and arbitrary because LGBT Community has same rights as of any ordinary citizen. Chief Justice Dipak Misra clearly laid down that criminalising gay sex is wholly irrational and indefensible,<sup>86</sup> 150 years old colonial law on Section 377 of the Indian Penal Code is intended to punish the offence of sodomy, buggery and bestiality. Homosexuality or sexual inversion is sexual attraction of one person to another of the same sex, leading to physical contact and sexual pleasure. The Delhi High Court on July 9, 2009 had decriminalised homosexuality among consenting adults and declares that it is the violation of Article 14, 15 and 21 of the Constitution of India. Thereafter, in the year 2013 the Supreme Court overruled the judgement of the Delhi High Court and again re-criminalising homosexuality. The High Court also considered it is not within the constitutional competence of the State to invade the privacy of citizen's lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable.

In *Suresh Kumar Koushal & Ors v. Naz Foundation & Ors*.<sup>87</sup> The Delhi High Court judgment *Naz Foundation v. Government of NCT of Delhi and others*<sup>88</sup> was challenged before the Supreme Court and court ruled that "Acts which fall within the purview of Section 377 of IPC can only be determined with reference to the act itself and to the circumstances in which it is executed. This Court further opined that Section 377 IPC would apply irrespective of age and consent. Section 377 IPC does not criminalize a particular people, identity, or orientation. It only identifies certain acts which, when committed, would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation."<sup>89</sup> In *Navtej Singh Johar & Ors. v. Union of India and others*, Thr. Secretary Ministry of Law and Justice, the Supreme Court observed "the Constitution is a living character; its interpretation must be dynamic." Therefore it is necessary to understand the Constitution in a manner which intricate and advances modern reality. Transgenders are human beings and therefore they have right to enjoy their human rights.

In this judgement the Supreme Court also analyses the concept of transformative Constitutionalism means the Constitution which would meet the recent social realities. The Preamble to our Constitution also embraces the ideals of justice, liberty, equality and fraternity which itself recognises the concept of transformative constitutionalism. Transformational Constitutionalism helpful to transforms the Indian society in the modern day social realities. In the Indian Constitution, the concept of transformative constitutionalism indicates the ability to adapt and transform the Constitution with the changing needs of the society. Therefore transformative constitutionalism factor makes our Constitution a living and organic document.<sup>90</sup> The Court also confirms that Sexual orientation is one of the many biological phenomena.



Supreme Court elaborately analysed the constitutional validity of section 377 of IPC with special reference to right to privacy as a fundamental right under Article 21 of the Constitution recently has been pronounced in the *Justice K. S Puttaswamy (Retd.), and another's v. Union of India and Others*<sup>91</sup> Individual's autonomy is an expression of self-determination. Hence, such self –determination covered within its ambit sexual –orientation and declaration of sexual identity and therefore, such an orientation considers an individual's autonomy is innate to him/her."<sup>92</sup> Section 377 of IPC in the present form draws discrimination and unequal treatment to the LGBT community and therefore, section 377 of IPC violates Article 14 of the Constitution."<sup>93</sup> Supreme Court declares Section 377 of IPC violates fundamental rights of an individual as prescribed under Article 21, 14 and 19 of the Constitution.

## References

- <sup>1</sup> Rattanlal and Dhirajlal. *The Indian Penal Code* ( Nagpur: Lexis Nexis Butterworth, 2012) 806
- <sup>2</sup> K.D.Gaur. *Indian Penal Code* ( New Delhi: Universal Law Publishing Company, 2011) 684
- <sup>3</sup> Retrieved from <https://indianexpress.com/article/india/section-377-verdict-live-updates-supreme-court-decriminalisation-of-homosexuality-5342203> , visited on September 15, 2018
- <sup>4</sup> Shrinivas Gupta. *Textbook on Indian Penal Code* ( Hyderabad: Asia Law House, 2016)
- <sup>5</sup> Hughes (1841) 9C & P 752
- <sup>6</sup> Rattanlal and Dhirajlal. *The Indian Penal Code* ( Nagpur: Lexis Nexis Butterworth, 2012) 806
- <sup>7</sup> Observations of Lord Devlin as quoted by Cross and Jones in their Introduction To The Criminal Law, 9<sup>th</sup> edn. P. 18-19, retrieved from Rattanlal and Dhirajlal. *The Indian Penal Code* ( Nagpur: Lexis Nexis Butterworth, 2012) 806
- <sup>8</sup> Russell on crime, Vol 1, Indian Reprint 2001, p. 735 ; Kennys Outlines of Criminal Law (19<sup>th</sup> Edn.) Retrieved from K.D.Gaur. *Indian Penal Code* ( New Delhi: Universal Law Publishing Company, 2011) 684
- <sup>9</sup> K.D.Gaur. *Indian Penal Code* ( New Delhi: Universal Law Publishing Company, 2011) 684
- <sup>10</sup> BM Gandhi, *Indian Penal Code* (Lucknow: Eastern Book Company, 2012) 527.
- <sup>11</sup> K.D.Gaur. *Indian Penal Code* ( New Delhi: Universal Law Publishing Company, 2011) 684
- <sup>12</sup> BM Gandhi, *Indian Penal Code* (Lucknow: Eastern Book Company, 2012) 527
- <sup>13</sup> Ibid.
- <sup>14</sup> Ibid.
- <sup>15</sup> Chitranjan Dass, AIR 1974 SC 2352, Retrieved from Rattanlal and Dhirajlal. *The Indian Penal Code* ( Nagpur: Lexis Nexis Butterworth, 2012) 807
- <sup>16</sup> 1983 Cri. L. J. 1352 (Madras)
- <sup>17</sup> 1992 Cri. L.J. 1352
- <sup>18</sup> 1992 Cri. L.J. (Ori.)
- <sup>19</sup> (2002) EWCA 41
- <sup>20</sup> (2001) URHL 41
- <sup>21</sup> Rattanlal and Dhirajlal. *The Indian Penal Code* ( Nagpur: Lexis Nexis Butterworth, 2012) 808
- <sup>22</sup> (1972) 2 AII ER 898 (HL)
- <sup>23</sup> K.D.Gaur. *Indian Penal Code* ( New Delhi: Universal Law Publishing Company, 2011) 686
- <sup>24</sup> Retrieved from <https://indianexpress.com/article/india/section-377-to-be-revisited-timeline-of-the-case-5016095> , visited on September 15, 2018
- <sup>25</sup> Retrieved from <https://www.ndtv.com/india-news/section-377-case-timeline-verdict-in-supreme-court-on-gay-sex-criminalisation-1912138> , visited on September 15, 2018
- <sup>26</sup> WRIT PETITION (CIVIL) NO 494 OF 2012 retrieved from <https://www.thehindu.com/news/national/article19551816.ece/BINARY/RightToPrivacyVerdict> , visited on August 19, 2018
- <sup>27</sup> Retrieved from <https://www.ndtv.com/india-news/section-377-case-timeline-verdict-in-supreme-court-on-gay-sex-criminalisation-1912138> , visited on September 15, 2018
- <sup>28</sup> Retrieved from <https://indiankanoon.org/doc/100472805/> , visited on September 16, 2018
- <sup>29</sup> IN THE HIGH COURT OF DELHI AT NEW DELHI, WP(C) No.7455/2001 Date of decision, 2nd July, 2009, Retrieved from <https://indiankanoon.org/doc/100472805/> , visited on September 16, 2018
- <sup>30</sup> Ibid.
- <sup>31</sup> Ibid.
- <sup>32</sup> Ibid.
- <sup>33</sup> Ibid.
- <sup>34</sup> Ibid.
- <sup>35</sup> Ibid.
- <sup>36</sup> Ibid.
- <sup>37</sup> IN THE HIGH COURT OF DELHI AT NEW DELHI, WP(C) No.7455/2001 Date of decision, 2nd July, 2009, Retrieved from <https://indiankanoon.org/doc/100472805/> , visited on September 16, 2018
- <sup>38</sup> Ibid.
- <sup>39</sup> Ibid.
- <sup>40</sup> SLP (c) 15436/2009, retrieved from [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf) , visited on September 16, 2018
- <sup>41</sup> IN THE HIGH COURT OF DELHI AT NEW DELHI, WP(C) No.7455/2001 Date of decision, 2nd July, 2009, Retrieved from <https://indiankanoon.org/doc/100472805/> , visited on September 16, 2018
- <sup>42</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>43</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>44</sup> Ibid.
- <sup>45</sup> Ibid.
- <sup>46</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>47</sup> Ibid.

- <sup>48</sup> Retrieved from <https://www.hindustantimes.com/india-news/freedom-from-fear-what-the-sc-judges-said-in-their-historic-verdict-on-section-377/story-8hiwvSNWuEHLjFUQ5VnwGK.html> , visited on September 16, 2018
- <sup>49</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>50</sup> Ibid
- <sup>51</sup> Ibid
- <sup>52</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>53</sup> Ibid
- <sup>54</sup> Ibid
- <sup>55</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>56</sup> Para 111, Ibid.
- <sup>57</sup> Para 113, Ibid
- <sup>58</sup> Para 115, Ibid.
- <sup>59</sup> Para 119, Ibid
- <sup>60</sup> Para 121, Ibid
- <sup>61</sup> Para 122, Ibid
- <sup>62</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>63</sup> Ibid.
- <sup>64</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>65</sup> Ibid.
- <sup>66</sup> Ibid.
- <sup>67</sup> WRIT PETITION (CIVIL) NO 494 OF 2012 retrieved from <https://www.thehindu.com/news/national/article19551816.ece/BINARY/RightToPrivacyVerdict> , visited on August 19, 2018
- <sup>68</sup> Retrieved from <https://www.thehindu.com/news/national/privacy-is-a-fundamental-right-under-article-21-rules-supreme-court/article19551224.ece> visited on August 19, 2018
- <sup>69</sup> Ibid
- <sup>70</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>71</sup> Ibid
- <sup>72</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>73</sup> Ibid
- <sup>74</sup> Ibid
- <sup>75</sup> Ibid
- <sup>76</sup> Ibid.
- <sup>77</sup> Ibid
- <sup>78</sup> Ibid
- <sup>79</sup> Ibid
- <sup>80</sup> Para 213, Ibid.
- <sup>81</sup> Ibid.
- <sup>82</sup> Ibid.
- <sup>83</sup> Ibid
- <sup>84</sup> Ibid
- <sup>85</sup> Ibid.
- <sup>86</sup> Retrieved from <https://www.ndtv.com/india-news/section-377-verdict-live-updates-supreme-court-to-deliver-judgment-today-1912100>
- <sup>87</sup> SLP (c) 15436/2009, retrieved from [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf) , visited on September 16, 2018
- <sup>88</sup> IN THE HIGH COURT OF DELHI AT NEW DELHI, WP(C) No.7455/2001 Date of decision, 2nd July, 2009, Retrieved from <https://indiankanoon.org/doc/100472805/> , visited on September 16, 2018
- <sup>89</sup> WRIT PETITION (CRIMINAL) NO. 76 OF 2016, retrieved from <https://indiankanoon.org/doc/168671544/> , visited on September 16, 2018 and [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)
- <sup>90</sup> Ibid
- <sup>91</sup> Ibid
- <sup>92</sup> Ibid
- <sup>93</sup> Ibid.