

## **STRIKING DOWN OF SECTION 377 OF THE INDIAN PENAL CODE – A STEP TOWARDS CONSTITUTIONAL MORALITY RATHER THAN TOWARDS SOCIAL MORALITY.**

The Supreme Court of India in the matter titled *Navtej Singh Johar & Ors v. Union of India & Ors*<sup>1</sup> has struck down Section 377 of the Indian Penal Code, 1860 (hereinafter called “IPC”) and has consequently overruled the earlier judgement passed by a 2 judge bench in *Suresh Kumar Koushal v. Naz Foundation & Ors*<sup>2</sup>.

Section 377<sup>3</sup> provides for punishment for “carnal intercourse against the order of nature”. The Petitioners in the batch of Writ Petitions before the Supreme Court put forth various arguments to state that the phraseology used in Section 377 is violative of the fundamental rights enshrined in the Indian Constitution.

It is of pertinence to point out that the Lesbian Gay Bisexual Transgender (LGBT) community consists of about 7-8% of the Indian population. Section 377 was promulgated in the year 1860 and the same can be considered to be a manifestation of the mindset of societal values in the Victorian Era where sexual activities were considered mainly for procreation. What Section 377 fails to consider is that homosexuality, bisexuality and other sexual orientation are as natural and are an expression of individualism.

In *National Legal Services Authority v. Union of India*,<sup>4</sup> the Supreme Court has acknowledged “gender identity” and has recognised transgender as third gender apart from male and female. Accordingly, Section 377 in its present form violates various fundamental rights<sup>5</sup> of the LGBT community. It has been contended that being homosexual is neither a physical nor a mental illness and right to choose a partner is a feature of dignity<sup>6</sup> and LGBT community has right to privacy<sup>7</sup>.

Union of India while addressing arguments left the issue of “consensual acts of adult in private” to the wisdom of the Supreme Court. On the other hand, various interveners in the batch petitions vehemently argued against striking down of Section 377 on *inter alia* the following grounds. Firstly, that the LGBT

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<sup>1</sup> Writ Petition (Criminal) No.7 of 2016 decided on 06.09.2018

<sup>2</sup> (2014)1SCC1

<sup>3</sup> Section 377 of the Indian Penal Code, 1860

<sup>4</sup> (2014)5SCC438

<sup>5</sup> Violation of Article 14, 19(1)(a), 19(1)(c) and 21 of the Indian Constitution.

<sup>6</sup> *Shakti Vahini v. UOI & Ors*, (2018)7SCC192

<sup>7</sup> *K.S. Puttaswamy v. UOI & Ors*, (2017)10SCC1

community is more susceptible to contracting HIV/ AIDS. Secondly, the same goes against the family system and the institution of marriage. Thirdly, interest of an individual/ section of people cannot supersede interest of the society as a whole.

The Constitution Bench of Supreme Court while deciding the *Navtej Singh Johar*<sup>8</sup> has recognised that the society needs to transform progressively and LGBT community has a right to live with dignity. It has also been duly recognised that sexual orientation is natural and inherent in an individual which is controlled by neurological and biological factors. Persons of same sex who indulge in ‘consensual sexual acts’ cannot be penalised and unequal treatment to be them cannot be meted out. Accordingly, the law in *Suresh Kumar Koushal*<sup>9</sup> has been overruled unanimously.

The Supreme Court has also laid emphasis on the reduction of social stigma and has accordingly suggested that the judgment ought to be widely publicised by various media platforms. While showing empathy towards the LGBT community, Supreme Court states that “*hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial.*” It also writes that “*History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries.*”

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<sup>8</sup> Supra Note 1

<sup>9</sup> Supra Note 2