



## Navtej Singh Johar & Ors. v. Union of India

Writ Petition (Criminal) No. 76 of 2016

**Country:** India

**Region:** Asia

**Year:** 2018

**Court:** Supreme Court of India

**Health Topics:** Health care and health services, HIV/AIDS, Mental health, Sexual and reproductive health

**Human Rights:** Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Freedom of expression, Right of access to information, Right to bodily integrity, Right to family life, Right to health, Right to life, Right to privacy

### Facts

Petitioners, by means of a writ petition, challenged Section 377 of the Indian Penal Code (â€˜IPCâ€™), which made â€œcarnal intercourse against the order of natureâ€• a criminal offense punishable with life imprisonment.

Petitioners argued that homosexuality, bisexuality, and other sexual orientations are equally natural and reflective of expression of choice and individuals should have the right to choose their sexual orientation. They further argued that the provision violated the rights of the Lesbian Gay Bisexual and Transgender (LGBT) community from accessing health care facilities because the LGBT persons faced stigma and discrimination by health providers.. Such discrimination and inequality deprived them of their entitlement to a system of health that gives everyone an equal opportunity to enjoy the highest attainable level of health. Petitioners argued that the LGBT community was denied the full realization of their right to health, which includes their sexual health.

Petitioners argued violations of Article 21 (Right to life), Article 19 (Freedom of expression), and Article 14 (Right to equality) of the Indian Constitution.&nbsp; They argued that the criminal nature of the provision violated LGBT personsâ€™ right to health, mental health, and their right to privacy, which is now a fundamental right under the Constitution.

### Decision and Reasoning

A five-judge bench of the Supreme Court of India struck down a part of Section 377 of the Indian Penal Code, and overturned a 2013 judgment delivered by a division bench of the Court. The Court held that a personâ€™s sexual orientation is natural.

The Court held that Section 377 violated the right to health of the LGBT community. The provision forced the community to live a â€œclosetedâ€™ life, which in turn, seriously disadvantaged and prejudiced them in accessing health care. This exclusion makes them particularly susceptible to contraction of HIV/AIDS, and especially the men who have sex with men (MSM) community. The Court took into consideration international treaties such as International Covenant on Economic, Social and Cultural Rights (ICESCR) and Universal Declaration of Human Rights (UDHR), and findings of the Global Community on HIV and the Law.

The Court held that the mental health of the LGBT community is severely impacted due to the criminal nature of Section 377 and the social stigma that it attracted.

The Court held that the right to privacy is not simply the â€œright to be let aloneâ€™, but instead incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. Section 377 affected the private sphere of the lives of the LGBT persons and it blatantly took away their autonomy to make decisions.

The Court, in striking down a portion of Section 377, also took into consideration principles of â€œtransformative constitutionalism,â€™ â€œconstitutional morality,â€™ and â€œprogressive realization of rightsâ€™.

### Decision Excerpts

“The eminence of identity which has been luculently stated in the NALSA case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity. With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one’s orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one’s own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, “constitutionally permissible”. • Para 253 (i)

“The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocal respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has laden the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity. • Para 253 (vi)

“Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression. • Para 253 (vii)

“Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person’s nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. • Para 253 (x)

“The expression against the order of nature” has neither been defined in Section 377 IPC nor in any other provision of the IPC. 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. • Para 253 (xii)