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## Critical Analysis Of Section 377 Of Indian Penal Code

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### Abstract

India is a democratic country, and its citizens have certain rights guaranteed by the Indian Constitution. Equal rights, non-discrimination based on religion, race, caste, gender, or place of birth, freedom of speech and expression, and protection of life and individual freedom are guaranteed by "Articles 14, 15, 19(1)(a), and 21" of the Constitution<sup>1</sup>. Nonetheless, despite the fact that the Supreme Court of India decriminalised the behaviour in the case of Navtej Singh Johar v. Union of India in 2018, section 377 of the Indian Penal Code 1860 criminalises consensus homosexuality. Unlike normal procreative intercourse, the word "heterosexuality" was used to describe sexual pathologies between men and women, such as oral and anal. In late-nineteenth-century Europe, homosexuality was used to describe unhealthy sexual emotions between people of the same sex. Colonial laws deemed it unnatural. Imperial power was used to enact laws that outlawed unnatural intercourse all throughout the world. This work is the subject of Section 377 analysis. It investigates how Section 377 was interpreted and discussed. The study begins with a brief overview of Section 377, including what it says, who it affects, who it is, and what it implies. The study investigates the history of the judicial system's rise to jurisdiction in Section 377. The purpose of this thesis is to determine whether or not the Supreme Court's decision to decriminalise homosexuality was fair. In the context of the dispute over Section 377 and related challenges, the paper raises an important cultural issue. The current paper investigates the finer points of homosexuality and morality from a modern human standpoint.

**Keywords-** Decriminalize, homosexuality.

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<sup>1</sup> Ali, Dr. H., & Choudhury, Dr. P. (2021). Constitutional Aspects Towards Social Networking Sites Regulation With Freedom Of Speech & Expression. International Journal of Grid and Distributed Computing, 14(2005-4262).

## Introduction

Section 377 of the Indian Penal Code, in addition to the gift of British rule, covers one of the most recent provisions of the penal code: the law dealing with unnatural sexual offences in India. Section 377 of the Indian Penal Code was established in 1864 during the British administration. All sexual practises outside of nature were illegal, according to Article 377 of the British Colonial Penal Code.<sup>2</sup> Individuals who engaged in oral and anal interactions, as well as homosexual behaviour, were prosecuted under the law. It has been repealed or is no longer enforceable in a number of former colonies. Although the term gay was not legally used in Section 377, it was used to criminalise homosexual behaviour. "This regulation was first implemented by the Raj in 1862 as Section 377 of the Indian penal code and, in some cases, functioned as a legal incentive for prosecuting unnatural offences in the various colonies. Section 377 of the Indian Penal Code was created in 1861 during British governance of India." It criminalises "against nature" sexual behaviour and is based on the 1533 Buggery Act. The Supreme Court of India ruled on September 6, 2018, that the application of Section 377 to consensual homosexual sex between adults was unconstitutional, "irrational, indefensible, and clearly arbitrary," but that Section 377's application to sex with minors<sup>3</sup>, sexual acts without consensus, and abuse remained valid. Parts of the section relating to gay sex were deemed unconstitutional by the Delhi High Court in July 2009. The Supreme Court of India (SC) overruled that decision in Suresh Kumar Koushal vs. Naz Foundation on December 11, 2013. The Court ruled that Parliament, not the courts, should decide whether to alter or repeal Section 377. "On February 6, 2016, a three-member panel of the Court reviewed the curative petitions filed by the Naz Foundation and others and ordered that they will be heard by a five-member constitutional court. In the landmark Puttaswamy case, decided on August 24, 2017, the Supreme Court upheld the right to privacy as a basic constitutional right. The Court also upheld equality and condemned discrimination, stating that the protection of sexual orientation lies at the heart of fundamental rights and that LGBT people have legitimate, legal rights." This decision was interpreted as meaning that Section 377 was unlawful. In January 2018, the Supreme Court agreed to examine a petition to reconsider the Naz Foundation's 2013 ruling.<sup>4</sup> In *Navtej Singh Johar v. Union of India*, the Supreme Court unanimously held

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<sup>2</sup>Bakshi, Kaustav, and Parjanya Sen. "India's queer expressions on-screen: The aftermath of the reading down of Section 377 of the Indian Penal Code." *New Cinemas: Journal of Contemporary Film* 10.2-3 (2012): 167-183.

<sup>3</sup> Dr. Shailender Singh. (2020). CONCEPTUAL FRAMEWORK RIGHTS OF SEXUAL MINORITIES IN LAW. *PalArch's Journal of Archaeology of Egypt / Egyptology*, 17(5), 1641-1648. Retrieved from <https://archives.palarch.nl/index.php/jae/article/view/7696>

<sup>4</sup>Sjöde, Linn. "Right to be and act Queer?: A descriptive analysis of how Indian LGBTQI activists framed Section 377 of the Indian Penal Code in order to challenge it, preceding the 2018 Indian Supreme Court verdict to overrule the law." (2019).

that Section 377 was unconstitutional "in so far as consensus sexual contact between adults of the same sex is penalised." The five-judge committee included then-Supreme Court of India President Dipak Misra, as well as Judges R.F. Nariman, D.Y. Chandrachud, A.M. Khanwilkar, and Indu Malhotra. The thesis seeks to examine whether or not the decision of the Supreme Court to decriminalise homosexuality was fair. The report addresses an important cultural issue in the context of the controversy over Section 377 and associated challenges. The current study examines from a modern human point of view the finer issues of homosexuality and morality.

### **Significance of the study**

This article looks into the history of the court system's ascent to power as a result of Section 377 of the Constitution<sup>5</sup>. The goal of this article is to review the evidence in order to assess whether or not the Supreme Court's decision to decriminalise homosexuality was based on sound reasoning. The study explores a critical cultural issue in the context of the debate over Section 377 and the challenges that have evolved as a result of that debate and discussion. Aspects of homosexuality and morality are examined in greater depth from the perspective of contemporary people in the current research, which is ongoing.

### **Research Methodology**

This study uses a critical and analytical methodology. In terms of water contamination, this approach is essentially religious. It explores in greater detail the regulations governing water contamination in the study. The study of constitutional provisions dealing to international affairs has led to a widespread examination of revisions to these laws. This page lists original sources as well as secondary sources such as governmental papers, chapters of textbooks, committee reports, scientific journals and case studies.

### **Section 377 of Indian penal Code**

Unnatural offences are addressed in Section 377 of the Indian Penal Code. Unnatural Offences - Anyone who engages in sexual intercourse outside the order of nature with any man, woman, or animal shall be sentenced to life imprisonment or prison of any sort for a term of no more than ten years, as well as a fine. Carnal intercourse is not required for the offence mentioned in this section. There is a lot of penetration. Sodomy, bestiality, paedophilia, tyke, and homosexuality are all criminal offences, according to the exact definition of this clause. In a nutshell, it forbids all forms of sexual behaviour save heterosexual penile-vaginal sex. Furthermore, the parties' consent is irrelevant in such instances. Over the last ten years, the section has sparked a lot of debate by

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5 Garje, D. B. S. (2020). AN ASSESSMENT OF STATUS OF PERSONAL LAWS IN INDIAN CONSTITUTION. PalArch's Journal of Archaeology of Egypt / Egyptology, 17(5), 1617–1624. Retrieved from <https://www.archives.palarch.nl/index.php/jae/article/view/7693>

advocating for the decriminalisation of homosexuality. In 1994, the AIDS Bhedbhav Virodhi Andolan filed the first petition for this cause. Section 377 of the Indian Penal Code was enacted during the British Raj. It is used to criminalise sexual behaviours that are "extraordinary" in nature and is based on the 1533 Buggery Act. Due to the absence of a specified definition, Section 377 has been subjected to a variety of legal interpretations over time. Section 377 does not prohibit homosexuality or non-natural acts of heterosexuality such as anal or oral sex. Anyone who knowingly engages in sexual intercourse with another man, woman, or animal in violation of the natural order faces life in jail or a prison sentence of up to ten years, as well as a fine. Penetration is sufficient to initiate the carnal interaction required for the offence described in this section. This includes any form of carnal intercourse, commonly referred to as penetrative sex, other than vaginal penetration, regardless of whether the two adults involved are straight or members of the LGBT community.<sup>6</sup> Anything that is 'against the natural order' is prohibited and has a minimum sentence of ten years in jail. Sexual consent between adults of the same sex is a life-sentence offence under Section 377. Section 377 makes it illegal for a group of individuals to be a sexual minority. Sexual minorities and disadvantaged social groups petitioned the Supreme Court to strike down the law. They pleaded for protection not merely as a sexual minority, but also for universal acknowledgement of human characteristics. In July 2009, a landmark judgement in the case of the Naz Foundation v. Govt. was issued. The Delhi High Court held that a portion of Section 377 is unconstitutional and that the National Capital Territory of Delhi breaches fundamental rights. In terms of gay sex, Articles 14, 15 and 21 of the Indian Constitution prohibit non-consensual, penile, non-vaginal sex, intercourse, and activities by adults with children involving force. Following this, religious organisations petitioned the Supreme Court for a reversal of the ruling. On 11 December 2013, a two-judge panel of the Supreme Court of India decided Suresh Kumar Koushal v. Naz Foundation on appeals filed by private parties. The Court concluded that Parliament, not the courts, should decide whether to amend or repeal section 377. It argued for the criminalization of gay relations, depriving the LGBTQ community of their right to sexuality, sexual orientation, and partner choice. On 6 February 2016, a three-judge Supreme Court panel evaluated and determined that a five-judge constitutional court would hear curative requests presented by the Naz Foundation and others. The case was revived in July 2018 under the direction of former Chief Justice of India Dipak Misra, who noted that a segment of the population could no longer live in fear of legislation that jeopardised their right to privacy, dignity, and choice.

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<sup>6</sup>Kottai, Sudarshan R., and Shubha Ranganathan. "Fractured narratives of psy disciplines and the LGBTQIA+ rights movement in India: A critical examination." *Indian journal of medical ethics* 4.2 (2019): 100-10.

## **Decriminalization of Section 377**

Section 377 of the Indian Penal Code is one of India's most serious legal concerns. There have been five significant cases that have resulted in the liberalisation of Section 377.

1. **Naz Foundation v. NCT Delhi Government** - The Naz Foundation is a non-governmental organisation that works in the field of AIDS and other health-related concerns. "In this case, one question that arose was whether Section 377 should be repealed or not; in response, the Court addressed it in two ways: first (Right to Life, Article 21) because nobody would be able to enjoy a life without dignity or confidentiality, and second (Right to Information, Article 14) (Right to Equality, Article 14&15)". It discriminated against homosexuals and consensus sex as a class. Section 15 states that no one should be discriminated against because of their gender. It takes into account more than just biological sex; it also considers sexual orientation. This debate has occurred numerous times and finally favours sexual orientation above biological sex. The Delhi High Court ruled that Section 377 of the homosexuality statute was unconstitutional.
2. **Suresh Kumar Koushal v. Naz Foundation**- The Suresh Kumar Koushal case produced two arguments. The first is that homosexuality is a felony that can only be decriminalised by Parliament and that the Court should not intervene. Second, the right to privacy is not protected by the Homosexual Law. Following the Naz Foundation case in 2009, the person admitting their name and freely showing their sexual orientations in a workplace was defined. Following Suresh Kumar Koushal's conviction, they were labelled criminals or offenders by the Society.
3. **NLSA vs. Union of India & Ors.**, - Transgender groups' rights are safeguarded in the lack of a legislation. One of the reasons why the transgender population faces discrimination in society is because of this. The Supreme Court has revised multidimensional rights, including Article 14[6], which states that everyone, including men, women, and transgender people, has the right to resolve these issues.
  - No one should be discriminated against because of their sexual orientation, according to Article 15[7].
  - Article 19(1) protects your privacy, gender, identity, and integrity (a).
  - Article 21[9] - the right to live in dignity, including the ability to choose one's gender identity.

Following this lawsuit, trans-generals have the opportunity to identify their gender, get equal treatment from everyone, and have their gender identification officially recognised (men, women, transgender).

4. In **Justice K.S. Puttaswamy v. Union of India**, the Supreme Court of India holds that the right to privacy is fundamental. Justice Chandrachud wrote the case, which was heard by a panel of nine judges. Furthermore, he contends that sexual

orientation is a fundamental privacy element, and thus that it is protected by Articles 14, 15, and 21 of Part 3 of the Indian Constitution. The concept of a miniscule minority was rejected in this case.

5. **Navtej Singh Johar v. Union of India** filed the petition, claiming that 377 infringed its constitutional rights to privacy, freedom of expression, equality, human dignity, and protection from discrimination. The Supreme Court ruled that discrimination based on sexual orientation violates the right to equality, criminalizing consensual sex between adults in private violates the right to privacy, sexual guidance is an integral part of self-identity, it violates the right to life, and it cannot erode fundamental rights..

### **LGBT+ Community**

Lesbian, homosexual, bisexual, and transgender (LGBT) people face unique legal and societal issues in India. While same-sex couples can engage in sexual activity, they cannot legally marry or form a civil partnership. Authorities have routinely exploited the now-defunct portion, harassing locals for years. Every year a new alphabet is added, hence the +. Then came L & G, B, T, Q, and I. (queer and trans) The verdict ends years of struggle by India's LGBTQI+ community for legal equality.

### **Arguments for it**

Many child rights activists have criticised the Delhi High Court's decision to decriminalise section 377, arguing it is important to deal with child abuse scenarios. Since the enactment of the POCSO Act in 2012, section 377 is no longer required in cases of child sexual abuse. Homosexuality and other forms of sex are forbidden by nature. Homosexuality also breaches societal and religious values. But it can't be forbidden because of religion or social standards.<sup>7</sup> For example, homosexuals are more susceptible to STDs like AIDS than heterosexuals. Enabling more people to choose homosexuality, decriminalising Section 377 could increase the sex ratio in India. A stress relief for students and soldiers may be homosexuality.

### **Arguments against it**

Section 377 obstructs fundamental human rights. This section's introduction harms the fabled golden triangle (Article 14, Article 19, and Article 21). It not only violates an individual's right to privacy, but also the fundamental right to equality. It contradicts humanism and equality. Having sexual contact with two willing adults is also a human right. Gays cannot marry or have sex, which is anti-equality. A law limiting the rights of consenting individuals can only be justified if no one else is harmed. It's hard to know what kind of sex two consenting adults are having in secret.

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<sup>7</sup>Kanchan, Tanvi. "An analysis of Hindu nationalist and homocapitalist discourses of queerness in Indian English newspapers post Navtej Singh Johar and others vs Union of India." *SOAS, University of London* (2019).

## **Analysis of the Court**

The Supreme Court has adopted a very restrictive interpretation of Articles 14, 15, and 21. Global developments or the growing acceptance of different sexual orientations have not been considered. In contrast to the Delhi High Court, the historical backgrounds and standards of Indian society have not been considered, even if there is evidence of homosexuality. Many temples depict scenes of people engaging in same sex, which is considered obscene in today's society. As a result, the respondents' claim that homosexuality is a sin is a Western concept that Indians have always accepted. Decriminalizing homosexuality would have resulted in numerous benefits, including improved HIV/AIDS prevention efforts and protection for LGBT individuals from police and other government abuses. It would have guaranteed its right to a decent existence. It is estimated that there are 25 lakh gay people in India, with approximately 7% (1.75 lakh) infected with HIV. As a result, the sexuality of this large segment of the population must be recognised and accepted in order for them to live as respectable Indians. Dr. Shashi Tharoor has been pushing to modify Section 377 of the Indian Penal Code since the Supreme Court's decision. As a member of the private law committee, he proposed legislation to decriminalise consensual sex between two adults. This motion, however, was defeated. Even Finance Minister Arun Jaitley has stated that the Supreme Court's ruling on Section 377 should be reconsidered. Parliament must do a logical analysis of the situation and pass legislation to defend the rights of LGBT persons. The first step toward this goal is to decriminalise homosexuality by making the required changes.

## **International Perspective**

At the global level, the lesbian, gay, bisexual, and transgender (LGBT) groups have seen a number of positive developments. Ireland approved same-sex marriage in May 2015. Following the decriminalisation of homosexuality in 1993, the country was the first to enable same-sex marriage through universal popular ballot. "In June 2015, the United States Supreme Court ruled that same-sex marriages were legal. Nepal legalised homosexuality in 2007, and the country's new constitution grants LGBT individuals a variety of rights." Homosexuality is no longer a felony in "the United Kingdom, Canada, the United States, Australia, Iceland, Ireland, Brazil, Canada, France, Luxembourg, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay. These are among the countries that permit equal-sex marriage or civil union. Previously, India was one of several countries that prohibited homosexuality, including "Nigeria, Ghana, Iran, Saudi Arabia, Afghanistan, Mauritania, Qatar, and Pakistan".

## **Conclusion**

Based on this article, it is possible to conclude that section 377 of the IPC was eventually decriminalised following the "Navtej Singh Johar decision in 2018". Section 377 was deemed unconstitutional, and LGBTQ individuals have the right to exercise their rights under Articles 14, 15, 19(1)(a), and 21 of the Indian Constitution. Despite the fact that Section 377 of the Indian Penal Code was found unconstitutional, the LGBTQ population

has been welcomed by Indian culture. As a result, members of these civilizations are hesitant to express their sexual orientation or identity. They were afraid that society would reject them and that they would not be able to live a normal life. It is a horrible truth that LGBTQi people are considered as untouchable or exterior, which I believe is clearly incorrect. You are a human being with the right to live your life as you see fit. We must stop viewing them as excluded and instead respect their Indian way of life. This critical decision was made by advocating for and protecting the rights of LGBTQI people. There is no legislation that protects homosexuals and lesbians from workplace discrimination or permits them to marry their preferred partner. The Supreme Court's decision opens the door to acceptance and prosperity for the LGBT community. Section 377 does not need to be kept. People should embrace and embrace change since it makes us more tolerant, pleasant, and, after all, less congested. Personal tastes are entirely up to you. However, as an Indian, I see no harm (rather, I see benefit) in welcoming LGBT people as my fellow citizens. We've even acknowledged the importance of equality. Everyone should have the right to love. Love is the same for everyone. What do you think about the courts deciding if your personal life is legal or not? It is past time for the constitution to leave people's bedrooms and cease focusing on a select few people's love lives. India is the world's largest democracy and a melting pot of religions, castes, faiths, genders, and ethnic groupings. Let us all appreciate and accept it, for that is all that is important. This historical viewpoint articulates a vision of constitutional dominance that will propel Indian democracy forward. It safeguards LGBT people's rights to equality, privacy, and dignity.

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