

Decriminalisation of Section 377, IPC: Reforming Laws on Same-Sex Relationships in India

Kavish Kumar Verma

LL.M. STUDENT, Vivekananda Global University, Jaipur

ABSTRACT

The presence of Section 377 within the Indian Penal Code has long been a contentious issue, rooted in colonial-era legislation that fails to align with contemporary societal norms and values. Originating from the Victorian Buggery Act of 1533, it was transplanted into the IPC in 1860, reflecting a punitive stance towards acts deemed to contravene the perceived natural order, including consensual homosexual relations. This antiquated provision, while ostensibly aimed at regulating sexual conduct, has instead perpetuated discrimination and marginalization against the LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) community. Despite progressive legal developments, such as the landmark *Naz Foundation vs. Govt. of NCR Delhi* case in 2009, which decriminalized same-sex relations, systemic barriers persist. Article 14, 15, and 21 of the Indian Constitution, guaranteeing equality before the law, prohibition of discrimination, and protection of life and personal liberty, respectively, stand in stark contradiction to the continued enforcement of Section 377. Furthermore, the Supreme Court's ruling in 2018, recognizing the rights and dignity of LGBTQ individuals, underscored the imperative for legislative reform. However, substantive legal changes are essential to address broader issues facing the LGBTQ community, including marriage equality, adoption rights, and inheritance. Despite these challenges, there is growing momentum towards reform, driven by a recognition of the fundamental rights and freedoms that all citizens, regardless of sexual orientation or gender identity, are entitled to. Efforts to dismantle discriminatory laws and foster a more inclusive legal framework are not merely matters of legality, but also of human rights and social justice. Therefore, the imperative lies in fostering legislative and societal change that ensures equal treatment and opportunities for all members of society, irrespective of sexual orientation or gender identity.

The section 377, Indian Panel Code, 1860

Section 377 – unnatural offences:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with life imprisonment or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The section 377 punishes all the acts of unnatural sexual intercourse and covers the offences of the bestiality and sodomy under the Law. The word “sodomy” used intercourse *per anus* by man with a man and with the women or with an animal. Sodomy may be either homosexual or heterosexual. Voluntary intercourse which is “*against the order of natural* which any man, woman or animal.

According to constitution of India

The section 377 of the Indian Penal Code 1860 criminalises any sexual act between the consenting adults in private and it therefore, violates the following Article of the constitution of India:-

1. Article 13 - The fundamental rights are provided by the constitution itself to the people. They are considered rights needed to live a meaningful life. The article of 13(2) of the constitution of India provides that

“The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void . “

According to above the article of the constitution of India, the 377 of the IPC, violation of the rights of LGBTQ people.

2. Article 14 - The Article 14 provides that “equality before the law as well as equal protection of the law. Definition is

“Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”

Article 14 of the constitution of India, there are two essential conditions must be fulfilled:-

(A) The classification must be based on an intelligible differentia, between the group of the members and,

(B) The differentia must be based on the rational criteria and the essential of the thing is there needs to be a definite nexus between the classification and the objective of the legal provision which introduced it.

3. Article 15- The article 15 of the constitution of India provides *prohibited discrimination on the ground like sex, religion, race, colour, place of birth*. The need is to accept the principle that ‘sexual orientation’ of a person is an inherent part of his sexual identity. Thus, any discrimination on basis of the sexual preference of a person is bound to be violation of the article 15 which is tell about ”Right against discrimination” of the people.

4. Article 19 – The article 19 of the constitution of India deals with the freedom of expression of the people. The section 377, basic of the freedom given under the article 19(1),(a),(b),(c)and (d) of the constitution of India.

5. Article 21 – The article 21 of the constitution of India deals with the right to the life along with the personal liberty of a person. The section of the IPC which is section 377, right to dignity guaranteed in the article 21 is also violated. The Supreme Court of India case of JUSTICE K.S.PUTTASWAMY(RETD) vs. UNION OF INDIA which established right to privacy to be an integral part of the article 21 of the constitution of India.

Thus , the impugned section 377 of the Indian Penal Code is indirect contravention of the Fundamental rights guaranteed to the citizens of India by the constitution.

JUDICIAL JOURNEY OF INDIA

The movement was reinforced by the public Interest litigation (PIL) filed by Naz Foundation before the

Delhi High Court in the year of 2001 sought the consensual acts of the sexual intercourse between the two adults with a valid consent.

The Delhi High Court's landmark decision in the *Naz Foundation v. Govt. of NCT of Delhi* case on July 2, 2009, heralded a significant legal shift by decriminalizing consensual sexual acts between adults. This historic ruling was celebrated by civil society activists, as it underscored the principle of non-discrimination enshrined in Article 15 of the Indian Constitution, which prohibits discrimination on the basis of "sex." The court's verdict, which found Section 377 of the Indian Penal Code to be in violation of Articles 14, 15, and 21, was hailed as a victory for LGBTQ rights and a triumph of liberal interpretation of fundamental rights. However, this progressive stance faced opposition, leading to the filing of numerous review petitions before the Hon'ble Supreme Court of India.

The subsequent decision in the *Suresh Koushal's case*, rendered on December 11, 2013, marked a dramatic reversal of the Delhi High Court's ruling, reinstating the criminalization of Section 377. The review petitions, including one from the Central Government, challenged the Delhi High Court's judgment, arguing against its interpretation of constitutional principles. In the case of *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors*, the court acceded to the petitioners' arguments and reinstated Section 377, asserting that those engaging in sexual intercourse deemed "against the order of nature" constituted a "separate class" deserving of distinct legal treatment. The court reasoned that discrimination based on this "intelligible differentia" did not contravene Article 15 of the Constitution, as it did not target individuals solely on the basis of sex. Moreover, the court highlighted the limited prosecution under Section 377 over the past 150 years, indicating a perceived minimal impact on individual liberties.

This decision, however, elicited significant criticism and sparked renewed debates over LGBTQ rights, constitutional interpretation, and the role of the judiciary in shaping social norms. While proponents of the verdict hailed it as a restoration of moral values and societal order, advocates for LGBTQ rights decried it as a setback for human rights and an endorsement of discrimination. The court's rationale for upholding Section 377 was contested on various grounds, including its failure to recognize evolving societal norms, its perpetuation of stigma against sexual minorities, and its departure from international human rights standards.

In the aftermath of the *Suresh Koushal's case*, the LGBTQ community and their allies intensified their advocacy efforts, seeking legal redress and societal acceptance. The decision galvanized civil society movements, leading to increased visibility, awareness, and solidarity among LGBTQ individuals and their supporters. Calls for legislative reform, public education campaigns, and cultural sensitization gained momentum, reflecting a broader push for inclusivity and equality.

While the legal battle over Section 377 continues, the judgments in the *Naz Foundation* and *Suresh Koushal* cases represent pivotal moments in India's LGBTQ rights movement, shaping legal discourse, public opinion, and social attitudes. The struggle for equality and dignity persists, fueled by the enduring commitment of activists, allies, and affected communities to challenge discrimination, assert their rights, and foster a more just and inclusive society.

RIGHT TO "PRIVACY" JUDGEMENT

The Supreme Court of India declared the "Right to Privacy" to be an integral part of the Right to life and personal given under Article 21 of the constitution of India in the case of *JUSTICE K.S.PUTTASWAMY(RETD) vs. UNION OF INDIA*. The 9 judge constitutional bench discussing the

various facts of the Right to Privacy into the scope of Section 377 of the IPC. The court declared that the fundamental rights could not be denied to even a minuscule of the population. Even if a small segment of the population is affected by the ruling, *“Sexual orientation is an essential of the privacy. Discrimination against the individual on the basis of the sexual intercourse is deeply offensive and self-worth of the individual.”* This is the line from the judgements defining the example of the principle to the richness of the constitution of India and fundamental right protection bestowed by the constitution.

Decriminalisation of Section 377 of the IPC (Supreme Court of India 2018) – the journey of the judgements and the judicial give by the various courts come to a head from the decision of the Supreme Court of India in the case of NAVTEJ SINGH JOHAR vs. UNION OF INDIA. The historic verdicts of the Court decriminalised the section 377 decision that *“intercourse against the order of the nature”*. The court found that the said Section was a violation of the Article 14, 15, and 21 of the constitution of India. The Court put up the need to recognise of the rights towards realisation of the free life by the people. The role of the constitution of better itself in its strive towards the modern society with the changing time. The court had stated that law, including the constitution cannot go along. The chief justice Misra noted that all the case regarding the case, all the requirement of the large number of the persons to their rights is “meaningless”.

The Court highlighted the value of *“Constitutional morality”* in the judgements. It referred to the case of Government of NCT of Delhi v. Union of India. In which the court held that *“constitutional Culture”* with the democratic form of the government and representation character of the state. The court also declared that role of the constitution morality in order of the value of the liberty, equality and fraternity.

IMPACT OF JUDGEMENTS ON SOCIETY

While the decriminalization of Section 377 of the Indian Penal Code marks a significant milestone in the recognition of LGBTQ rights, its impact on society extends beyond mere legal changes. Although a welcome first step, it is clear that the journey toward full equality is far from over. The LGBTQ community continues to face societal stigmatization and political opposition, with some leaders questioning the compatibility of such judgments with Indian cultural values. However, global trends, such as America's enactment of laws supporting homosexual marriage, and international recognition, such as the United Nations' commendation of India's liberal verdicts on the Right to Life, signify a broader movement toward recognizing and affirming LGBTQ rights worldwide. The Supreme Court's decision contributes to this momentum, amplifying the voices advocating for equality and challenging discriminatory norms. While legal victories are significant, they must be accompanied by cultural shifts and ongoing advocacy efforts to truly address the systemic challenges faced by the LGBTQ community and foster a society that embraces diversity and inclusivity.

CONCLUSION

In the wake of the landmark Navtej Singh Johar judgment of 2018, which heralded the decriminalization of Section 377 of the Indian Penal Code, India's legal landscape experienced a transformative moment for LGBTQ rights. This ruling not only invalidated an archaic law but also symbolized a significant stride towards equality and justice for sexual minorities. While the judgment was a victory on paper, its true impact lies in its potential to reshape societal attitudes and behaviours towards the LGBTQ community. Despite legal advancements, societal acceptance remains an ongoing challenge, with entrenched discrimination persisting in various facets of Indian society. The imperative now is not only

to uphold the legal principles of equality and non-discrimination but also to foster widespread societal education and acceptance. Recognizing sexual orientation as a natural aspect of human diversity is fundamental to this endeavour. The affirmation of the Right to Life by the court empowers LGBTQ individuals to live authentically, free from fear of persecution or discrimination, and with equal protection under the law. However, true progress requires a concerted effort to cultivate a culture of inclusivity and understanding, wherein all individuals, regardless of sexual orientation, can fully realize their rights and dignity as equal members of society. This journey towards genuine equality necessitates not only legal reform but also a broader societal shift towards embracing diversity and celebrating the inherent worth and dignity of every individual.

End Notes:

1. Article 14, The Constitution of India, 1950
2. Article 15, The Constitution of India, 1950
3. Article 19, The Constitution of India, 1950
4. Article 21, The Constitution of India, 1950
5. Section 377 of Indian Penal Code, 1860
6. Judgement of Delhi High Court
7. <https://blog.ipleaders.in/reasonable-classification-and-its-validity-under-article-14/>
8. <https://www.timesnownews.com/india/article/history-of-section-377-of-the-indian-penal-code-10-things-you-must-know/253061>
9. <https://indiankanoon.org/doc/1465319/>