
DECRIMINALISATION OF SECTION 377 IPC

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ABSTRACT

The decriminalisation of **Section 377** of the Indian Penal Code (*hereinafter referred to as 'IPC'*) was a crucial change in the history of India and created a deep impact on the lives of LGBTQIA+ people, who are now allowed to be free and finally identify themselves as what they want. People from the LGBTQIA+ community now have the right to choose their partners, and their consensual sexual activity is no longer seen as an unnatural offence. The decriminalisation of **Section 377** of the IPC may have given homosexuals the right to exist, but the main conversation is about whether they have been given the right to enjoy the quality and live their life with respect and safety like any other individual. This paper is about those landmark judgments that helped with the decriminalisation of **Section 377** and gave them representation in society. It also talks about how much law is inclusive of the LGBTQIA+ community, whether the representation is truly worthwhile or just another gimmick. Homosexuals, though, deserve equal opportunity in every field and protection from homophobic people, but do they really get these opportunities in a society where there is deep hatred and very little to no awareness about homosexuals? Thus, this paper talks about the problems that the LGBTQIA+ community still faces. It also talks about the statistics of their situation in the country. It also talks about the reforms of these problems and the question that is homosexual people's representation limited, or there is no representation at all. Thus, to tackle such issues, some solutions have also been opined by the authors. It is high time that every person in the country should be treated equally and with respect. It is basic morality to understand that homosexual people also have the right to privacy, which includes their sexual partners. As per **Article 21** of the Constitution of India, every person has the right to life and liberty, and **Section 377** was violating the rights of homosexual people.

Keywords: Decriminalisation, Privacy, Article 21, Homosexuality, Morality.

Introduction

Criminalisation of homosexuality has always been discriminatory. It was introduced by the British government through **Section 377** of the IPC¹. This section caused discrimination and the violation of the basic human rights of homosexual people. The punishment for a homosexual act was imprisonment for life, imprisonment for a term which may extend for up to ten years, and the convict shall also be liable for a fine. Ancient temple carvings of Konark, Ajanta-Ellora and mention of homosexuality in various scriptures and mythology. These are not just coincidences but proof that homosexuality has always been part of human nature and was widely accepted in India with an open-mind. But due to the criminalization of homosexuality for so long, the society evolved into believing that homosexuality is not natural and people who are involved in a homosexual relationship are doing sin or they have a mental illness. The conversation about the decriminalisation of homosexuality was started by the case of *NAZ Foundation v. Govt. of NCT of Delhi*². In this case, the question of decriminalizing homosexuality was discussed. The judgment stated that **Section 377**³ is a violation of fundamental rights and it leads to discrimination against people on the basis of sex, which is not just biological sex, but sexual orientation. But the journey of repealing **Section 377**⁴ hit a major setback with the case of *Suresh Kumar Kaushal v. NAZ Foundation*⁵. The judgment stated that the right to privacy should not be extended so much that people start committing offences in their private spaces. Moving on to the case of *Justice K.S. Puttaswamy v. Union of India*⁶, in this case, it was established that, sexual orientation is an essential attribute of privacy and must be protected from all platforms. In 2018, homosexuality was finally decriminalised in India with the case of *Navtej Singh Johar v. Union of India*⁷. In this case, the court stated that **Section 377**⁸ infringes fundamental right to life by criminalizing and individual's sexual identity and convicting them for the offence of freedom of expression and freedom to choose. Through this case, it was also somewhat proven that India is more of a constitutional democracy than a majoritarian democracy. This case turned out to be the most important and crucial in Indian history. This was a landmark judgment that finally helped in

¹ The Indian Penal Code, § 377 (1860).

² *Naz Found. v. Gov't of NCT of Delhi*, 160 D.L.T. 277 (Del. H.C. 2009).

³ Indian Penal Code § 377, supra note 1.

⁴ Id.

⁵ *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 S.C.C. 1.

⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1.

⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1.

⁸ Indian Penal Code § 377, supra note 1.

decriminalisation of the provision. The precedent of this case was movement towards progressive society and a huge change. It made the people of India to finally talk about homosexuality and transgender rights more openly. The basic right to choose their partners and express themselves however they want, was finally given to people of LGBTQIA+ community, though a lot of reforms are still left to make for the progression and betterment of LGBTQIA+ community to help access their rights and identify themselves as they want. This precedent was revolutionary for the people of the LGBTQIA+ community who have since not stopped to get the equality they deserve.

Journey of Decriminalisation of Homosexuality

The journey of decriminalisation of **Section 377** of the IPC⁹ is more of a shift from giving importance to colonial law to constitutional law. The journey was not simple, but it was quite complex and took a lot of debating to prove that the provision was discriminatory and consensual sexual activity between homosexual adults is not an offence. Since **Section 377**¹⁰ in India was introduced in the 1860s, the stigma over homosexuality was deeply rooted in society, and although the provision did not talk about homosexuality exactly, it was used to penalise homosexual people. Though it was against homosexual people, it was still a law due to the deep-rooted stigma. Thus, to accept homosexual people, a single case or law couldn't change the thought process of the entire society. However, there are a few cases that have brought immense changes in the country of India.

The case of *Naz Foundation v. Govt. of NCT of Delhi*¹¹ is one of the first case law where the provision was talked about and how it is discriminatory and unconstitutional. In 2009, Naz Foundation, a non-governmental organisation, challenged the constitutionality of **Section 377**¹² under **Articles 14**¹³, **15**¹⁴, **19**¹⁵ and **21**¹⁶ of the Indian Constitution before the Delhi High Court. The Foundation argued that the provision was discriminatory and supported an outdated conception of sex which is not welcomed in society. This case constituted a five-judge bench headed by Chief Justice Deepak Mishra and Justices RF Nariman, AM Khanwilker, DY

⁹ Indian Penal Code § 377, supra note 1.

¹⁰ Id.

¹¹ *Naz Found.*, supra note 2.

¹² Indian Penal Code § 377, supra note 1.

¹³ INDIA CONST. art. 14.

¹⁴ INDIA CONST. art. 15.

¹⁵ INDIA CONST. art. 19.

¹⁶ INDIA CONST. art. 21.

Chandrachud, Indu Malhotra. At first the Delhi High Court rejected the appeal of petitioner by saying that petitioner did not have any right to come before the court in this matter. However, later, the Supreme Court after hearing this matter from Naz Foundation, said that the Foundation has the right to file the petition through PIL. Delhi High Court concluded that the provision should not be used to punish consenting adults for any sexual activity as it violates the basic fundamental right of an individual under **Article 21**¹⁷. The Hon'ble Delhi High Court also stated that categorizing people based on the sexual orientation violated another fundamental right which is under **Article 14**¹⁸ of the Constitution which states that every human being deserves to enjoy equal rights and thus, even different sexual orientation people deserve equal right to choose their partners.

Many people were agitated by this judgment; petitions were filed against this ruling. In those petitions, many organization and social groups also argued that right to privacy does not give the privilege to people to commit any offence in the private. Many of the petitioners argued that decriminalisation of this provision will ruin the institution and depth of marriage and lot of people will follow the path of homosexuality by getting influenced by the west.

One landmark case that set back the journey of decriminalisation of **Section 377**¹⁹ is **Suresh Kumar Koushal v. Naz Foundation**²⁰. In this case, the decision of the Delhi High Court was appealed in the Supreme Court. The appellant and supporters included organisations and individuals who have stated that they had an interest in protecting the moral, cultural and religious values of the Indian society. The appellant in this case said that decriminalisation of the provision does not reduce HIV-AIDS, and thus, the documentary evidence which the respondents provided was fraudulent. Appellant also stated that the provision was not against any gender but carnal intercourse regardless of gender, which proves that the provision is not unconstitutional. Appellant also stated that courts should not remove the provision as they seem fit, as it is the Parliament's duty. The Supreme Court acknowledged that the High Court does have the authority to declare any law void, whether it was prior to the Constitution or after the Constitution. The Supreme Court said, "**Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain acts which, if committed, would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and**

¹⁷ Id.

¹⁸ INDIA CONST. art. 14, supra note 13.

¹⁹ Indian Penal Code § 377, supra note 1.

²⁰ *Koushal*, supra note 5.

orientation”.

After this case, the provision was criminalised again. One of the most important cases that talked about a very crucial point about the situation of transgender and homosexual people in society is *National Legal Services Authority v. Union of India*²¹. The petitioner of this case argued that there are only two genders recognised under Indian legal provisions, that is, male or female, and suggested that there should be a formal and legal term for the people who do not identify themselves as male or female. They should be legally recognised third gender. They should also be allowed to use ‘they’ as their pronouns for more inclusivity. The petitioner also argued that there was a lack of provision to protect and cater for the needs of transgender people, which eventually violated their fundamental and constitutional rights, including the right to life and liberty, the right to freedom and expression, and the right to be protected from discrimination. On 15 April 2014, the judgment of the case was given by a divisional bench, constituting **Justice K.S. Radhakrishnan and Justice A.K. Sikri**. The judgment held by the bench relied on opinions and case judgment of the foreign courts, including courts of Australia, New Zealand, Malaysia, and even English courts. The court specially emphasised on ‘psychological sex’ and its difference from biological sex. In other words, the focus was on the gender identity an individual may want to identify with, it can differ from biological sex and that is where transgender community stood. The court in this judgment talked about the case of *Corbett v. Corbett*²², with its complete emphasis on biological sex and its difference from psychological sex. The court also highlighted about the case of *Attorney General v. Otahuhu Family Court*²³, which talks about the requirement of surgical and medical procedure, which is the standard of New Zealand to recognise the transformation officially. The divisional bench, based on these cases, held that gender recognition should not be based on the biology of a person or the biological sex they were born with. Instead, importance should be given on ‘psychological sex’ or the gender identity they identify themselves with. The Supreme Court held that the transgender, just as any other citizen of India, fall within the protection the Indian Constitution. They should also be able to enjoy all the rights and freedoms that are enshrined in the Constitution.

In another landmark judgment of *K.S. Puttaswamy v. Union of India*²⁴, the Supreme Court

²¹ *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 S.C.C. 438.

²² *Corbett v. Corbett*, [1971] P. 83 (Eng.).

²³ *Att'y-Gen. v. Fam. Ct. at Otahuhu*, [1995] 1 N.Z.L.R. 603 (H.C.).

²⁴ *Puttaswamy*, supra note 6.

declared that the right to privacy is a fundamental right and an integral part of **Article 21**²⁵ of the Constitution of India. Drawing parallel to this judgment and taking it into consideration, the Supreme Court stated that the *Suresh Kumar Kaushal*²⁶ judgment was per incuriam, that is, this judgment is bad in law as it does not follow the previous decision of the court. A unanimous verdict was given by a nine-judge bench of the Supreme Court wherein it was declared that right to privacy should be constitutionally protected as a part of liberty, dignity and individual autonomy. The Supreme Court held that the right of privacy is a fundamental right. It protects the privacy and autonomy of a person from another person or state interference and to make decision on their behalf. The Supreme Court also held that right to privacy is crucial part of fundamental right that can be traced to **Article 14**²⁷, **Article 19**²⁸, and **Article 21**²⁹ of the Constitution of India. The court also described the fundamental right to privacy and the aspects that it covers:

1. Intrusion with an individual's physical body.
2. Informational privacy.
3. Privacy of choice.

The Supreme Court stated that privacy is a concomitant of the right of the individual to exercise control over his or her personality. The court held that the right to privacy is a natural and moral right that gives an individual freedom to exercise control over his or her life and body. The court made it clear that the right to privacy of an individual is inalienable. The precedent of the case, in a way, cleared that the right to privacy of an individual is crucial and cannot be denied, which means that if an individual participates in consensual carnal intercourse, then it is their private matter and no other individual or State can interfere in this matter. This case turned out to be one of the most important cases whose precedent protected the rights of LGBTQIA+ community people.

In the landmark case of *Navtej Singh Johar v. Union of India*³⁰, the Apex Court granted right to privacy, which includes choosing one's own sexual orientation and individual autonomy, to

²⁵ INDIA CONST. art. 21, supra note 16.

²⁶ *Koushal*, supra note 5.

²⁷ INDIA CONST. art. 14, supra note 13.

²⁸ INDIA CONST. art. 19, supra note 15.

²⁹ INDIA CONST. art. 21, supra note 16.

³⁰ *Navtej Singh Johar*, supra note 7.

the members of the LGBTQIA+ section. A person's choice of partner should not make them punishable under a law. Therefore, **Section 377**³¹ of the IPC was declared unconstitutional as it violated **Articles 14**³², **15**³³, **19**³⁴ and **21**³⁵ of the Constitution of India. This section violated the fundamental right of expression of the people of the homosexual community. **Section 377**³⁶ blatantly violated **Article 21**³⁷ of the Constitution by curtailing their human dignity and personal choice. The court took into consideration the case of *Justice K.S. Puttaswamy v. Union of India*³⁸ and emphasised the importance of human dignity, autonomy, freedom of choice and right to sexual orientation.

The Lingering Issues

Despite the decriminalisation of **Section 377**³⁹, various problems still exist. The judgment may have made society talk about homosexuality, but society accepting homosexuals is still in question. There are many issues still existing, and other issues may have been created after the decriminalisation of **Section 377**⁴⁰ as a whole. The Section did not only talk about homosexuals but also about other things:

- 1. No law for anti-discrimination:** There is no law in India that stops people from discriminating against the LGBTQIA+ people. The people of this community still face discrimination and constant humiliation at various places like the education system, the health care department, getting and even renting houses. This clearly violates the fundamental rights of the LGBTQIA+ people as per the Constitution of India.
- 2. Same sex marriage not allowed:** Same sex couples are still not allowed to marry, and even if they do marry as per their customs, they are not recognised as married couples. Same sex couple do not get the benefits of marriage, like insurance, pension benefits and inheritance rights. Morally, it is also wrong to stop an individual from marrying someone they want.

³¹ Indian Penal Code § 377, supra note 1.

³² INDIA CONST. art. 14, supra note 13.

³³ INDIA CONST. art. 15, Supra note 14.

³⁴ INDIA CONST. art. 19, Supra note 15.

³⁵ INDIA CONST. art. 21, Supra note 16.

³⁶ Indian Penal Code § 377, supra note 1.

³⁷ INDIA CONST. art. 21, supra note 16.

³⁸ *Puttaswamy*, supra note 6.

³⁹ Indian Penal Code § 377, supra note 1.

⁴⁰ *Id.*

3. **Not allowed to adopt:** A couple of the same sex is not allowed to adopt, but an individual from the LGBTQIA+ community can adopt. This discrimination only against the same sex couple causes confusion over the rights of the child or who is the legal parent.
4. **Social stigma:** Despite the legal changes and so many protest, the social stigma still exists. Society has not fully accepted the LGBTQIA+ community. Homosexual people are still scared of disclosing their sexual orientation due to fear of rejection from their parents, harassment from people and getting shunned by the society.
5. **Lack of awareness:** A lot of people in authority are not knowledgeable enough about homosexuality, and thus, it causes discrimination and ignorance against the LGBTQIA+ community. Even police and doctors are ignorant and discriminate against these people.
6. **Issue of bestiality:** Section 377⁴¹ had a wide scope. It not only talked about homosexuality, but also other offences like bestiality. Decriminalisation of the Section 377⁴² has a good aspect, that is, giving homosexual people the right to choose their partners and express themselves but there is also a problematic aspect, that is, not protecting animals from bestiality. This causes rape of innocent animals and the culprits don't even get appropriate punishment. The biggest loophole of decriminalizing this section is not making bestiality a punishable crime under unnatural offence, this makes the perpetrators immune to commit offences like this.

Analysing the Current Situation

Although the decriminalisation of the provision was a much-needed step towards the acceptance of homosexuals in India, it might not have had the impact that it should have. Though the precedent of the judgment finally made the Indians talk about homosexuality, at the same time, it did not help them to get completely accepted in the society. The social stigma about homosexuality still exists in India. There is barely any talk or representation of how homosexuality is a perfectly natural phenomenon. The larger section of India still believes that homosexuality is an unnatural offence and refuses to hear anything opposite. Although the

⁴¹ Indian Penal Code § 377, supra note 1.

⁴² Id.

fundamental right to equality protects every individual from discrimination on the basis of sex, but not protect against discrimination on the basis of sexual orientation. For example, there is an Act that protects women from sexual harassment in the workplace, but there is no act to protect the LGBTQIA+ community from workplace harassment. There are cases where homosexual men and transgender people have been raped, but they did not get appropriate justice because, according to the Indian law, only women can be raped, and this very provision shows the inequality based on gender and gender orientation. Although the judgment has decriminalised homosexuality, it has only decriminalised the existence of homosexuals. Homosexual people still cannot marry legally; despite following the custom of marriage, they cannot register the marriage. The Hindu Marriage Act still refers to both parties as “husband” and “wife”. There is no mention of any other kind of couple. This can be seen as a hypocrisy of the law. On one side, homosexuality is accepted, and on the other side, there is no provision, protection, or policies that recognise them as equal. **The Surrogacy Bill, 2019**⁴³ bans single parents and homosexual couples from having children through surrogacy. The Indian adoption Acts also have no provision for homosexual couple to adopt children. A heterosexual couple, or a single male or female are only individual that can adopt a child. In multiple provisions, only male and female are described under law, including adoption, which stops transgender from adopting. This clearly shows that law does not recognise the existence of any other kind of family or individual and does not take the needs of LGBTQIA+ community into consideration. The **Indian LGBT Workplace Climate Survey in 2016**⁴⁴ showed that 40% of LGBTQIA+ persons are subject to harassment in the workplace because of their sexual identity. Two-thirds reported hearing homophobic comments in the workplace and one-fifth reported facing discrimination by their seniors. This is a clear indication of people from LGBTQIA+ community facing discrimination and harassment in workplace but despite this, there is not legal provision protecting individuals from this discriminatory behavior. There being no provision for their protection not only denies justice to LGBTQIA+ people but also exposes themselves for more discrimination and harassment. They might face more violent crimes against themselves if taken up the opportunity at all. This often resort to begging and sex work which leads to more problems for community as both these occupations are prohibited under Indian law. Furthermore, there is no provision for separate toilets within colleges for transgender people which is a basic human necessity. Even law at certain times does not

⁴³ The Surrogacy (Regulation) Bill, 2019, No. 156 of 2019 (India).

⁴⁴ Mission for Indian Gay & Lesbian Empowerment (MINGLE), The Indian LGBT Workplace Climate Survey 2016 (2016).

recognize them as equal which violates LGBTQIA+ community's fundamental and constitutional rights.

Proposed Solutions

It is clear that a lot of issues still exist in society in the matter of the decriminalisation of **Section 377**⁴⁵. The government must make laws and introduce reforms to smooth out the problems that still exist around us. There are certain reforms that should be added to the law for the betterment of homosexual people as well as animals:

- 1. Enact a comprehensive equality law:** Removing the provision is not enough to bring acceptance in the society. A comprehensive and long-term provision should be added in law promoting equality for LGBTQIA+ community.
- 2. Legal recognition of marriage:** Allowing homosexual people to live however they want but not giving them legal rights of marriage is discriminatory against the people of LGBTQIA+ community. Thus, marriage right and benefits of married couple must be given to homosexual people too. Homosexual people are as human as straight people and there should not be any law drawing a line between them.
- 3. Separate and clear law for bestiality:** With the removal of former provision, law that was protecting animals from getting sexually assaulted is also removed. It is high time that there should be provisions for protecting animals from being assaulted and give perpetrators appropriate punishment.
- 4. Police and judiciary training:** Though the law may legalize the sexual activity between two same genders, but the society has still not accepted homosexual people with open mind. People from LGBTQIA+ community after revealing their sexuality still face discrimination on a daily basis. To remove this discrimination, there should be proper training for police officials and people in authority about homosexual people and not to discriminate against them.
- 5. Fast-track complaint system:** Since, homosexual people are facing daily discrimination and violence for their sexual orientation, there must be fast track

⁴⁵ Indian Penal Code § 377, supra note 1.

complaint system so they can get justice as soon as possible.

- 6. Workplace inclusion policies:** After homosexual people reveal their sexuality and are open about it, they face brutal rejection in society and that include education as well as workplace. Thus, there should policies to include people from LGBTQIA+ for jobs and they don't face discrimination just because of their sexuality.

Conclusion

The step to decriminalise an outdated provision was a crucial and huge change in Indian history, though, the fact that the change happened a little too late cannot be ignored. This provision had a deep impact on the Indian people by the British Raj. It cannot be ignored that hatred against homosexuality was a colonial mindset embedded in the Indians, though it was not in India from the start. The LGBTQIA+ community still struggles for acceptance and representation. The decriminalisation of the provision has led society to talk about the topic, which was seen as “taboo” before. Various media forms have also represented and talked about more reforms for the LGBTQIA+ community. The LGBTQIA+ community has been represented through the screen, social media, newspapers, and many other mass communication forms. However, the acceptance of the LGBTQIA+ community in society should come with various other measures and provisions. These are huge loopholes when it comes to our country, giving them access to fundamental and constitutional rights and not making any policy to protect those rights is very similar to not giving them any right at all. The aim should be to change gender-bias laws to gender-neutral laws. And this must be followed with proper awareness and education about the LGBTQIA+ community. Proper provisions, policies and awareness through education are the only way to actually accept them and treat them with equality and respect.