

THE DECRIMINALIZATION OF SECTION 377: A CRITICAL REVIEW

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By striking down Section 377 of the Penal Code, the Supreme Court of India made clear its constitutional responsibility to protect every person's dignity, autonomy and right to equality. The Navtej Singh Johar judgment of 2018 reaffirmed that sexual orientation is an integral part of a person's identity and that the rights associated with sexual orientation are guaranteed by Articles 14, 15, 19 and 21 of the Indian Constitution. The Navtej Singh Johar ruling, therefore, represents a significant socio-legal change in the way LGBTQ+ people will be perceived in India and the types of treatment they will receive from the Government of India as provided for by the Constitution of India. While the Supreme Court's ruling in Navtej Singh Johar has removed legal discrimination against LGBTQ+ persons in India, the movement for acceptance, entry, and deinstitutionalization will keep on after the removal of Section 377, creating an enormous body of case law surrounding LGBTQ+ rights in India, but continuing to strive toward achieving full and substantive equality for LGBTQ+ people within democratic India.

Introduction

In 2018, the Supreme Court of India ruled decriminalising Section 377 of the Indian Penal Code (IPC) in *Navtej Singh Johar v Union of India*, and through this ruling, landmark advancements were made in India's legal history and its socio-legal framework. Under the statute established by British colonisers in 1861, many individuals were punished for engaging in carnal intercourse with those of the same sex (sodomy) prior to the Supreme Court's ruling. Section 377 has subsequently provided a tool to discriminate against and exclude individuals from society based on their sexual preference. The *Navtej Singh Johar v Union of India* court ruling signified a significant shift in how the highest court of India viewed homosexuals, departing from a morality/penalty viewpoint and focusing instead on constitutional rights. A right to sexual preference forms part of an individual's dignity and privacy, and therefore, the court found that one's sexual preference is

part of an individual's inherent worth and identity, allowing for the origin of the constitution's transformative power.

Historical Background

The history surrounding the decriminalization of Section 377 was significantly influenced by India's colonial past and the British Empire's ideas surrounding sexual morality. In 1860, Section 377 of the Indian Penal Code was created during British rule by Lord Macaulay in an attempt to impose portions of the British Empire's 1533 Buggery Act upon its colonies¹. It has been argued by several academics that before the arrival of the British, India was not constrained in its views about gender and sexuality to the extent that the British were constrained by their own views regarding those topics. The Kama Sutra and temple practices provide proof that there was no foundational basis in India for a prohibition against same-sex relationships like that which was used to enforce Section 377 and that such a prohibition was imposed on India as a result of colonial rule². After India gained independence from colonial rule, Section 377 came into effect in India and was used by Law Enforcement as a

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tool for harassment and social discrimination against the LGBTQ+ community³. The legal challenge to Section 377 began to grow significantly starting in the late 1990s due to activism from AIDS activists who believed Section 377 was preventing access to public health initiatives⁴. The Naz Foundation's petition in 2001 was ultimately led to the suspension of Section 377 by the Delhi High Court in its decision handed down on July 2, 2009.

Legal Evolution Leading to Decriminalization

To enable India to adopt values of equality, privacy, and dignity as fundamental values that are part of its constitutional framework, there has been an evolution of the law concerning Section 377. It is important to note that the introduction of Section 377 was made by the British colonisers in 1860, as a result of which consensual same-sex intimacy became a punishable offence, thus perpetuating the stigma surrounding homosexuality in India⁵. The High Court of Delhi in *Naz Foundation v NCT Delhi* (2009) ruled that Section 377 violates the Articles 14, 15 and 21 contained in the Constitution and declared it unconstitutional⁶. However, in *Suresh Koushal v Naz Foundation* (2013), this ruling was set aside by the Supreme Court on the grounds that members of the LGBT community constituted only a "minuscule minority" of the population⁷. The transformative case in this regard was *Justice KS Puttaswamy v Union of India* (2017) in which the Supreme Court of India reaffirmed that privacy and sexual autonomy are both fundamental rights⁸ and subsequently in *Navtej Singh Johar v Union of India* (2018), unanimously decriminalising consensual same-sex relationships and affirming the principle that constitutional morals take precedence over societal prejudice⁸.

Impact of Decriminalisation

In India in 2018, the Supreme Court of India made a historic ruling in *Navtej Singh Johar v Union of India*, which legalised consensual same-sex activity between adults by nullifying Section 377. As a result of this ruling, how law, social values, political order, and mental health interact with LGBT people changed throughout India. In addition, the ruling is based on Articles 14, 15, and 21 of the Indian Constitution – equality before law, freedom from discrimination, and protection of private life. The ruling also reinforced the concept that sexual identity is part of who we are and that sexual identity should not be defined by majority rule or morality⁸.

Remaining Challenges

Lastly, without legal recognition of same-sex relationships, LGBTQ+ persons cannot access the same rights and protections related to marriage, adoption and inheritance that heterosexual couples can; therefore, police harassment and therefore, through police education and accountability to address how police treat LGBTQ+ persons (Human Rights Watch,⁹ remains a significant human rights violation for LGBTQ+ persons.

Conclusion

In India, the Supreme Court's interpretation of the Constitution has changed recently in light of recent advancements in the legalisation and recognition of Gender Identity Rights due to Section 377, largely due to the continued and persistent efforts of Civil Society and Human Rights organisations as well as Individual Citizens. By framing the issue as a human right, through litigation and community advocacy¹⁴, these organisations such as the Naz Foundation, the Lawyers Collective, and others have affected the decisions of the Supreme Court. In making these changes based on a new understanding of the Constitution, the Court has stated that constitutional Morality overrides the moral values of Society, and that the will of the Majority cannot impose limits on either the Equality, Liberty, or Dignity of Lonely People based upon the Majority's opinion⁸.

Therefore, Civil Society and Constitutional Morality aid in Protecting and Promoting the Human Rights of LGBTQ+ Individuals and the Right to Justice and Autonomy in an Open and Democratic Society. □

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