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## Beyond Decriminalization: Analyzing the Implications of Section 377's absence in the Bhartiya Nyaya Sanhita

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*On October 14, 2024, the Preeminent Court declined to consider an open intrigued case (PIL) looking for hearings beneath Article 142<sup>1</sup> to include sexual offenses against men, trans people and creatures to the recently ordered Bhartiya Nyaya Sanhita (BNS) that replaces the Indian Penal Code. The appeal was recorded contending that the unused BNS did not contain the criminalising arrangement of the prior S. 377<sup>2</sup> of the Indian Penal Code, which particularised the act of homosexuality<sup>3</sup>. Assist outline has been given through another case in India where the affirmed suicide of a 23-year-old man, a few hours after he was gang-raped by four men in the Gorakhpur locale of Uttar Pradesh, highlighted the modern Bhartiya Nyaya Sanhita which, in any case, does not contain section 377 or any other area that bargains with the assault of men and individuals classified as transgendered<sup>4</sup>. In this article, the history of socio-legal advancement of LGBTQ+ rights in India, from the choice to decriminalise*

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<sup>1</sup> Constitution of India 1950, art 142

<sup>2</sup> Indian Penal Code 1860, s 377

<sup>3</sup> Anmol Kaur Bawa, 'Supreme Court Refuses To Entertain Plea To Criminalise Sexual Offences Against Men, Trans Persons & Animals In BNS' *Live Law* (14 October 2024) <<https://www.livelaw.in/top-stories/supreme-court-refuses-to-entertain-plea-to-criminalise-sexual-offences-against-men-trans-persons-animals-in-bns-272371>> accessed 17 September 2024

<sup>4</sup> Alisha Dutta, 'Bharatiya Nyaya Sanhita has no section dealing with rape of men, transgender persons' *The Hindu* (22 June 2024) <<https://www.thehindu.com/news/national/gang-rape-of-up-man-highlights-need-for-section-377-in-bns-bill/article68320575.ece>> accessed 17 September 2024

*homosexuality through the endeavour to proclaim an exceptionally gendered pursuit of assault enactment, and the results of section 377, which is not included in the pending Bhartiya Nyaya Sanhita, harmful as it may be, will be explained. The article raises concerns about how the total exclusion of section 377 from the BNS would shockingly result in a circumstance where the law authorisation officers will not discover security against the offense of 'carnal intercut against the arrange of nature' and how this in turn, has greater suggestions to the current battles for the uniformity of the LGBTQ+ community and the require for changes in laws and social demeanours to permit everyone free rule notwithstanding of their sexual orientation and sex orientation.*

**Keywords:** *decriminalisation, bns, section 377, lgbtq+.*

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## INTRODUCTION

In India, it's a man in the books when you authoritatively assault and authoritatively get assaulted when you're a lady. If you are a man assaulted by a man or a lady assaulted by a lady or a transgendered or transsexual individual, you have, at best, insufficient alternative for change or, at most, exceedingly bad, no alternative at all. Government bolster has come in making assault laws sexual orientation neutral.

However, it has not come to pass due to resistance from women's bunches. Sex nonpartisanship in assault laws has been named "a concept without any social reality of sexual mishandling in our nation". Same-sex assault and assault of and by transgendered or transsexual individuals are not investigated since there have not been many restrictions to criminalise those, but with the rider that to begin with, homosexuality must be totally decriminalised. India is one of the 28 Asian nations<sup>5</sup> that have legalized homosexuality and ensured the rights of LGBTQIA+. The judgment rendered in Navtej Singh Johar and Ors v Union of India (2018)<sup>6</sup> brought a modification in the lives of numerous people in the nation. Before this model judgment, the community did not have such rights since homosexuality was considered wrongdoing beneath section 377 of the Indian Penal Code, 1860. Individuals accept that the court has set aside the entirety of Area 377 of IPC with this judgment, which is not so. There is still an approval of section 377 to the degree that it criminalises sexual intercourse between two people who have a

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<sup>5</sup> Aditya Prasanna Bhattacharya and Gunjan Chawla, 'A Case for Gender Neutral Rape Laws in India' (2013) Centre for Civil Society Paper No 286, 2013 <<https://ccs.in/sites/default/files/2022-10/A%20Case%20for%20Gender%20Neutral%20Rape%20Laws%20in%20India.pdf>> accessed 17 September 2024

<sup>6</sup> *Navtej Singh Johar v Union of India Ministry of Law and Justice* (2018) 10 SCC 1

place to the same sex without any kind of assent. But, be that as it may, the court has decriminalised this area to the degree that it rebuffs the consensual sexual acts between the individuals of this community. This arrangement was pertinent to the illegal sexual acts by heterosexuals as well, but it was broadly utilised to arraign and bug the eccentric community individuals. Numerous petitions were recorded sometime recently, in the early 1990s, against this arrangement, but the courts proceeded to dismiss the same. At last, an NGO concerned with things relating to sexuality and HIV/AIDS avoidance, Naz Foundation, recorded a request that was taken up by the Delhi High Court in 2006 as an open, intriguing case. The Naz Foundation, which, in its beginning raid into the courts, challenged section 377 of the IPC as violative of the Indian Structure, brought to the Court's take note the Lucknow occurrence of 2001. In this case, labourers who conveyed condoms to gay people as a portion of HIV anticipation endeavours were captured for planning to commit an offense. This way, it proceeded to be abused indeed assist in rebuffing consensual sexual acts by grown-ups of the same sex. Be that as it may, on the other side, a few organisations which challenged the unconstitutionality of section 377 in the Preeminent Court in the case of Suresh Kaushal v Naz Foundation case<sup>7</sup> have contended that the decriminalisation of homosexuality would be destructive to the institution of marriage and take youthful individuals along with such gay person exercises. After the judgment of Navtej Singh Johar's case, the Indian government constituted Transgender People Act, 2019<sup>8</sup> for the security of trans individuals.

## LEGAL CHALLENGES

The Court observed that Section 377 unconditionally penalised individualities involved in homosexual connections and concluded that the section discerned against individualities grounded on their sexual exposure, targeting the LGBTQ+ community as a whole. In Naz Foundation v Government of NCT of Delhi and Ors<sup>9</sup>, the Court stated that outlawing or criminalising homosexuality or same-coitus relations grounded on gender was an illegal and unjust bracket, as it stigmatised non-heterosexual connections while allowing heterosexual intercourse to go unpunished. The Court applied the “arbitrariness test” to determine whether the section was unconstitutional and set up that it failed to distinguish between consensual and non-consensual sexual acts. Since there was no detriment in criminalising consensual coitus

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<sup>7</sup> *Suresh Kaushal v Naz Foundation* (2018) 3 SCC 254

<sup>8</sup> Transgender Persons (Protection of Rights) Act 2019

<sup>9</sup> *Naz Foundation v Government of NCT of Delhi and Ors* (2009) 6 SCC 712

between grown-ups of the same coitus — an aspect of individual sexual freedom — the provision served no purpose and violated the substance of Article 14<sup>10</sup>.

Furthermore, although Article 15<sup>11</sup> doesn't explicitly mention "sexual exposure," the Court took a broad interpretation of the term "coitus" to include sexual exposure. The judgment affirmed that treating individualities else grounded on sexual exposure amounted to coitus demarcation. As a result, Section 377 discerned against individualities on the grounds of sexual exposure, violating Article 15. The Court also substantiated the *NALSA v Union of India*<sup>12</sup> case, in which the meaning of "expression" under Article 19(a)<sup>13</sup> was expanded to include expressing one's sexual identity and exposure, which are integral to a person's character and autonomy. Section 377 confined the LGBTQ community's freedom to express their individualities without fear, thinking their sexual connections were felonious. The Court emphasised that fornication is an essential part of an existent's personality, and criminalising it undermined the indigenous order. Accordingly, central and state governments were ordered to fete manly, womanish, and transgender individuals as the three sanctioned genders.

Also, the Supreme Court, in the *Puttaswamy v Union of India*<sup>14</sup> case, honoured the right to sequestration as an abecedarian right under Article 21<sup>15</sup>. The judgment in *Navtej Singh Johar's* case was grounded on this precedent and clarified that the right to sequestration included the right to make particular and private opinions about one's body and sexual exposure. Section 377 inaptly distributed numerous heterosexual connections as sodomy, thereby infringing on particular autonomy and the right to love someone of the same coitus. The Court further explained that sequestration is essential to maintaining the essential quality of individualities. Article 21 of the Constitution guarantees the right to life and personal liberty, which includes the right to live with quality. The Court held that assessing a ban on consensual same-sex connections through Section 377 harmed the quality of the LGBTQ community by condemning their identity and connections as immoral and illegal. Quality, according to the Court, is central to autonomy and individual worth, and corrective measures against a specific sexual exposure

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<sup>10</sup> Constitution of India 1950, art 14

<sup>11</sup> Constitution of India 1950, art 15

<sup>12</sup> *National Legal Service Authority v Union of India & Ors* (2014) 5 SCC 438

<sup>13</sup> Constitution of India 1950, art 19(a)

<sup>14</sup> *K S Puttaswamy v Union of India* (2017) 10 SCC 1

<sup>15</sup> Constitution of India 1950, art 21

strip individualities of quality and deprive them of a meaningful and regardful life. Therefore, the Court set up a violation of the abecedarian right to live a staid life.

Eventually, the Supreme Court conceded the transnational recognition of mortal rights and, in particular, the rights of LGBTQ individuals. Numerous nations have reformed laws to legalise homosexuality, aligning with widely accepted mortal rights principles championing equivalency, quality, and non-discrimination. International bodies, including the United Nations Human Rights Council, have called for a homophobia-free society and prompted the dissolution of laws that criminalise sexual preferences. As India is a party to several transnational mortal rights covenants, the Court noted that similar discriminative practices couldn't be blinked.

### **IMPACTING THE OMITTING SECTION 377 OF BNS REPLACE FROM IPC**

The elimination of Section 377 could significantly enhance social acceptance and inclusion of LGBTQ+ identities by helping normalise and make LGBTQ+ individuals more visible and accepted. Social reforms often influence societal behaviour, and removing this section might encourage people to accept and celebrate same-sex love in public spaces. It could boost LGBTQ+ visibility and integration, allowing more individuals to feel safe in coming out and living openly without fear of harassment or mistreatment from their families or society. This shift would also reinforce the idea that diversity is natural and that love should not be judged solely by heterosexual norms.

In addition, the removal of Section 377 may pave the way for broader legal reforms that could provide civil rights protections for the LGBTQ+ community. This would mark a step toward legal recognition in areas such as marriage, inheritance, and adoption. The elimination of the section could also signal a legal commitment to treating the LGBTQ+ community as equal to other citizens, possibly laying the foundation for same-sex marriage reforms. Moreover, this action could strengthen the push for binding anti-discrimination laws that protect LGBTQ+ individuals in workplaces, schools, and other areas of society. Following the *Navtej Singh Johar v Union of India*<sup>16</sup> judgment, the government introduced the Transgender Persons Act, 2019<sup>17</sup>, which aimed to protect the LGBTQ+ community from discrimination and improve their living conditions by challenging societal stigma and prejudice.

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<sup>16</sup> *Navtej Singh Johar v Union of India Ministry of Law and Justice* (2018) 10 SCC 1

<sup>17</sup> Transgender Persons (Protection of Rights) Act 2019

India, as a member of the Universal Declaration of Human Rights (UDHR), would align itself with global human rights standards by repealing Section 377. This would promote equality under Article 2 of the UDHR<sup>18</sup> and non-discrimination regardless of sexual orientation, as described in Article 3 of the UDHR<sup>19</sup>. Such a move could strengthen India's international standing as a nation committed to upholding human rights and constitutional freedoms, potentially setting a precedent for other nations where same-sex relationships are still criminalised. This change has the potential to inspire LGBTQ+ activism and legal reforms worldwide.

However, challenges remain. While striking down Section 377 is a landmark step, it will not immediately resolve other legal battles for LGBTQ+ rights, such as same-sex marriage, adoption, and inheritance. The omission of Section 377 does not automatically extend civil rights to homosexual individuals, who still face legislative and judicial hurdles. Additionally, despite the government's introduction of laws to protect the LGBTQ+ community, such as the Transgender Persons Act, implementation has been weak, and social discrimination, particularly in rural India, persists. In many areas, LGBTQ+ individuals are still viewed as outcasts and are treated with disdain.

Another concern involves the impact of Section 377's removal on other sections related to sexual offenses. Section 377 previously covered non-consensual acts like bestiality, as well as various forms of sexual abuse involving minors or non-consensual offenses such as rape and exploitation. The Supreme Court's judgment in the *\*Navtej Singh Johar\** case partially decriminalised Section 377, ensuring dignity, privacy, and equality for LGBTQ+ individuals while maintaining criminal penalties for non-consensual acts. However, with the complete omission of Section 377 in the new *Bhartiya Nyaya Sanhita (BNS)*, which replaces the Indian Penal Code (IPC), criminal acts such as bestiality and certain non-consensual sexual offenses may not be adequately covered, creating a legal loophole that requires careful attention to ensure these crimes are properly addressed.

Finally, even in the absence of Section 377, LGBTQ+ individuals may still face harassment through other means, particularly from law enforcement. The lack of explicit anti-discrimination laws means that LGBTQ+ people remain vulnerable to exploitation or violence, especially in regions where social attitudes lag behind legal reforms. Police, the judiciary, and other legal

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<sup>18</sup> Universal Declaration of Human Rights 1948, art 2

<sup>19</sup> Universal Declaration of Human Rights 1948, art 3

institutions will need training and sensitisation to prevent unjust treatment or persecution of LGBTQ+ individuals. Without these efforts, removing Section 377 may not fully eliminate entrenched prejudices within law enforcement.

### **DILEMMA BETWEEN BNS AND IPC**

To completely understand the problem of transgender-related to Sec. 377, we first have to look into the historical background of the said section. This provision was built on the Buggery Act 1533<sup>20</sup> in England, which was enacted during the regime of King Henry VIII. This was the first attempt to criminalise Sodomy, defined and known as a procreative sexual act. It criminalises both homosexual and heterosexual activity that was considered unnatural. The British Raj in India was highly influenced by vectorial morality, which was rooted in conservative Christians' belief in these values, which emphasised sexual creativity, strict gender roles and moral decency. It was not only a moral or social tool, but it was also a means to control colonised people and regulate their personal lives. Many pre-colonial Indian cultures and texts, such as Kamasutra and various regional traditions and far more dynamic views on sex and gender and not rigid life vectorial moral values.<sup>21</sup> Even after India gained independence, Section 377 was retained. Although public discourse around homosexuality was minimal, it was used occasionally to criminalise homosexual behaviour and also became a tool to harass and intimidate LGBTQ+ individuals due to colonial-era rule and traditional conservative attitudes that made it difficult to challenge Section 377 for a decade. But over, longtime activists in India challenged the law, and it was defined as unconstitutional by a Supreme Court in the judgement of Navtej Singh Johar's case in 2018 in new criminal law BNS replaced in IPC wholly omits the section 377, which is a big step of changing the stigma and social discrimination towards LGBTQ+ community under IPC whoever Section 377 focus on a wide range of act criminalising consensual and non-consensual sexual act whereas BNS decriminalised both the sexual act which has resulted in creating a loophole for the criminal act like man rape, trans rape and bestiality which was previously punishable which has resulted in creating a problem for the enforcement agency to file FIR on what ground and what punishment should be aborded for this offence.

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<sup>20</sup> The Buggery Act 1533

<sup>21</sup> Prabhash kumar, 'Section 377: How Buggery Act of King Henry comes a full circle in Supreme Court' *India Today* (16 September 2018) <<https://www.indiatoday.in/india/story/section-377-history-supreme-court-1333075-2018-09-06>> accessed 17 September 2024

## **CONCLUSION**

The omission of Section 377 shows the development of legal frameworks and the social attitude toward LGBTQ+ rights in India signifies progress but also challenges such as those yet to be duly addressed on obtaining equality and protection for marginalised groups, including men, transgender individuals, and animals, against sexual violence. No Section 377, as it colloquially happens to be described in the *Bhartiya Nyaya Sanhita*, reflects the slippery slope that sometimes occurs as a result of legal reforms wherein the removal of offending clauses inadvertently results in loopholes for illegal conduct.

As India looks forward to the future, it is supposed to be more inclusive, and this lacuna has to be plugged in by lawmakers and policymakers by passing all-round, gender-neutral legislation that makes available equal and ample legal recourse for protection from sexual crimes to each one of them. Concurrently with legal reforms, social education and law-enforcement training, as well as public awareness, would be needed to tear down deep-seated prejudice and create a society that genuinely respects dignity, privacy and equality for people of all sexual orientations or gender identities. The journey may be far from being completed, but with advocacy and reform leading the parade, the ground of an even more just society is being set.