



Section 377 Judgement

Last Updated: July 2022

For Prelims: Fundamental Rights, Justice K.S. Puttaswamy vs. Union of India, LGBTQ Community

For Mains: Importance of the Section 377 Judgement, Issues with the Criminalization of Homosexuality, Issues Related to Transgenders

Why in News?

- In November 2018, the [Supreme Court \(SC\)](#) decriminalised homosexuality by striking off parts of Section 377 of the [Indian Penal Code \(IPC\)](#) which were held violative of [Fundamental Rights](#) of [LGBTQ Community](#).

What did the Supreme Court Hold?

- The court made it clear that Article 14 of the Constitution guarantees equality before law and this applies to all classes of citizens thereby restoring 'inclusiveness' of LGBTQ Community.
- SC upheld the pre-eminence of Constitutional morality in India by observing that equality before law cannot be denied by giving precedence to public or religious morality.
- SC noted that modern psychiatric studies and legislations recognise that gay persons and transgender do not suffer from a mental disorder and therefore cannot be penalized.
- SC observed that homosexuality is not unique to humans, which dispels the prejudice that it is against the order of nature.
- Supreme Court stated that the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' should be applied as a part of Indian law.

Yogyakarta Principles recognise freedom of sexual orientation and gender identity as part of Human Rights. They were outlined in 2006 in Yogyakarta, Indonesia by a distinguished group of International Human Right experts.

Section 377

- Section 377 of the Indian Penal Code 1860, a relic of British India, **states that "whoever voluntarily has carnal intercourse** against the order of nature with any man, woman or animal shall be punished."
- This included private consensual sex between adults of same sex.
- After the recent SC judgement, provisions of Section 377 remain applicable in cases of non-consensual carnal intercourse with adults, all acts of carnal intercourse with minors, and acts of

bestiality.

What are the Issues with the Criminalization of Homosexuality?

▪ Fundamental Rights

- Sexual orientation and its relationship to the Fundamental Rights of the individuals has been at the heart of the debate.
- SC in its judgement specifically said that the **Right to Privacy and the protection of sexual orientation lie at the core of the fundamental rights** guaranteed by Article 14 (Equality before Law), Article 15 (Prohibition of discrimination on the basis of race, religion, caste, sex, place of birth), Article 21 (Protection of life and liberty) and Article 19 (Freedom of expression) of the Constitution.
- The Supreme Court, while decriminalising consensual sex between homosexuals, observed that members of the LGBTQ community possessed the same fundamental rights as others.

▪ Health Issues

- Criminalisation of homosexuality **leads to discrimination and results in LGBTQ people getting poor or inadequate access** to services within the health system.
- It also creates barriers to both the availability and the ability to access HIV prevention, testing and treatment services.
- Public health evidence also indicates a clear relationship of a lack of social acceptance and legal rights with substance abuse, violence, isolation, and mental illness.

▪ Law and morality

- Those against legalising gay sex argue that it is against the moral values of the society. However, activists arguing for it say what is forbidden in religion need not be prohibited in law.

What are the Related Judgements?

▪ Naz Foundation vs. Govt. of NCT of Delhi (2009)

- It is one of the first case laws wherein Section 377 of the IPC was held unconstitutional, as it discriminated against the LGBTQ community of the country and violated their privacy as individuals.
- The Landmark judgment given by Delhi High Court stated that Section 377 violates Articles 14, 15, and 21. The court concluded that Section 377 does not distinguish between public and private acts, or between consensual and non-consensual acts.
- The judgment was restricted to adults when Section 377 also applied to minors. Section 377 had permitted the harassment of LGBT people in law.

▪ Suresh Kumar Koushal Case (2013)

- SC overturned the previous judgment by Delhi High Court (2009) that decriminalised homosexual acts and criminalised homosexuality once again.
- SC argued that in 150 years, less than 200 persons had been prosecuted under Section 377.
- Therefore, "plight of sexual minorities" could not be used as argument for deciding constitutionality of law.
- Further, SC ruled that it was for the legislature to look into desirability of deleting section 377 of IPC.

▪ Justice K.S. Puttaswamy vs. Union of India (2017)

- SC ruled that Fundamental Right to Privacy is intrinsic to life and liberty and thus, comes under Article 21 of the Indian constitution.
- SC declared that bodily autonomy was an integral part of the right to privacy.
- This bodily autonomy has within its ambit sexual orientation of an individual.

▪ Navtej Singh Johar vs. Union Of India (2018)

- Decriminalised homosexuality.
- Dismissed the position taken by SC in Suresh Kumar Koushal case (2013) that the LGBTQ community constitute a minuscule minority and so there was no need to decriminalise homosexual sex.

- **National Legal Services Authority vs Union of India (2014):**
 - The court **declared transgenders as the 'Third Gender'** and affirmed the fundamental rights guaranteed to them.
 - They were also granted reservations in admissions to educational institutions and jobs.

What are the Initiatives taken for Transgender Persons?

- **India:**
 - **Transgender Persons Act, 2019:**
 - The Act defines a transgender person as one whose gender does not match the gender assigned at birth. It includes transmen and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra.
 - **Judgements of the Supreme Court:**
 - **National Legal Services Authority (NALSA) v. Union of India, 2014:** The SC declared transgender people to be a 'third gender'.
 - **Transgender Persons (Protection of Rights) Rules, 2020:**
 - The Central Government made the rules under the powers conferred by the Transgender Persons (Protection of Rights) Act, 2019.
 - **National Portal for Transgender Persons** was launched under in consonance with the Transgender Persons (Protection of Rights) Rules, 2020.
 - **Scheme of 'Shelter Home for Transgender Persons:**
 - To provide safe and secure shelter to transgender persons in need, the Ministry of Social Justice and Empowerment is setting up 'Garima Greh' shelter homes for them.
- **Global:**
 - **International Labour Organisation (ILO)** released a **document on "Inclusion of LGBTIQ+ persons in the world of work"**.
 - It provides certain recommendations to ensure equal opportunities and treatment for LGBTIQ+ persons at work.

What has been the Impact of Decriminalization Homosexuality?

- It has been possible for the LGBTQ community to be open about their sexual preferences.
- Police harassment and discrimination will be eliminated in their access to health care.
- The decriminalisation of LGBTQ people has also been associated with more self-acceptance and psychological and emotional security.
- As a result of this judgment, the LGBTQ community will now push for more progressive laws, such as gay marriage laws, right to form partnerships, inheritance rights, employment equality, and protection from discrimination based on gender identity.

Way forward

- **Multi-Pronged Approach:**
 - While the judgment goes a long way in removing the stigma attached with the LGBT community, **a multi-pronged approach is required** to address prejudice and discrimination prevalent in society.
- **Anti-Discrimination Law:**
 - The LGTBQ community **must be empowered by anti-discrimination laws** that make it easier for them to live productive lives and relationships regardless of their gender identity or sexual orientation.
- **Government Bodies Needs to be Sensitised**
 - Government bodies, especially related to Health, and Law and Order need to be sensitised and made aware about the changed position of law to ensure that the LGBTQ community is not denied public services or harassed for their sexual orientation.

For Mind Map

UPSC Civil Services Examination, Previous Year Questions (PYQs)

Mains

Q. Examine the scope of Fundamental Rights in the light of the latest judgement of the Supreme Court on Right to Privacy. **(2017)**

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