

# Canvassing Section 377 In The Order Of Constitution

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## Introduction

September 6, 2018 ushered a new hope to LGBT community when the Honorable Supreme Court read down Section 377 of Indian Penal Code 1860. The landmark verdict discarded the case of *Suresh Koushal*<sup>2</sup> and also repudiated the conservative mindset of people under the veil of Indian tradition and culture. As they say best things take time to happen, reading down of the section has contracted the ambit of Section 377 but has not scrapped it. There is a twofold achievement of such a judicial decision that has not only hoisted the rights of homosexuals but has also provided protection of animals.

From 'Felons' to 'Fellows' of the society Section 377 has witnessed an excruciating journey of Homosexuals crawling away from their sexual choices. The interpretation to Section 377 finally grounded its decision on the fact that homosexuality is innate and not a crime against society. While the non-recognition of the LGBT Community heaped the risk of HIV/AIDS among MSM, the historic judgment has not only opened gates for tackling surrogacy, marriage and adoption but has also construed upon the prevention of HIV/AIDS.

Thus, this paper seeks to put forth a dynamic timeline of Section 377 promoted of its epidemic status in India and the hopeful prospects of its legitimization.

## Research Methodolgy

The paper has primarily relied upon both quantitative and qualitative aspect. The authors have tried to establish a deductive reasoning on the hypothesis of need for criminalization of Section 377. The paper has employed primary research with the help of survey (Global Commission on HIV and the Law), newspaper articles and reports to give away a statistical analysis of prevalence of HIV/AIDS among MSM.

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<sup>2</sup> Suresh Kumar Kaushal v Naz foundation, (2014) 1 S.C.C 1 (India).

### **Highlights: Section 377**

Walking down the long and dark road in the quest of equality and freedom for almost two decades was of complete worth for the individuals of LGBT community as honorable Supreme Court welcomed them with open arms. An exquisite day with the rainbow shining bright and high in the day sky and the spirit of joy and love in the air. After all, this was the day when Lord Macaulay's untouched legacy of Section 377 came to an end after 157 years of never ending tussle. Better late than never, the Supreme Court finally addressed the plight and anguish suffered by Lesbians and Gays, Bisexual and Transgender who were denied equality, freedom, dignity, liberty and fraternity for more than seventy years since Independence.

### **Tracing The Roots**

An inquiry into the origins of Section 377 and its postulates is a necessity to understand the issue with relevance of modern times. The roots can be traced back to Judeo-Christian morality which condemned non-procreational intercourse.<sup>3</sup>The use of the term "sodomites" to describe those who engaged in anal intercourse emerged in the 13th Century, and the term "sodomy" was used as an euphemism for a number of sexual 'sins' two centuries earlier.<sup>4</sup> English laws has largely been based on these conceptions of anal and oral intercourse which led to the enactment of Buggery Act, 1533 which in turn criminalized 'unnatural sexual acts against the will of God' and laid bases from criminalizing the offense in British colonies. The great architect of Indian Penal Code, Lord Thomas Babington Macaulay had introduced the provision of unnatural offence and it has been in our legal system ever since until now.

The struggle of decriminalization of Section 377 in India which saw LGBT community as 'nonconvicted felons' started from 2001 when an NGO called Naz Foundation fighting for gay rights had filed a PIL challenging its validity before Delhi High Court. With filing of this PIL, the members of LGBT community came out of the shadows and mobilized to fight for their rights. However, the PIL was dismissed by the High Court on the ground of maintainability, but Supreme Court in 2006 directed the High Court to take the matter on the

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<sup>3</sup>Michael Kirby, "The Sodomy Offence: England's Least Lovely Law Export?" Journal of Commonwealth Criminal Law, Inaugural Issue (2011).

<sup>4</sup>Douglas E. Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia", Asian Journal of Comparative Law, Vol. 4, 4 (2009); KSN Murthy, KSN Murthy's Criminal Law: Indian Penal Code (KVS Sarma ed., Lexis Nexis, 2016).

merits of the case. After three years of litigation the High Court righteously strikes down Section 377 on the ground that it infringes fundamental rights of the citizens.

This judgment of High Court was later on challenged before the Honorable Supreme Court. In 2013, the two-judge bench of Supreme Court meaninglessly and wrongfully sets aside the verdict of Delhi High Court and upholds the constitutional validity of Section 377.

The NALSA judgment<sup>5</sup> gave hope to LGBT community as it recognized transgender as third gender and gave importance to gender identity. Which meant that one wicket was down in a three wicket match. The privacy<sup>6</sup> judgment, said that sexual orientation is an important facet of privacy and dignity of an individual which further boosted the LGBT struggle around the country. And finally in September 2018, the Supreme Court delivered the landmark judgment in the case of *Navtej Singh Johar*<sup>7</sup> ended the tragedy of Section 377 and recognized members of LGBT community as equal citizens whose rights and interest has to be safeguarded.

### **Infringement Of Fundamental Rights**

Section 377 Indian Penal Code, 1860 is the reason behind all the hardships and agony suffered by LGBT community of India. It has not destructed the identity of homosexuals but has also refused to recognize them as equal citizens and has blatantly violated their most cherished and celebrated fundamental rights.

#### **Article 14**

Article 14 of the Indian Constitution pledges to ensure equality before law and equal protection of law to every citizen. Section 377 created a classification between homosexuals and heterosexuals on the ground of their sexual orientation and sexual conduct. Consensual acts of the former category performed in private space being prosecuted with ten years of imprisonment. The object of this section was to protect women and children from being subjected to non-consensual carnal intercourse, which now has been dealt under Section 375 of IPC and Protection of Children against Sexual Offences Act, 2012. Since crime against women and children has been recognized under other provisions there is no longer need of

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<sup>5</sup>National Legal Services Authority v Union of India and others, (2014) 5 S.C.C 438 (India).

<sup>6</sup>K.S. Puttaswamy and another v Union of India and others, (2017) 10 SCC 1 (India).

<sup>7</sup>Writ Petition (Criminal) No. 76 of 2016.

this section. Therefore, its existence in our legal system doesn't show rational nexus with the object sought to be achieved.

Section 377 is grossly arbitrary in nature as consensual or sexual acts performed by adults in private are not harming the society. Over the decades Section 377 has been used as an odious weapon for continuously harassing the LGBT community, treating them like outcasts and denying them equal enjoyment of fundamental rights like other citizens. Thus, Section 377 is **manifestly arbitrary** and is righteously struck down by the Honorable Supreme Court.

### **Article 15**

Article 15 guarantees protection from discrimination on five specific grounds, one such ground being that of 'sex'. The courts had adopted a very narrow and strict approach for interpretation of this ground; if it would be proved that the discrimination was based on sex and any other ground then such would fall beyond the ambit of Article 15(1). However, the course was changed with the NALSA<sup>8</sup> case which stated that any sex discrimination whether direct or indirect for not being in conformity with the **stereotypical generalization** of gender will violate Article 15(1).

This approach has been hailed and widely accepted. It can be said that the discrimination against LGBT community is based on societal stereotypes of understanding of 'role of sex' and such discrimination will be in violation of Article 15(1).

### **Article 19(1)(a)**

This Article guarantees freedom of speech and expression. Section 377 cannot be curtailed and restricted on the ground of decency and morality. Public decency and morality cannot be amplified beyond a logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. The consensual acts performed in private whether by homosexual or heterosexual couples will not in any way injure the **public decency and morality**. Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution.

### **Article 21**

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<sup>8</sup> supra 3.

Article 21 is the heart and soul of Indian Constitution which guarantees a number of rights to its citizens. In the case of Puttaswamy<sup>9</sup> the Honorable Supreme Court held that sexual orientation is an intrinsic part of right to privacy.

The sexual minorities all over the world has faced torment and distress because their same sex relation is often labeled as ‘unnatural’ and falls outside the standard of **heteronormative society** which only recognizes opposite sex relations. Section 377 would criminalize ‘sexual acts of consenting adults’ which were performed in private. It would bar LGBT community to occupy their private space free from government intrusion and express themselves and their ‘sexuality’ which lies at the core of privacy.

Human dignity is the most cherished and admired constitutional value, Section 377 was long crushing the dignity of members of LGBT community. Right to dignity enables to carry out such activities and functions that would render an individual’s life meaningful. Human dignity is much more than having basic necessities of life and said to be harmed when individuals and groups are marginalized, ignored or devalued in the society. It would hamper the dignity of individual if they are treated unfairly because of their personal traits. Section 377 would hinder self-determination of sexual minorities and cripple them to exercise their right to autonomy to choose their mate or partner and force them to suppress their choices and would treat them as marginalized thereby infringing their dignity.

### **Some Highlights Of The Judgement**

#### **1. Right to Health:**

The right to health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right to emergency medical care and the right to the maintenance and improvement of public health.<sup>10</sup>

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<sup>9</sup>Supra 4, at page 123.

<sup>10</sup>3 C.E.S.C. Limited v. Subhash Chandra Bose, (1992) 1 SCC 441; Consumer Education and Research Centre v. UOI, (1995) 3 SCC 42; PaschimBangaKhetMazdoorSamity v. State of West Bengal, (1996) 4 SCC 37; Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1; Devika Biswas v. Union of India &Ors., (2016) 10 SCC 726; Common Cause v. Union of India &Ors., (2018) 5 SCC 1.

Sexuality is a fundamental aspect of one's life. Sexual rights that are related to sexuality has its flow from the stream of freedom, equality, dignity and liberty. People can only attain highest standard of health when they can feel safe in expressing their sexual identity without having a fear of violence, suppression or even prosecution.

Operation of Section 377 forces sexual minorities indulging in anal or oral intercourse in the closet of shame. Criminalizing certain sexual acts would lead to shunning such groups from having free access to healthcare services as then they would have to disclose their identity, which in turn would open them to criminal sanctions. Section 377 has been a hurdle in effective treatment and prevention of HIV/AIDS among homosexual groups. A study published by Global Commission on HIV and Law states that MSM were found to be 19 times more susceptible to be inflicted with HIV/AIDS than any other man.<sup>11</sup> Laws like Section 377 are obstacle in way of homosexuals and encourage escalation of incidents of HIV/AIDS and are of no good.

**2. Mental Health:**

Homosexuality has not only been a taboo for Indian society but has also been considered as a disorder. Various studies have shown greater level of depression, self-harm, anxiety and suicide among members of LGBT community. According to American Psychology Association, homosexuality is neither a mental illness or it is a moral depravity, it is simply the way of expression of human love and sexuality. The Mental Healthcare Act, 2017 clears the misconception that those indulging in anal or oral intercourse are mentally ill. Instead of trying to cure what is not even a disease or illness a progressive approach should be adopted with change in both medical and societal position.

**3. Constitutional Morality :**

The concept of constitutional morality ushers all organs of the government to curb any attempt by the majority to take away rights and freedoms of a smaller or weaker section of the society. Indian constitution embodies a vision, it has a goal of bringing about transformation in the society when needed. Constitutional morality aims to eliminate all forms inequalities from our social structure and to guarantee assurance of enforcement of

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<sup>11</sup>Id. at page 45; HIV prevalence amongst MSM is 4.3% and amongst transgender persons it is 7.5% as opposed to the overall adult HIV prevalence of 0.26%.

fundamental rights of every individual or class. LGBT community has been prejudiced and stereotyped for having non-conformity with the cultural morality of the majority. Constitutional morality requires the courts to act as an institution which protects constitutional rights regardless of what majority believes.

#### **4. Progressive Constitution :**

The Constitution of India has been a dynamic and evolutionary document which has beautifully addressed all the needs of the changing society. Our constitution is an organic being which changes with the change in the society. It is judiciary that has strongest allegiance with the Constitutional principles and have sworn to safeguard them. The role of the court becomes more important when rights of a class of individuals are transgressed and when citizens have been subject to harassment, humiliation, discrimination and violence. The ideal constitution is the one that grows and progresses with the need of the society and its citizens, just like our very own.

### **Protection Under International Conventions**

The Constitution of India is derived from various countries that have decriminalized Homosexuality on the facet of growth and development. Many a times Article 51(c) has relied upon to implement and introduce various International Conventions in the interpretation of Fundamental Rights. Hence in absence of any provision of domestic law, the provision of the Conventions of which the country is a party is applicable.

Homosexuality is widely accepted around the globe and United Nations through its various organizations has taken measures to protect and address the need of homosexuals. The obligations assumed by India in International Conventions and Treaties, has reflected in the legislations enacted by the government<sup>12</sup>

**United Nations Resolutions** - Sexual orientation and gender identity under Human right council has passed a number of resolutions including protection against violence and discrimination based on sexual orientation and gender identity.

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<sup>12</sup>Bachan Singh v State of Punjab, (1980) 2 S.C.C 684 (India).

**Human Rights Council resolution** - Human rights sexual orientation and gender identity. Article 1 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>13</sup> and Article 2 and Article 26 of International Covenant on Civil and Political Rights<sup>14</sup>. Article 12 of the Universal Declaration of Human Rights also makes a reference to privacy<sup>15</sup>

Along with this, the Court also took into account Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity so far as they were not inconsistent with Part-III of the Constitution.

### **Conclusion**

Constitution of India is the supreme law of the land which has always endeavored to protect basic human rights of all its citizens. It has guaranteed a potent bunch of Fundamental Rights under Part-III that are core to every individual.

State has realized that a human being belonging to the LGBT community is a citizen first and an individual later. Perhaps this is why every citizen of this glorious nation lies at the core of constitutional focus and the ideals of preamble and is immune to any harm whatsoever that disrupts the zest of life and causes hindrances in its enjoyment.

The aforesaid Section 377 trapped the Constitution to predicate protection against its infringement. Section 377 was the mirror that reflected the nature of a timid society, a society that ran against the will of its citizens in the name of societal standard of morality. On September 6, 2018 India swung in a breeze of Love, Respect and Freedom. Thus, the 158 years of struggle of identity was coupled by evolution of Constitution in realm of its values and ideals.

The citizens have entrusted their faith and judiciary has invariably provided shelter of justice to infringement and violations of any part or provision of the Indian Constitution. In closure, the authors hail the dynamic and charismatic nature of judiciary in the light of decriminalization of Section 377 of the Indian Penal Code 1860.

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<sup>13</sup> Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, June 26 1984.

<sup>14</sup> International Covenant on Civil and Political Rights art. 2 & art. 26, Dec. 16 1966.

<sup>15</sup> Declaration of Human Rights art. 12, Dec. 10 1948.

