



Section 377 Judgement

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Why in News?

The Supreme Court (SC) recently 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.

Key Observations

- SC 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.

Issues Involved

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.

Landmark Judgements related to issues

- **Naz Foundation vs. Govt. of NCT of Delhi (2009)**
Delhi High Court struck off section 377, legalising consensual homosexual activities between adults.

- **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.

Impact of Decriminalising Homosexuality

- Sexual minorities in India are one step closer to living with dignity.
- LGBTQ Community will be able to come out in the open with their sexual preferences.
- Discrimination faced by them in accessing health and their harassment by Police will cease.
- **Decriminalisation has also been associated with more self-acceptance as well as psychological and emotional security among LGBTQ Community.**
- This judgement will spur LGBTQ Community to demand more progressive laws like Gay marriage laws, right to form partnerships, inheritance, employment equality, protection from gender-identity-based discrimination among others.
- The judgment has opened up grey areas, and guidelines will be needed to deal with cases where, say, a gay individual withdraws "consent" and lodges a complaint against the partner. **India's laws on sexual assault do not recognise men as victims of rape.**

Way forward

- Though the judgement goes a long way in removing the stigma attached with the LGTBQ community, there is need for a multi pronged approach to deal with issue of prejudice and discrimination prevalent in society against them.

- The LGTBQ community needs an anti-discrimination law that empowers them to build productive lives and relationships irrespective of gender identity or sexual orientation and place the onus to change on state and society and not the individual.
- 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 LGTBQ community is not denied public services or harassed for their sexual orientation.

For Mind Map