

Section 377

Legality of section 377

Our mankind is known to have two sexes, male and female. The term sex is always confused with the word gender. The term sex is scientific and it is often used to understand the biological structure of the two categories in humankind whereas the term gender is societal and psychological, it is often used to understand how one identifies himself or herself to be or how the society identifies them to be. For instance, a person's sex might be male but he might like to identify himself as a female because of the strong feminine feelings he holds. The incapability of mankind to understand this basic difference has led to the ruin of the lives of many individuals since centuries. Fortunately, our courts have been successful in understanding this difference and this is evident through the recent judgements. The emphasis here is basically on the ruling of section 377 in previous and current judgements.

Since people believe that there are just two categories of gender (male and female), they also believe that the sexual intercourse should happen only between these two genders or sexes. Any form of sexual behaviour (other than between male and female), which cannot lead to procreation was considered to be a taboo and people indulging in such sexual activities were considered to be criminals under section 377 of our Indian Penal code. Section 377 read as follows –*“Unnatural offences -Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”*.

This section came into force in the year 1861 during the British rule of India while Buggery Act of 1533 was in force. This act criminalised sexual activities against the 'order of the nature'. This includes homosexual activities and bestiality as well. In addition to this, though the carnal intercourse was voluntary i.e. consensual, it still did not matter and the individuals were nonetheless held to be criminals under this section. And this way of viewing homosexuality was raised only during colonial period, in the pre-colonial period though homosexuality was not approved, homosexuals were not punished in such harsh ways.

The most important phrase in this section is 'against the order of nature', there is no source as such to understand this phrase and courts have jumped into their own interpretation in the past. The major concern i.e., what is the order of nature was addressed in a very different

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manner by the courts. It was construed as something which is not against the notions of nature, but again this is very subjective and ambiguous.

When we try to deeply dwell into what has been led to think in this particular manner, it can be understood that, the very fact that something is not in accordance with nature and something is in accordance with nature comes from man and not the nature itself. Hence, ultimately everything reduces to man's interpretation of right and wrong. In the cases of homosexuals, the court was acting under the impression that homosexuality is against the order of nature because the majority in the society construed it to be so because such sexual activities will not lead to procreation.

This is evident through the judgement passed by the court in the case *Suresh kumar koushal v. Naz foundation*, the first judgement of this case was passed in the year 2009 by Delhi High Court. Though the Naz foundation challenged this law in the year 2001, the Delhi High court after 8 long years, decriminalized Homosexuality and declared that section 377 of IPC was violating the human rights, but the same case stepped into supreme court through an appeal where it was held that *'the judgement passes by the Delhi high court would stand corrected and homosexuality will be criminalised while reviving the section 377'*. As mentioned above, the court complied with the notion that any activity of coitus not leading to procreation is against the order of nature. In this particular case the three-judge bench consisting of justice Singhvi, failed to understand that sexual orientation was something natural and sexual relationship with the loved ones, no matter it is a man or a woman is a basic human right that should be provided to the individuals. This judgment disappointed the entire LGBTQ community as well as their supporters. The Naz Foundation challenged this verdict and demanded the High Court to reconsider the case. The revolutionary judgement came from chief justice Ajith Prakash Shah and justice S Muralidhar. They decriminalised the consensual sexual activities between the consenting adults till the parliament amends the section. But this judgment clearly states that it would hold as just a clarification till the act is amended by the parliament and it would not result in re-opening of the criminal cases involving section 377. The story did not end here, many challenged the power of the high court to amend the law and appealed to supreme court, such appeals took a major turn and finally two supreme court judges overruled the High court's judgement and asked the parliament to look into the matter.

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When the above-mentioned case was wandering without a proper conclusion, there were other cases though not directly related to section 377, spoke about certain sensitive beliefs that influenced the further judgements. The two important cases of this sort are *National legal services authority v. Union of India* which was held in 2014 and *Justice K puttaswamy v. Union of India* which was held in 2012. In the former case, the discrimination on the basis of gender identity and not considering them equally with others in the society was considered to be violative of constitutional rights i.e. article 21 and 14 of the transgender community. In the latter case which is well known as the Right to privacy case, the court held that, sexual orientation is an attribute of privacy and discrimination of an individual on this basis is offensive. Right to privacy and protection of sexual orientation lie at the core of fundamental rights guaranteed by articles 14,15 and 21. This judgement also condemned the view held in Suresh kumar koushal's case as unsustainable by them. It made the society believe that the right provided to the LGBTQ community was the right which dwells in privacy and dignity and could not be taken away by anyone. Thus, these two cases by laying down such strong principles with regard to the sexual orientation of the LGBTQ community, influenced the Suresh kumar Koushal's case that was yet to be decided.

Finally,*Suresh Kumar Koushal v. Naz Foundation's* case was decided on September 6th of 2018. The five-judge bench of the Supreme court pronounced that section 377 was unconstitutional. They struck down the law which was considered to be used to target the LGBTQ community. The judges held that the concept of identity should be recognised and majoritarian views cannot dictate the constitutional rights guaranteed under article 14, 15 and 21. LGBTQ community possesses human rights like all other sections of the society and hence the essence of section 377 of IPC is arbitrary. In addition to this, they also mentioned that homosexuality is not a mental disorder and hence individuals are free to live with their sexual orientation without being scared that they will be tagged as people with psychological problems.

The archaic law which stayed for 158 years was struck down. The rights of the individuals belonging to LGBTQ community has been widened. They are now free to openly speak and fight for their rights. It can be said that the LGBTQ's have met a new dawn in India for which they were awaiting since years and for which they had undergone severe hardships since centuries. The courts through these judgments have uplifted the human rights and have taught

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the society that each and every individual in this country deserves to live with human dignity. Every individual is a human being after all and discrimination between the individuals will lead towards the achievement of nothing but just pain and misery. The act of the court in recognizing the trauma underwent by LGBTQ community and declaring the arbitrary law as unconstitutional is very appreciable and serves as an inspiration for the upcoming judgements, not just with regard to the right of LGBTQ but also with regard to many issues concerning the interpretation of laws and constitutional articles.