

## The lowdown on row over Section 377

Section 377 of the Indian Penal Code criminalises consensual private sexual acts between adults. It came into force in 1862. Lawyers have argued that the notorious Criminal Tribes Act, 1871, which branded a number of marginalised population groups like transgenders as “innately criminal” before it was repealed, drew inspiration from Section 377. Though the 172nd report of the Law Commission of India recommended the deletion of Section 377, no action was taken. The penal provision says “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 10 years, and shall also be liable to fine.”

In 2009, the Delhi High Court read down Section 377 to apply only to non-consensual, penile, non-vaginal sex, and sexual acts by adults with minors. In December 2013, a two-judge Bench of the Supreme Court, on appeals filed by private parties, set aside the High Court’s judgment. It upheld the criminalisation of gay sex while virtually denying the LGBTQ community the right to sexuality, sexual orientation and choice of partner. In July 2018, a Constitution Bench, led by Chief Justice Dipak Misra, re-opened the entire issue, saying a section of people could not live in fear of the law which atrophied their rights to choice, privacy and dignity.

Arguing for 20 IITians against Section 377, advocate Menaka Guruswamy told the Supreme Court that the penal provision reduced the LGBTQ community to the status of “unconvicted felons.” Hopes of the community to lead a normal life got dashed when the Supreme Court overturned the Delhi High Court’s verdict in December 2013. But their decades-long struggle for dignity took a significant turn for the better with the progressive NALSA judgment delivered by a Supreme Court Bench, led by Justice K.S. Radhakrishnan. This verdict recognised transgender people as ‘third gender,’ possessing rights, including marriage, adoption, divorce, succession and inheritance. More importantly, it condemned discrimination on the grounds of sex as a violation of the fundamental right to equality under the Constitution. In August 2017, the fight against Section 377 got a second major boost when a nine-judge Bench of the court, led by the then Chief Justice of India J.S. Khehar, upheld the right to privacy as a fundamental right intrinsic to life and liberty. This Bench ripped apart the December, 2013 judgment. The nine-judge Bench, in its main opinion authored by Justice D.Y. Chandrachud, underlined the impact of Section 377, saying it “poses a grave danger to the unhindered fulfilment of one’s sexual orientation, as an element of privacy and dignity.” The two judgments signalled that the court was ready to change its opinion on Section 377. They became the pillars on which the petitioners based their case before the Constitution Bench.

Section 377 criminalises a section of people for being a sexual minority. A cross-section of the people has approached the Supreme Court against the penal provision. They are not just seeking protection as sexual minorities, but recognition of characteristics inherent in all human beings. They argue that the right to sexuality, sexual autonomy and freedom to choose a sexual partner form the cornerstone of human dignity. Section 377 has a “chilling effect” on the right of equality, liberty, life, dignity and non-discrimination on the ground of sex.

The pertinent question before the court is, what is the ‘order of nature’ meant by Section 377 in its text. Once the Constitution Bench decides that homosexuality is also an order of nature and upholds the fundamental right to sexuality, sexual orientation and choice of same-sex partners, the doors are opened for individuals to approach the court in future on the larger issues of legalising same-sex marriages, inheritance, adoption, and reservation in employment.

Krishnadas Rajagopal

Sign up to receive our newsletter in your inbox every day!

Please enter a valid email address.

Our existing notification subscribers need to choose this option to keep getting the alerts.

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com

crackIAS.com