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Email –

[editor@ijlra.com](mailto:editor@ijlra.com)

Website – [www.ijlra.com](http://www.ijlra.com)



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2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

## **An Overview of Decriminalization of Sec 377 of IPC, 1860**

By : S. Sankar Ganesh & S Muthu Praba

II LLB (Hons), School of Excellence in Law, The Tamil Nadu Dr Ambedkar Law University

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### **ABSTRACT**

The time where homosexuality in India is punished and it was a criminal action. The rights of the citizens have been prohibited all along the years until the judgement of honourable supreme court pronounced in the famous case of Navtej Singh Johar. The researchers are explaining in detail about the Section 377 of Indian Penal Code, 1860 and the impact of decriminalization. Pre-Constitutional Laws and how it is in this modern world and how far it is helping the criminal justice system is the crux of this research. The framer of Indian Penal Code, 1860, Lord Macaulay drafted the penal code inculcated the provisions and included the sections based on the system prevailed over that period. The provisions relating to sodomy have undergone several changes over the period based on the perception, social changes, environmental changes and so on. Until 1973, it was criminalised in USA, and the developed countries accepted the same sex marriage slowly. The researchers are attempting to analyse in detail the mental and health data of homosexuals with the reports of various medical associations including psychiatry associations. The fundamental rights enshrined in the constitution especially with respect to Article 14, Article 15, Article 19, Article 21 of Indian Constitution, should not be abridged or abrogated at any point of time. The terminology “carnal intercourse against the order of nature” is analysed in detail with the meaning given by legal dictionaries, judicial interpretations. The statutory provisions of various countries analysed in detail in respect of homosexuals and its legal impact. The researchers concluding the research with the suggestions in respect of LGBT community and their future.

**Key Words:** LGBTQ+, Homosexuals, Decriminalizing Sec 377, Violation of Fundamental Rights, Carnal Intercourse, Against the Order of Nature

**Synopsis**

- a. Introduction
- b. What is all about Sec 377 of Indian Penal Code
- c. Timeline of Sec 377
- d. Decriminalization and Judicial Review
- e. Sec 377 in Global Perspective
- f. Suggestion
- g. Conclusion

**a. Introduction**

Indian Psychiatric Society (IPS) in 2018 stated that “homosexuality” is not a disease, and it should not be regarded as such. With the act of supremacy, high command, the laws were defined and codified according to their will and wish. The colonial condescension rewritten the history and modified according to their wish. The bible quote says sex outside of marriage is a misdeed. The erstwhile rulers strictly followed these principles and enacted the laws accordingly. It is pertinent to note that, in the initial framing of Sec 377, it was supposed that touching itself as a crime, fortunately it did not come into existence. The scriptures, sculptures in various temples in India has portrayed the homosexuality and it confirms the concept of homosexuality is not new in India and it was accepted in the dark side.

**b. What is all about Sec 377 of IPC, 1860?**

Section 377 of Indian Penal Code, 1860 is 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.

**Explanation** — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The terms used “Carnal Intercourse”, “Against the order of nature” plays a vital role in this Section 377 and it charges the offender based on the offences committed by determining activities accordingly.

According to **Mariam Webster Dictionary**, Carnal Knowledge means “**an act of especially illegal sexual intercourse**”.

According to **Legal Dictionary**, Carnal Knowledge means

**“sexual intercourse between a male and female in which there is at least some slight penetration of the woman's vagina by the man's penis.**

It is lawfully vital in this it is a necessary legal characteristic or component of rape, child molestation, or accordant sexual relations with a woman below the age of consent (rape legally), age of consent varies from 14 to 18, relying upon the state legislations. Thus penetration is a necessary component of sexual issues and there is a sexual relation if even the slightest penetration of the feminine by the male organ takes place.

As defined in **Stroud’s Judicial Dictionary, 3<sup>rd</sup> Edition**, the word “buggery” is said to be synonymous with “sodomy”. Sodomy will be a species and unnatural offences will be generis.

**Unnatural Offences** is defined in detail in **Sexual Offences Act, 1956, United Kingdom** as follows:

**Section 12** states that it is a crime of someone to commit perversion with another person or with an animal

**Section 13** states that it is an offence for a person to commit associate act of gross indecency with another man, whether publicly or before any video taping instruments, this leads to person to commit act of gross indecency with another person.

This section 377 uses the words, ‘**against the order of nature**’. Order of nature means events that are normal and expected to take place automatically and if there is no unnatural or faux impediment to the same. Unnatural is something, an act or behavior, dissimilar to that considered as natural.

As per Section 377, solely the **peno-vaginal** sexual relation is natural, all alternative styles of carnal intercourse like anal or oral are unnatural. It leads to perpetration of life, so it is logical to construe the same as ‘in the order of nature’, but can it be understood to imply that all else is perverse to nature.

### **Essentials to Unnatural Offences**

- i. Voluntary Intercourse
- ii. Against the order of nature
- iii. Penetration should be there

Sex is not a static concept and its dynamic. It changes over the period. The sex orientation and autonomy changes from person to person and it is the right of the person to express love on another, and it is not gender biased. It cannot be restricted to man with woman or vice versa.

The term sex includes sexual orientation, sexual autonomy, expression of love and affection. The discrimination based on gender is against their rights.

**c. Timeline of Sec 377**

Manusmriti provided severe punishment for sexual activities against the nature. It recognized only the heterosexual and not recognised the other sexual activities.

The scriptures and sculptures in the various temples signify the culture practised in the olden era. The book of Kamasutra which is a bible for sex is around 2000 years old and which was written by Vatsasayanar. This book describes the sexual orientation, sexual autonomy, and other sexual intercourses.

It is pertinent to note that, in the year 1290 at Fleta, the sodomy was criminalized as per the practice of Common Law in England. Then in Britton in the year 1300. The punishment of sodomy was very severe, and they were burnt alive.

British codified the laws and enacted a Buggery act in the year 1533, which hanged the sodomy offenders. This was re-enacted in the year 1563, this became the charter for British colonies. With the provisos envisaged in the Buggery Act, 1583, the section 377 in IPC was framed by Lord Macaulay in Indian Penal Code.

Oral and genital sex were removed in the year 1817. In the year 1861, death punishment was removed in England and Wales for buggery.

It is to be noted that, the sexual inter course is mentioned in two other sections in IPC that is Section 375 which deals about rape and Section 497 of IPC which deals about adultery in general.

The first case reported in India is **Queen – Empress v Khairati**<sup>1</sup>, punished under Section 377 of Indian Penal Code for the offence “carnal internal course against the order of nature”.

Over the period, from 1861, the courts started interpreting the terms in the Section 377 and pronounced judgements. The courts interpreted the phrase “carnal intercourse against the order of nature” and held that “penile - anal<sup>2</sup>, penile – oral<sup>3</sup>, penile-animal<sup>4</sup>, are all forming part of offence punishable under Section 377.

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<sup>1</sup> [1884] 6 ILR ALL 205

<sup>2</sup> Lohana Vasantlal Devchand v State AIR 1968 Guj 252

<sup>3</sup> Calvin Francis v State of Orissa (1992) 2 Crimes 455 (Ori)

<sup>4</sup> Khandu v Emperor AIR 1934 Lah 261



It was held in **R v Jacobs**<sup>5</sup> and in **RE: Govindarajalu**<sup>6</sup>, that oral sex which includes penetrating penis into the mouth does not leads to an offence punishable under section 377.

It was held in **Fazal Rab Choudhary v State of Bihar**<sup>7</sup>, that Section 377 implies sexual intransigence.

As held in **State of Kerala v Kundumkara Govindan**<sup>8</sup>, the honourable Kerala High Court interpreted the term “Carnal Intercourse” and “Penetration”. Intercourse means a sexual relation rather than a social one and penetration means “fine access into or through, pass-through” and “insertion in any place, fir or thrust”.

It was held in **Gorakh Daji Ghadge v State of Maharastra**<sup>9</sup>, While punishing the accused the court elaborately discussed the term “**against the order in nature**”. The seminal emission is not required and there must be a penetration to establish the case under rape.

As held in **Calvin Francis v State of Orissa**<sup>10</sup>, Petitioner faced trial for allegedly having committed coitus per se (sin of Gomorrah), was found guilty and convicted under Section 377 of the India Penal Code. Penetration was considered as “carnal intercourse against the order of nature”.

As held in **Sakshi v Union of India**<sup>11</sup>, wherein the term “intercourse” was interpreted, and the honourable supreme Court directed Law Commission of India vide its order dated 13.01.1998 for their response in this issue. The Law Commission of India filed its 156<sup>th</sup> report on Indian Penal Code and which was not in line with the petitioner’s questions as said by the honourable court.

Further, on **09.08.1999**, the honourable supreme court requested the Law Commission of India to examine the issue of the petitioner to include all types of penetration, penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration, and object/vaginal penetration while defining the term intercourse for the punishment under section 375, 376 and 376A to 376D of Indian Penal Code.

After considering the views of Interventions for Support, Healing and Awareness (IFSHA), All India Democratic Women’s Association (AIDWA) and The National Commission for Women

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<sup>5</sup> (1817) Russ & RY 331 CCR

<sup>6</sup> (1886) 1 Weir 382

<sup>7</sup> AIR 1983 SC 323

<sup>8</sup> 1969 Cr LJ 818 (Ker)

<sup>9</sup> 1980 Cr LJ 1380

<sup>10</sup> 1992 I OLR 316

<sup>11</sup> WP (Crl) No. 33 of 1997

(NCW), the Law Commission of India vide its report No. 172 on review of Rape Laws, March 2000 dated 25.03.2000 recommended for including all such penetrations as required by “Sakthi” while defining the term “inter course”. Also, insertion of new section 376F for unlawful sexual contact and repealing Sec 377 of Indian Penal Code and for the higher punishment under section 509 of Indian Penal Code. Several Changes were also recommended by Law Commission of India to shut the loopholes provided in the Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872.

The report No. 172 dated 25.03.2000 of Law Commission of India, insisted for the changes in IPC, 1860 titling “review of rape laws” and the changes recommended by the commission are in line with UN convention and various constitutional provisions and this will protect child from sexual exploitations and sexual abuse.

It was held in **S. Gopal Reddy v State of Andhra Pradesh**<sup>12</sup>, that purpose approach is necessary while interpreting the statutes and the object of the statute should be considered and the social conditions should be kept in mind while interpreting the statute even if the legislators fail to comply with. This was said in **Directorate of Enforcement v Deepak Mahajan & Anr**<sup>13</sup> that purposive approach is necessary while interpreting the statutes.

In the year 2001, **Naz foundation**<sup>14</sup> filed a petition in Delhi High Court for challenging the constitutionality of Section 377 of IPC. It was decided by division bench, in this case initially that the foundation has no authority to file the suit, and this was taken to honourable supreme court, then the case was referred to Delhi High Court.

It was held in this case, in the year 2009, the court decided that Section 377 of IPC, in so far, has criminalised consensual sexual acts in private and which violates in Article 14, 15 and 21 of the Constitution. Further, Sec 377 will continue for sex involving minors.

In the year 2012, **Suresh Kumar Koushal**<sup>15</sup> filed a petition in Supreme Court against the decision of the Delhi High Court regarding decriminalization of Section 377 of IPC. The Supreme Court reversed the decision of Delhi High Court and stated that only 200 were so far have been punished under section 377 of IPC in the period of 150 years since its enactment. The Supreme Court recommended the parliament to pass such laws / amend laws to overcome these

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<sup>12</sup> [1996] 4 SCC 596

<sup>13</sup> [1994] 3 SCC 440

<sup>14</sup> Naz Foundation V Government of NCT of Delhi, WP (C) No.7455/2001

<sup>15</sup> Suresh Kumar Koushal & Anr v Naz Foundation & Ors, SLP (c) No. 15436 of 2009

issues.

In the year 2015, a member of parliament introduced a private member bill regarding decision of Sec 377 of IPC in the case of **Suresh Kumar Koushal**<sup>16</sup>. That time, it was not decided by Supreme Court of India. After, one year the same bill was introduced again but Loksabha voted against it.

**d. Decriminalization and Judicial Review**

In the year 2016, five petitioners namely, **Navtej Singh Johar**<sup>17</sup>, Journalist Sunil Mehra, Chef Ritu Dalmia, Hotelier Aman Nath and Business Executive Ayesha Kapur filed a petition regarding the rights to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity, equality, and they contended that Sec 377 violates the rights enshrined in the Constitution.

It was the landmark case decided in the year 2018 and opened the birds from cage after a period of 150 years. The partial decriminalization of Section 377 was the decision of the honourable supreme court which laid down the foundation for dignity, rights for LGBT community.

The litmus test for the validity of Sec 377 and its constitutionality was analysed in detail in this case. The Court made a detailed study on this.

**Right to Privacy – Article 21**

The court taken into consideration the observation of Justice J Bhagwati in the case of **Maneka Gandhi**<sup>18</sup>, it was held that Personal Liberty is of the broadest scale, and it covers various rights, and which is protected under Article 19 of the Constitution.

As in **Anug Garg**<sup>19</sup>, it was held that a citizen of India should be permitted to live a life on her own conditions without any limitations and there should not be any restriction.

As in **Common Cause**<sup>20</sup> (A registered Society), it was held that right to life includes the right to live the life with dignity. Dignity of an individual is a fundamental right, and this right includes right to carry such functions and activities as it would be meaningful for the human themselves.

As in **Puttasamy**<sup>21</sup> Case, the court held that right to privacy is a fundamental right as enshrined under the Article 21 of the Indian Constitution.

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<sup>16</sup> Suresh Kumar Koushal & Anr v Naz Foundation & Ors, SLP (c) No. 15436 of 2009

<sup>17</sup> Navtej Singh Johar v Union of India, WP (Crl) No. 76/2016, WP (C) 572/2016

<sup>18</sup> Maneka Gandhi v Union of India (1978) AIR 597

<sup>19</sup> Anug Garg & Ors v Hotel Association of India & Ors, WP (Civil) No. 5657 of 2007, Supreme Court

<sup>20</sup> Common Cause (regd) v Union of India, WP (Civil) No. 215 of 2005, Supreme Court

<sup>21</sup> K S Puttasamy v Union of India, WP (Civil) No. 494 of 2012, Supreme Court

As in **Sunil Batra v Delhi Administration and Others**<sup>22</sup>, Justice Krishna Iyer opined that severely despicable, appalling unusual or cruel and reconstructive counterproductive, is unarguably unreasonable and arbitrary and is whizzed down by Article 14 and 19 and if perpetrated with procedural injustice, plummets foul of Article 21.

Based on the above citations and as per the inferences, it was held that Sec 377 violates the human dignity and right to privacy and hence it is violating the provisions enshrined under Article 21 of Indian Constitution.

### **Right to Equality – Article 14**

As in **M Nagaraj and Others v Union of India and Others**<sup>23</sup>, it was held that the law should operate equally on all persons under similar circumstances. It is pertinent to note that the doctrine of classification is dealt in detail in Article 14. Equality test is an objective test, and it is not the test of intention.

As in **EP Royappa v State of Tamil Nadu and another**<sup>24</sup>, the rights enshrined in the constitution cannot be cribbed, cabined, and confined.

As in **Budhan Choudhry v The State of Bihar**<sup>25</sup>, the court held that Article 14 forbids classification which is not reasonable. The discrimination in any manner is not permissible by substantive law and by a law of procedure.

In Section 377, it discriminates LGBT community and punishes them, which is violating the provisions enshrined under Article 14 of the Constitution. Hence, Section 377 of IPC is unconstitutional.

### **Right to Express – Article 19**

As in **Chintaman Rao v State of Madhya Pradesh**<sup>26</sup>, the court in detailed explain the term “reasonable restriction”. Restriction cannot be made and anything which is arbitrary and unreasonable is violative of Article 19(1)(g) of the Constitution of India

As in **S Rangarajan v P Jagagivan Ram and Others**<sup>27</sup>, the court held that freedom of expression should not endanger the society interest and at the same time, it cannot be suppressed. The danger on anticipation of freedom of expression should be clear, precise and it should not be

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<sup>22</sup> AIR 1978 SC 1675

<sup>23</sup> AIR 2007 SC 71

<sup>24</sup> AIR 1974 SC 555

<sup>25</sup> AIR 1955 SC 191

<sup>26</sup> AIR 1951 SC 118

<sup>27</sup> (1989) 2 SCC 574

inaccessible, hypothetical, or unbelievable.

As in **S Khushboo**<sup>28</sup>, the court held in detail about the terms morality and dignity while restricting on the grounds of reasonable restriction envisaged under Article 19 of the Constitution of India.

As in **Shreya Singhal v Union of India**<sup>29</sup>, the Court strike down the provisions of Sec 66A of Information Technology Act, 2000 and stated that it criminalizes the shielded speech and speech of unintended nature, resultantly it is a frightening effect and liable to be struck down.

Based on the above citations and in detailed explanation, Section 377 of IPC violates the freedom of expression enshrined under Article 19 of the Constitution of India.

Section 377 which penalizes the voluntary intercourse against the order of nature by man, woman, and animal, and in this any action by man and woman (Hetero Sex), man and man (homo sex), woman and woman (lesbian) is against the principles enshrined in the constitution and it is unconstitutional. However, any woman and man having sexuality with animal is against the order of nature and it is liable to be punished.

e. **Decriminalisation of Section 377 in Global Perspective**

The first country to decriminalise sodomy is Denmark and followed by United Kingdom and USA. The Washington post which lauded the decision of Supreme Court and the decriminalisation of Section 377 and appreciated the social changes in India. The colonial era laws delimited the scope, and the decriminalization widened the feathers.

The New York times stated about the spread of Hinduism in India and its dominant nature. It also pointed out the scriptures/sculptures in various temples and how sodomy had place in the olden days. Colonial Victorian era had shut down the rights of such community by Section 377 in IPC and the decriminalization sealed the limitations and restrictions and it made a brighter window to such community.

BBC in its report stated that it had opened the feathers of the bird and the caged bird is permitted to fly freely. However, this decision of court is silent on same sex marriage and inheritance.

The Guardian stated that the decision put an end of a tense path in legalization of homosexuality.

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<sup>28</sup> S Khushboo v Kanniammal & Anr, [2010] 5 SCC 600

<sup>29</sup> (2015) 5 SCC 1

Many corporates<sup>30</sup> welcomed the decision of Supreme Court of India on decriminalization of Section 377 and they expressed their gratitude by means of tweeting / in social media. Many companies considered the inclusion of such people in their employment. **Godrej** included LGBT community in their employment even before this judgment, but this judgement made them to do it in wider manner. **RBS** welcomed the decision and extended hospitalization benefits to same sex workers in the employment. **Infosys** welcomed the decision and created a workgroup named IGLU (Infosys Gays Lesbians and You) to group the LGBT community and started doing activities in respect the culture. **Intuit** and **Barclays** also welcomed the decision. **Tata Steel** also welcomed the decision and ensure that 25% of its workers will be recognised from such diversified nature.

#### f. Suggestions

India is a country with high traditions and has a culture which runs from thousands of years. Though India was colonised for a period of more than 200 years, but the culture not got diluted. Before the colonization, the invasion of various kings and intruders, which also was not able to de-structure our civilization and their cultural beliefs.

During the colonization, British codified laws and enacted such laws for the control and tried to implement their ideas and views and good example of such thing is including Section 377 of Indian Penal Code, 1860 which is beneficial by the ides of The Buggery Act, 1533.

The Hindu Marriage Act, The Christian Marriage Act, The Muslim Marriage Act, The Special Marriage Act are all codified personal laws. These acts are discussing in detail and the provision in the act specifies the rules and regulations to recognize the marriage of individuals. These personal laws do not recognize the same sex marriage and the same gender sex.

The decriminalization of Section 377 has given only the partial benefits to LGBT community, and issue here is about the recognition of such persons in the personal laws especially with respect to marriage.

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<sup>30</sup> After Section 377, what is Corporate India doing? (shrm.org)

The codified laws must be restructured, repealed, or amended in such a way to recognize the rights of LGBT community in a whole and the partial justice given by the Supreme Court of India is to be made full by the law makers.

The researchers suggest for the amendment of personal laws to ratify and to give effect for the judgement of Supreme Court in a whole by allowing same sex marriage.

### **g. Conclusion**

*Law is not static, and it is a dynamic concept. The technical and technologies changes influence the people at large and it has great impact in the society. The culture is a preserved one and it cannot be changed just like that because of the influence of technology and import of cultural activities in this modern day. The laws should be crystal clear, and it should not suppress or oppress a particular community by citing reasons followed in olden era. Adaptability is the most important thing in this universe. The weighing of rights cannot be a fake appeal to imprecise and hypothetical consequences. LGBT community are all humans, and they have every right to the rights enshrined in the constitution as like that of others. They have every right to choose their life partner and their rights cannot be abridged and abrogated.*