

I AM WHAT I AM, SO TAKE ME AS I AM: SECTION 377 VERDICT AND THE WAY FORWARD

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The decision follows a protracted struggle by activists and members of the community against the repressive law, introduced in 1861 when India was under British rule. The controversy erupts after Kiran Bedi, inspector general of the Tihar jail in Delhi, [refused to provide condoms](#) for inmates, saying it would encourage homosexuality, besides admitting that inmates indulge in it. In response, AIDS Bhedbhav Virodhi Andolan (ABVA) files a writ petition in the Delhi high court, demanding that free condoms be provided and that section 377 be recognised as unconstitutional. Despite long-running efforts to mobilise support, the petition was eventually dismissed in 2001.

In this recent verdict, the Supreme Court has taken a step forward to widen the ambit of individual autonomy and decisional privacy. Constitutional morality was differentiated from social or majoritarian morality and emphasis was put on constitutional morality. Fundamental right of an individual should not be violated for the sake of social morality. The Constitution lays its foundation on diversity and as long as constitutional morality is not hampered, it should protect the fundamental rights of every individual without any discrimination.¹

Another aspect of the Constitution is that it aims to change and transform the society in order to develop an atmosphere in which every individual is given an opportunity to grow to their fullest. For this purpose, the Constitution is said to be transformative in nature in the sense that the provisions of the Constitution should not be read literally but should be interpreted in a way as to reflect the intent and purpose of the same and to accommodate the changes of a society.

Section 377 of the Indian Penal Code reads as ‘Unnatural Offences’. What is unnatural? Most importantly, who decides whether a particular act is natural or not?

¹HuffPost India. (2018). *377 Verdict: Key Highlights From The Supreme Court Judgement*. [online] Available at: https://www.huffingtonpost.in/2018/09/06/377-verdict-key-highlights-from-the-supreme-court-judgement_a_23518974/ [Accessed 20 Oct. 2018].

Unnatural is anything that is against the order of the nature. The IPC nowhere defines the phrase 'against the order of the nature'. Neither does Section 377.

One of the reasons why Section 377 was not being decriminalized is because it aimed at protecting children from being subjected to carnal intercourse. This brings into light an important question that how is Section 377 relevant to child abuse? How does Section 377 prevent child abuse?

It was because homosexuals were usually projected as paedophiles and the argument was that decriminalizing homosexuality would mean encouraging paedophilic activities. Even though it is not true but it is a mere projection attached to homosexuals. Being homosexual per se was not considered to be a crime but it was feared that decriminalizing homosexuality would have repercussions and that would be a problem. That being so, the question remains whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in negative because protection against child abuse is provided under the POSCO Act (Protection of Children from Sexual Offences Act). Hence, criminalizing such activities under another provision has no rationality behind it. Instead, the presence of this section was having an objectionable and undesired effect on consensual sexual relations which were not harmful to children.

Further, Section 377 verdict has also made a reference to gender neutrality. What is gender neutrality? The entire LGBT movement has drawn its strength from Feminist Movement.² The Feminist Movement has, to a great extent, changed the perspective about genders. Gender is always a social construction and after the Feminist movement, gender was differentiated from sex. Sex related to biological orientation of an individual and has nothing to do with gender. Gender, which was once seen as a moral standard, was now being identified as a political construction. It was through the Feminist movement that gender started evolving as a social contract. Feminist movement advocated for the rights of those individuals who refused to commit to a traditional gender order. Gender was classified into male and female but what about the third category of gender? What is gender neutrality when some genders are not even recognized? In order to protect the fundamental rights of the transsexuals, it was necessary that they subverted the binary gender system. All this while, gender was being looked at as binary but gender unlike sex is not binary.

² Hivequal.org. (2018). *Men will be Men: Feminism and LGBT Rights :: HIV Equal*. [online] Available at: <http://www.hivequal.org/homepage/men-will-be-men-feminism-and-lgbt-rights> [Accessed 20 Oct. 2018].

Article 15 prohibits discrimination on the basis of sex and hence, Section 377 is inherently violative of the Constitution in nature. One of the arguments made against this claim was that it differentiates on the basis on sexual orientation and not sex, and thus, Section 377 is not violative of the Constitution. As a result, attention was drawn to the report of Justice J. S. Verma Committee on Criminal Law which includes sexual orientation under the ambit of sex. Thus, by discriminating on the ground of sexual orientation, Section 377 was violating Article 15 of the Constitution.

As far as Article 21 of the Constitution is concerned, an individual is entitled to privacy even when he is in public. An individual who is a homosexual is ought to be given the same liberty and dignity to express and conduct themselves in public, as a heterosexual individual. By not allowing homosexuals to express their identity and by not extending to them the basic fundamental rights, the state was denying them citizenship. Without Section 377 being decriminalized, it would not have been possible for homosexuals to escape the stigmas attached to them for being who they are.³ The mere fact that the percentage of people whose fundamental rights was being violated is relatively low is no justification for the State to escape its liability to ensure protection of fundamental rights guaranteed to them under the Constitution. The State cannot treat a specific class of people as strangers to its own law.

Section 377 IPC neglects to consider that consensual sexual acts between adults in private space that are neither unfavourable nor infectious to the general public. Despite what might be expected, Section 377 trenches a grating note in regard of the freedom of people belonging to the LGBT community by subjecting them to social decrepitude and treating them as social outcast. Obviously, the Section additionally meddles with consensual activities of adults in private space. Sexual acts can't be seen from the focal point of societal standard of morality or that of customary statutes wherein sexual acts were viewed as just with the end goal of reproduction. This being the situation, Section 377 IPC, inasmuch as it criminalizes consensual sexual demonstrations of whatever nature between competent adults, is obviously discretionary.

In this recent verdict on Section 377, the section was not struck down but read down to the extent that it has decriminalized consensual same-sex activities. Through this judgement, rape has been distinguished from consensual acts of sex. The problem with Section 377 was that it considered

³ @GI_weltweit. (2018). *The right to be different*. [online] Available at: <https://www.goethe.de/en/kul/ges/20876203.html> [Accessed 20 Oct. 2018].

all non penile vaginal sex as “carnal intercourse against the order of nature”⁴ without bringing in the element of consent. Bestiality and necrophilia still continues to be a crime under the read-down section 377, given that consent is the cornerstone of the judgement.

However, the larger issues for the interests of the community have been conveniently ignored in the ruling. One such reason might be the issue of “jurisdiction”. Though the apex court has recognized the rights of the community, it has not shed light on whether there is a need to amend any existing laws so that members of the LGBT community can lead their lives in a normal manner just like the heterosexuals.⁵

For instance, the court has recognised gay rights but has been tight lipped on gay marriage or same-sex marriage. This might be because of the absence of any laws to permit such marriages.

In the Indian legal fraternity, a marriage has been defined as a relation between a man and a woman. There is no mention of a marriage between a man and a man or a woman and a woman. Further, there are no laws which can enable such couples to adopt children, just like the heterosexual couples. There is no provision either for such couples to claim rights on properties under the Succession law.

In conclusion, Section 377 verdict by stretch of imagination can be said to jeopardize its constitutional principle. Instead it has moved a step ahead to uphold the importance of fundamental rights guaranteed by the Constitution to its citizens without discriminating amongst them on irrational basis. There is still a long way ahead and there will have to be further struggles to bring the homosexuals at par with heterosexuals but nevertheless, this verdict is a step towards a progressive society that aims to accommodate all its citizens and respects diversification.

⁴ Indiankanoon.org. (2018). *Section 377 in The Indian Penal Code*. [online] Available at: <https://indiankanoon.org/doc/1836974/> [Accessed 20 Oct. 2018].

⁵ American Civil Liberties Union. (2018). *The Rights of Lesbian, Gay, Bisexual and Transgender People*. [online] Available at: <https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people-0> [Accessed 20 Oct. 2018].