

General Studies-2; Topic– Indian Constitution- historical underpinnings, evolution, features, amendments, significant provisions and basic structure.

Section 377 of IPC

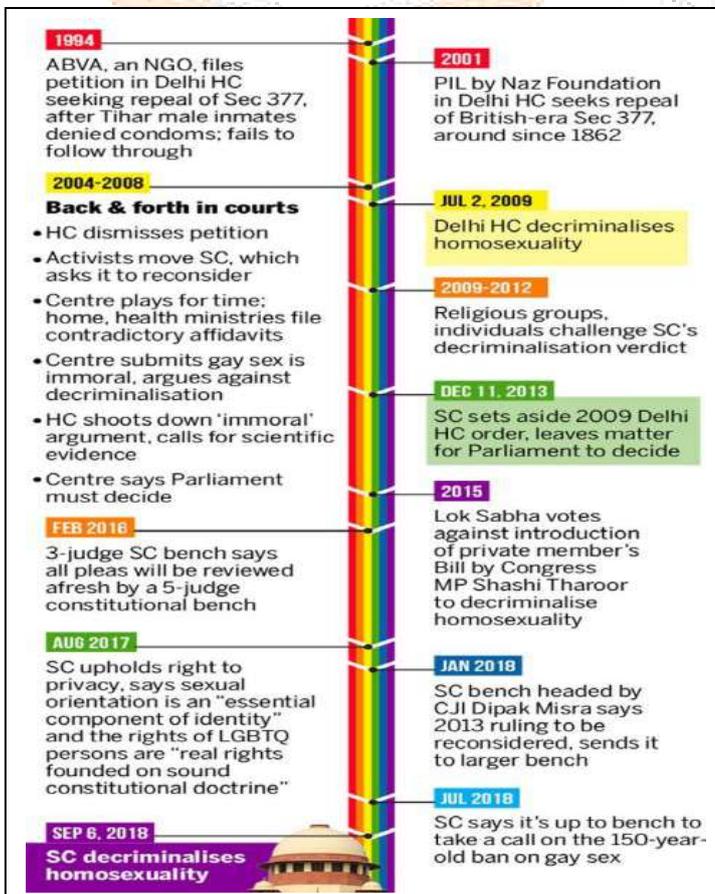
1) Introduction

- The Supreme Court has restored a landmark Delhi High Court judgement which had decriminalised homosexuality.
- A five-judge bench led by CJI Dipak Misra diluted Section 377 of the Indian Penal Code, to exclude all kinds of adult consensual sexual behaviour.
- Dipak Misra’s opinion lays emphasis on transformative constitutionalism that is, treating the Constitution as a dynamic document that progressively realises various rights.

2) What is Section 377

- Section 377 of the IPC states: “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 archaic British law dates back to 1861 and criminalises sexual activities against the order of nature.

3) Timeline of Events



4) Courts judgement on Section 377

- The Delhi High Court in Naz Foundation v. Government of NCT of Delhi (2009) held that criminalising sexual activities with consent in private not only impairs the dignity of those persons, but it is also discriminatory and impacts the health of those people.
 - The Delhi High Court decriminalised homosexuality on the grounds that Section 377 is a violation of Article 14, 15 and 21.
- Supreme Court, in Suresh Kumar Koushal v. Naz Foundation (2013) case, set aside the Delhi High Court judgment and said that homosexuality under Section 377 of IPC is illegal and will continue to be an offense.
 - The court said that Section 377 did not suffer from any “constitutional infirmity”.
 - It said there was no need to challenge Section 377 because the LGBT community constitutes only a minuscule minority.
 - The court also added the responsibility of amending or removing Section 377 lay with the Parliament.

- In the Puttuswamy vs. Union of India case the Supreme Court held right to privacy as a fundamental right.
- The court stated that privacy included the preservation of personal intimacies and that sexual orientation was an essential attribute of privacy.
- The Court argued that right to privacy and the protection of sexual orientation lay at the core of fundamental rights guaranteed under Article 14, 15 and 21.

5) Arguments against Section 377

- The constitutional morality makes it mandatory for the state to provide equality to all.
- Section 377 abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry.
- It is the right of every individual including the LGBT (lesbian, gay, bisexual, transgender) to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.
- No one can be discriminated against only on the grounds of their sexual orientation and called for constitutional protection to even sexual minorities.
- Decriminalising homosexuality upholds universality of human rights.
- Non-acceptance has been an issue for long and Section 377 fuelled it.
- It not only has repercussions on the development of the community, it affects the economic growth of the country as well.
- By building an inclusive nation, everyone can contribute to the GDP of the country.
- There is an entire market that caters to their needs and, therefore, legalisation of homosexuality legalises that market too.
- The 2017 Supreme Court verdict on right to privacy highlights that the choice of one's sexual orientation is an important part of his/her privacy.

6) Problems faced by LGBT Community

- Throughout the world such laws have led to abuses against lesbian, gay, bisexual and transgender people including arbitrary arrests, violence, bullying in schools, denial of access to health and harassment at work.
- Depression is high amongst members of the LGBT community and one of the primary reasons for it is the failure to lead a normal life.
- Jobs and, in turn, financial security is denied to people on the basis of their sexual orientation.
- Constant police harassment of the gay community.
- Doctors need to say that homosexuality is not a disease.
- Government needs to train doctors to understand health issues specific to the homosexual community, it needs to be part of the educational curriculum.

7) Constitutional Safeguards

- The ideals of individual autonomy and liberty, equality for all, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our Constitution.
- Right to Privacy enshrined under Article 21 upholds that if a person cannot enjoy his privacy then it hampers his right to dignified life.
- It violates the provision of equality before law (Article 14).
- Article 15 provides for a prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth.
- Petitioners argue that Section 377 is a violation to Freedom of Expression under Article 19 (1) (a).

8) Impact

- The Supreme Court, while decriminalising homosexuality, has acknowledged the basic human needs of the citizens.
- This will help the community claim equal constitutional status as other citizens.
- It also affirms their right to claim the right to adopt, marry and have a family.
- It may also prevent social exclusion with the court declaring that it was not a mental disorder. But something innate to a human being.
- It will take time for it to be openly accepted by the society.
- It will provide an impetus for other countries, especially those of the Commonwealth of Nations, to revoke similar provisions that criminalise consensual sexual relations.

9) Recommendations

- 172nd Law Commission Report recommended deletion of Section 377.
- In 2016, a UN report had urged to decriminalize consensual homosexual relations.

10) International Practice

- In 2015, Ireland became the first country to legalise gay marriage.
- In 2015, US Supreme Court held that same-sex marriages are legal.
- Germany, France, UK, Canada, Australia and Brazil have de-criminalized homosexuality.
- Michelle Bachelet, the new UN High Commissioner for Human Rights, applauded the Supreme Court's decision to decriminalise homosexuality.

11) Concerns / Challenges

- It will throw up several challenges on equality and discrimination.
- Since homosexuality is against the majoritarian view on sexual orientation, decriminalising Section 377 might lead to widespread criticisms across the country.
- Decriminalization of Section 377 will open new debates on marriage, adoption, inheritance and other such rights.
- Mere decriminalizing Section 377 does not ensure rights of the LGBT community.
- Decriminalizing Section 377 does not ensure a halt in discrimination against the LGBT community.
- The other challenge for LGBT members will be with respect to acceptance in jobs and in family gatherings.

12) Conclusion

- It is time for the Indian Parliament to conduct wide-ranging review of existing legal framework, repeal discriminatory laws, and address other gaps in the law that prevent LGBT persons from fully exercising their rights