

## Section 377 of IPC - UPSC Polity Notes

In 2018, the Supreme Court of India decriminalised homosexuality by ruling that Section 377's application to acts of homosexuality between consenting adults was unconstitutional. In this article, you can read all about Section 377, its relation to the rights of the LGBTQ community, and the debate surrounding this topic for the [UPSC exam](#).

### Section 377 of IPC

Section 377 of the Indian Penal Code states "*whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished*".

- This was a colonial-era law that was at odds with modern notions of justice and equality of all humankind. Section 377 criminalised the act of private consensual homosexual sex between adults as well.
- Even some heterosexual acts considered "against the order of nature" are offences under this Section.
- The Supreme Court judgement in 2018 ruled that this Section's use against consenting adult homosexuality was **irrational, arbitrary and not justified**.
- After the ruling, Section 377 is applicable only to non-consensual sexual acts, sex with minors and bestiality. These are still criminal offences.

### Some Key Observations by SC

The SC ruling in effect decriminalised homosexuality in India.

- The SC stated that Article 14 guarantees to every person equality before the law or the equal protection of the laws within the territory of India. Read more on the [Right to Equality](#).
- The Court upheld the **preeminence of constitutional morality** by saying that equality before the law cannot be denied by according precedence to religious or public morality.
- The SC also took into cognisance the fact that many legislations and modern psychiatry do not consider homosexuality a mental disorder, and hence, it cannot be penalised.
- The SC also acknowledged that homosexuality was observed even in the animal world and this dispels the myth that it is against the order of nature.
- The SC also said that the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' ought to be applied to Indian law.
  - The **Yogyakarta Principles** were outlined in 2006 in Yogyakarta, Indonesia, by a group of eminent human rights experts.
  - They are a set of principles which pertain to the application of international human rights law with respect to sexual orientation and gender identity.

### Background/Timeline of the Debate on Section 377

The movement against Sec 377 started in 1991 when the AIDS Bhedbhav Virodhi Andolan published a landmark report titled, 'Less than Gay: A Citizen's Report'. The report laid out the problems with this Section and advocated for its repeal.

- The second, more recent attempt in this direction was by the NGO, the Naz Foundation.
- In 2001, the group filed a [PIL](#) in the Delhi High Court that sought to legitimise homosexual union between two consenting adults.
- This case was dismissed by a 2-judge bench in 2004.
- As a result of the SC ordering the Delhi High Court to hear the case again, in 2009, the Delhi HC

decriminalised homosexuality by ruling that consenting homosexual intercourse between adults is not illegal.

- This verdict declared Section 377 to be in violation of Articles 21, 14 and 15 of the Constitution of India.
- This verdict was challenged in the SC by an astrologer and journalist named Suresh Kumar Koushal.
- In 2013, an SC bench upheld the appeal by Koushal and reversed the earlier ruling that decriminalised homosexuality.
- This verdict stated that it was up to the Parliament to consider whether the Section should be deleted from the statute books or not.
- This verdict was met with a lot of criticism from the LGBTQ community in India and abroad, and activists observed it is a “Global Day of Rage”.
- Many review petitions were quashed and in 2016, the SC referred a curative plea to a five-judge Bench.
- There were two landmark SC judgements that acted as a short in the arm for the case against Section 377.
  - One was in 2014 when the SC gave the transgender community the right to be called the **third gender** in the NALSA judgement.
  - The second one was in 2017 when the SC, in the Puttaswamy judgement, stated that the **right to privacy** is a fundamental right. This order stated that privacy included the sanctity of family life, the preservation of personal intimacies, marriage, procreation, the home and sexual orientation.
- In 2018, the issue was reopened by a Constitution Bench which said that a section of people could not live in fear of the law which undermined their rights to privacy and dignity and to choose.
- The petitioners had alleged that the presence of Section 377 of the IPC meant that equality, dignity, fraternity, liberty and life guaranteed by the Constitution were not extended to them.

## Arguments in Favour of Repealing Sec 377

### Fundamental Rights

- Section 377 criminalised a section of society for being a sexual minority.
- The petitioners argued that the right to sexuality, sexual autonomy and freedom were indispensable to human dignity.
- This Section was against the fundamental rights enshrined in the Constitution and that a section of people was denied their fundamental rights based on this.

### Health Issues

- Due to the criminalisation of homosexuality, a section of the society could not get adequate access to health care.
- It created barriers in the effective prevention, testing and treatment of AIDS/HIV.
- There was evidence to suggest that lack of social acceptance and rights led to increased substance abuse, violence and mental illness.

### Issue of Law Vs Morality

- Many argued that what was forbidden in most religions, and by traditional mores need not be forbidden in the eyes of the law, which saw everybody equally.

### Section 377 and Child Abuse

- There was criticism from child rights activists that the repealing of this Section would be a problem

for tackling child abuse cases.

- But, the enactment of the [Protection of Children from Sexual Offences \(POCSO\) Act 2012](#) did away with the need for this Section to deal with cases of child abuse. POCSO is more stringent as well as child-friendly.

### Implications for Heterosexuals

- Section 377 included some consensual acts between heterosexuals, which were considered 'unnatural' and punishable.

## Arguments against Repealing Sec 377

There are certain groups who were against the repealing of this Section. Many religious groups and denominations were against this contending that homosexuality was against God and religious mores. There was also another criticism of repealing the Section, that legalising homosexuality would spread diseases such as AIDS, and cause a health hazard in the country.

## Impact of Decriminalising Homosexuality

The repealing of Section 377 and the resultant decriminalisation of homosexuality in India is a giant leap for the LGBTQ community in India. It also takes India a step closer towards achieving equality of all classes of human beings, not to mention, make lives a lot easier for sexual minorities, although there is a long way to go in terms of social acceptance. Nevertheless, the fact that legally, there is an equal footing for all people, is an achievement in itself.

- Before the Section was repealed, people belonging to the LGBTQ community used to complain of harassment by law enforcement agencies, owing to the Section. This will come to an end since legally, homosexuality is no longer a crime in India.
- It is important to remember that the SC ruling did not strike down the entire Section. Offences against children, non-consensual sexual activity and bestiality continue to be punishable.
- The judgement means that sexual minorities will get full access to all the enshrined fundamental rights. They can lead a life of dignity without fear of the law.
- As mentioned before, along with the legal aspects (which is now taken care of), there is a need to bring in a societal change. There is a need for acceptance of sexual minorities into society, particularly, families need to be more open-minded about embracing LGBTQ members.

## UPSC Questions related to Section 377

### What does Section 377 say?

Section 377 of the Indian Penal Code states “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished”.

### Does Section 377 allow marriage?

Although Section 377 is repealed and homosexuality has been decriminalised, same-sex marriage or civil unions are not recognised legally in India.

### Is Section 497 removed?

The SC struck down Section 497 of the IPC that considered adultery to be a crime. Adultery is not a crime any more, although it can be grounds for divorce.

