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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

HOMOSEXUALITY: A LONG WAY TO EQUALITY

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ABSTRACT

The infamous Section 377 of the Indian Penal Code, which criminalizes homosexuality. There are many misconceptions regarding the history of homosexuality, so to explain the various controversies and the judgments that have been made and the laws that have been drafted regarding the homosexuality. As it exists today in Chapter XVI of the Indian Penal Code, Section 377 “UNNATURAL OFFENCE”.

In 2001 a PIL was filed by Naz Foundation, in Delhi High Court for challenging the constitutional validity of section 377 of IPC which criminalizes homosexuality. Saying that it violates Article 14, 15 and 21 of the Indian Constitution. Then further the judgment given by Delhi High Court was challenged in the Supreme Court in Suresh Koushal case. And finally in 2018 section 377 was decriminalized.

The author has discussed the section 377 of IPC and critically analyzed it with the help of the decided cases. This research paper shows how Section 377 of IPC got decriminalized. And also the problems based by the LGBT community.

KEY WORDS

Homosexual

LGBT community

PIL

Decriminalized

HOMOSEXUALITY IN ANCIENT INDIA

The famous Khajuraho Temple situated in Madhya Pradesh has many sculptures which reflect sexuality in ancient India. It was built by the rulers of Rajput Chandela Dynasty in 10th century. This temple depicts all the emotions of human nature. Some of the sculpture displays the homosexual acts and this proves the existence of homosexuality in ancient India.

Manusmriti which is one of the famous law code which was followed by majority of the people. It prescribes the punishment for the homosexual acts performed by men or women. Though it does not approve homosexuality acts, but it proves the existence of homosexuality at that time.

The popular ancient manual known as Arthashastra of Kautilya. This manual imposes a duty on the king to punish those who are indulged in homosexual acts. This is also the proof of the existence of homosexuality during that time.

HISTORY

INDIAN PENAL CODE was framed by the British Colonial Rulers in the 19th century. Section 377 of INDIAN PENAL CODE was framed according to the Buggery Act.

The Buggery Act, 1533. This act was passed by the Parliament of England in 1533 under the kinship of King Henry VIII. It was the first civil sodomy law in the country. It defined the homosexual acts, sodomy as unnatural acts against the will of God. Later it includes only anal penetration and bestiality. Under this act unnatural offences were punishable by death. Thomas Macaulay drafted section 377 of INDIAN PENAL CODE of 1860. As it exist in the Chapter XVI of IPC.

Section 377. Unnatural offence- whoever voluntarily has carnal intercourse against the order of nature with the any man, woman or animal, shall be punished with imprisonment for all times , or with imprisonment of either description for a term which can extent to 10 years, and shall even be susceptible to fine.

In 1862, the Buggery Act was replaced and repealed by the Offences against the Person Act 1861. This is the Act of the Parliament of the United Kingdom of Great Britain and Ireland. It includes provisions related to offences against the person. So, this Act broadened the definition

of unnatural sexual acts. Section 61-63 of this Act talks about the sexual activities.

Section 61. whoever shall be convicted of the abominable crime of sodomy and buggery, committed either with man or with animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than 10 years.

Section 62. whoever shall plan to commit the said abominable crime, or shall be guilty of any assault with intent to commit an equivalent, or of any indecent assault upon a male, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding 10 years and not less than 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour.

Section 63. Whenever, upon the trial for any offence punishable under this Act, it's going to be necessary to prove the particular Emission of Seed so as to constitute a sexual intercourse, but the sexual intercourse shall be deemed complete upon proof of penetration only.

Homosexuality was finally decriminalized in the UK by the Sexual Offences Act 1967. While the British government has made same sex marriage legal, India still follows the law written in the 1830s and enacted in 1860. It legalized homosexual acts, on the condition that they should be consensual and should be in private, who have attained the age of 21. The applied only to England and Wales.

NAZ FOUNDATION VS GOVERNMENT OF NCT OF DELHI AND OTHERS WP (C) NO. 7455/2001

FACTS

This is a landmark case in the legal history. A writ petition (a public interest action taken before the court) was under Article 226 of the Constitution of India which was brought by the Naz Foundation, an NGO working for HIV/AIDS sufferers. The petition held that Section 377 of the INDIAN PENAL CODE was unconstitutional. Section 377 was implied during the colonial rule in India, criminalizes carnal intercourse against the order of the nature. Means all variations and kinds of sexual activity except heterosexual penile-vaginal intercourse. Section 377 has been on the books since 1861 and has effectively become a topic for discussion as many felt that it withholds the freedom and choices of certain minority. This movement was led by the

Naz foundation Trust, a non-governmental organization. They filed a lawsuit in the Delhi High Court in 2001. For legalization of homosexual intercourse between 2 consentful adults. Naz foundation stated that section 377 of the IPC violated the fundamental rights under Articles 14, 15, 19 and 21 of the Constitution of India.

Article 14 - Equality before law.

Article 15 - Prohibition of discrimination on grounds of faith, race, caste, sex or place of birth.

Article 19 - Protection of certain rights regarding freedom of speech, etc.

Article 21 - Protection of life and private liberty.

It held its opinion in the public interest on the grounds that its work on tackling the spread of HIVS/AIDS was being hampered by the discrimination faced by the gay community as a result of section 377. The discrimination, the petitioner submitted, resulted within the denial of the basic human rights, abuse, harassment and assault by the general authorities, thus driving the gay community underground them to greater vulnerability in violation of their fundamental rights. This was not the first petition it was the second petition, the first was filed in 1994 by AIDS Bhedhav Virodhi Andolan.

Two contradictory responses were submitted on behalf of the Union of India. One of the Respondents, the Ministry of Home Affairs (MHA) primarily argued that the Section reflected public morality which was a reasonable restriction under Article 19 of the Constitution. It also contended that the Section informed a “compelling state interest” on grounds of public health as instances of HIV/AIDS infection were highest amongst the gay community.

The Ministry of Health, through the National AIDS Control Organization (NACO), submitted the second response. It stated that MSM engaged in high risk activities and were “particularly susceptible to attracting HIV/AIDS.” It contended that the Section needed to be repealed as fear of law enforcement agencies was driving members of the gay community underground. According to NACO such laws suffocated proper HIV/AIDS intervention and prevention efforts. The MHA, on the other hand, stressed that since MSM indulged in high risk activities criminalization of homosexuality would ensure prevention of spread of HIV.

In 2003, the Delhi High Court denied taking this petition concerning the legality of the law, saying that the petitioners had no locus standi (to appear in the court) in this matter. Then the Naz Foundation went to the Supreme Court of India against the decision of the High Court to

dismiss and neglected their petition on technical issues. Supreme Court decided that the Naz Foundation had the legality to file a public interest lawsuit in this case and sent back the case to the High Court to hear the case.

In 2006, the National AIDS Control Organization also filed an affidavit saying for the implication of Section 377 violates the right of the LGBT community.

ISSUES

1. Is section 377 of IPC unconstitutional?
2. Does section 377 of IPC violates article 14, 15 and 21 of Indian Constitution?

JUDGMENT

DATE: 2nd July 2009

BENCH: Chief Justice Ajit Prakash and S. Muralidhar

The Court declared that Section 377 IPC, insofar as it criminalizes sexual acts of adults in private, is violative of Article 21, 14 and 15 of the Constitution.

The court started its Article 14 analysis by laying out that any difference or classification must be supported a justified differentia which encompasses a relevancy the aim sought and must not be unfair or unjust. The Court doesn't differentiate between public and private acts, or between consensual and non-consensual acts, therefore it doesn't take into consideration relevant factors like age, consent and also the character of the act or absence of harm.

Relation to “sex” in Article 15 of the Constitution should be considered including sexual orientation on the grounds that discrimination on the stature of the latter relies on stereotypes of conduct on the premise of sex – as was contented by the Naz Foundation, the court cited the Human Rights Committee’s decision in *Toonen v. Australia*, (No.488/1992, CCPR/C/50/D/488/1992, March 31, 1994) during which the criminalization of sexual acts between men was considered a violation of Article 2 of the International Covenant on Civil and Political Rights, where a relation to “sex” was taken as including sexual orientation. On the premise of the analysis of Indian and international human rights jurisprudence the court declared that Section 377 was also unconstitutional on the premise of Article 15:

“We hold that sexual orientation could also be a ground analogous to sex which discrimination on the premise of sexual orientation isn't permitted by Article 15. Further, Article 15(2)

incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of 1 citizen by another in matters of access to public spaces. In our view, discrimination on the underside of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.”

Summing up its judgment, the court stressed the importance of upholding the values of equality, tolerance and inclusiveness in Indian society by stating

“If there's one constitutional tenet which can be said to be underlying theme of the Indian Constitution, it's that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a task in society for everyone. Those perceived by the majority as ‘Deviants’ or ‘different’ don't seem to be thereon score excluded. For the nowadays, the selection of the court of Delhi has invalidated the criminalization of consensual same-sex conduct between adults across the country. Since the writ petition involved a constitutional matter, the judgment goes to be implicated throughout India. However, the judgment is restricted to adults. Hence, “Section 377 will still govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.”

SURESH KUMAR KOSHAL AND ANOTHERS VS NAZ FOUNDATION AND OTHERS SUPREME COURT: CIVIL APPEAL NO. 10972 OF 2013

FACTS

In 2001 Naz Foundation filed a writ petition before Delhi High Court seeking penalized sexual acts in private between consenting adults, under Section 377 because it violates article 14, 15 and 21 of the Indian Constitution. In 2004, Delhi High Court dismissed the Writ Petition, saying that the petitioner had on locus stand (to appear in the court) in this matter. In reaching its decision, the court emphasis on domestic judgments, court relied on comparative law in reaching its decision, referring to various judgment from various jurisdiction including the European Court of Human Rights, United Kingdom, Republic of Ireland, South Africa and USA. The court also relied on the international legal frameworks including the Yogyakarta Principles and therefore the 2008 Declaration of Principles of Equality produced by the Equal Rights Trust also as number of reports and documents relating to section 377.

Judgment was conveyed on July 2, 2009 Delhi high court declared that section 377 of the IPC, 1860 violates various fundamental rights, including the proper to privacy, right to dignity under the fundamental right to life and liberty (ARTICLE 21), right to equality (ARTICLE 14) and forbiddance of separation on grounds of sex (ARITCLE 15). The decision was appealed against in the Supreme Court on India in the Suresh Kumar Koushal and another v NAZ Foundation and Others case and it was held that the Delhi high court was wrong and was also wrong in reading down the section to permit consensual homosexual activities between two adults of an equivalent sex.

JUDGMENT

DATE: 11th December 13

An appeal was filed within the Supreme Court against the selection given by the court. The Supreme Court in NAZ Foundation observed that: “The judicature discussed whether morality is that the bottom for imposing restriction on fundamental rights, named the judgments in Gobind v. State of Madhya Pradesh and Another (1975) 2 S.C.C. 148, Lawrence v. Texas 539 U.S. 558 (2003), Dudgeon v. UK, European Court of Human Rights Application No. 7525/1976, Norris v. Republic of eire, European Court of Human Rights Application No. 10581/1983, The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, South African Constitutional Court 1999 (1) SA 6, the words of Dr. Ambedkar quoting Grotius while moving the Draft Constitution, Granville Austin in his treatise The Indian Constitution Cornerstone of A Nation, the Wolfenden Committee Report, 172nd Law Commission of India Report, the address of the shielded of India before UN Human Rights Council, the opinion of Justice Michael Kirby, former Judge of the Australian court and observed: “Thus popular morality or public disapproval of certain acts isn't a legitimate justification for restriction of the essential rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, relies on shifting and subjecting notions of right and wrong. If there's any kind of “morality” that will pass the test of compelling state interest, it must be “constitutional” morality and not public morality.”

The Supreme Court further stated that:

Right to privacy in any event will necessarily must bear a process of case-by-case development. Therefore, even the right to private liberty, the right to move freely throughout the territory of India and also the right to liberty of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we don't think that

the right is absolute. Respondent no.1 said that section 377 IPC has been used for harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated nor condoned by it, and also the indisputable fact that the police are misusing the authorities. To protect the right of the LGBT persons and to declare that section 377 IPC violates the right to privacy, autonomy, and dignity, the court has relied upon the judgment of the alternative jurisdictions. Though these judgments shed considerable light on various aspects of the proper and are informative in relevancy the plight of sexual minorities, we feel that they can't be applied blindfolded for declaring the constitutionality of the law enacted by the Indian legislature. Within the view of the above discussion, we hold that section 377 IPC doesn't suffer from the vice unconstitutionality, and also the declaration made by the Division Bench of the High court is legally unsustainable. The court has merely pronounced on the correctness of the view taken by the Delhi court on the constitutionality of section 377 IPC and said that section doesn't suffer from any constitutionality infirmity. Supreme Court reversed the order given the Delhi Court holding that the Naz Foundation has didn't prove that section 377 was discriminatory to gays; the section was non-discriminatory because it punished everyone who indulged in unnatural offense.

NAVTEJ SINGH JOHAR AND ORS. VS. UNION OF INDIA AND ORS.

FACTS

The central issue of the case was validity of section 377 of the Indian Penal Code, 1860 insofar as it applied to the consensual sexual conduct of adults of the same sex in private place. Section 377 was titled as 'Unnatural Offences' and stated " whoever voluntarily has carnal intercourse against the order of nature with any men, women or animal shall be punished with imprisonment for life, or with imprisonment with description for a term which may not extend to ten years, and shall also be liable to fine."

The issue was originated in 2009 when the Delhi High Court, in the case named Naz Foundation v. Government of N.C.T. of Delhi, held that section 377 of Indian Penal Code to be unconstitutional, as it pertained to consensual sexual conduct between two adults of the same sex. The petitioners challenged the provisions and contended that the section violates the Article 14, 15, 19 and 21 of the Constitution. High Court struck down the section as it clearly infringed the right to personal liberty, right to live with dignity and privacy of an individual. It

violates Article 14 of the constitution equal protection.

Then in 2014, two-judge bench of the Supreme Court, in the case named as Suresh Kumar Koushal v. Naz Foundation, overturned the Delhi High Court decision. A petitioner named Suresh Kumar Koushal challenged the decision of the Delhi High Court. They reinstated Section 377, reason being that only the Parliament had the power to debate and declare the section unconstitutional. “A miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders and that the High Court had erroneously relied upon international precedents in its anxiety to protect the so-called rights of LGBT community.” The bench comprising of Justice G. S. Singhvi and J. S. Mukhopadhyaya stated-“in the view of the above discussion, hold that section 377 is not unconstitutional and the declaration made by the Bench of the High Court is legally unsustainable.”

The petition was filed on 27th April 2016 to challenge the constitutional validity of Section 377 of the IPC, on the ground that it criminalizes consensual sexual intercourse between two persons belonging to the same sex in private. The petition was filed by 5 members of LGBT Community, journalist Sunil Mehra, dancer Navjeet Singh Johar, hoteliers Aman Nath and Keshav Suri, businesswomen Ayesha Kapur and Chef Ritu Dalmia. The petitioners claimed that their issue was very different from the issue raised in the petition in Suresh Koushal case. They challenged the section by saying “punishing consenting adults having sexual intercourse and rendering it as an act against the order of nature.”

Navtej Singh Johar was the petitioner. He was a dancer and a member of the LGBT (Lesbian, Gay, Bisexual, and Transgender) community filed a writ petition in the court seeking right to the sexual autonomy and right to choose the sexual partner under Article 21 of the Indian Constitution. He also said that section 377 of the IPC is unconstitutional. He also mentioned that the language of section 377 of the IPC is unclear and there is no intelligible differentia between natural and unnatural sexual acts. He also mentioned that section 377 discriminates on the basis of sexual partners and effect the freedom of speech and expression by denying the expression of one’s sexual identity through choice of their partner. Section 377 of IPC violates the right to privacy of the LGBT people by putting them in the fear and humiliation.

ISSUES

1. Whether section 377 violates Article 14, 15 and 21 (right to privacy) of the Indian Constitution?
2. The judgment declared in Suresh Koushal judgment was proper or not?
3. Section 377 has any 'chilling effect' on article 19(1) (a) by criminalizing gender expression by the LGBT community?

JUDGMENT

DATE: 6TH SEPTEMBER 2018

BENCH: CJI Dipak Misra, Justice A.M. Khanwilkar, Justice Rohinton Fali Nariman, Justice D.Y.

Chandrachud and Justice Indu Malhotra.

The judgment was announced on 6th September, 2018. The judgment was declared to criminalize Section 377, consensual acts of adults (person above 18 years who are competent to consent) in private, and is violative of Article 14, 15, 19 and 21 of the Constitution. It clarified that such consent must be free consent, which is totally voluntary in nature, and barren of any coercion. It was also stated that the reading down of Section 377 shall not, lead to the reopening of any concluded prosecutions, but can certainly be relied upon in all pending matters.

The points considered in the judgment are as follows:

1. It is not the duty of the state and the judiciary to protect the rights to dignity, but at large it also owes a responsibility to respect one another's dignity, showing respect for the dignity of another is a constitutional duty. It is an expression of the component of constitutional fraternity.
2. There can be a situations which influences the emotional behavior of an individual to seek intimacy in the same gender that may bring the 2 persons together. It has to be treated as consensual activity.
3. In view of the majority opinion, was not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection. The court noted that minorities face grave danger of discrimination for the simple reason that their views, beliefs or way of life does not match with the mainstream, but in a democratic

Constitution founded on the Rule of Law, it does not mean that their rights are less sacred than those conferred on other citizens.

4. In Suresh Koushal case that gays, lesbians, bisexuals and transgender constitute a very small part in the population is perverse due to the very reason that such an approach would be violative of the equality principle under Article 14 of the Constitution. The term 'carnal intercourse' and 'order of nature' renders section 377 as violating the equality clause in Article 14.
5. Section 377 fails to make difference between consensual and non-consensual sexual acts between adults in private space are neither harmful to the society.
6. The court stated that 'Homosexuality is not a mental disorder or mental illnesses' under the Mental Healthcare Act, 2017.
7. It is the right of an individual to engage in sexual relations on their own terms. It includes the individual's right to choose the partner as well as the freedom to decide the nature of the relationship that the individual wishes to pursue.
8. The Court also took into consideration the opinions and propositions of jurists globally like Bentham who was one of the earliest supporters who remarked that, homosexuality, if viewed outside the realms of morality and religion, is neutral behavior which provides the participants pleasure and doesn't cause pain to anyone else. And concluded that such an act cannot constitute an offence. Similarly John Stuart Mill's theory called the 'harm principle' suggests that the state can poke into private life by way of sanction as long as harm is caused to others or if the conduct is "other affecting".

CJI Misra wrote the judgment on behalf of the Justice Khanwilkar and himself. He basically emphasized on individual's right on self-determination. For him section 377 fails to recognize an individual's ability to consent. He said that section 377 not only discriminates against individuals on the basis of biological determinants, but also of an individual's choice. He emphasized that constitution protects the individual's sexual autonomy and personal choices. He struck down section 377 on two grounds 'manifest arbitrariness' and 'reasonable classification test'.

Justice Chandrachud called section 377 an "anachronistic colonial law". He added that it had reduced a class of citizens. He said that non-recognition of right to sexual orientation is also a denial of privacy, a fundamental right recognized in Puttaswamy. He also said that human sexuality can't categorize individuals as male or female. Decriminalization of section 377 in

not the only end of the problem of LGBT community their constitutional rights and that the constitution envisages much more.

Justice Nariman emphasized that according to Medical Healthcare Act 2017, homosexuality is not a disease. This Act shows that the distinction between natural and unnatural in section 377 is manifestly arbitrary and violates section Article 14. He was specify that LGBT individuals have the fundamental right to live with dignity under Article 21. He request court's judgment to get high publicized so that the problems based by the LGBT is reduced. He request government to undergo sensitization training of the officials especially police officers.

JUSTICE MALHOTRA emphasize on the fundamental right to health, which comes from right to life in Article 21. LGBT are denied to access adequate healthcare facilities. She was main concern about the sexually transmitted diseases in LGBT communities.

CONCLUSION

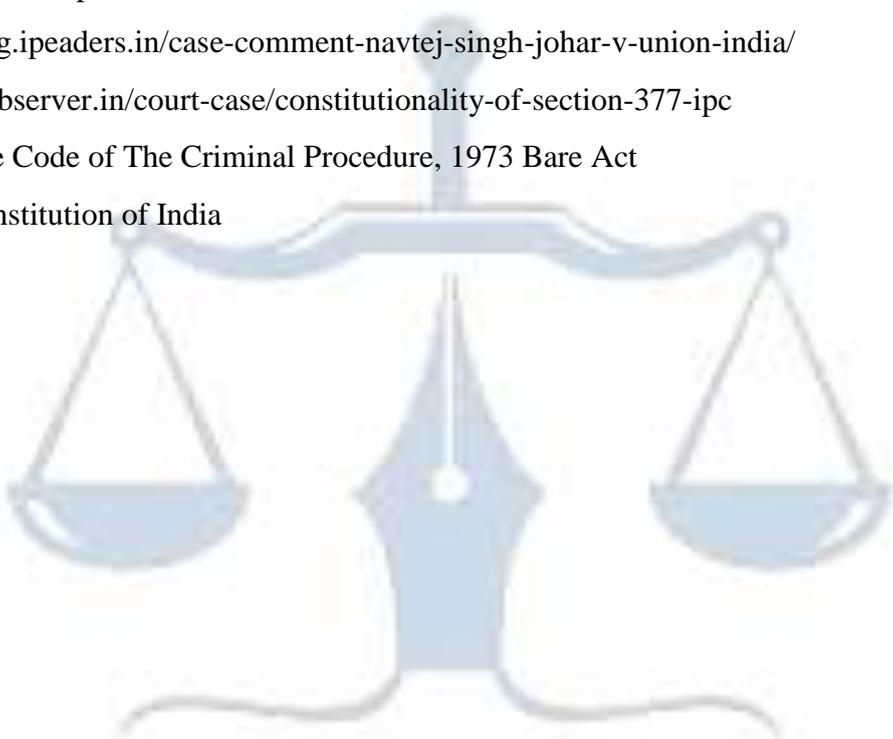
Section 377 was struck in the Navtej Johar case where the court said that constitution is for every individual in the country, whether it is a part of a minority or majority group. India doesn't discriminate any group. Every section of the society has the right to get equal treatment. Preamble of the constitution also says this. The court also said that because of discrimination against the homosexuals in the social environment and due to fear of punishment and humiliation, homosexuals hide their gender identity, ignore their healthcare. With the view of the court sexual orientation is a matter of choice, it can't be forced upon someone. Indu Malhotra, J. said in this case that homosexuality is a variation, not abhorrence. Because of pressure upon homosexuals, they turns bisexuals and this has large social ramification. And this violates the Indian Constitution. Criminalizing homosexuality had aggravated the sensitive issues. The Indian society may have feeling of disgust for certain out of line practices but it can't be a ground for denying the basic rights for section of the society. So, it was the high time for India, to recognize homosexuality. Many western countries have already recognized the homosexuality. Court also held that not giving privacy to homosexuals is denying them a dignified life and personal liberty under Article 21.

Finally, the court had gave a good and courageous judgment in the case. Judgment indicates towards the shift of society from an archaic to a pragmatic one and upheld constitutional

morality. Judgment focus on the goals of the fundamental rights. It laid down the foundation for other historical judgments such as the Joseph Shine case (decriminalization of adultery) and the Sabarimala case (rights of women to enter a worship place).

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