

The rise of the rainbow

On Thursday, the Supreme Court struck down a colonial-era law that made gay sex punishable by up to 10 years in prison. A timeline of the case



1862: Section 377 came into force

July 2009: The Delhi High Court read down the Section to apply only to non-consensual, penile, non-vaginal sex, and sexual acts by adults with minors

December 2013: A Supreme Court Bench set aside the Delhi HC judgment. It upheld the criminalisation of gay sex and dismissed the LGBTQ community as a 'negligible population'

February 2016: SC Bench indicated that the question of constitutionality of 377 required a possible back-to-roots, in-depth hearing

August 2017: The fight against the Section got a boost when a SC Bench upheld the right to privacy as a fundamental right. The Bench had observed that Section 377 "poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity"


2017-18 saw a flood of writ petitions to quash 377

January 8, 2018: A Bench led by the CJ referred the petitions to a Constitution Bench to examine the legality of the Section and re-visit that a section of people cannot live in fear of the law which atrophies their right to choice and natural sexual inclinations

July 10, 2018: A Constitution Bench started hearing the writ petitions. The CJ said a person cannot be held criminally liable for his sexuality. Justice Chandrachud observed that if an adult has a fundamental right to choose his or her partner under Article 21, the term 'partner' includes same-sex partner


September 6, 2018: The Supreme Court unanimously struck down the ban on gay sex, putting to rest a legal battle that stretched for years

Five petitioners who challenged Section 377




Navtej Johar
Dancer

- The rights activist refused to be defined by his sexuality and rose to be a doyen in his chosen profession




Sunil Mehra
Journalist

- He and his partner Navtej Johar have been together for over 25 years. He is also an actor and storyteller




Ritu Dalmia
Chef

- Kolkata-born, she joined her family business at the age of 16 and soon set up her own restaurant



Aman Nath
Writer

- Co-founder and co-chairman of India's famous boutique chain of heritage hotels, the *Neemrana*



Keshav Suri
Hoteller

- He is an executive director of The Lalit Suri Group, which is known to employ LGBT members as well

Source :PTI

Govt. should have taken a stand on Section 377: judge

In his 180-page separate opinion, Justice Chandrachud says the matter should not have been left to the court to decide

KRISHNADAS RAJAGOPAL
NEW DELHI

The “neutral” position of the Centre on the legality of Section 377 IPC, which criminalised homosexuality, did not sit well with the Supreme Court.

Instead of washing its hands of and leaving it to the “wisdom of the court”, Justice D.Y. Chandrachud said the government should have taken a “categorical” stand one way or the other.

“All that the stand of the government indicates is that it is to the ‘wisdom’ of this

Court that the matter is left. In reflecting upon this appeal to our wisdom, it is just as well that we as judges remind ourselves of a truth which can unwittingly be forgotten: flattery is a graveyard for the gullible,” Justice Chandrachud wrote scathingly in his 180-page separate opinion for the Constitution Bench of the Supreme Court.

The ambivalence of the government does not obviate the necessity for a judgment on the issues raised, he wrote.

Whether the government

has a position or not, the court must plainly do its duty to the LGBTQ community and the Indian Constitution. The challenge to the constitutional validity of Section 377 must squarely be addressed.

“Constitutional issues are not decided on concession,” Justice Chandrachud observed.

‘Neutrality slammed’

The government’s neutrality was slammed, especially in the light of the fact that “Section 377 creates a class of cri-

minals, consisting of individuals who engage in consensual sexual activity.”

“It typecasts LGBTQ individuals as sex-offenders, categorising their consensual conduct on par with sexual offences like rape and child molestation. Section 377 not only criminalises acts (consensual sexual conduct between adults) which should not constitute crime, but also stigmatises and condemns LGBTQ individuals in society,” Justice Chandrachud said.

The observations against

the government keeping mum came in the background of the “silence and secrecy” that accompanies the “institutional discrimination faced by the LGBTQ community in health care.

Social stigma

Noting that the stigma attached by health providers, employers and other service providers to the community contributes to the increased sexual risk behaviour and encouragement of HIV/AIDS. MSM and transgender per-

sons do not approach State health care providers for fear of being prosecuted for engaging in criminalised intercourse.

“There exist serious obstacles to effective HIV prevention and treatment as discrimination and harassment can hinder access to HIV and sexual health services and prevention programmes,” Justice Chandrachud pointed out. To safeguard the health of persons who are at the greatest risk of HIV infection, it is imperative that access is granted to effective HIV pre-

vention, treatment services and commodities such as clean needles, syringes, condoms and lubricants.

“A needle or a condom can only be considered a concrete representation of the entitlements of vulnerable groups: the fundamental human rights of dignity, autonomy and freedom from ill-treatment, along with the right to the highest attainable standard of physical and mental health, without regard to sexuality or legal status,” Justice Chandrachud said.

IN BRIEF



Important step towards liberal society: Congress

NEW DELHI

The Congress on Thursday hailed the Supreme Court verdict as “momentous” and termed it as an important step towards a liberal and tolerant society. Congress chief spokesperson Randeep Surjewala (in picture) said the verdict restores the fundamental rights and negates discrimination based on sexual orientation. PTI

Not unique to humans, says SC

LEGAL CORRESPONDENT
NEW DELHI

Justice D.Y. Chandrachud on Thursday said homosexuality is documented in 1,500 species and is not unique to humans.

The judge, with this single observation, dispelled the prejudice that homosexuality is against the order of nature. Justice Chandrachud quoted from an article he read which said that homosexual behaviour existed in all species except those that “never have sex at all, such as sea urchins and aphids.” Chief Justice of India Dipak Misra also wrote, “What nature gives is natural. That is called nature within.”

The Chief Justice quoted German thinker Johann Wolfgang von Goethe, who said, “I am what I am, so take me as I am.”

Justice Chandrachud compared same-sex love to those of couples who married outside their caste, religion and faith, at enormous personal risk. The judge located the struggle of citizens belonging to sexual minorities in the larger history of the struggles against various forms of social subordination.

Thus, he observed, the limits imposed by structures such as gender, caste, class, religion and community made the “right to love” not just a separate battle for LGBTQ individuals, but a battle for all.



On cloud nine: (Clockwise from top) A member of LGBTQ community holding a placard celebrating the verdict outside the Supreme Court in New Delhi, and members welcoming the verdict in Bengaluru and Lucknow on Thursday. • AFP & RAJEEV BHATT

CJ: community needed the rainbow of hope

LEGAL CORRESPONDENT
NEW DELHI

The 2013 Supreme Court judgment in the Suresh Koushal case had upheld Section 377 and set aside the reprieve won by the LGBTQ community when the Delhi High Court in 2009 decriminalised homosexuality. It had cast the community back into the shadows as “unconvicted felons.”

The five-judge Constitution Bench declared that once a nine-judge Bench had declared privacy to be a part of the fundamental right to life, nothing could stop the court from upholding bodily autonomy and sexual orientation as a fundamental right too.

Chief Justice Dipak Misra, in his separate opinion shared with Justice A.M. Khanwilkar, held that the LGBTQ community possessed equal rights as any other citizen.

Any societal repression of their innate and biological sexual orientation was against the fundamental right to free expression. Homosexuality was their order of nature.

Chief Justice Misra said the community needed the rainbow of hope for the sake of humanity. It should be allowed to live with dignity and without pretence about its identity. This verdict should be the beginning of a journey towards greater dignity, equality and liberty, he said.

Justice Rohinton F. Nariman, in his separate opinion, held that homosexuals had a fundamental right to live with dignity. They were entitled to be treated as human beings and should be allowed to imbibe the spirit of fraternity. Justice Nariman embraced the Yogyakarta Principles, which recognise freedom of sexual orientation and gender identity as part of human rights.

Justice Chandrachud said medical science should stop being a party to the stigmatisation of homosexuals by “trying to cure something that is not even a disease.” Medical professionals and counsellors should tweak their own attitude. Stigmatisation seriously affected members of the community.

Justice D.Y. Chandrachud pointed out that variations in sexual orientation had become a reason for blackmail on the Internet. Quoting Leonard Cohen, he described how “shadows of a receding past” still controlled the quest of LGBTQ community for fulfilment.

It is not a crime, but we do not support it: RSS

NEW DELHI

Guarded in its response to the Supreme Court verdict, the RSS, said, “Like the Supreme Court, we also do not consider this to be a crime. But same sex marriages are not compatible with norms of nature, so we do not support such relations. Bharatiya society also does not have the tradition to recognise such relations.”

Verdict gives hope, says Amnesty

NEW DELHI

Hailing the Supreme Court judgment, Amnesty International India on Thursday said the verdict gave hope to everyone fighting for justice and equality. The judgment closes the door on a dark chapter of the Indian history. It marks a new era of equality for millions of people in India,” said Asmita Basu, Programmes Director, Amnesty International India. PTI


This day will be remembered as a golden day in the history of the country and it is a tight slap on (the faces of) those who used to categorise human beings on the basis of their sexuality

— LAXMI TRIPATHI, Transgender rights activist




Not only does the judgment say that people from LGBTQ are not criminals, but also that the majority cannot decide for the minority. The only morality that should be practised is constitutional morality

— AKKAI PADMASHALI, Transgender rights activist



Decriminalising homosexuality and abolishing Section 377 is a huge thumbs up for humanity and equal rights. The country gets its oxygen back

— KARAN JOHAR, Film director



Accepting diversity has to be the core value of every Indian and frankly (it) is the only way India will survive... scrapping #Section377 is a step in that direction

— CHETAN BHAGAT, Writer



No more seen as ‘mental illness’

LEGAL CORRESPONDENT
NEW DELHI

Justice Rohinton Nariman on the Constitution Bench said the stigma of ‘mental illness’ attached to homosexuality has gone for good.

As proof, Justice Nariman pointed to the recent parliamentary re-enactment of the Mental Healthcare Act of 2017.

Justice Nariman said the definition of ‘mental illness’ in the Act “throws to the winds all earlier misconceptions of mental illness, including the fact that same-sex couples who indulge in anal sex are persons with mental illness.”

‘Advance in law’

“The present definition of mental illness in the 2017 Parliamentary statute makes it clear that homosexuality is not considered to be a mental illness. This is a major advance in our law which has been recognised

by Parliament itself,” Justice Nariman observed, in his separate opinion for the five-judge Constitution Bench led by Chief Justice of India Dipak Misra on Thursday. Justice Nariman said, “Mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person’s community.”

‘Give wide publicity’

The judge urged the Centre to take all measures to ensure that the Bench’s judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals.

Speaking for the Constitution Bench, Justice Nariman said the government should initiate programmes to reduce and finally eliminate the stigma against homosexuality.

U.P. tops in cases booked under Section 377

Around 10% of the incidents booked may pertain to sex among consenting adults, say sources

K.S. SUDHI
KOCHI

Uttar Pradesh had the highest number of cases, a whopping 999, registered under Section 377 of the Indian Penal Code during 2016, figures for which are available now.

Kerala came second with 207 cases that fell under the category of “unnatural offences.” Delhi followed with 182 cases, statistics of the Na-

tional Crime Records Bureau reveals. Figures for 2017 would be available only later this year, Kerala police sources said here on Thursday.

According to the police sources, 2,187 cases were registered invoking Section 377 across the country in 2017. The number for Kerala was 198 during the year.

The current year has seen as many as 126 cases being

registered till July. The sources say around 10% of the incidents booked under the Section may pertain to sexual intercourse among consenting adults, which the apex court has now decriminalised. Section 377 is an essential element in cases charged under the Protection of Children from Sexual Offences (POCSO) Act.

Sources in the State’s high-

er judiciary said though the apex court has decriminalised Section 377, it could be a long road to freedom for those who have been booked under it. They would have to move the appropriate superior courts, as the law does not allow a court to review its own decision. That right is vested with the superior courts.

With the latest apex court

verdict, a magistrate shall no longer take cognizance of such cases. If cognizance has already been taken, the accused can exercise their right to get themselves discharged before framing of charges. Those who have been convicted and are now undergoing imprisonment can approach the superior courts concerned for setting aside the judgment.

‘Bigoted attitudes dehumanise transgenders’

Stigma, oppression and prejudice against the community have to be eradicated, says Dipak Misra

LEGAL CORRESPONDENT
NEW DELHI

The very existence of Section 377 IPC, criminalising transgenders, stigmatised an already oppressed and discriminated class of people, Chief Justice Dipak Misra, who headed the Constitution Bench decriminalising homosexuality, wrote.

Bigoted and homophobic attitudes dehumanise transgenders by denying them their dignity, personhood and above all, their basic human rights.

“To change the societal bias and root out the weed, it is the foremost duty of each one of us to stand up and speak up against the slightest

form of discrimination against transgenders that we come across. Let us move from darkness to light, from bigotry to tolerance and from the winter of mere survival to the spring of life – as the herald of a New India – to a more inclusive society,” the Chief Justice wrote in an opinion shared by Justice

A.M. Khanwilkar on the Bench.

Stigma, oppression and prejudice against the transgender community have to be eradicated.

“Transgenders have to progress from their narrow claustrophobic spaces of mere survival, hiding in there with their isolation and

fears, to enjoying the richness of living,” Chief Justice Misra observed.

The community should be allowed to walk out of the shadows in order to fully realise their potential.

The community should get equal opportunity in all walks of life, Chief Justice Misra said.