



Supreme Court decriminalises homosexuality, says history owes LGBTQ community an apology

Posted at: 07/09/2018

Constitution Bench declares the 156-year-old “tyranny” of Section 377 as “irrational, indefensible and manifestly arbitrary”.

What is Section 377 of IPC?

- 377 {Unnatural offences} Section of the IPC states: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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 which is modeled on Buggery Act of 1533 and criminalizes sexual activities against the order of nature.
- Section 377 punished homosexuality with a 10-year imprisonment.

Previous Judgments

2009

- In 2009, in a landmark judgment, the Delhi High Court described Section 377 as a violation of the fundamental rights guaranteed by the Constitution.

2013 (Suresh Kumar Koushal vs. Naz Foundation)

- The Supreme Court in 2013 overruled the Delhi High Court’s order and reinforced criminalisation of homosexuality stating that Parliament’s job was to scrap laws.
- It had cast the community back into the shadows as “unconvicted felons”.
- This judgment by the apex court was highly criticised by the LGBTQ community in India and was seen as a setback for human rights.

2018

- In January 2018, the Supreme Court said a larger group of judges would re-consider the previous judgment and examine Section 377’s constitutional validity.
- Revisiting their 2013 verdict, the top court added that it will decide on a curative petition by five persons.
- The Supreme Court had then said: “The section of people who exercise their choice should never remain in a state of fear.”

Now

- The Supreme Court on Thursday decriminalised homosexuality with a prayer to the LGBTQ (Lesbian, gay, bisexual, transgender, and queer) community to forgive history for their “brutal” suppression.
- The prayer for forgiveness came from Justice Indu Malhotra, the lone woman judge on the Constitution Bench.
- “History owes an apology,” she reached out to the rainbow spectrum.
- A five-judge Constitution Bench, led by Chief Justice of India (CJI) Dipak Misra unanimously held that criminalisation of private consensual sexual conduct between adults of the same sex under Section 377 of the Indian Penal Code is clearly unconstitutional.

What is crime still under Sec 377?

- The court, however, held that Section 377 will apply to “unnatural” sexual acts like bestiality.
- Sexual acts without consent continue to be a crime under the Section.
- Section 377 won’t apply to consensual same-sex acts, says Supreme Court.

Macaulay’s Legacy

- Justice D.Y. Chandrachud called Section 377 “Macaulay’s legacy”, which continued for 68 years despite a liberal Constitution because of the manifest lethargy of lawmakers.
- He said the Section shackled the human instinct to love.
- It had been a reason for tragedy and anguish.

‘It is just a step’

- Justice Chandrachud said decriminalisation of homosexuality was just a step.
- This case was about people wanting to live with dignity.
- Citizens cannot be pushed into obscurity by a colonial law.

Grave Violations Addressed

- Section 377 discriminates against a minority solely for their sexual orientation. It violates the right of the LGBTQ community to “equal citizenship and equal protection of laws”.
- The court held that bodily autonomy is individualistic.
- Choice of partner is part of the fundamental right to privacy.
- The Bench set aside the 2013 judgment of the court in the Suresh Koushal case.
- Legal experts said this was a much-needed self-correction of a past judicial wrong committed on the LGBTQ community.
- The verdict would become the foundation for members of the community to seek individual rights like.
- The court declared that once a nine-judge Bench has declared privacy to be a part of the fundamental right to life, nothing could stop the Supreme Court from upholding bodily autonomy and sexual orientation as fundamental rights too.

‘LGBTQ community possesses equal rights’

- The CJI, in his separate opinion shared with Justice A.M. Khanwilkar, held that the

LGBTQ community possesses equal rights as any other citizen.

- Any societal repression of their innate and biological sexual orientation is against the fundamental right to free expression.
- Homosexuality is their order of nature.
- The CJI said the community needs the rainbow of hope for the sake of humanity.
- They should be allowed to live with dignity and without pretence about their identity.
- This verdict is the beginning of a journey towards greater dignity, equality and liberty.
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‘Fundamental right to live with dignity’

- Justice Rohinton F. Nariman, in his separate opinion, held that homosexuals have a fundamental right to live with dignity.
- They are 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, saying they “animate” the right to equality and equal protection by laws.

Not a disease

- 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 affects members of the LGBTQ community.

Shadows of Receding Past

- Justice Chandrachud pointed out how variations in sexual orientation have become a reason for blackmail on the Internet.
- Quoting Lenoard Cohen, he described how “shadows of a receding past” still controlled the quest of LGBTQ community for fulfillment.
- “Civilisation has been brutal,” he wrote.

The Hindu

