

Endgame for Section 377?

Bright rainbow colored background with a grunge texture and graffiti paint drops. Global colours are easily modified | Photo Credit: [Getty Images](#)

The guillotine has fallen on the right of men to unilateral divorce by mere pronouncement in one go. It is a reflection of the failure of politics in India, and the pusillanimity of the political class that is its custodian, that the practice had the long life that it enjoyed in a secular republic. And even though it is disappointing that none of the judges came to the conclusion of the unconstitutionality of triple talaq via the path of equal rights — in this case of India's women — it is yet the case that the highest court of the land has pronounced a negative verdict on the practice. Rulings by the Supreme Court can have significant spread effects.

Even when rulings in one case may not directly impact those in other areas, they have the potential to change behaviour across society. Thus, activists see the ruling against triple talaq as generally empowering women among India's Muslims. Similarly, the ruling that has closely followed it in time, namely the one upholding privacy as a fundamental right of the citizen under the Constitution, is believed to have major implications for the lives of Indians. We can see immediately that it stalls the incipient rise of the surveillance state. But it has been suggested that it has the potential to impact the Indian state's regulation of sexual relations. In particular, it has been suggested that the ruling has a bearing on the constitutional validity of Section 377 of the Indian Penal Code (IPC) which criminalises acts "against the order of nature". In the first instance, this immediately devalues by association the homosexual condition, a historical peeve of European Christianity. It should be recognised that even though all religions drawing upon West Asian culture have strictures against homosexuality, it was the West that justified sexual persecution on aesthetic grounds. Under Hitler homosexuals were to be exterminated so that Germany would be populated by the perfect race. It needs to be acknowledged at the same time that it is the Christian West that has taken the lead in reversing the historical prejudice against homosexuality and that members of its political class have played a leading role in this. But we live in India and must perforce address its realities.

Within minutes of the Supreme Court's ruling on the primacy of privacy, commentators pointed out that it has implications for Section 377 as no longer can sex acts in private be overseen by law. While this may at first blush appear to be a tenable interpretation, it is not an argument that is made by activists for gay rights. Incidentally, it must be said that this group includes a large number of Indians who are not in any way circumscribed by Section 377 as the fight for sexual equality is not spearheaded by gay men. So why is the argument against Section 377 not to be based on the right to privacy but to be premised instead on the idea of the right to equality before the law? While privacy is of paramount importance, in itself it cannot be the clinching argument in the context. After all, do individuals have the right to violence in the privacy of their homes? We may well agree with a man that his home is his castle, and therefore beyond the invasive remit of the state, but we are unlikely to agree with his right to domestic violence. He has no right to subjugate his spouse through violence, not even in the privacy of his home. The case against Section 377 must be based on the argument that it is arbitrary in proscribing all but the 'missionary position' in intercourse. What the Indian law as it stands does is to violate the right to non-discriminatory treatment of the LGBT community who invariably reject this position.

So are we witnessing the endgame of Section 377? Hardly, it would be seem, though we should not give up all hope to seeing a civilised India in our lifetime. Why so? At least, the arguments of some of the judges of the Supreme Court are not a cause for optimism. The swing judge, so to speak, in the talaq ruling thought of the practice as bad in religion and therefore not "good in law". This has a direct bearing on the path of LGBT rights in India as homosexuality is proscribed in

some religions. Is this to be interpreted as suggesting that India's gay Muslims and Christians should remain criminalised for all time? Not if we are to go by the court's earlier rulings. The NALSA judgment of 2014 is a landmark one in that it upheld the right to choose one's sexual orientation. However, it did not go far enough to call for a repeal of Section 377. In some ways, however high-minded the judges in that case may have been, they did not allow their minds to soar enough to recognise sexual rights as legitimately redeemable through practice.

While the courts may get away without addressing the sexual rights of Indians constrained by Section 377, the political class cannot any longer credibly do so. The Bharatiya Janata Party (BJP) and the Congress cry themselves hoarse with their slogans 'sabka saath, sabka vikas (together with everyone, everyone's progress)' and 'inclusion', respectively. If the populace are to see these as meant to no more than stimulate a self-induced rapture, the political parties have their task cut out. The Congress must recognise that the provisions of this law are exclusionary in that it leaves out a section of Indians. The BJP on its part had better get to finally see that 'vikas' is all about flourishing lives and not just making goods in India for sale abroad. If the Kinsey report on sexuality based on the United States experience is to be taken as a benchmark, we would have to heed its finding that around 10% of men are homosexual.

This is larger than some of India's religious groups. It appears that for the main political parties of India, sabka vikas amounts to privileging religion, even when it is exclusionary. But if they would only dare to see the full logic of their pronouncements, they cannot shrink from devoting their energies to empowering the LGBT community in India. Among India's political parties, the CPI(M) alone has frontally sought repeal of Section 377, even though this may have something to do with the intelligence of its JNU-educated leadership rather than their MPs, not to mention the rank and file of the party. The Congress did include Section 377 in its manifesto in 2014, but somewhat limply under the section on governance, betraying its timidity. After all, its clan-based allies from Uttar Pradesh and Bihar, on whom it increasingly relies, seem unable to see beyond their families and their biradari, showing little concern for women, linguistic minorities or civil liberties in general.

Having tasted the sweetness of power, the BJP has begun to choose its words more carefully. As soon as the ruling on triple talaq was announced, the entire leadership was all agog with tweets and statements. The Minister for Law and Justice spoke of the judgment having upheld "gender justice, dignity and equality". He couldn't have been more precise. Could he not have noticed that that is exactly what repeal of Section 377 of the IPC will achieve on the sexual plane, we wonder. But while legislation for its repeal may be some way off, the LGBT movement of India is here to stay. Chances are that in a city near you preparations are on right now for the next annual 'Pride' march. It would be a party with a difference as all parties are welcomed. You could even walk your talk.

Pulapre Balakrishnan is Professor of Economics, Ashoka University and Senior Fellow, Indian Institute of Management, Kozhikode

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