

GOVT. SHOULD HAVE TAKEN A STAND ON SECTION 377: JUDGE

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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 criminals, 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 encourage escalation of the incidence of HIV/AIDS.

MSM and transgender persons 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 prevention, 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.

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