Supreme Court Verdict on Section 377

Why in news?

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- A Constitution Bench of the Supreme Court has unanimously decriminalised homosexuality.
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- Click here to know more on the judicial journey of Section 377.
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What were the concerns with Section 377?

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> ***"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 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."***

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- Section 377 creates a class of criminals, consisting of individuals who engage in consensual sexual activity.
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- It typecasts Lesbian, Gay, Bisexual, and Transgender, Queer (LGBTQ) individuals as sex-offenders.
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- It categorised their consensual conduct on par with sexual offences like rape and child molestation.
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- This has led to stigmatisation and condemnation of LGBTQ individuals in society.
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- It was a cause for institutional discrimination faced by the LGBTQ community in health care, which even led to ineffective HIV prevention and treatment.
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What was the judgment?

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- The Bench unanimously held that criminalisation of private consensual sexual conduct between adults of the same sex was clearly unconstitutional.
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- The court, however, held that the Section 377 would apply to “unnatural” sexual acts like bestiality.
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- Sexual act without consent would also continue to be a crime under Section 377.
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What was SC’s rationale?

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- **Individual** - Bodily autonomy is individualistic as it is a matter of choice and is part of dignity.
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- Sexual orientation is biological and innate, as an individual has no control over who they get attracted to.
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- Any repression of this by the state will be a violation of free expression.
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- **Rights** - Homosexuals, as individuals, have a fundamental right to live with dignity and possess full range of constitutional rights.
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- These include sexual orientation, partner choice, equal citizenship and equal protection of laws.
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- The State cannot decide the boundaries between what is permissible and not.
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- **Society** - Section 377 is based on deep-rooted gender stereotypes ingrained in the society.
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- It is a majoritarian impulse to subjugate a sexual minority to live in silence.
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- But the societal morality cannot override constitutional morality and fundamental rights.
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- **Nature** - The verdict noted that homosexuality was documented in 1,500 species and was not unique to humans.
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- This firmly dispels the prejudice that homosexuality is "against the order of nature".
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- **Right to love** - Section 377 speaks not just about non-procreative sex but also about forms of intimacy.
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- This, the court has acknowledged as the 'right to love'.
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- But the social order finds some of these ‘disturbing’.
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- It is the result of limits imposed by structures such as gender, caste, class, religion and community.
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- These limits affect the “right to love” of not just the LGBTQ individuals, but of couples who make relationships across caste and community lines.
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- **Perception** - The recent parliamentary re-enactment of the Mental Healthcare Act of 2017 was mentioned.
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- The present definition in the Act makes it clear that homosexuality is not considered to be a mental illness.
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- It is reaffirmed that mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, religious beliefs.
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- **Awareness** - The Centre was urged to take all measures to ensure that the judgment is given wide publicity.
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- Government was instructed to initiate programmes to reduce and eliminate the stigma against homosexuality.
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- Government officials and police will have to be given periodic sensitisation campaigns.
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What are the shortcomings?

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- How the judgment operates on the ground is yet to be seen as recent orders on triple divorce and lynching have not had visible impact.
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- The judgment has opened up grey areas, and new guidelines will be needed.
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- e.g Say, a gay individual withdraws “consent” and lodges a complaint against their partner.
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- India’s laws on sexual assault do not recognise men as victims of rape. Police will now have to establish the principle of consent.
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Source: The Hindu

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