

Who is who in the fight to decriminalise homosexuality in India

A Look Back At Those Who Aided, and Hindered, the Fight Against Section 377

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No epic war - and the victorious struggle for LGBTQ+ rights in India is certainly one - is complete without a cast of characters who bring to the battlefield qualities such as heroism and cowardice, innocence and guile, loyalty and treachery.

Homosexual relations were criminalised in India for the first time 158 years ago when Section 377 of the Indian Penal Code outlawed what it called “carnal intercourse against the order of nature”. On Thursday, September 6, 2018, a five judge bench of the Supreme Court finally held that this section would no longer apply to consensual sexual acts between adults.

“Section 377 is arbitrary,” the bench declared. “The LGBT community possesses rights like others. Majoritarian views and popular morality cannot dictate constitutional rights.”

In saying so, the court over-ruled a judgment that a two-judge bench of the apex court order had passed in 2013 in the *Suresh Kumar Koushal* case which had re-criminalised ‘unnatural sex’ four years after the Delhi high court had de-criminalised it.

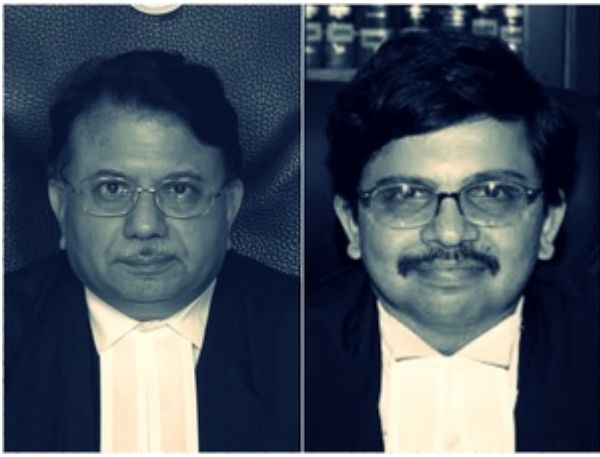
In light of Thursday’s landmark judgment, *The Wire* looks back at the cast of characters who contributed all the twists and turns in this long struggle

1. The heroes...

Justice Ajit Prakash Shah and Justice S. Muralidhar

On July 2, 2009 judgment that was considered momentous at the time, Justice A.P. Shah, then chief justice of the Delhi high court, and Justice S. Muralidhar had decriminalised homosexuality in India for the first time. The colonial-era law has been a part of the Indian legal system in some form or the other for nearly 165 years and has been used to target sexual minorities and homosexual couples. “Unnatural sex” is of course no longer illegal in Britain itself, but India has chosen not to shed this colonial artifice.

In a landmark 105-page judgement, Justice Shah, who has since retired, and Justice Muralidhar, who is still a judge of the Delhi high court, declared Section 377 of the IPC as violating Article 21 (right to life), 14 (right to equality) and 15 (non-discrimination on grounds of sex and gender) of the constitution. The verdict in [Naz Foundation vs Government of NCT of Delhi](#) held that treating homosexual sex between consenting adults as a crime was a violation of their fundamental rights.



Justice A.P. Shah (Retd.) and Justice S. Muralidhar of the Delhi high court. Credit: delhihighcourt.nic.in

In an interview with [LiveMint in August 2013](#), Shah revealed that due to his judgment decriminalising homosexuality, he has had to deal with knee-jerk outrage disguised as community sentiment. “Any person who believes in democracy should be worried by this trend in our country,” he declared.

Shah and Muralidhar’s judgment was a major shot in the arm for the LGBTQ+ movement in the country. Quoting Jawaharlal Nehru’s speech while moving the Objective Resolution, the order read: “Words are magic things often enough, even the magic of words sometimes cannot convey magic of human spirit and of a nation’s passion ...(this resolution seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future)”.

Anjali Gopalan

The founder and executive director of Naz Foundation, Anjali Gopalan has been at the forefront of India’s fight to decriminalise homosexuality. In 2001, the Naz Foundation under Gopalan became the original petitioner for scrapping Section 377 under which individuals are harassed and discriminated against based on their sexual orientation, a battle that they won in 2009, albeit temporarily.

[Speaking to The Hindu](#) in December 2013 – soon after the Supreme Court overturned the July 2009 judgment – Gopalan said that it was because of the Delhi high court order that thousands had gotten “the courage to come out of the closet,” and taking away that right from them by re-criminalising homosexuality was a reflection of what we as a country are “doing with our minorities”.

“We are becoming more and more intolerant of the other.”



Anjali Gopalan at a pride parade. Credit: Wikimedia Commons

Anand Grover

The senior lawyer and activist had in 2009 led the Naz Foundation's legal case for repealing Section 377. Grover, who has been working for LGBT+ and human rights in the country, continued to believe after the Supreme Court's 2013 [order that](#) "the last victory will be ours".

SC judges on right to privacy bench

In August 2017, a nine-judge bench of the [Supreme Court declared](#) the right to privacy as a fundamental right in a case originally about challenging the constitutional validity of the Indian biometric identity scheme Aadhaar. Thanks to the way they framed their judgment, the Supreme Court justices effectively [reopened the issue of Section 377](#).

At least three of the five separate but concurring judgments that made up the Supreme Court's privacy ruling – the four-judge judgment authored by Justice D.Y. Chandrachud on behalf of the Chief Justice J.S. Khehar, Justice R.K. Agarwal, himself and Justice Abdul Nazeer, and the judgments of Justice Sanjay Kishan Kaul and Justice S.A. Bobde – explicitly tackled the implications of privacy as a fundamental right on Section 377 or the sexual orientation of a citizen.

Justice D.Y. Chandrachud, while delivering the main judgment, held that privacy is intrinsic to life, liberty, freedom and dignity and therefore, is an inalienable natural right.

"Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform."

Stating that sexual orientation was implicit in the right of choice, the order said this was a facet of the right to privacy. The court further held that the right to privacy cannot be denied, even if there is a minuscule fraction of the population which is affected.

The [wording was significant](#) since the LGBTQ+ community has been referred to as a 'minuscule'

minority group in the 2013 Supreme Court judgment re-criminalising homosexuality. “One’s sexual orientation is undoubtedly an attribute of privacy,” Chandrachud had said, adding, “Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone.”

Petitioners in Section 377 case

Among those who fought – and won – the good fight is a [group of 20 students](#) and alumni of the Indian Institutes of Technology who asked the apex court “for a declaration that Section 377 of the IPC violates Articles 14, 15, 16, 19 and 21 of the constitution” and to ensure the right to equality before the law so that there is no discrimination against anyone for their sexual orientation.



Lawyers Arundhati Katju (second from left) and Menaka Guruswamy (third from left), petitioner Keshav Suri and his partner and Devdutt Pattanaik (in green shirt) celebrate the Supreme Court’s judgment. Credit: Anoo Bhuyan/The Wire

Menaka Guruswamy and Arundhati Katju

The Supreme Court advocate was at the helm of making concrete arguments to strike down Section 377 as it violated Articles 14, 15, 19 and 21 of the constitution.

Guruswamy and Katju represented the IIT students, graduate and alumni who belong to the LGBTQ+ community that had petitioned the Supreme Court. Guruswamy asked the bench, “How strongly must we love knowing we are unconvicted felons under Section 377? My Lords, this is love that must be constitutionally recognised, and not just sexual acts.”

2. Those they were up against...

Apart from British colonial state, which bequeathed a homophobic law to independent India, the LGBTQ+ community in India has had to battle the prejudice, indifference and cowardice of politicians cutting across all political parties who saw no reason to remove from the statute books a law that was a clear violation of the right to equality enshrined in the constitution.

As the battle moved to the courts in 2001, the opposition solidified around a clutch of individuals and organisations who led the charge in favour of holding on to Section 377.

B.P. Singhal

The Hindutva ideologue and BJP leader was among the respondents in the 2009 *Naz Foundation* case and opposed the legalisation of gay sex in the Delhi high court. He had then challenged the verdict in the apex court [saying that](#) homosexuality was illegal, immoral and against

the ethos of Indian culture. In an interview with [Kafila](#), the late BJP leader said he believed gay sex is “unnatural.”

“It’s unnatural. The anus is designed only for exit of things. Therefore, the mucus membrane of the anus is soft and can be torn. The vaginal mucus membrane is tough. When a woman is desirous of sex, the vaginal canal is irrigated. No such lubrication takes place in the anus.”

A former police officer, Singh was also a BJP MP.

Justice G.S. Singhvi and Justice S.J. Mukhopadhaya

In December 2013, Supreme Court Justices G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya reversed the Delhi high court’s 2009 judgment stating that criminalising homosexuality was “unconstitutional.”

Claiming that Section 377 is not unconstitutional, the apex court ruled that the Delhi high court had “overlooked that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years, less than 200 persons have been prosecuted for committing offence under Section 377.”

Suresh Kumar Kaushal

If a major blow was inflicted on LGBTQ+ rights by the December 2013 Supreme Court judgment, Suresh Kumar Kaushal was the face of [that case](#).

In 2009, soon after the Delhi high court ruling, Kaushal, along with the All-India Muslim Personal Law Board, Trust God Missionaries and Krantikari Manuwadi Morcha, filed a petition in favour of re-criminalising gay sex. [Speaking to The Hindu](#), Kaushal said homosexuality was “simply unnatural” and that one of the motives behind challenging the Delhi high court judgement was that it was a “religious issue”.

“After homosexuality was decriminalised, a lot of gay men and lesbians began approaching temples and gurudwaras for marriages. They had to put a ban on this as marriage in every religion follows certain rituals.”



Delhi pride parade: Credit: Karnika Kohli/*The Wire*

Apostolic Alliance of Churches, Utkal Christian Council and Trust God Ministries

The final challenge against Section 377 in the Supreme Court went unopposed except by [three obscure Christian groups](#), the Apostolic Alliance of Churches and the Utkal Christian Council – which were respondents in the earlier curative petition on Section 377 – and the Trust God Ministries. On the last day, they were joined by a lawyer saying she had just received a brief from Kaushal.

Subramanian Swamy

The senior BJP leader has a long-held belief that homosexuality is against Hindutva. Claiming that it is an “American habit,” the former Union cabinet minister believes that the legalisation of consensual gay sex [will lead to](#) “commercial profits” since gay bars “will be opened in all cities on

FDI.”

[View image on Twitter](#)





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It is not a normal thing. We cannot celebrate it. It's against Hindutva. We should invest in medical research to see if it can be cured. Government should consider having a 7 or 9 judge bench: Subramanian Swamy on SC to begin hearing the pleas seeking scrapping of [#Section377](#)

[1:05 PM - Jul 10, 2018](#)

"The Americans want to open gay bars, and it'll be a cover for paedophiles. It will only increase HIV cases. The government should invest in medical research to see if homosexuality can be cured. It is not a normal thing. We cannot celebrate it," [Swamy has been quoted](#) as saying.

Earlier this year, [Swamy said](#) homosexuality was not a problem if "they don't celebrate it, don't flaunt it." Today, minutes after the landmark Supreme Court ruling in the matter, the leader [told CNN-News18](#) that the order would give rise to what he alluded to as social evils.

Baba Ramdev

The yoga guru believes homosexuality to be a disease and claims he can cure it. In December 2013, [Ramdev extended an invitation](#) to members of the community to his ashram saying that he guaranteed that yoga could "cure the bad addiction."

"Homosexuality is not genetic. If our parents were homosexuals, then we would not have been born. So it's unnatural," he said.

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