

**Target Section 377: On decriminalising gay sex**

Same-gender sex remains a crime in the country due to a flagrant judicial mistake committed by the Supreme Court in 2013. The time has come to undo it. Ever since the constitutional validity of Section 377 of the Indian Penal Code was upheld in *Suresh Kumar Koushal* (2013), the correctness of the retrograde verdict has come under doubt twice. The latest criticism from the court is strident and explicit. While declaring that the right to privacy is a fundamental right and an inherent component of human liberty and dignity, the nine-judge Bench has observed that the rationale behind the *Koushal* judgment is flawed and unsustainable. It has said the rights of LGBT persons are real rights founded on sound constitutional doctrine and not “so-called rights” as the earlier Bench had described them disdainfully. The astounding claim made in *Koushal* that there was no need to challenge Section 377 because the LGBT community constitutes only a minuscule minority has been completely discredited. It was unreasonable to advance the view that constitutional protection is available to a group based on its size. Yet, in a show of uncharacteristic reticence and contrary to the history of the evolution of constitutional jurisprudence, the earlier Bench had suggested that the provision can be diluted only through the legislative route. This week’s ruling on privacy rights contains a clear enunciation of the constitutional basis for protection of rights based on sexual orientation.

Transgenders, even though insignificant in numbers, are entitled to human rights, another Bench had observed in *National Legal Services Authority* (2014), in a subtle hit at the “minuscule minority” formulation in *Koushal*. At another point, it said Section 377 had been an instrument of harassment and abuse, something the earlier judgment had refused to accept. Significantly, it advocated the adoption of the Yogyakarta Principles — norms on gender identity and sexual orientation adopted by human rights experts in 2006 in Indonesia. A key principle is that discrimination based on sexual orientation and gender identity must end. By commending this norm, the court has located sexual orientation not only as a freedom flowing from the right to privacy, but as demanding of non-discriminatory treatment. Both these verdicts correctly refrained from ruling on the validity of Section 377, as it was not the primary question before them. However, it is quite apparent that a strong body of constitutional jurisprudence is now available to target Section 377, as and when a five-judge Bench takes up the reconsideration of *Koushal*. By the latest verdict, sexual orientation is an aspect of the right to privacy and an inalienable part of human dignity, freedom, and personal liberty. Under the 2014 reasoning, it is relatable to both dignity and equality. Read together, they have laid the foundation for restoring the Delhi High Court judgment of 2010 in *Naz Foundation*, which read down Section 377 to decriminalise consensual sex among adults irrespective of gender.

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