

THE RIGHT TO LOVE: ON SECTION 377 VERDICT

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The stirring message from the [Supreme Court's landmark judgment decriminalising gay sex](#) is that social morality cannot trump constitutional morality. It is a reaffirmation of the right to love. In a 5-0 verdict, a Constitution Bench has corrected the flagrant judicial error committed by a two-member Bench in *Suresh Kumar Koushal* (2013), in overturning a reasoned judgment of the Delhi High Court reading down Section 377 of the IPC. The 2013 decision meant that the LGBTQ community's belatedly recognised right to equal protection of the law was withdrawn on specious grounds: that there was nothing wrong in the law treating people having sex "against the order of nature" differently from those who abide by "nature", and that it was up to Parliament to act if it wanted to change the law against unnatural sex. The court has overruled *Koushal* and upheld homosexuals' right to have intimate relations with people of their choice, their inherent right to privacy and dignity and the freedom to live without fear. The outcome was not unexpected. When the courts considered Section 377 earlier, the litigation was initiated by voluntary organisations. When those affected by the 2013 verdict approached the Supreme Court, it was referred to a larger Bench to reconsider *Koushal*.

Full text of Supreme Court's verdict on Section 377 on September 6, 2018

In the intervening years, two landmark judgments took forward the law on sexual orientation and privacy and formed the jurisprudential basis for the latest judgment. In *National Legal Services Authority* (2014), a case concerning the rights of transgender people, the court ruled that there could be no discrimination on the basis of sexual orientation and gender identity. In *Justice K.S. Puttaswamy* (2017), or the 'privacy case', a nine-judge Bench ruled that sexual orientation is a facet of privacy, and constitutionally protected. Chief Justice of India Dipak Misra's opinion lays emphasis on transformative constitutionalism, that is, treating the Constitution as a dynamic document that progressively realises various rights. In particular, he invokes the doctrine of non-retrogression, which means that once a right is recognised, it cannot be reversed. Taken together, the four opinions have furthered the frontiers of personal freedom and liberated the idea of individual rights from the pressure of public opinion. Constitutional morality trumps any imposition of a particular view of social morality, says Justice R.H. Nariman, while Justice D.Y. Chandrachud underscores the "unbridgeable divide" between the moral values on which Section 377 is based and the values of the Constitution. Justice Indu Malhotra strikes a poignant note when she says history owes an apology to the LGBTQ community for the delay in providing the redress. The dilution of Section 377 marks a welcome departure from centuries of heteronormative thinking. This is a verdict that will, to borrow a phrase from Justice Chandrachud, help sexual minorities 'confront the closet' and realise their rights.

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