



## The right to love

The Supreme Court ruling on Section 377 furthers the frontiers of personal freedom

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 The 2013 decision meant that the LGBTQ community's belatedly recognised right to equal protection of the law was withdrawn on specious grounds: that there was nothing wrong in the law treating people having sex "against the order of nature" differently from those who abide by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*.

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.

## Pieces of land

South Africa still struggles with the post-apartheid promise of redistribution

As South Africa debates contentious legislative proposals on land redistribution, few see any risk of Zimbabwe-style violent farm seizures of the 1990s in Africa's most industrialised country. But President Cyril Ramaphosa, a former business tycoon and trade union leader, faces the delicate task of making good on the constitutional principle of land "expropriation without compensation", not undermining the right to private property. Land ownership patterns remain skewed against the black majority, 24 years since the end of apartheid. Official statistics on land holdings among racial groups are contested on their details. Yet, there is no denying that the majority were dispossessed of their holdings during the colonial period. Impatience for speedy transformation has gripped South Africans since they saw off the corrupt rule of Jacob Zuma and as the country approaches the 25-year milestone of liberation from apartheid. The annual growth rate is poor, and unemployment hovers around 25%, even as the country comes to terms with the role of top African National Congress leaders in the loot of its natural wealth. The data on inequality and economic drift have led to a sense of despair that the mission of Nelson Mandela has dissipated under successive governments. Against this backdrop, nothing seems to be more pressing than reforms to colonial-era land holding patterns that have displaced the majority for centuries and hampered their prospects. The World Bank has rated unequal distribution and access to land as South Africa's second greatest obstacle to reducing poverty, after skill deficits.

Amendments to the Constitution that are under consideration aim to make land expropriation provisions more explicit. The proposals target unutilised land, derelict buildings and land used for speculative purposes. The implications of these changes for the mining sector could be significant. His business acumen and trade union experience should equip Mr. Ramaphosa to balance competing and conflicting interests. It remains to be seen whether the amendments will satisfy the Economic Freedom Fighters, the radical breakaway party of the ANC. But for Mr. Ramaphosa, the moves are about instilling public confidence in his leadership and that of the ANC ahead of the 2019 general election. His bold initiatives as President have seen the return of competent Ministers sacked by his predecessor, manoeuvres to revive investor confidence and restoration of an independent prosecutor's office. The land reforms he has started are potentially the most transformative yet for South Africa, and also the most difficult as they are politically contentious. Mr. Ramaphosa should stand his ground.

# For all that we may become

Today, when civil liberties face unfathomable pressure, it cannot be just heteronormativity that we fight



GAUTAM BHAN

For all the lines of the 2009 Delhi High Court verdict (colloquially called the *Naz* judgment), the one that stayed with me the longest was perhaps an aside to the main point about reading down Section 377. The High Court had said: "While recognising the unique worth of each person, the Constitution does not presuppose that the holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times."

### Reaffirmed, yet changed

As a gay man, what I heard them say that muggy day in July was that I was not just my sexual orientation. That my worth and my rights were not meant to be my responsibility alone. That I could expect, demand, get respect. That I could dream not just of a life free of violence but one of personhood, of joy. That our lives as queer people could hold rights and dignity without needing either extraordinary courage or immense privilege. That I would not have to hold my breath so often, whether in fear or regret. That the cost of freedom would not be loneliness.

On Thursday, standing in the



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Supreme Court as the Constitution Bench read down Section 377 once and for all, I felt reaffirmed yet also changed. I heard the judges once again speak of sexuality as dignity, as mutual respect, as equality. I heard the invocations of Articles 14, 15, 19 and 21. Yet, I am not the same person I was when I became part of a petition in the *Naz* case in 2005. The law, thankfully, doesn't have nearly the same importance in queer lives. Perhaps most importantly, these are not the same times. This time, what has remained with me are the words of the individual judgment of Justice D.Y. Chandrachud. In what feels like both diagnosis and warning, he says: "We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society."

This is a different "we" from

*Naz*. This is not a "we" of some of us who are LGBTQ and the others who either accept or reject us. This is not just about our rights as they pertain to our sexualities and gender identities. This is a "we" of all of us as a society, a public, a democracy, and a people needing to face the inequalities that persist in our names today. I realise today that when I heard *Naz* all those years ago, I wanted others to embrace their constitutional morality to extend to queer people the dignity we had been denied. It had felt vital at the time. It was. Today, when dissent, freedoms and civil liberties face unfathomable pressure far beyond just that experienced by LGBTQ communities – a pressure that draws precisely from what the court called majoritarian sentiment and arbitrary state power – it cannot be just heteronormativity that we must fight. What is at stake is all that is

endangering the constitutional edifices of equality, liberty, dignity and fraternity that the judges invoked.

### Freedom's echoes

Listed immediately after us in the Chief Justice's court was the next hearing in *Romila Thapar*, the petition challenging the continuing house arrest of activists under the Unlawful Activities (Prevention) Act, a law that defines the many ways in which we are willing to sacrifice our civil liberties. When the judges called for a transformative constitutionality, when they spoke of the need for all of us to do the work to make our Constitution a living organism, when they reminded us, in the words of Justice Chandrachud, that "the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so," what remained in my mind was that the freedom I had just had affirmed could have meaning only if it found echo in the freedoms of others. We are not just islands, *Naz* had said, but bodies, cultures, communities, places, times. The opposite of loneliness is not freedom but fraternity. Dignity cannot be just what we possess but must be what we give to and share with others. On Thursday, what stayed with me was not just the respect we are owed, but the respect we owe as queer people to insist that the transformative power of constitutional values affirmed for us in page after page of the judgments be one that spreads far beyond us. If our freedoms are not inter-linked, they are

not freedoms at all.

The Chief Justice of India, Dipak Misra, began his judgment by saying, "I am what I am." There is no doubt that queer people in India have never had a chance to fully be ourselves, to believe and know what our own possibilities are. I have nothing but happiness that, 24 years after the first AIDS Bhedbhav Virodhi Andolan petition against Section 377 in 1994, queer people will have won the right to breathe and to dream. Yet we have never been alone in not having the right to be who we are. If there is one measure of the injustice and inequalities that define us today as a society, it is how many of us live at some distance from the dignities our Constitution imagined: the dignity of a home and a wage, of a life without fear and violence, of a right to choose love, of a right to express ourselves, of a right to believe in the possibility of justice at all.

### How to be truly free

A transformational constitutionality must go beyond just being who we are. It must instead ask: who can we be? Who must we be to ourselves and each other? How can we use constitutional morality as a transformative power to speak not just of equality on the basis of sexual orientation and gender identity but on all that divides us? After Thursday, our work must merely begin so that we may not be the cause of injustice from having once been its inheritors. It is only then that we will truly be free.

Gautam Bhan is a writer and an activist

## Sexual equality affirmed

The lives of over 100 million Indians may have been freed by the Supreme Court



PULAPRE BALAKRISHNAN

With the words, "Take me as I am", five Indians led the way to a new India, one where the rule of law assures its citizens liberty. A Constitution Bench of the Supreme Court in a concurring judgment ruled that sex between two consenting adults of the same gender is no longer a criminal offence. In one stroke, this restores the equality before the law of all sexual orientations and identities, which cover a wide range. To term this judgment as 'historic' would be an understatement. Of course, it is historic in the literal sense that it struck down a law imposed on India in the middle of the 19th century by a colonial power, leaving it in place for over a century and a half. However, it is momentous also in terms of the sheer number of people affected by it. The Kinsey Report on sexuality, though based on a narrow cultural base, had estimated that about 10% of a population is not exclusively heterosexual. Accordingly, the lives of over 100 million Indians may have been freed by the Supreme Court. While

India's highest court has in the past ruled on many important issues ranging from civil liberties to property rights, it would be difficult to match this one verdict for its immediate impact on the lives of Indians. As the law that has been struck down is a British colonial vestige, the ruling is bound to have a ripple effect on its future in other erstwhile colonies, many of which are far richer than India but have a less vibrant civil society.

### A certain uniqueness

There is a degree of uniqueness about this victory for India's Lesbian, Gay, Bisexual and Transgender, Queer (LGBTQ) community. First, it has been the outcome of a battle fought by its members. In the U.K., for instance, the decriminalisation of homosexuality came about by an Act of Parliament after the Labour Party had constituted a committee to look into the issue. So the freedom gained by the LGBTQ community in India is not something gifted to them. On the contrary, India's political parties had distanced themselves from their cause, no doubt fearing majoritarian backlash, revealing that they have no convictions of their own. The top leadership of the Communist Party of India (Marxist) alone has been the exception. Nor has there been much support from India's liberal intelligentsia,



the right and left wings of which have not been able to slough off a deep conservatism when it comes to matters of sex. The weakness led them to adopt the incredible pose that the only axes of inequality in India are income and caste. This section, otherwise quite active in the political discourse in the country, lost the opportunity of being on the right side of history as it was being made in India.

A second feature is that the movement to get Section 377 of the Indian Penal Code struck down has not been so male dominated here, with a far greater presence of women than was historically the case in the West. Far from this being just a matter of political correctness, it has made the struggle for sexual equality in India more effective and joyous than it may have been.

Finally, the verdict has brushed aside religious opposition to the expansion of human rights. Not even in Catholic Ireland had the religious establishment attempted to stall gay rights as it has done in India. In 2013, a coalition of religious groups – Hindu, Muslim and Christian – came together to reinstate Section 377. And they succeeded. Since then Christian groups have persisted in their aim, but this time the Supreme Court did not entertain claims made in the name of religion. Secularism has thus been given a fresh lease of life in India. Henceforth, political parties that appease religious interests for electoral gain do so at a cost to their credibility.

### Hope, gratitude

As a gay Indian I have only two things to say at this moment. The first is to express the hope that having won their own freedom, the country's LGBTQ community will now work to further the freedom of all, many far less privileged than some of them. The second would be to express gratitude. The debt owed to the five judges of the Supreme Court for the sheer intellectual power of their pronouncements is so large that any expression of gratitude would be wanting.

But an attempt may be made in other quarters. Now, the first one

would be to thank the leaders of the Indian LGBTQ movement. While they, along with the lawyers who represented the community in the courts, are numerous, I believe everyone would agree that two deserve particular mention. They are Ashok Row Kavi who started a gay support group in Mumbai over 25 years ago, flagging off a movement in India, and Anjali Gopalan of the Naz Foundation in Delhi who took the matter to the courts over a decade ago, paving the way for the present ruling. The dates remind us of how long a journey this has been.

Secondly, the media in India has been quite unusual in the support it has demonstrated. This is quite unlike the experience in the West where gay rights activists received far less expressive support in the mainstream media when their struggles were on. It is a different matter that the media there has become more solicitous of the gay community after they won the battle. While something similar may be at play in this country too, with the Indian languages media having shown less enthusiasm for their cause, this detail need not detain us at present. At the rendezvous of victory there is room for all.

Pulapre Balakrishnan is Professor at Ashoka University, Sonapat, Haryana

## LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

### A momentous verdict

This is an emotional day for the LGBTQ community and a big step forward for India ("SC decriminalises homosexuality, says history owes LGBTQ community an apology", Sept. 6, online). While partially striking down Section 377 is a significant development, the bigger challenge is to now change attitudes. The court has pronounced a remarkable judgment and has done its job; it is now up to us to do our job by letting go of our own prejudices. We must join hands with the LGBTQ community so that every day, and not just the day of the verdict, feels like an occasion to celebrate freedom and our constitutional rights.

JENISTA GRACE L.,  
Bengaluru

Majoritarian morality cannot dictate constitutional morality. History has been created, justice has been delivered. The legal fraternity has

taken a step towards equality, a step that could not be taken earlier due to the lack of political will. This is why people's faith in the judiciary remains strong and this is why we need judicial activism.

AA YUSH JAIN,  
Jaipur

It is wonderful that some people can virtually restart their lives from now. There is a long road ahead in building a society that accepts love in all its forms. A conscious attempt is needed to ensure that the LGBTQ community is not discriminated against in public spaces, hospitals and workplaces. It is time to educate the masses about the difference between gender and sexuality. It's also time for filmmakers to stop stereotyping the community.

SAHITHI ANDOJU,  
Hyderabad

I am still shocked that it took us so long to move past a regressive Section

that we borrowed from Britain and which Britain itself changed many decades ago! I am shocked that we still live in a society where the LGBTQ community still had to fight for its rights despite the existence of Articles 14 and 21 of the Constitution. The court has said homosexuality is not a mental disorder. This is significant as many people force homosexuals to "change" their sexual orientation.

SHASHANK BHARDWAJ,  
Bengaluru

I am incredibly happy to have witnessed the making of history. India has taken a giant leap towards modernity, acceptance and equality. I can proudly say that I was a part of the era that began this wonderful change for the better. My hope for the future is that we will eventually move towards a society with less stigma and discrimination.

RAGHAVI KASA,  
Bengaluru

### Protect free speech

The fact that the Supreme Court threw out the plea to ban *Meesha* is certainly a shot in the arm for freedom of expression, but it is high time the State governments took a cue from the court and nipped in the bud protests against books, films and paintings ("SC throws out plea to ban Malayalam novel *Meesha*", Sept. 6). There must be a free flow of ideas in every society so that people are exposed to all kinds of opinions that will enable them to form their own.

R. PRABHU RAJ,  
Bengaluru

It is unfortunate that it has become almost inconceivable in our times for anything remotely related to religion to be discussed without it being controversial or politicised. Self-proclaimed religious representatives who have taken it upon themselves to "protect" their religion are ironically the same people who are causing the

degeneration of that religion. Until this need to "protect" a religion goes, issues like book and film bans will continue to keep our courts busy.

MANSI TYAGI,  
Bengaluru

### More than a name

The advisory is unwarranted ("What's in a name?", Sept. 6). The word 'Dalit' has never been opposed by the community, as it connotes self-empowerment. Changing the nomenclature without any rhyme or reason defies logic. If at all the government is interested in the welfare of Dalits, it should protect the community from relentless

discrimination and violence instead of insisting that it be called by another name.

P.K. VARADARAJAN,  
Chennai

The name of a community is representative of its culture, identity and history ("What's in a name?", Sept. 6). The name Dalit offers the community empowerment and solidarity. To erase that identity and replace it with administrative parlance shows poverty of thought. It is the 'Dalitness' of Dalits that empowers them and gives them hope.

SHAGUN AITRI,  
Bengaluru

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**CORRECTIONS & CLARIFICATIONS:** In the Non-Fiction page (Sept. 2, 2018), a book title was erroneously given as 'We Who Wove with Lotus Thread: Summoning Community in South Asia' instead of 'We Who Wove with Lotus Thread: Summoning Community in South India'.

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