

# **“I am what I am, so take me as I am” – Historic Decision of India’s Highest Court Decides Gay Sex No Longer Criminal**

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Commencing with the famous quote of German thinker Johann Wolfgang von Goethe, India’s Supreme Court has today legalised sexual relationships between same-sex people. This landmark decision ends a long fight against Section 377 of the Indian Penal Code 1860 (IPC) which had criminalised certain homosexual acts. In its decision, the Supreme Court held that: “Criminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional.”

## Background

For over 150 years, certain homosexual acts could result in individuals facing life imprisonment and/or heavy fines under Section 377 IPC.

Over recent years there have been calls for this law to be repealed. There was backlash in 2013, when the Supreme Court decided in to maintain the law. By 2017, however, the Supreme Court of India had recognised that “sexual orientation is an essential attribute of privacy”, describing it as an “essential component of identity”. Nevertheless, the law criminalising certain homosexual acts remained in force.

## Decision

But today that law is no longer in force. Today's decision, found that Section 377 IPC was unconstitutional, as it criminalises consensual sexual acts between competent adults. It has been heralded throughout the LGBTQ community globally. The individuals claimed that the right of sexuality, the right to sexual autonomy and the right of choice of a sexual partner were guaranteed principles of the Constitution. They mentioned, that every sexual orientation is an expression of the right of privacy as an essential attribute (referring to *K.S. Puttaswamy vs. Union of India and Others*), grounded in Art. 21 of the Constitution, regulating same-sex relationships as a criminal offence destroying the inherent idea of freedom. Furthermore, Art. 19(1)(a) of the Constitution would have been violated by Section 377 IPC as it impedes the growth of personality and relation building endeavour to enter into a live-in relationship, which can be expressed through words, action, behaviour or any other form. Putting forward the decision in *NALSA* case, wherein transgenders have been recognised as a third gender, the rights of the LGBT community would also need equal constitutional protection. Also the individuals submitted, that Section 377 would involve several fundamental rights, namely right to privacy, right to dignity, equality, liberty and right to freedom of expression and referred to Art. 21 of the Constitution, which protects gender identity and, therefore, sexual orientation. Any ulterior decision would run counter to several cases, as *NALSA*, *Manoj Narula* and *Naz Foundation*, wherein the concept of constitutional morality and guarantee of choice of partner was laid down. Moreover, Section 377 would be a violation of the rights of LGBT persons to form associations (Art. 19(1)(c)), eligibility of such persons and the reputation as an element of personal security (referring to *Kishore Samrite v. State of U.P.*). At least, individuals further contended that LGBT persons are forced to seek assistance of private resources such as Gay Housing Assistance Resources to access safe and suitable shelter, fearing prosecution and persecution, under Section 377, so these members are in need of care and protection of the State.

By contrast, opponents argued that right of privacy should not be extended in order to enable unnatural offences. It was also argued that homosexual persons would be more susceptible and vulnerable to contracting HIV/AIDS. Confronting the argumentation of the individuals on *Puttaswamy*, opponents submitted that there wouldn't be an unlimited right to privacy, as such "acts are undignified and derogatory to the constitutional concept of dignity". Reliefs, given by the Court in the *NALSA* case would content that no further reliefs can be granted. As well, the family system would be "in shambles", the institution of marriage would be detrimentally affected, causing legal uncertainty. Unconstitutionality of Section 377 IPC would run counter to all religions practised in the country. In addition, opponents referred to *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Others*, therefore the interest of a citizen or a section of the society is secondary to the interest of the country or community.

In its decision, the Supreme Court held that the law could "subject the LGBT community to social pariah" and was "manifestly arbitrary", noting that its own decision in 2013 was "constitutionally impermissible". The law was dynamic rather than static and simply taking a static interpretation without envisaging the shifts would be against the principles of the Constitution. Further, the Supreme Court analysed the origins of Section 377 and its misuse causing serious damage to the LGBTQ community. Decisions of foreign courts were also taken in account, including Canada (2004), the U.S. (2015) and the ECHR decision in *Euan Sutherland v. U.K.* (2001), all of which had decriminalised homosexual behaviours, reinforced equality and/or permitted same sex marriage. Emphasising the "freedom of choice to perform sex for procreation or otherwise" the Supreme Court concluded, that "it cannot be said to be against the order of nature", as Section 377 IPC had asserted. However, any sexual act of non-consensual nature between two individuals continue to be an offence under Section 377. Finally, the Supreme Court held that "ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals, heterosexuals or lesbians, cannot be regarded as constitutional".

It will be exciting to see how this decision will affect the employment and immigration scenery in India and how the Indian law makers as well as the authorities may put the basic ideas, envisaged by the Supreme Court, into practice.

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