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India: Supreme Court's right to privacy judgment is a welcome step towards decriminalizing consensual same-sex relations

Today, the Indian Supreme Court delivered a landmark [judgment](#) declaring the right to privacy an intrinsic part of the right to life and liberty under Article 21 of India's Constitution.

The International Commission of Jurists (ICJ) welcomed a momentous and courageous judgment, where the Supreme Court took an expansive view of the right to privacy, and held that, at its core, privacy includes "the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation..."

As such, this judgment is an important step towards scrapping laws criminalizing same-sex activity in the country, the ICJ said.

"The judgment is a testament to the inspiring work of human rights activists and lawyers in India, who have shown the potential of the law to affirm human rights and equality," said Frederick Rawski, ICJ's Asia Director.

"The ruling could have far-reaching implications for a number of cases - including with respect to the criminalization of consensual same-sex relations - where laws, policy and practices have been challenged on the basis that they violate the right to privacy," he added.

The judgment clarified that the right to privacy is not spatially bound and exists beyond four walls as it "attaches to the person" and is not "lost or surrendered merely because the individual is in a public place."

Significantly, in explaining the ambit of the right to privacy, the Supreme Court held that sexual orientation is "an essential component of identity" and "equal protection demands protection of the identity of every individual without discrimination."

The Court also highlighted that laws criminalizing same-sex activity have a "chilling effect on the exercise of the right", posing "a grave danger to the unhindered fulfillment of one's sexual orientation, as an element of privacy and dignity."

Section 377 of the Indian Penal Code criminalizes voluntary "carnal intercourse against the order of nature with any man, woman or animal" and prescribes a range of penalties including life imprisonment.

In *Naz Foundation v. Govt. of NCT of Delhi*, the Delhi High Court in 2009 read down the application of section 377, holding, among other things, that insofar as it criminalizes consensual sexual acts, it violates Articles 21 (right to life and liberty), 14 (equal protection of the law) and 15 of the Constitution (freedom from discrimination) of the Indian Constitution.

However, in *Suresh Kumar Koushal* in December 2013, the Supreme Court reversed the 2009 Delhi High Court ruling, effectively recriminalizing homosexuality.

The petitioners challenged the ruling in *Koushal*, and in February 2016, the Indian Supreme Court referred a "curative petition" to a five-judge bench of the Supreme Court for consideration.

In today's judgment, the Supreme Court questioned the rationale in *Koushal*, and expressed disagreement with the manner in which *Koushal* dealt with the "privacy-dignity based claims of LGBT persons." It also found the reasoning in *Koushal* flawed and unsustainable for being discriminatory towards LGBT persons by calling them "a miniscule fraction of the country's population" and making that the basis for denying their right to privacy.

However, the Court held that since a challenge to section 377 is pending before a larger bench, its constitutional validity would be decided in the appropriate proceedings.

"The Supreme Court's judgment is indeed historic, but the real test of its impact will be whether the right to privacy it affirms is given effect in its true spirit in individual cases, so as to ensure that laws, policies and practices meet India's obligations under the Constitution as well as international standards," added Rawski.

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Background

While hearing the constitutional challenge to the Union Government's "Aadhaar card scheme" (mandatory biometric ID card programme), a three-member bench of the Supreme Court questioned the compilation of demographic biometric data by the Government on the ground that it violated the right to privacy. The Attorney General of India argued that the existence of a fundamental right of privacy in India was in doubt in view of two previous Supreme Court decisions (*M P Sharma* and *Kharak Singh*), and that the Indian Constitution did not specifically protect the right to privacy.

In August 2015, the three-member bench highlighted the “apparent unresolved contradiction in the law declared by this Court” on the right to privacy, and suggested a larger bench of the Supreme Court should authoritatively settle the matter.

On 18 July 2017, a Constitution Bench presided over by the Chief Justice of India referred the case to a nine-member bench of the Supreme Court to determine whether privacy is a constitutionally protected value in India. It is this bench that handed down today’s landmark judgment.

The judgment makes a number of references to India’s obligations under international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), to which India acceded in 1979.

Article 17 of ICCPR guarantees that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation” and “everyone has the right to the protection of the law against such interference or attacks.”

Under international standards, it is undisputed that the right to privacy covers consensual same-sex sexual relations. The UN Human Rights Committee, for example, has expressly held that the continued existence of laws criminalizing consensual same-sex activity “continuously and directly” interferes with the right to privacy, even where the laws are not implemented.

In February 2017, the ICJ released a [report](#) documenting challenges queer persons in India face while trying to access justice, including because of laws that criminalize real or imputed sexual orientation and gender identity. The ICJ recommended that the Government repeal section 377 of the Indian Penal Code, as well as other vaguely worded criminal laws that allow for discrimination and other abuse in their application. Failing that, the organization recommended that the Indian authorities should at least substantially revise the above-mentioned laws to ensure there is no scope for abuse in their enforcement.