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India's Supreme Court gets another chance to decriminalize same-sex relationships

The Indian Supreme Court is set to reconsider the criminalization of consensual same-sex relationships between adults, in response to a writ petition that has significant ramifications for addressing the full range of human rights violations based on real or perceived sexual orientation or gender identity in India, said the International Commission of Jurists today.

The Indian Supreme Court commenced hearing the case, *Navtej Singh Johar v. Union of India*, which is joined with five connected cases, today, concerning the constitutional validity of the criminalization of consensual same-sex relations between adults under Section 377 of the Indian Penal Code in response to writ petitions filed by several LGBTI individuals.

Section 377 criminalizes "carnal intercourse against the order of nature". Section 377 is a relic of the British colonial penal code and is replicated in several former British colonies even though it was finally repealed in Northern Ireland in 1982, following repeals in Scotland in 1980 and England and Wales in 1967.

"Hopefully, the Indian Supreme Court will follow and build upon the strong precedent set by the Delhi High Court in the *Naz Foundation v. Govt. of NCT of Delhi* that declared Section 377 and the criminalization of consensual same-sex relationships to be in violation of the Indian Constitution as well as international law in 2009," said Saman Zia-Zarifi, ICJ's Secretary General.

"There are real grounds for optimism as the Indian Supreme court as recently as August 2017 handed a landmark judgment in *Justice K.S. Puttaswamy and Another v. Union of India and Others* that declared the right to determine one's sexual orientation and gender identity as core to the right of privacy."

The ICJ has [documented](#) how section 377 has created a climate in which arbitrary arrest, extortion, harassment and blackmail of LGBTI persons in India thrives..

"The Indian judiciary's decision to read down section 377 in *Naz Foundation v. Govt. of NCT of Delhi*, which was then overruled by the Supreme Court, has been used by several other jurisdictions, such as Trinidad and Tobago as support for putting an end to criminalization of same-sex relationships. So the outcome of this petition before the Indian Supreme Court is of

significance not just to people in India, but to the fight against discrimination around the world,” Zarifi said.

“But even a good decision by the Indian Supreme Court will not end the discrimination against people on the basis of their sexual orientation or gender identity in India. It’s time for the Indian Parliament to repeal section 377 in its entirety and engage in a wide-ranging review to consider which gaps, if any, need to be filled, for example with respect to acts constituting rape or other sexual offences.” Zarifi said.

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Background

On 10 July, 2018, a five-judge bench of the Indian Supreme Court has commenced hearing a case concerning the constitutional validity of the criminalization of consensual same-sex relations between adults under Section 377 of the Indian Penal Code (S. 377, IPC) in the writ petitions filed by several LGBTI individuals. The joint cases arise from the petitions filed with the Supreme Court in the cases of *Navtej Singh Johar v. Union of India*, *Dr. Akkai Padmasali & Others v. Union of India*, *Keshav Suri v. Union of India*, *Arif Jafar v. Union of India*, *Ashok Row Kavi and Others v. Union of India*, and *Anwesh Pokkuluri and Others v. Union of India*. The petitioners have asked the Supreme Court to find that S. 377, IPC is unconstitutional in as much as it applies to consensual same-sex relations between adults, and have underscored that its existence violates their fundamental rights guaranteed by the Indian Constitution, including their rights to life, dignity, equality, non-discrimination, security, privacy, freedom of expression and association, liberty, sexuality and sexual autonomy, on the grounds of their sexual orientation.

S. 377, IPC criminalizes “carnal intercourse against the order of nature”; it has facilitated the persecution of people based on discrimination and hatred against their real or imputed sexual orientation, gender identity, gender expression, and/or sex characteristics (SOGIESC). Further, it has created a climate in which arbitrary arrest, extortion, harassment and blackmail of LGBTI persons in India thrives. As stated in *Navtej Singh Johar v. Union of India*, the existence of S. 377, IPC has rendered LGBTI persons “criminals in their own country” as it has “criminalized the very existence of LGBT persons by criminalizing their sexuality”.

Under India’s international law obligations, the Indian judiciary, as one of the three branches of the State, should respect, protect and fulfill the non-discrimination principle, the rights to equality before the law, equal protection of the law for all without discrimination, as well as the rights to privacy, liberty and security of the person, without discrimination on the

basis of a person's real or imputed SOGIESC. The existence of S. 377, IPC, which criminalizes consensual same-sex activity, thus violates India's international human rights law obligations. As the [Yogyakarta Principles](#) – which apply international human rights law to issues of sexual orientation and gender identity – clarify, the rights to equality, non-discrimination and privacy require States to “repeal all laws that criminalize consensual sexual activity among persons of the same sex who are over the age of consent.”

The Indian Supreme Court has been leading the way in the South Asia region and beyond by expanding the rights to equality, non-discrimination, dignity, and privacy to include the rights of the LGBTI individuals. Specifically, the Supreme Court has recognized the transgender person's right to self-identify their gender as protected by the constitutionally guaranteed rights to privacy, autonomy, and dignity in the case of *NALSA v. Union of India*. In another case, *Puttaswamy v. Union of India*, the Supreme Court, in a unanimous judgment handed down by a bench of nine judges has recognized privacy as essential to fulfilling “India's commitment to a global human rights regime”, and has recognized the right to determine one's sexuality, sexual orientation, gender identity, and gender expression as integral to the right of privacy. Further, the Supreme Court held that, “[t]he rights of the lesbian, gay, bisexual and transgender population are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity.”

The ICJ hopes that the Indian Supreme Court will continue in its progressive stead and recognize the full range of human rights violations faced by the LGBTI individuals due to S. 377, IPC and thereby decriminalize consensual same-sex relationships. The ICJ further hopes that the Court will respect, protect, and fulfill the LGBTI individual's human rights, including the twin rights to equality before the law and equal protection of the law, as well as their right to dignity, liberty, security of the person, freedom of expression, equality in employment, health, and privacy, as being essential to advancing their human rights.

The ICJ next calls on the Indian Parliament to repeal S. 377, IPC, in its entirety; pending repeal there should be a wide-ranging review to consider which gaps, if any, the repeal of S. 377 in its entirety would leave, e.g., with respect to acts constituting rape or other sexual offences, and to make recommendations as to how any eventual gaps found should be filled by Parliament.

India's jurisprudential developments have transnational value, especially across other common law countries. The ICJ, along with the rest of the international community is looking to the Indian Courts jurisprudential developments in the belief that they will provide an impetus to other countries to debate the constitutionality of similar criminal code provisions, and to reflect on their misuse in the context of consensual same-sex

consensual relations.

Read also

ICJ Practitioners' Guide No. 4: [Sexual Orientation, Gender Identity and International Human Rights Law](#) which provides legal practitioners, activists and policy-makers with detailed and practical references on international standards on sexual orientation, gender identity, gender expression, and sexual characteristics.

ICJ Comparative Law Casebook: [Sexual Orientation, Gender Identity, and Justice: A Comparative Law Casebook](#) which provides legal practitioners, activists and policy-makers a compilation of cases and analyses on sexual orientation, gender identity, gender expression, and sexual characteristics.

ICJ India 2017 Report: ["Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity](#) which provides a legal analyses of the discriminations and abuse faced by the LGBTI community in India based on over 100 interviews with LGBTI persons.