



# Supreme Court Decriminalizes Homosexuality

Supreme Court of India has scrapped a 158 years old British era law that banned same-sex relations between consenting adults in private.

- Section 377 of the Indian Penal Code (IPC) criminalizes private consensual sexual conduct between the adults of the same sex.
- Supreme Court has stated Section 377 as **“irrational, indefensible and manifestly arbitrary”**.

## Judgment of SC

- Supreme Court decriminalized a part of section 377 of the IPC stating that it violated the identity of an individual, the right to equality and the right to privacy.
- The provision will, however, continue to apply to cases of bestiality, carnal intercourse with minors and in case of no consent.
- In a **5-0 verdict**, a Constitution Bench has revised its own judgment given by a two-member Bench in Suresh Kumar Koushal (2013).

## Upholding Rights of Minority

- SC upheld the rights of the minority over the opinion of the majority. SC noted that under the constitutional scheme no minority group must suffer deprivation of a constitutional right because they do not adhere to majoritarian views.
  - The constitution is not for just the majority, the fundamental rights are guaranteed to “any person” and “any citizen”, and the sustenance of these rights does not require majoritarian sanction.

## Upholding rights of Individual

- SC noted the importance of individual liberty over community preferences. SC said that **“Denial of self-expression is like death”**.
  - Sexual autonomy is an important pillar and inseparable facet of individual liberty.
  - The sexual orientation of the LGBTQ community is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy.
  - In broadening the scope of the term “sex” prohibited as the ground of discrimination in Article 15. SC stated that it is not merely restricted to the biological attributes of an individual, but also includes their “sexual identity and character”.

## Homosexuality is not a Mental Illness

- SC has noted that modern psychiatric studies and legislation recognizes that gay persons and transgenders are not the person suffering from mental disorder and therefore cannot be penalized.
  - It also noted that the Mental Health Care Act, 2017 clears the misconceptions and stigma around homosexuality as mental illness.

## Against stigma faced by LGBTQ

- SC noted that decriminalization of homosexuality was necessary to bury the stigma related to

sexual orientation of individual in society.

- Sexual orientation implicates negative and positive obligations on the state. It not only requires state not to discriminate but also calls for the state to recognize rights which bring fulfillment to a same-sex relationship.

### **Not Against the Order of Nature**

- SC has noted that homosexuality is documented in 1,500 species and is not unique to humans hence it dispel the prejudice that it is against the order of nature.
  - It rejected the notion of natural and unnatural sexual relations and said that what nature gives is natural and the natural identity of an individual should be treated absolutely essential to his being.
  - It also rejected the logic of Suresh Koushal(2013) judgment, saying there is no cogent reason to support the idea that uncommon behavior is abnormal, and must be deemed ethically or morally wrong. And even behavior that may be considered wrong or unnatural cannot be criminalized without sufficient justification.

### **Constitutional morality triumphs over societal morality**

- SC judgment laid emphasis on **“transformative constitutionalism”**, that is, treating the Constitution as a dynamic document that progressively realizes various rights.
  - The judgment said that **“Constitutional morality is not confined to the literal text of the Constitution, rather, it must seek to usher in a pluralistic and inclusive society.”**
  - It also mentioned that Constitutional morality triumphs over social morality and personal freedom and the idea of individual rights are free from the pressure of public opinion.
  - The **doctrine of non-retrogression**, which means that once a right is recognized, it cannot be reversed was emphasized.
  - It also emphasized that “unbridgeable divide” between the moral values on which Section 377 is based and the values of the Constitution.

### **Way Forward**

- This judgment can be considered as a revolutionary one in a society like India. But every judgment has two parts, one is written and other is its execution. The written part is progressive and reformist and it’s execution includes sensitizing society and institutions in accepting what is written in this judgment. That may take time.
- Currently, the SC has restricted itself to look into only on the matters of decriminalization of homosexuality. The issues like gay marriages, adoption and ancillary civil rights of the LGBTQ community are yet to be recognized, which are now left for parliament. It is advised that Parliament should step in making society at large inclusive and progressive.

### **Naz Foundation vs Govt Of NCT of Delhi (2009)**

A 2001 plea against Sec 377 IPC was dismissed in 2004 but was remitted back to the High Court(HC) by the SC in 2006. In this judgment, HC decriminalizes consensual sexual acts of adults in private and said Section 377 to be violative of Articles 21, 14 and 15 of the Constitution.

### **Suresh Kumar Koushal & Anr vs Naz Foundation & Ors (2013)**

In this judgment two-judges, SC bench quashed HC order of 2009 and said that HC order is legally unsustainable.

### **National Legal Services Authority v. Union of India (2014)**

- In this judgment, the Supreme Court held that transgender people be treated as ‘third gender’ for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
- It upheld transgender persons’ right to decide their self-identified gender and directed the Centre and State Governments grant legal recognition of their gender identity.
- It also directed them to treat transgenders as socially and educationally backward classes of

citizens [OBCs] and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

### **KS Puttaswamy vs. Union of India, (2017) (Right to Privacy Judgement )**

- In this judgment, SC disagreed with its 2013 judgment and said that “we disagree with the manner in which Suresh Kumar Koushal v. Naz Foundation (2013) has dealt with the privacy dignity based claims of LGBT persons on this aspect.
- Section 377 was held to be a denial of the dignity of an individual and to criminalize his or her core identity solely on account of sexuality would violate Article 21.
- It further said that “sexual orientation is an essential attribute of privacy”.

**LGBTQ stands for Lesbian, gay, bisexual, transgender, queer.**

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