

Criminalisation of Homosexuality

Updated 25 October 2015

	India	
<p>National Law: <i>Indian Penal Code, 1860</i>¹</p> <ul style="list-style-type: none"> - S377: Unnatural Offences² <p>State of Jammu and Kashmir³:</p> <p><i>Ranbir Penal Code, 1989</i>⁴</p> <ul style="list-style-type: none"> - S377: Unnatural Offences 	<p>Maximum Penalties:</p> <ul style="list-style-type: none"> - Life imprisonment - Life imprisonment 	<p><u>Treaty Ratification</u></p> <p>CEDAW</p> <p>CRC</p> <p>ICCPR</p> <p>ICESCR</p>
<p>The law is applicable only to men.</p> <p>However, the 2009 Delhi High Court judgment in <i>Naz Foundation v Government of NCT of Delhi</i> recorded a case involving two women who wanted to live together where a magistrate’s court in Delhi observed that the case involved a hidden allegation under Section 377, thus stretching its application to an adult lesbian couple.⁵</p>		
<p>Enforcement</p>	<ul style="list-style-type: none"> - Whilst enforcement of Section 377 in India is rare, less than 200 prosecutions in 150 years according to one observation in a Supreme Court judgment⁶, the decision of the Supreme Court upholding the constitutional validity of Section 377 exposes the LGBT people to a constant threat of arrest and prosecution.⁷ See below some well documented cases demonstrating this threat under Section 377: - 18 December 2013: Yashwant Sinha, a senior BJP leader, called for the arrest of gay American diplomats and their partners. According to Sinha: <i>... after the Supreme Court ruling, it is completely illegal in our country, just as paying less wages was illegal in the US. So, why does not the government of India go ahead and arrest them and punish them?</i>⁸ - 3 November 2013: 13 men were arrested and charged under Section 377, although the law was unenforceable at the time as the Delhi High Court has decriminalised same-sex sexual acts. A later Supreme Court judgment upheld Section 377 and cast this case in a new light.⁹ - 4 January 2006: Lucknow city police arrested four men on charges of operating a ‘gay racket’ on the Internet, as well as of engaging in ‘unnatural’ sex. Police claimed they seized the men while having a picnic in a public place, and accused them of belonging to an ‘international gay club’.¹⁰ - 2007: A British man named Desmond Hope was arrested in Goa under Section 377. He was freed after a month in jail by a judge who reportedly noted that legal 	

	<p>appeals to decriminalise homosexuality were making their way through the courts, and such archaic laws should not apply in his case because they were about to be struck down.¹¹</p> <ul style="list-style-type: none"> - 2006: The 2009 Delhi High Court judgment in <i>Naz Foundation v Government of NCT of Delhi</i> recorded a case in which four policemen raped and sexually abused a gay man while holding him in jail overnight after being picked up by two policemen who accused him of being a homosexual. They used wooden sticks to assault him while also using sexual and degrading language.¹² - Lucknow arrests 2001: Healthcare workers arrested under Section 377 for distributing condoms. Remain in jail for 47 days as the courts refuse to grant bail.¹³
<p>Statements by Public Figures</p>	<p>After the Supreme Court upheld Section 377, statements by key public figures have generally been supportive of LGBT rights.</p> <ul style="list-style-type: none"> - 30 June 2015: After the Law Minister was quoted by a leading daily as having said that the government might look to scrap Section 377, he clarified: <i>'I never said that, I was misquoted... The topic was on USA legalising same-sex marriage. I just said that such decisions would need wide discussions in India.'</i>¹⁴ - 11 June 2015: Speaking at an interview, Justice Leila Seth, India's first female High Court Chief Justice said that <i>'sexual orientation should not be ground for discrimination'</i>.¹⁵ - 13 January 2015: After facing public criticism for his comments that the Goa government was contemplating setting up centres on the line of Alcoholics Anonymous for LGBT youth in order to make them <i>'normal'</i>, the state's Sports Minister later said that he was misunderstood: <i>'I was not talking about the LGBT (youths) but about drug addicted and sexually abused youths.'</i>¹⁶ - 11 December 2014: Former Supreme Court Chief Justice (2007-2010) and Chair of the National Human Rights Commission, KG Balakrishnan condemned the country's ban on same-sex relationships. He said: <i>'Human rights of the LGBT community need protection, and they should not be categorised as criminals.'</i>¹⁷ - 17 July 2014: India's Health Minister Harsh Vardhan had stated at an event that: <i>'Everybody, including gays, has human rights. It is the job of the government to protect their rights.'</i> However, he declined to make further comments when asked to explain his position as his party President had supported the Supreme Court judgment which had upheld the validity of Section 377.¹⁸ - 28 May 2014: Ram Madhav, the then spokesperson of RSS, India's leading Hindu think-tank and now a key member of the ruling party, BJP, had reportedly stated that while he did not glorify certain kinds of behaviour covered by Section 377, it

was debatable whether they should be considered a crime.¹⁹

- **27 May 2014:** The Law Minister in the current government, Ravi Shankar Prasad appeared evasive on the issue when asked whether the government was opposed to the deletion of Section 377. He stated: *'We will have to examine the Supreme Court judgment. I will have to examine what is the nature of the government's direction,'*²⁰
- **7 May 2014:** Indian Crown Prince, Manvendra Singh Gohil, the first openly gay Prince of India, criticised the recent Indian Supreme Court decision to re-criminalise homosexuality: *'We enjoyed our freedom for four years, and now we are back to square one.'*²¹
- **27 February 2014:** The current Finance Minister Arun Jaitley has repeatedly supported decriminalisation. Mr Jaitley, when he was still the leader of opposition in the Upper House, reiterated that although his party is yet to take an official position, his personal opinion is that he supports Justice Shah's judgment decriminalising homosexuality. He had openly supported the High Court's 2009 judgment in *Naz*.²²
- **15 December 2014:** Soli Sorabjee, a former Attorney General of India and one of the senior-most lawyers in the country, heavily criticised the Supreme Court's judgment upholding the validity of Section 377, stating that the judgment shows an intolerant mindset.²³
- **12 December 2013:** India's Law Minister Kapil Sibal reacted against the decision of the Indian Supreme Court to re-criminalise gay sex: *'The archaic law should be changed, millions of people are affected and these people should not be exposed to 377.'* He added that *'[India] must decriminalize adult consensual relationships.'*²⁴
- **12 December 2013:** Following the ruling of the Supreme Court upholding the validity of section 377²⁵, a number of Indian politicians spoke both in support of and against the criminal provisions, though mostly against Section 377:
 - o Rahul Gandhi, the Vice President of the Indian National Congress (then the ruling party), spoke of the importance of personal freedom.
 - o P. Chidambaram, the then Indian Finance Minister, spoke of his disappointment at the decision, adding that: *'[India] must explore ways and means in which this judgement can be reversed very quickly.'*
 - o Indian National Congress President, Sonia Gandhi expressed her pride at the tolerance and inclusiveness of India:

We are proud that our culture has always been an inclusive and tolerant one... I hope that Parliament will address this issue and uphold the Constitutional

	<p><i>guarantee of life and liberty to all citizens of India, including those directly affected by this judgment.</i></p> <ul style="list-style-type: none"> ○ Yogi Adityanath and Meenakshi Lekhi - two BJP (currently ruling party, then in opposition) leaders supported the Supreme Court ruling. The former stated that he would continue to oppose any effort to decriminalise homosexuality, while the latter argued that the provision protects men from exploitation.²⁶ - 27 May 2013: Subramanian Swamy, the leader of the Janata Party was heavily criticised for referring to homosexuality as a mental disorder on twitter.²⁷
<p>Persecution and Discrimination</p>	<ul style="list-style-type: none"> - 19 September 2015: Observing that a section of society may perceive homosexuality as akin to 'social evils', the Supreme Court of India has admitted an appeal by the State of Gujarat against a High Court order allowing entertainment tax exemption to a Gujarati film that depicts the '<i>sufferings of a homosexual</i>' prince from the state. This has affected the release of the film. The bench also stated that its interim order, denying tax exemption to K R Devmani's <i>Meghdhanyshya - The colour of life</i>, shall continue.²⁸ - 31 August 2015: A decade after two pioneering reports from the region, a report by Ondede documented powerful testimonies of transgender people in the State of Karnataka, showing that the transgender community continues to face harassment, abuse and violence, despite advances in transgender rights as articulated in the Supreme Court <i>NALSA judgment</i> (2014).²⁹ - 13 July 2015: Four youths were arrested in Coimbatore, south India for robbing and killing a gay man. The gang robbed four others in the same way, by luring men at a bus station toilet to a nearby lake, where they were beaten and robbed.³⁰ - 7 July 2015: Police in the north Indian state of Uttar Pradesh arrested two men in the murder case of a transgender person after recovering alleged murder weapons from their possession.³¹ - 1 June 2015: According the group LGBT Collective in the Telangana state, there have been 15 instances of 'corrective rapes' that have been reported in the group in the last five years.³² - 28 May 2015: The Delhi Government ordered a probe after a news report exposed some Delhi doctors offering to 'cure' homosexuality with hormone therapy, seizure inducing drugs and even electric shocks.³³ - 10 May 2015: A transgender person allegedly committed suicide after being humiliated by some youths in the state of Tamil Nadu.³⁴ - 20 April 2015: A doctor in Delhi committed suicide when she found out about her husband's gay relationship. The husband was later arrested.³⁵

- **17 January 2015** : Four men, who used to extort money from transgender persons, were arrested for murdering Pravalika (25) after she refused to pay them and threatened with complaining to the police.³⁶
- **11 December 2014**: According to Pehchan, a healthcare charity in India, there has been an increase in instances of persecution after the Supreme Court's judgment upholding Section 377: '*Across the country, we are getting many more reports about threats, intimidation, police harassment, rapes and especially cases of blackmail and extortion,*'. The organisation had reportedly recorded 2,064 cases of violence against LGBT in one year after the Supreme Court judgment.³⁷
- **24 September 2014**: A transgender person reportedly died after she was pushed out of a running train near Bangalore. She was speech-impaired and used to beg on trains.³⁸
- **20 June 2014**: A group of men were arrested for extortion after two of the men recorded a video while having sex with a gay doctor and then blackmailed him. The men were charged both with extortion and with unnatural sex acts under the IPC. According to reports, the doctor will also be charged.³⁹
- **23 May 2014**: A gay man was allegedly threatened with extortion and beaten after being lured into dating by a model and his female accomplice.⁴⁰
- **23 April 2014**: Inhabitants of some of the larger Indian Cities such as Delhi have been noted for their progressive attitude towards sexual minorities, but in many states LGBTI people still face high levels of discrimination. In April, a gay man was granted asylum in Australia having reportedly faced death threats and physical assault at the hands of his family in an attempt to force him into an arranged marriage.⁴¹
- **10 April 2014**: Four men were arrested for attempting to blackmail a gay man over his sexuality. The police were initially reluctant to act due to the man's sexuality and the nature of the blackmail; however, with the help of a local politician the men were arrested.⁴²
- **11 February 2014**: A 23-year-old man reported being forced into giving two police officers oral sex. The officers stopped the man, whom they had seen at a gay pride event, and attempted to rape him. Speaking on his decision not to file a police complaint, the man said: '*I came out of the closet when I was 15 years old. Had homosexuality been legal, I would have had the courage to file a complaint. Also, my attackers were cops. How can I expect any justice from them?*'⁴³
- **2 July 2009**: The Delhi High Court's judgment in *Naz Foundation v Government of NCT of Delhi* records several instances of prosecution under Section 377 as well as explains the breadth of evidence that the petitioners had placed before the Court

	<p>documenting persecution of LGBT people by police, non-state actors as well as family members.⁴⁴</p> <ul style="list-style-type: none"> - 18 June 2004: A 21-year-old <i>hijra</i> (member of a traditional male-to-female transsexual community in South Asia) living in Bangalore City was raped by several men. However, when she attempted to seek redress by the police, she was arrested, verbally harassed and tortured.⁴⁵ - 2001-2003: The violation of the rights of transgender persons have been documented in the year 2001 and 2003 by way of two reports by the People’s Union for Civil Liberties - Karnataka. These pioneering works documented the harassment and violence faced by transgender persons at the hands of the police, public and also their family and often the medical establishment.⁴⁶
Legislative News	<ul style="list-style-type: none"> - 31 August 2015: A report by Ondede on the situation of transgender persons stated that the Criminal Tribes Act, a British colonial law that deemed certain people criminal merely by virtue of them belonging to a particular tribe has been re-introduced into the law books of the State of Karnataka by way of section 36A of the Karnataka Police Act. This gives the police the power to regulate ‘Eunuchs’. It puts the transgender community under surveillance and threat of illegal detention.⁴⁷ - 24 April 2015: The Rights of Transgender Persons Bill 2014 was passed by the Upper House of the Parliament with cross-party support, becoming the first private member’s bill passed in the last 45 years. The Bill deals with a number of different aspects ranging from social inclusion, rights and entitlements, financial and legal aid, education, skill development to prevention of abuse, violence and exploitation. The Bill now has to be passed by the Lower House of the Parliament and obtain presidential assent before it becomes an Act.⁴⁸ A later report suggested that the Central Government was worried that the Bill could provide a strong opening for decriminalisation of homosexuality and is likely to introduce another official legislation that could replace the private members' bill.⁴⁹ - 24 March 2015: Voted in favour of a failed Russian draft decision at the UN General Assembly’s Fifth Committee (Administrative and Budgetary) that would have had the Secretary-General withdraw his bulletin laying UN staff benefits for same-sex couples.⁵⁰ - 2014-2015: After a 2014 Supreme Court of India judgment recognising the Constitutional rights of transgender persons⁵¹, several governmental institutions have taken steps to recognise them as a ‘third gender’: <ul style="list-style-type: none"> o Government Census: After being counted as 'males' by the Indian Government's Census department for decades, the transgender community

for the first time found mention in a survey report released by the National Crime Records Bureau making it the first time that transgender persons have been recognised as a separate category in an official survey undertaken by the Ministry of Home Affairs.⁵²

- Reserve Bank of India: To help transgender persons open bank accounts and avail related services, the Reserve Bank directed banks to include a separate column 'third gender' in all their forms and applications.⁵³
- The University Grants Commission has decided to include transgender people as a separate category for its scholarship and fellowship schemes.⁵⁴

- **19 November 2014:** UN General Assembly's Third Committee adopted a resolution on Extrajudicial, summary or arbitrary executions.⁵⁵ This is introduced biennially and calls upon States to investigate killings based on discriminatory grounds, including killings that target people based on their sexual orientation or gender identity. India voted in favour of adoption this resolution.⁵⁶

- **15 April 2014:** The Supreme Court of India's judgment in *National Legal Services Authority v. Union of India* [Writ Petition (Civil) No. 400 of 2012] recognised the constitutional rights of transgender people. Explaining that the constitutional rights guaranteed under articles 14, 15, 16, 19 and 21 are 'gender neutral' and applicable to all human-beings, the Court stated that:
discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution..." [para. 77].
The mention of the term 'sexual orientation' along with 'gender identity' is significant as it gives a broader meaning to the constitutional guarantees.⁵⁷

- **11 December 2013:** In the case of *Suresh Kumar Kaushal v. Naz Foundation (Civil Appeal No. 10972 of 2013)*, the Supreme Court of India overturned a landmark 2009 decision in which the Delhi High Court declared section 377 of the Indian Penal Code unconstitutional to the extent it makes consensual homosexual intimacy in private a criminal offence.⁵⁸ The Central Government, along with several other concerned parties had subsequently filed a review petition against the Supreme Court's judgment.⁵⁹ After the review petitions failed, three curative petitions filed against this judgment are set to be heard by the Supreme Court.⁶⁰

- **9 July 2012:** (UPR) With regard to the protection of LGBT persons, the delegation stated that article 15 of the Constitution clearly prohibited discrimination on grounds of religion, race, caste, sex or place of birth and article 16 provided for equality of opportunity in matters of public employment.⁶¹ India accepted the recommendations to study the possibility of eliminating any criminalisation of same sex relations and to ensure access to information and counselling on sexual and reproductive health and rights as set out in its National Population Policy.⁶² The delegation did not expressly

	<p>accept the recommendation to take measures to address violence and discrimination directed towards persons based on their sexual orientation, especially related to employment.</p> <p>- 23 May 2008: (UPR) Responding to a question raised during the Working Group discussions regarding section 377 and measures to ensure equality on the ground of sexual orientation, India's delegation acknowledged that: <i>'the concept of homosexuality itself does not find a mention in the Indian Penal Code and it can be a matter of debate whether it is "against the order of nature".'</i> The delegation also added that the matter was referred to the Law Commission of India, which took the view that Indian society does not currently accept homosexuality as an acceptable form of behaviour.⁶³</p>
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¹ The law is : <http://ncw.nic.in/acts/THEINDIANPENALCODE1860.pdf>

² *Indian Penal Code, 1860, s.377: 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1*[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'*

³ The Indian Penal Code, 1860 extends to the whole of India except the State of Jammu and Kashmir

⁴ Full text unavailable. See: Lucas Paoli Itaborahy & Jingshu Zhu, *State-Sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love* (International Lesbian, Gay, Bisexual, Trans and Intersex Association May 2013) <<http://www.refworld.org/pdfid/519b6c2f4.pdf>> accessed on 14 September 2015.

⁵ *Naz Foundation v Government of NCT of Delhi*, Delhi High Court, 2 July 2009, 160, DLT 277, p 20

⁶ *Suresh Kumar Kaushal v. Naz Foundation*, Civil Appeal No. 10972, 2013, para. 43. :

http://www.humandignitytrust.org/uploaded/Library/Case_Law/Naz-judgment-SC.pdf

⁷ See the persecution and discrimination section of this report generally

⁸ 'Act against gay US officials, Yashwant Sinha says', *Times of India*, 18 December 2013,

<<http://timesofindia.indiatimes.com/india/Act-against-gay-US-officials-Yashwant-Sinha-says/articleshow/27558809.cms>> accessed on 19 July 2014

⁹ Feder, J.L., 'What Happened When India Decided It Was OK With Homosexuality — Then Violently Changed Its Mind', *BuzzFeed*, 17 February 2014, <<http://www.buzzfeed.com/lesterfeder/what-happened-when-india-decided-it-was-okay-with-homosexual#.rdl7z7Y8n>> accessed on 10 September 2015

¹⁰ *India: Repeal Colonial-Era Sodomy Law*, Human Rights Watch, 11 January 2006, <<https://www.hrw.org/news/2006/01/11/india-repeal-colonial-era-sodomy-law>> accessed on 10 September 2015

¹¹ Menezes, V., 'Macaulay's revenge: A giant step backwards on Section 377', *The Times of India*, 21 December 2013) <<http://timesofindia.indiatimes.com/city/goa/Macaulays-revenge-A-giant-step-backwards-on-Section-377/articleshow/27695491.cms>> accessed on 11 September 2015

¹² *Naz Foundation v Government of NCT of Delhi*, Delhi High Court, 2 July 2009, 160, DLT 277, p 20

¹³ Human Rights Watch, *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*, 2002 <<http://www.hrw.org/reports/2002/india2/>> accessed on 10 September 2015

¹⁴ Scroll staff, 'Not only is BJP refusing to scrap Section 377, it's back to saying gays have a 'genetic disorder'', *Scroll.in*, 30 June 2015, < <http://scroll.in/article/737871/not-only-is-bjp-not-scrapping-section-377-its-back-to-saying-gays-have-a-genetic-disorder>> accessed on 11 September 2015

¹⁵ Saluja, P., "'Sexual orientation should not be ground for discrimination" - Justice Leila Seth', *Bar & Bench*, 11 June 2015, <<http://barandbench.com/sexual-orientation-should-not-be-ground-for-discrimination-justice-leila-seth/>> accessed on 11 September 2015

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