

Section 377 and beyond

There is finally good reason to believe that consensual gay sex may once again be decriminalised. The [ongoing hearing before a five-judge Constitution Bench](#) of the Supreme Court indicates that there is now a better appreciation of the need for equal constitutional protection to all individuals without any discrimination than was the case in 2013, when a [two-member Bench declined to read down Section 377](#) of the Indian Penal Code as homosexuals constituted only a “minuscule minority”. The Centre’s stand was believed to be critical when the current hearing began this month. The Union government is cautiously supporting the cause, but it has stopped short of taking a categorical position. By [leaving it to the Supreme Court’s wisdom](#) to decide on the constitutionality of Section 377, the Centre has signalled it is not opposed to the decriminalisation of same-sex relationships as long as these are limited to consensual acts between adults in private. At the same time, its position is hedged against the possibility that the Constitution Bench, currently reconsidering the court’s 2013 judgment upholding the validity of Section 377, may venture into other rights for the LGBTQs relating to marriage and inheritance. In the event of the court going into issues and rights that are not slated for reconsideration, it wants to file a detailed counter-affidavit spelling out its stand.

Observations by the judges of the Bench, including the Chief Justice of India, indicate that it is now focussing only on Section 377. However, at least one judge has observed that the question involved was not only one relating to sex, but the right to life and the right to privacy of those in such relationships. The current hearing is taking place against the backdrop of a [nine-member Bench’s verdict last year](#) in *Justice K.S. Puttaswamy v. Union of India*, which said “the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution”. In other words, a whole gamut of rights flowing from the decriminalisation of homosexual relationships must be examined, if not now, then at least as and when they arise. Obviously worried about the reaction of some religious and conservative sections if homosexuality is decriminalised, the Centre has sought to dissuade the court from going into other related rights. Its apprehension, perhaps, is that once homosexuality is no more an offence, it may lead to demands to legalise same-sex marriages and inheritance by survivorship among gay partners. While the current focus is on the urgent need to overturn the retrograde judgment of 2013 in *Suresh Kumar Koushal*, the extension of constitutional rights to citizens, irrespective of gender and sexual orientation, is long overdue.

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