



ONE STEP FORWARD, TWO STEPS BACKWARDS: IMMIGRATION BENEFITS FOR SAME SEX AND DOMESTIC PARTNERS IN INDIA

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The question of immigration benefits to same sex couples is still a far cry in India. India not only disallows same sex marriages, it also currently criminalizes relationships between same sex partners, terming them as unnatural. Section 377 of the Indian Penal Code (“IPC”), an archaic law, was introduced in 1861 during the British rule in India, which criminalized “carnal intercourse against the order of nature with any man, woman or animal” with a maximum sentence of life imprisonment.

The struggle to strike down Section 377 of the IPC as unconstitutional has been a long one, spearheaded by several activists from Non-Governmental Organizations (“NGOs”) fighting for the rights of the Lesbian Gay Bisexual Transgender (LGBT) community. On July 2, 2009, a historic judgment decriminalizing homosexuality was passed by the Delhi High Court in favor of Naz Foundation, an NGO working in the fields of HIV/AIDS intervention and prevention and for the rights of the LGBT community. An appeal was filed challenging this decision in the Supreme Court of India. On December 11, 2013, the Supreme Court reversed the decision of the Delhi High Court, thereby criminalizing homosexual intercourse between consenting adults. The apex court shifted the onus onto parliament to decide whether to repeal the provision, arguing that the courts could not make such decisions under the existing laws. The apex court further observed that there was “no constitutional infirmity” in the 377 law. This judgment has sparked widespread condemnation throughout India and internationally, and has been criticized as regressive. Naz Foundation plans to file a review petition challenging the decision of the

Supreme Court soon.

As Indian law does not recognize same sex marriages, there are no provisions in Indian law according immigration benefits to same sex partners. It is therefore not possible to qualify for an entry visa to accompany one's partner who may be entering India on a long term employment visa. At the most, the partner can come to India on tourist visa (for a maximum period of 180 days).

However, there have been isolated incidents and trends worth reporting. In November 2013, a senior IFS officer was demoted from her post in the Ministry of External Affairs ("MEA") passport and visa division for refusing a visa to the same sex spouse of an American diplomat. She refused the visa on the ground that same sex marriages are not legal in India and the diplomat's spouse could not therefore be granted a diplomatic visa and recognized as a "spouse" in India. A senior official in the MEA's American division suggested that although there is no rule in India to give visa to a gay couple, the diplomat's partner could be given visa as a family member as it had been done in the past. In light of India's opposition to the arrest of its Deputy Consul General in New York, one politician from the Bhartiya Janata Party has shrilly suggested that the same sex partners of American diplomats be prosecuted under Section 377 as a retaliatory measure. It is hoped that this inappropriate statement be viewed as an isolated one and not consistent with mainstream opinion.

As for domestic and unmarried partners, Indian law did not, till recently recognize the relationships between domestic, live-in partners. On June 17, 2013, the Madras High Court held that for a valid marriage, all customary rights need not be followed and subsequently solemnized. As long as the couple is not disqualified by law from marrying each other, and a third party's rights are not affected, the couple can be declared to be spouses by the court. This declaration would be on the basis of whether they have had a sexual relationship. The Court held that if a woman aged 18 and above, and a man aged 21 and above, have a sexual relationship, they will be treated as husband and wife, especially if the woman becomes pregnant. Even if the woman does not become pregnant, if there is "strong documentary evidence to show existence of such relationship," they will still be termed "husband" and "wife." However, this ruling is only applicable to the state of Tamil Nadu and cannot be enforced elsewhere in India.

In a recent judgment of November 26, 2013, the Supreme Court of India had

dealt with the issue of live-in relationships but it was within the purview of the Domestic Violence Act 2005 (the "DV Act, 2005"). The Supreme Court has held that a "live-in relationship" would not amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" under Section 2(f) of the DV Act, 2005 if the lady in such a relationship knew that the male partner was already married. All live-in relationships are not relationships in the nature of marriage, but they can still come within the ambit of the DV Act, 2005.. The judgment was delivered by a Division Bench of Justices KS Radhakrishnan and Pinaki Chandra Ghose in an appeal filed by one Indra Sarma (Appellant) against the decision of the Karnataka High Court. This ruling will only apply to domestic partners of opposite sexes and will not be applicable to same sex partners in view of the recent decision of the Supreme Court in the Suresh Kumar Koushal case

It has to be kept in mind that as these issues are very recent and path-breaking as far as Indian laws are concerned, there has been no recognition, thus far, in Indian law, of same sex partners or domestic / unmarried partners with respect to Indian immigration. It is quite obvious that if India does not change its outlook to according benefits to same sex spouses or partners, it will be disadvantageous to the country as fewer people may wish to travel to India for tourism and business. More important, failure to recognize same-sex relationships, especially in light of a regressive penal provision in 377, is not in keeping with the principles and traditions of the world's largest democracy country that has otherwise accommodated diverse people and beliefs through its history.

Update: In a very positive development, the Indian government [filed a review petition](#) in The Supreme Court on December 20, 2013 challenging the earlier judgment upholding Section 377 stating, "Section 377 IPC, insofar as it criminalizes consensual sexual acts in private, falls foul of the principles of equality and liberty enshrined in our Constitution."

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Section 377: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for 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 offense described in this section.

Naz Foundation vs. Government of NCT of Delhi 2010CriLJ94.

Suresh Kumar Koushal vs. Naz Foundation decided by the Supreme Court of India on December 11, 2013.

<http://www.indianexpress.com/news/ifs-officer-denies-visa-to-spouse-of-gay-american-diplomat-moved-out/1201023/>

Aysha vs. Ozir Hassan 2013 (5)MLJ 31.

Indra Sarma vs VKV Sarma, Supreme Court of India, Criminal Appeal no. 2009 of 2013 decided on November 26, 2013.

Supra , see footnote 3.