

## **Rights of Homosexuals (LGBT Community) in India: An Analytical Study**

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### **Abstract**

*This research paper analytically represents the rights of the homosexual community in India as Homosexuality in India has a long history, dating back to ancient texts like the Kamasutra. However, its status changed during British colonial rule when Section 377 of the Indian Penal Code was introduced, criminalizing “carnal intercourse against the order of nature.” Post-independence, Section 377 remained a legal provision outlawing homosexual acts. Despite this, social attitudes towards homosexuality have evolved, particularly among younger, urban populations. LGBT individuals face harassment, blackmail, and violence from families and authorities, with little legal recourse. The Indian Supreme Court declared Section 377 unconstitutional in Navtej Johar v. Union of India (2018), but it did not explicitly amend the text of Section 377 IPC, leaving room for misuse. The Constitution guarantees fundamental rights to equality, life and personal liberty, and non-discrimination on grounds including sex. But homosexuals do not have the right to marry under the Special Marriage Act.*

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## **Introduction**

### **What is the LGBT Community**

LGBT is a short form of the English term in which the first letter “L” stands for Lesbian means “a woman who is sexually attracted to other women”, the second letter “G” stands for Gay means “a man who is sexually attracted to other man”, the third letter “B” standd for Bisexual means “a person who has both male and female organs or is sexually attracted to both men and women”, and the fourth letter “T” stands for Transgender means “a person whose gender identity is different from the gender they were thought to be at birth”.<sup>1</sup>

### **Historical Context of Homosexuality in India**

Homosexuality has been documented in ancient Indian texts such as the Kamasutra. However, its status changed during British colonial rule when Section 377 of the Indian Penal Code<sup>2</sup> was introduced, criminalizing “carnal intercourse against the order of nature”. Post-independence, Section 377 remained a legal provision outlawing homosexual acts.

Section 377 of the Indian Penal Code penalized “**carnal intercourse against the order of nature**”. It was frequently used to harass and blackmail LGBT individuals. Judicial challenges to the law gained momentum in the 2000s. In 2018, the Supreme Court of India ruled Section 377 to be unconstitutional insofar as it criminalized consensual homosexual acts between adults in private.

### **Social Attitudes towards Homosexuality**

While traditional Indian society viewed homosexuality as taboo, attitudes are evolving faster among younger, urban populations due to greater exposure and civil society advocacy. However, stigma and discrimination persist, especially outside of major cities.

### **Recognition of Same-sex Relationships**

In the absence of marriage rights, LGBT individuals have no legal recognition or protection for their relationships or families. Issues around inheritance, adoption, and surrogacy remain unclear in law.

### **Discrimination and Violence Faced**

Reports indicate LGBT individuals regularly face harassment, blackmail, and violence from families and authorities with little legal recourse. Hate crime laws and support services are inadequate.

### **Definitions**

LGBT/LGBTQ refers to lesbian, gay, bisexual, transgender and queer individuals.

Section 377 IPC refers to Section 377 of the Indian Penal Code which criminalized “carnal intercourse against the order of nature”.

**Homosexuality**, is sexual interest in and attraction to members of one’s own sex. The term *gay* is frequently used as a synonym for homosexual; female homosexuality is often referred to as lesbianism.<sup>3</sup>

**Heterosexuality** refers to sexual orientation or romantic attraction to people of the opposite sex. Heterosexual meaning - of, relating to, or characterized by sexual or romantic attraction to or between people of the opposite sex.<sup>4</sup>

**Marriage** refers to the legal union between two individuals as spouses, recognized by law.

Civil union refers to a legally recognized arrangement similar to marriage that provides the benefits of marriage to same-sex couples.

### **Historical Context Origins in Ancient Texts**

References found in ancient texts such as the Kamasutra depict same-sex acts between men as a normal aspect of sexuality practiced during that period. Passages in ancient scriptures such as the Vedas and Upanishads do not explicitly condemn homosexuality, indicating more ambiguous or accepting social attitudes at the time.

### **Status during the Medieval Period**

During the medieval period, Hindu and Islamic norms became more patriarchal and homosexual acts began facing social stigma. Under Mughal-era Sharia laws, same-sex acts were punished, though records suggest that this was interpreted restrictively to non-consensual or public acts.

### **Criminalization under British Rule**

Section 377 of the Indian Penal Code, introduced in 1860, criminalized “carnal intercourse against the order of nature” without explicitly referring to homosexuality. The British colonial administration enacted Section 377 primarily to suppress political dissent and cultural practices challenging Victorian morality rather than due to religious influence.

### **Post-independence Period**

Despite independence, Section 377 was retained in the Indian legal code, continuing the criminalization of homosexual acts.

Conservative social attitudes gained influence due to factors like nationalism, modernization and the rise of fundamentalist movements.

## **Evolution of Social Attitudes**

Over different historical periods in India, the social status and acceptance of same-sex relationships varied from ambiguity to stigma depending on prevailing cultural and political norms.

## **Current Legal Status Decriminalisation of Homosexuality**

In **Navtej Johar v. Union of India (2018)**<sup>5</sup>, the Supreme Court of India declared Section 377 of the Indian Penal Code unconstitutional insofar as it criminalized consensual sexual acts between adults in private.

The Court recognized the right to sexuality and gender identity as integral to the fundamental rights to dignity, autonomy and privacy under Articles 14, 15 and 21 of the Constitution of India.

However, the judgment did not explicitly amend the text of Section 377 IPC, leaving scope for misuse of the law against LGBT individuals. There have been calls to explicitly decriminalize homosexuality through the amendment of Section 377 IPC.

## **Constitutional Rights of LGBT Individuals**

The Constitution guarantees the fundamental rights to equality (**Article 14**), life and personal liberty (**Article 21**), and non-discrimination on grounds including sex (**Article 15**).

However, in the absence of marriage or relationship recognition rights, LGBT individuals have no legal protection or entitlements from same-sex partnerships.

Issues around adoption, surrogacy, inheritance and next of kin status within same-sex families remain unaddressed.

## **Other Discriminatory Laws**

Indian law currently lacks comprehensive hate crime legislation addressing violence against LGBT individuals. No explicit anti-discrimination laws exist on grounds of sexual orientation or gender identity in sectors like employment, education and healthcare. A holistic law reform is needed to address all aspects of discrimination and ensure equality for LGBT individuals as guaranteed under the Constitution.

## **Constitutional Provisions Right to Equality (Article 14)<sup>6</sup>**

Sexual orientation and gender identity are recognized as grounds analogous to sex and are therefore covered under the right to equality and equal protection of laws guaranteed under Article 14 of the Constitution.

Any discrimination by the State or its authorities based solely on sexual orientation or gender identity amounts to a violation of the fundamental right to equality before the law under Article 14.

### **Right to Life and Personal Liberty (Article 21)<sup>7</sup>**

Sexual orientation is an essential component of an individual's personality and identity and is protected as an integral part of the right to life and personal liberty under Article 21. The criminalization of consensual sexual acts between persons of the same sex solely based on their sexual orientation violated the fundamental right to life and personal liberty of LGBT individuals.

### **Right to Privacy**

The right to privacy, while not explicitly mentioned, is an intrinsic part of the right to life and personal liberty under Article 21 and the other fundamental freedoms guaranteed by Part III of the Constitution. The decriminalization of consensual homosexual acts between adults was based on the recognition of a zone of privacy wherein individuals can freely express their identities and make intimate personal decisions without interference from the state. Explicit recognition of the fundamental right to privacy will strengthen constitutional protection for LGBT individuals to freely express their sexual orientation and gender identity without discrimination or stigma.

### **Judicial Interpretations**

#### **Naz Foundation v. Govt. of NCT of Delhi (2009)<sup>8</sup>**

In this landmark judgment, the Delhi High Court read down Section 377 IPC to decriminalize consensual homosexual acts between adults in private. The Court relied on principles of equality, non-discrimination and protection of personal intimacy under Articles 14, 15 and 21 of the Constitution. It held that criminalizing homosexuality was a violation of fundamental rights.

The court ruled that Section 377 IPC denies a person's dignity and criminalizes his/her core identity solely on account of his or her sexuality.

#### **Suresh Kumar Koushal and another v. Naz Foundation and Others (2014)<sup>9</sup>**

The Supreme Court overruled the Delhi High Court's judgment that held that Section 377 IPC does not violate constitutional rights. The apex court held that homosexuality was against Indian culture and morality and it was up to the legislature to consider reform of Section 377 IPC.

#### **Navtej Singh Johar v. Union of India (2018)<sup>10</sup>**

In a historic judgment, the Supreme Court reviewed its earlier judgment in Suresh Koushal and declared Section 377 IPC to be unconstitutional insofar as it criminalizes consensual homosexual acts between adults in private. The Supreme Court in its judgement specifically said that the right to privacy and Protection of

sexual orientation lie at the core of fundamental rights guaranteed by Art 14, Art 15, Art 21 and Art 19 of the Constitution. The Court held that criminalization of private acts between consenting adults violated fundamental rights to dignity, expression and privacy under Articles 14, 15, 19 and 21 of the Constitution.

### **Supriyo v. Union of India (2023)<sup>11</sup>**

On October 17, 2023 a 5-judge bench of the supreme court unanimously held that there is no fundamental right to marry and that the court could not recognize LGBTQIA+ persons right to marry under Special Marriage Act. Some key takeaways from the judgment are:-

1. **No Right to Civil Union Without Legal Framework:** Like marriage, civil unions can only be recognized legally by a statute that is passed. Such a legal status cannot be mandated or created by the Court. Comparative Laws.
2. **No legal status for Queer couples:** Queer couples, by virtue of their right to privacy, autonomy, and choice, are entitled to develop emotional, mental, and sexual relationships.

Nevertheless, this does not confer upon them any legal standing or the right to enter into matrimony.

3. **No right for Queer people to adopt children:** Under the current legal framework, gay couples are not allowed to adopt. It is upheld that unmarried people are not permitted to adopt under Central Adoption Resource Authority Regulations (CARA Regulations), specifically Regulation 5(3). However, in situations where single people are permitted to adopt and then establish non-marriage partnerships, CARA and the Central Government ought to take the consequences for de facto families into account.

### **Decriminalization of Homosexuality in Foreign Jurisdictions**

Several countries have struck down laws criminalizing homosexual acts on grounds of violating the privacy, dignity and anti-discrimination principles. These include the UK (1967), Canada (1969), South Africa (1998), Argentina (1987), Brazil (1830) and Belize (2016). In *Lawrence v. Texas* (2003), the US Supreme Court ruled that laws criminalizing private homosexual conduct between consenting adults violate due process. The court recognized a due process liberty interest in intimate relationships.

In *Naz Foundation v. Govt. of NCT of Delhi* (2009), the Delhi High Court relied on international precedents to hold that Section 377 IPC violated the fundamental rights to equality, life and dignity. However, the Supreme Court re-criminalised homosexual acts in 2013 before decriminalising them again in 2018.

### **Recognition of Same-sex Relationships**

Several countries have legalized same-sex marriage through legislation or court orders, including Canada (2005), South Africa (2006), Argentina (2010), Brazil (2013), Ireland (2015) and Germany (2017). Other countries recognize same-sex civil partnerships or civil unions that provide similar rights to marriage, such as the UK, France, Portugal, Netherlands, Australia, New Zealand and Taiwan.

Most countries that recognize same-sex relationships accord rights around inheritance, social security, immigration, hospital visitation, taxation and pension benefits to married/partnered couples.

### **Anti-discrimination Laws**

Laws in the European Union, Canada, South Africa, Australia, New Zealand and some US states comprehensively ban discrimination based on sexual orientation in employment, education, healthcare and provision of goods/services. Enforcement mechanisms include complaints to independent human rights commissions, tribunals, courts and remedial measures like affirmative action, diversity training, and compensation.

### **Adoption and Surrogacy Rights**

Countries like Canada, UK, Ireland, Belgium, Spain, Portugal and some US states have opened up adoption and guardianship to same-sex couples on an equal basis as heterosexual couples.

Jurisdictions like the UK, Netherlands, Australia, Israel and some US states also allow access to assisted reproduction techniques like IVF and altruistic/commercial surrogacy for same-sex couples.

### **Hate crime Laws**

Laws in the European Union, Canada, Australia and several US states define hate crimes targeting persons due to their sexual orientation or gender identity. Sentence enhancements and additional penalties are prescribed to deter such crimes and address their aggravated nature and impact on the LGBT community.

### **International Obligations**

India is obligated under international law to prohibit discrimination based on sexual orientation.

Article 51 of the Constitution of India directs the State to foster respect for international law and treaty obligations.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which India is a signatory, guarantee the right to non-discrimination and equal protection of law.

United Nations treaty bodies have repeatedly recommended the decriminalisation of consensual homosexual acts in India. The UN Human Rights Committee and the former UN Commission on Human Rights have called upon India to amend or repeal Section 377 IPC.

The Yogyakarta Principles, a set of international legal principles relating to sexual orientation and gender identity, provide that criminalization of consensual same-sex acts violates international human rights standards.

International law recognizes same-sex couples' rights to find a family and access benefits. Principle 24 of the Yogyakarta Principles guarantees all necessary legal and social protection, benefits, and entitlements for families, including same-sex families.

### **Conclusion**

Under Indian law presently there is no recognition of same-sex marriages or civil unions. This has been explicitly clarified after *Navtej Singh Johar vs Union of India* (2018) and *Supriyo vs Union of India* (2023). India must fulfill its non-refoulement obligations towards asylum seekers fleeing persecution due to their sexual orientation or gender identity. The principle of non-refoulement in international refugee law prohibits forcing refugees to return to a country where they would face threats to life or freedom.

India has yet to adopt comprehensive asylum policies addressing the protection needs of LGBT refugees and asylum seekers. There is an urgent need for some socio-legal development. Although we have a few developments like Joyita Mondal (India's first transgender judge), Aishvarya Rituparna Pradhan (India's first transgender IAS), etc but on the other hand we have Saurabh Kirpal (a senior lawyer whose homosexuality hinders his path of becoming a judge of Delhi HC) but still

Our legal system does need improvements relating to the development of rights of homosexuals in our country.

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