



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Homosexuality and its Legal Developments in India

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Received 31 October 2022; *Accepted* 20 November 2022; *Published* 01 December 2022

It is said that same-sex relationships are prevalent in western countries which is a misleading perspective as it existed in Indian society for ages. Ironically, homophobia was imported from western countries, not homosexuality. The issue of homosexuality in India is controversial. It is a complex matter because of the presence and practice of a variety of religions. Public discussion of homosexuality is minimal in Indian society and sexuality in any form is rarely discussed openly. Homosexuality also called the third sex, has an unsettled legal and social status in India. While we see public protests against the oppression of homosexuals in society, we also see homosexuals being looked down upon by a large number of members of society. It is unethical to treat homosexual people differently just because their sexual orientation is not that of the “majority” of people. Even the constitution has provided minority rights based on religion, so why not based on sexual orientation? It is not the case that homosexual people cannot contribute to society or do not have degrees, and are illiterate. LGBTQ+ should have the same rights as that other person in society. This article reviews the meaning of homosexuality, its brief history, and prevalence in India, the condition of homosexual people, personal laws and same-sex marriage, legal status, and different judgments over the period by the Supreme Court and various other courts.

Keywords: *homosexuality, social status, society, public discussion.*

INTRODUCTION

Homosexuality is the term used to refer to people who are sexually, emotionally, and physically attracted to the same sex. Gay, lesbian, bisexual, transgenders, and queer are the main preferred terms to describe people who are attracted to members of the same sex, and these days it has been concised in a term known as LGBTQ+. This sexual orientation is the opposite of "heterosexuality", a "sexual attraction to individuals of the opposite sex," which is known colloquially as being "straight." Homosexuality is characterized by a sexual or romantic attraction to, or sexual activity with, people of the same sex; involving or relating to same-sex desire or sexual activity. The term was first coined in the late nineteen century, the word "homosexuals" had a biological connotation that it later lost.

Now the question arises what do different terms related to homosexuals such as gay, lesbian, bisexual, transgender, and queer mean and how do people get to know that they are one among these terms. Beginning with the first term is "gay"-one man attracted to another man. Similarly, the term "lesbian"- is a woman attracted to another woman. The term "bisexual" covers people who are attracted to both sexes, whether male or female, not necessarily equally or simultaneously. The other term which falls under the umbrella of homosexuality is "transgender" those people whose gender identity does not align with social expectations or according to their sex-assigned birth. It is also used as an umbrella term to include people like crossdressers, genderqueer people, trans women trans men, etc.

The last and latest one is the "Queer", Linguist Gregory Coles writes that it "can be read as at once pejorative and honorific", this term is used for those people who have not confirmed their gender and sexual identity. The second part of the question raised above is how people get to know whether they fall under the category of LGBTQ, the simple answer is the attraction that forms the basis of adult sexual orientation which emerge in early childhood or early adolescence.

BRIEF HISTORY AND PREVALENCE IN INDIA

Homosexuality is not a new phenomenon. Instances of homosexuality are present in Hindu Mythology. The literature drawn from Hindu, Buddhist, Muslim, and modern fiction also

testifies to the presence of same-sex love in various forms. Ancient texts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads, and Puranas sit down with sexual practice.¹ The Rigveda, one of the sacred texts in Hinduism mentions, 'Vikriti Evam Prakriti' which suggests what looks to be unnatural is rather natural. Under Muslim rule, this grew additionally common with the sultans of the Delhi state themselves establishing relationships with men despite the prohibitions against it in law. Besides literary proof, Indian history has provided visual traces of sexual practice in India. These records exist as art, paintings, and sculptures throughout the country.

One such chronicle is preserved within the temples of Khajuraho. The Khajuraho temple sculptures, engineered by the Chandela kinfolk between 950 to 1050 AD, showcase pictures wherever men expose their genital organs to different men. Scholars and historians have taken this as an acknowledgement of sexual practice and same-sex love in those times. These sculptures stand as an assertion of the sexuality of men, girls, and also the third gender. Thirteenth-century Sun temple in Konark in Odisha additionally referred to as Surya Devalaya, exhibits similar imagery. The Sun temple is dedicated to the Hindu Sun god, with the outside lined with sculptures portrayal of sexual scenes from the Kamasutra. Temples of Puri and Tanjore additionally portray express pictures of queer couples. These visual records counter any and each belief related to the absence of sexual practice from the Indian culture.

Moreover, these depictions of one's gender were quite astounding for the Britishers, who regulated such vivid displays of gender. Thus, land colonizers affected India's understanding of gender on the far side of the proscription of 'perverse' sex. Among different things, they additionally anglicized India's ethical lens. The British rule criminalized sexual activities "against the order of nature", as well as homosexual sexual activities, under Section 377 of the Indian Penal Code, which states "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 a term which may extend to ten years, and shall also be liable

¹ Sandeep Roy Chowdhury, 'The best of both worlds? South Asian bisexuals speak out,' (February 1996) India Currents

to fine. *Explanation.*—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”, which entered into force in 1861. When this social control no modification occurred until 2009, the urban centre tribunal, under Naz Foundation v Government of NCT of Delhi, declared Section 377 unconstitutional on the idea that it violates Articles 14² & 15³ of the Indian Constitution.

The prevalence of homosexuality is troublesome to estimate for several reasons, as well as the associated stigma and social repression, the atypical samples surveyed, and also the failure to tell apart want, behaviour and identity. The figures vary between age teams, regions, and cultures. Today, same-sex marriage is legally performed and recognized (nationwide or in some parts) within the following countries: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, Netherlands, New Sjaelland, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, UK, US, Uruguay.

In India, according to Ipsos, 3% of the Indian Population identify as homosexual (Including Gay and Lesbian), 9% identify as bisexual, 1% identify as pansexual and 2% identify as asexual. 56% of urban Indians say their views are different from what they were 5 years ago. Despite medication and medicine conflict, homosexual orientation may be a traditional variant of human physiological property, psychological, and state fraternity, and also the government in India require a transparent stand on the problems of varying wide prevailing prejudice in society.

CONDITION OF HOMOSEXUAL PEOPLE

The census and general view of people are different due to the taboo that gays or homosexuals threaten society’s purity and are considered unholy and immoral. Marriage is believed to be a union of two souls between individuals of different sex. They are generally ill-treated and usually are outcasted. But many people including Gen Z do not consider it as something that

² Constitution of India, art. 14

³ Constitution of India, art. 15

negatively affects society. Rather it is appreciated and treated normally to ensure that the ones who gained the courage to come out in society must not feel different from others. This situation is generally seen in the more developed and urban areas where people are more open-minded than that rural people due to differences in the quality of education and values taught to them since childhood. Various judgments by the supreme court and other courts proved that there is still a sign of hope in the Indian society to change and develop its perspective and not consider natural processes like sexual orientation, which is not in one's hand and with which one is born with, as a matter of discussion as there are many other social issues which need special attention of the population like poverty, unemployment, economic condition, etc.

Today, homosexual and queer identities could also be acceptable in addition to Indian youths than ever before, however inside the boundaries of family, home, and college, acceptance of their physiological property and freedom to categorize their gender selections still stay a relentless struggle for LGBTQ+ individuals. In urban India, wherever social media and company initiatives have created increased awareness of LGBTQ+ rights, the situation appears additional upbeat for gay men than for transgender individuals or lesbian girls. whereas urban LGBTQ+ voices of that area unit detected through many online and real-world platforms play a very important part of LGBTQ+ policy, these expose solely a tiny low part of the various challenges -faced by the community. Families in rural India have their ways of managing LGBTQ+ people. In some places, secret honour killings are planned, so the sole approach for a young homo to survive is to run away in the night to some town, with no cash or social support. In alternative elements, lesbian girls are subjected to family-sanctioned corrective rapes that are usually perpetrated by their family members.

THE CONSEQUENCES OF COMING OUT

A recent study found that one of the key factors that end up in the stigmatization of LGBTQ+ individuals is a parental reaction toward sex. The study goes on to conclude that the majority of LGBTQ+ individuals are acceptable to families given that they comply with behave like heterosexuals. Various LGBTQ+ people traumatize by important issues every year related to violence, state prejudice, and poverty.

PROBLEMS FACED

As we are witnessing that homosexuals still today are not given dignity and respect in society. It would be right to say that they are deprived of the principles, and ideas that were the aim of the French revolution in the 18th century. They are continuously harassed by society, politically, economically, etc. and the condition became worse when they are harassed by their own family which is the last resort for them to feel safe. So, this section will be dealing with the problems which are faced by homosexuals in society

A. The first drawback is marginalization and social exclusion- Within a world that is running on the ideology of equality, we tend to see that homosexual individuals are still marginalized from the society they're not given any important worth in any diaspora. They are restricted with fewer opportunities, low vanity, and less confidence to face society. Social policies created for equal welfare don't reach them or they need restricted access to any or all such policies. Because of marginalization, they lack their basic wants like attention, education, housing, income, etc. They need to also manage issues like racism, sexism, poverty, or alternative factors – aboard prejudice or transphobia that negatively impact their psychological state. This can be, thanks to marginalization or social exclusion that they're prevented from accessing basic services. They're excluded from their families. Lacking support and being marginalized has forced them into criminal activities, and they are additionally at risk of health issues like HIV/AIDS the rationale behind this can be the sexual orientation that ends up in obstacles for them.

B. The second drawback faced by them is the socioeconomic issue. The earnings of homosexual individuals are less than the earnings of heterosexuals. Homosexuals face additional discrimination within the workplace than others. They're forced to leave their jobs and face the high state in addition to impoverishment. In line with a report, of individual 64% of homosexuals have an income of less than \$70/day in India.

C. Issues faced by the youth - The variations between homosexuals and heterosexuals have rectified a negative impact on homosexuals however the main impact is faced by the homosexual youth. An outsized range of individual youth face issues like impoverishment,

being excluded from family and social arena, etc. Different studies are conducted to showcase the issues. As an example, a study conducted in nearly 82000 high faculties in Minnesota has unconcealed that homosexual youths are more at risk of bullying than alternative children, they're the victims of continuous abuse.

In India, homosexual youth face issues like early abandonment from faculties, less job security, not obtaining support from families, and medication-addicted time, these youth are the best target of human trafficking, forced to do solicitation, unaware of their rights, etc. Statics shows that 52% of LGBTQ+ youth don't get family support. Moreover, educational institutes show no youth gender- neutrality. According to the United Nations agency Report of 2018, LGBTQ+ youngsters face plenty of bullying in faculties, colleges, etc., and also are discriminated against. This act of bullying and discrimination leaves a permanent scar on their life and it usually takes them years to urge out of that.

D. Alternative common issues faced

- **Legal Injustice** – Several countries have not formed any laws to protect homosexual individuals. Their experiences with legal services aren't satisfactory in any respect. They're being discriminated against terribly starting from lodging complaints in police stations. Then in several situations, favourable laws are not created for them therefore, current judicial systems realize themselves in a very quandary to relinquish justice. Several countries have created laws that are against the activities of homosexuals leads homosexual individuals additionally liable to judicial scrutiny.
- **Victims of Violence**— a survey conducted by the Swasti health resource centre published in 2018 revealed that 52% of gay people face violence in Indian society. “More than half of all men who face physical violence (52.4%), sexual abuse (55%), and emotional torture (46.5%) were still living with their parents and mostly in the closet, according to the survey. According to the United Nations General Assembly Special Session on HIV/AIDS Report. HIV prevalence among this group in the country is 14.5%, according to this 2011 working paper by the Global Commission on Law and HIV, Men

who face violence are most likely (41.3%) to not report if it is physical, less likely (39.8%) if it is sexual, and least likely (32.4%) if it is emotional.

LEGAL STATUS

Legal Status of Homosexuals in India Section 377 of the Indian Penal Code (1860) relates to Unnatural Offences and includes homosexuality within its domain. In India, this Law relating to homosexuality was adopted from the British penal code dating to the 19th century. Section 377 states: "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 a term which may extend to ten years and shall also be liable to fine." Similarly, section 292 of IPC⁴ refers to obscenity and there is ample scope to include homosexuality under this section. Also, section 294⁵ of Indian Penal Code, which penalizes any kind of "obscene behaviour in public", is also used against gay men. It is important to note here that in England the offence of homosexuality between consenting partners has been abolished by the Sexual Offences Act 1967⁶ (that is in the country of origin of this law) whereas, in India, the consent is quite immaterial for constituting an offence as defined under this section. Thus, in India, it is primarily section 377 which explains and defines unnatural offences. It is this section that makes Homosexuality illegal with life imprisonment or with imprisonment for ten years with a fine.

The offence here is termed as an associate degree unnatural offence and also the term 'carnal intercourse' employed in this section refers to sexuality between men that in alternative words termed as a homosexual relationship. In India homosexual relationship continues to be not acceptable. When a protracted amount of waiting, the Delhi high court delivered its judgment (*Naz Foundation v Govt of NCT Delhi*⁷) on the unconstitutionality of Section 377 of the Indian penal code.

⁴ Indian Penal Code 1860, s 292

⁵ Indian Penal Code 1860, s 294

⁶ Sexual Offences Act 1967, s 60

⁷ *Naz Foundation v Govt of NCT Delhi* 2009 SCC Online Del 1762

The constitutional validity of Section 377 of the Indian penal code was challenged as an offensive of basic rights secure below the Indian Constitution. The Delhi High Court aforesaid that simply because there's social opposition to a move doesn't mean that the rights of people are trodden upon. It's an excellent strength of democracy wherever individuals will not raise their voice solely mob can. The time has come back to lift their voice and also LGBTQ+ activists have started their protests to decriminalize sex activity.

Section 377 had been opposed various times in the past, due to its extremely arbitrary nature. The sec directly hits the basic legal core of human life provided by the Indian constitution, articles 14 & 21. This was the main reason for its opposition. The remaining fuel was put by article 19, that it violates the freedom of speech and expression of homosexuals. Hence, it would be right to say that it violates the golden triangle. The other reason for its opposition was that it contravenes the preamble of the constitution which deals with the dignity of the individual. It also conveys that homosexuals have less value than normal people. Along with contravention of the Indian constitution, it also contravenes international laws. So, in its opposition, many petitions were filed in the hon'ble courts, and many ups and downs were experienced by the homosexual community, but at last, justice was provided and the section was held unconstitutional.

LANDMARK JUDGEMENTS

- Naz Judgement 2009

It was for the first time in India that the validity of sec 377 of IPC was challenged in the case *Naz Foundation v Government of NCT of Delhi*.⁸ In the judgment pronounced by the Delhi High Court, it struck down section 377 and held it unconstitutional. The reasoning given by the HC while striking it down was that it violated the provisions of the Constitution, i.e., articles 14 and 15.

⁸ *Ibid*

- NALSA Judgement, 2014

2013 was a dark year for rights in India normally and LGBTQ+ rights, particularly as a result of the Supreme Court of India delivering *Suresh Kumar Koushal v Union of India*⁹ where sexual practice was re-criminalized. The darkness was short lived as a result of the National Legal Services Authority vs Union of India or NALSA judgment delivered by the Supreme Court. For the first time in legal history, Transgender individuals were recognized as voters of this country, all the basic Rights were extended to them, and they got the identity of Third Gender. This case continues to be the landmark case for Transgender Rights. The court arranged a comprehensive set of pointers that each State should follow to bring Transgenders into public spheres and provide remedies for their marginalization.

- Puttaswamy Judgement, 2017

*K.S. Puttaswamy and Another v Union of India and Other*¹⁰ or Puttaswamy judgment because it is popularly known is an integral judgment because it commands the right to Privacy to be integral. Article 21 of the Constitution of India grants the Right to Life and Liberty and was additionally enlarged to incorporate the Right to Privacy. The right to Privacy was additionally extended to each individual regardless of gender and sex. Recognition of privacy for members of the LGBTQ+ community as inalienable and grants them autonomy and protection from State action whereas travail their right to decide on their partners. Hence, this judgment at the side of the NALSA judgment became the precursor to the reading down of Section 377 in 2018.

- Navtej Johar, 2018

*Navtej Singh Johar and others v Union of India*¹¹ is the seminal judgment that decriminalized sexual practice in India. This judgment delivered by the Supreme Court of India was a result of multiple Public Interest Litigations that are filed by different members of the LGBTQ+ community.

⁹ *Suresh Kumar Koushal v Union of India* AIR 2014 SC 563

¹⁰ *KS Puttaswamy & Anr v Union of India & Ors* 2017 SCC Online SC 996

¹¹ *Navtej Singh Johar & Ors v Union of India* 2018 SCC Online SC 1350

The Bench struck down Section 377 to the extent that it criminalized sex. The Court upheld the provision that criminalizes non-consensual acts with children or animals. The Supreme Court commanded that Section 377 violates Article 14, 15, and 19 (1)(a) of the Constitution of India. It recognized that each individual regardless of their individuality and sexual orientation has the right to measure with dignity, and autonomy and build personal personality while not State interference.

- Arun Kumar Judgement, 2019

*Arunkumar v Inspector General of Registration*¹², Tamil Nadu could be a case from the Madras court that reads into the class of brides to incorporate transwomen. Under the Hindu Marriage Act, of 1955 the definition of marriage solely includes men and women. This judgment expands the class of women to incorporate transgender individuals to spot as women to be brides moreover. It takes the clause of self-identification as has been mentioned within the NALSA judgment, wherever someone will establish as any individuality with no need for a State or external body to verify their identity. Evolving this clause, it says if a person desires to spot as a transwoman, then they need the constitutional right. This, among several different cases, lays the muse for marriages inside the LGBTQ+ community broadening the correct to marry.

PERSONAL LAWS AND SAME-SEX MARRIAGES

On examining the spiritual standing of same-sex marriages in India it may be summarised as follows:

- **Hinduism:** The followers of Hinduism have completely different stances in sexual practice. However, there's enough literature available that speaks concerning same-sex relationships and as an extension to same-sex marriages.
- **Islam:** Muslim sharia is extracted from sacred writing and Muhammad's way of life. It's clear in Islam that sexual practice is a punishable offence. This read remains equivalent to all told four primary faculties of Sunni jurisprudence. More in step with Muslim

¹² *Arun kumar v Inspector General of Registration* AIR 2019 MAD 265

principles Muhammad declared that effeminate men and masculine girls deserve to be cursed and will be thrown out of their homes.

- **Christianity:** the sole confusion concerning sexual practice in Christianity is concerning the question that how homosexuals are treated and ought to be thought about as criminals or ought to their behaviour be corrected. In each case, the position is evident that sexual practice is condemned in Christianity.
- **Parsis:** In religious belief too, sexual practice is taken into account as one thing evil and is powerfully out. However, some followers support LGBT+ individuals and take into account the higher interpretation as a distortion of the essential principle of “good thought, the good word, and good deed”.
- **Jainism and Buddhism:** Jains discourage every kind of sexual activity that isn't finished with the aim of reproduction which suggests except for sexual practice, even observance sex, heterosexual sex, or sex for fun is additionally not allowed. While Buddhists say that until the time any sex is consensual and is out of affection it is permissible. Homosexual sex is allowed provided nobody is harmed and is consensual.
- **Sikhism:** In Sikhism, since the spiritual texts stay silent on this side, they don't hold any same-sex marriages in their gurudwaras.

The significance of discussing the religious standing of same-sex marriages is an essential pre-requisite before drafting any policy or law on same-sex marriages. Therefore, any amendments in the personal laws regarding LGBTQ+ cannot be a practical solution to the status quo.

CONCLUSION

At last, it can be concluded that homosexual people have witnessed a long struggle to achieve their rights. But till now after the intervention of a court of law, they are not provided with suitable legislation. Now, it is high time that government should start thinking about them. Also, society must make them feel comfortable socially and society must realize it. At least their inalienable rights should be backed by the law and this can only happen when they will have representation in the law-making process.