

“WHY IS HE SO GAY?”- INDIA AND FIGHT AGAINST HOMOSEXUALITY

SUB THEME: HOMOSEXUALITY

Written by Nasma Abidi , assistant professor, faculty of law, integral university, Lucknow, Uttar Pradesh and Shipra Mishra, assistant professor, faculty of law, integral university, Lucknow, Uttar Pradesh

Abstract

What is homosexuality? Well, they're just slightly different in their sexual orientation. But that is where the society comes in; despite the equality offered by constitutional laws. We as a society just refuse to accept the difference. This is where we as a community, have a tendency that, when we detect the difference, we refuse to understand-we try to correct it, though less than honourable means. The study of this research paper is to analyze and acknowledge the responsibility of the state as well as the people of India to help to end the stigma attached to Homosexuality. Many states have created laws with the idea to stop the bullying as well as the cruel actions towards the homosexuals, but yet we are doing the same thing by discriminating and denying homosexuals their right to equality. The concept of homosexuality is not a new phenomenon as the history of Indian culture and tradition are the evidence of its origin, depicted through the existence of several god and goddess.

And so to answer the question in summation-he is so gay because people will still frown at him when he walks down the street. He is so gay because 40% of all depressed youths are homosexual. He is so gay because 1 in 12 homosexual people will be murdered. He is so gay because the same systems that say that “gay people are less than they need to be” abide by the standards of what is normal are the same systems that justify police brutality, discrimination or murder. And most importantly he is so gay because when after months of being closed up in a room and pep-talking himself to fit into his sexuality when he comes out confident and determined to face the world. It does not take us even an entire minute to single-handedly crush his entire confidence by laughing at this human whom we in our entire normalcy “consider different” thereby causing the failure of the implementation of the morally, equitably, legal rights of the person granted by the constitution.

Keywords: homosexual, LGBT's rights, Unconstitutional

People around the world face violence and inequality—and sometimes torture, even execution—because of who they love, how they look, or who they are. Sexual orientation and gender identity are integral aspects of our selves and should never lead to discrimination or abuse. Human Rights Watch works for lesbian, gay, bisexual, and transgender peoples' rights, and with activists representing a multiplicity of identities and issues. We document and expose abuses based on sexual orientation and gender identity worldwide, including torture, killing and executions, arrests under unjust laws, unequal treatment, censorship, medical abuses, discrimination in health and jobs and housing, domestic violence, abuses against children, and denial of family rights and recognition. We advocate for laws and policies that will protect everyone's dignity. We work for a world where all people can enjoy their rights fully.

The word homosexuals mean as 'of the same sex, being a hybrid of the Greek prefix homo meaning 'same' and Latin root meaning 'sex'. Homosexuality is a sexual orientation characterized by sexual attraction or romantic love exclusively for people who are identified as being of the same sex. People who are homosexual, particularly males are known as 'gay', gay females are known as 'lesbians'. That is homosexual marriages, sometimes referred to as gay marriage, indicates a marriage between two persons of the same sex¹. In preindustrial societies also homosexuality was generally accepted by the lower classes while some members of upper classes considered it immoral. However, with the rise of urbanization and the nuclear family, homosexuality became much less tolerated and even outlawed in some cases. The sexual orientation in the pre-modern era as depicted in love poetry and paintings and even in historical figures such as Alexander the Great, Plato, Hadrian, Virgil, Leonardo da Vinci, Michelangelo and Christopher Marlowe included or were centred upon the relationship with people of their gender.

However, the term homosexuality appears in print for the first time in 1869 in an anonymous German pamphlet paragraph 142 of the Prussian penal Code and Its maintenance paragraph 152 of the Draft of a Penal Code for North German Confederation written by Karl Maria Kertbeny. This pamphlet advocated the repeal of Prussia's sodomy laws²

¹ Homosexual marriages are also known as gender-neutral marriage, equal marriage, and gay marriage

² Ruth Vanita and Saleem Kidwai (Eds.) Same-Sex Love In India: Readings From Literature And History (St. Martin Press, 2000).

Thus homosexuality is not a new phenomenon. Even instances of homosexuality are available in Hindu Mythology. The literature is drawn from Hindu, Buddhist, Muslim, and modern fiction also testifies the presence of same-sex love in various forms. Ancient texts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads and Puranas refer to homosexuality. Also, there are reports that same-sex activities are common among sannyasins, who cannot marry. Thus instances of homosexuality are available in historical and mythological texts world over and India is not an exception to this. The Cultural residues of homosexuality can be seen even today in a small village Angaar in Gujarat where amongst the Kutchi community a ritualistic transgender marriage is performed during the time of Holi festival. This wedding which is being celebrated every year, for the past 150 years is unusual because Ishaak, the bridegroom and Ishakali the bride are both men. Thus the history is filled with shreds of evidence proving the existence of homosexuality in past. Whereas in the past 10 years world over, for the lesbian and gay rights, we find that the legal initiatives have shifted from the right to be privately sexual, that is the right to have same-sex relationships at all, to the right to be individual civic subjects, protected from discrimination in the workplace and the provision of services, toward the right to have relationships given status by the law. This shift in rights-focus, from decriminalization to civil protection, to civil recognition is, not entirely a linear one. Thus in recent years several jurisdictions had relaxed or eliminated laws curbing homosexual behaviour.

BRILLOPEDIA

The interdependent relationship between health and human rights is well recognized. Human rights are indivisible and inalienable rights due to all people. Articles 1, 2, 3, 5, 6, 7, and 16 of the Universal Declaration of Human Rights (UDHR) address, respectively, the rights to equality; freedom from discrimination; life, liberty, and personal security; freedom from torture and degrading treatment; recognition as a person before the law; equality before the law; and the rights to marry and have a family³. Some people, specifically lesbian, gay, bisexual, and transgender (LGBT) individuals, are in many places and circumstances denied their claim to the full set of human rights. This puts LGBT people in many countries at risk for discrimination, abuse, poor health, and death — the ultimate human rights violation.

Denial of the recognition of human rights for any group of individuals is a denial of their humanity, which has a profound impact on health. For LGBT people, it may result in discrimination in housing and jobs (affecting the ability to purchase food, shelter, and health

³ Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III), UN GAOR, Res. 71, UN Doc. A/810 (1948)

care); lack of benefits (affecting the ability to pay for health care and financial security); harassment and stress (affecting mental health and/or prompting substance abuse, smoking, overeating, or suicide); isolation (leading to depression); sexual risk-taking (exposing oneself and loved ones to sexual health risks, including HIV); physical abuse and injuries; and/or torture and death ⁴ . If health care organizations take a rights-based approach to health provision for LGBT people by explicitly recognizing their existence and targeting health interventions to their needs, it may alleviate the fear of discrimination and discrimination itself, as well as improving health outcomes.

LGBT people in many societies are subjected to discrimination, abuse, torture, and sometimes state-sponsored execution. For many human rights violations, there exist laws under which countries punish the perpetrators of such abuses. For LGBT people in most countries, abuses perpetrated against them are not viewed as human rights violations. Some countries, such as Iran and Saudi Arabia, have laws calling for the execution of “practising homosexuals. ⁵ ” At least 40 countries criminalize same-sex behaviour for both men and women, and an additional 35 or more criminalize it just for men⁶ Countries most recently in the news in this respect include Uzbekistan, India, Nigeria, and Saudi Arabia ⁷ . In many Muslim countries, both civil law and shari’a (the rules governing the practice of Islam) criminalize homosexual activity. Police abuse of LGBT people is common and pervasive in many places, including the United States ⁸ . Recent notable abuse cases have occurred in Nepal, Guatemala, Ecuador, Honduras, Colombia, Peru, India, Taiwan, Cameroon, Uganda, and Zimbabwe ⁹ . Many countries legalize and condone discrimination in housing and employment. Laws providing citizens with benefits, including those in the US, do not provide equal benefits to LGBT couples. For example, a report by the US Government Accountability

⁴ Amnesty International. *OUTFront! Lesbian, Gay, Bisexual, Transgender Human Rights: Report on Human Rights and Sexual Orientation and Gender Identity*. undated Available
at<http://www.amnestyusa.org/outfront/document.do?id=9F25DB548B5696C680256E5C00688E96>

⁵ The International Lesbian and Gay Association. *World Legal Survey*. 1999 Available
athttp://www.ilga.info/information/Legal_survey

⁶ *Ibid.*

⁷ Human Rights Watch. *Saudi Arabia: Men ‘Behaving Like Women’ Face Flogging: Sentences Imposed for Alleged Homosexual Conduct Violate Basic Rights*. 2005 Apr 7; Available
at<http://hrw.org/english/docs/2005/04/07/saudia10434.htm>

⁸ Amnesty International USA. *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the US*. 2005 Available
at<http://www.amnestyusa.org/news/document.do?id=Engus20050922002>

⁹ Amnesty International USA. *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the US*. 2005 Available
at<http://www.amnestyusa.org/news/document.do?id=Engus20050922002>

Office (GAO) documented more than 1,000 benefits, rights, and privileges that the federal government provides to opposite-sex married couples but not same-sex couples, including taxation and social security survivor benefits¹⁰. Protections under the law are similarly lacking. Thirty-four of the 50 US states and the District of Columbia do not prohibit discrimination based on sexual orientation. Twenty do not have “hate-crime” laws that include sexual orientation among their protected categories. Protection for transgender identity is even more limited.

In the human rights arena, major international human rights organizations have only committed to including the rights of LGBT people within the past decade or so. Human rights organizations such as Amnesty International and Human Rights Watch now have campaigns to address LGBT human rights violations. Specialized LGBT human rights groups have been active for much longer. For example, the International Gay and Lesbian Human Rights Commission (IGLHRC) has existed for the past 16 years to secure the full enjoyment of the human rights of LGBT people and communities subject to discrimination or abuse based on sexual orientation or expression, gender identity or expression, and/or HIV status¹¹. Likewise, for the past 28 years, the International Lesbian and Gay Association (ILGA) has been fighting for equal rights for LGBT people¹².

There is some support for LGBT human rights at the United Nations (UN). UN Secretary-General Kofi Annan expressed his support in August 2003 for LGBT non-discrimination, stating, “the United Nations cannot condone any persecution of, or discrimination against, people on any grounds.” The UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, found that laws punishing adult consensual homosexual acts violate the Covenant’s guarantees of non-discrimination and privacy and held that discrimination based on sexual orientation is prohibited under Articles 2 and 26 of the Covenant.

¹⁰ International Gay and Lesbian Human Rights Commission. A Show of Force: Report on Members of GALZ affected by Murambatsvina. 2005 Sep 15; Available

at <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=586>

¹¹ International Gay and Lesbian Human Rights Commission. Mission Statement. Available

at <http://www.iglhrc.org/site/iglhrc/>

¹² International Lesbian and Gay Association. About ILGA. Available at <http://www.ilga.org/aboutilga.asp>

However, advocates still have trepidation about using UN fora to claim the human rights of LGBT populations because of the threat of opposition from several sectors, including the Vatican, countries in the Organization of Islamic Cooperation (OIC), and, recently, the US.

Indian Society and Homosexuality

Homosexuality in India has been a subject of discussion since ancient times to modern times. Hindu texts have taken positions regarding homosexual characters and themes. [Rigveda](#), one of the four canonical sacred texts of Hinduism says *Vikriti Evam Prakriti* meaning what seems unnatural is also natural¹³.

Historical literary evidence indicates that homosexuality has been prevalent across the Indian subcontinent throughout history and that homosexuals were not necessarily considered inferior in any way until about 18th century during British colonial rule. On 6 September 2018, a 5-judge constitutional bench of [Supreme Court of India](#) invalidated part of [Section 377](#) of the Indian Penal Code, making homosexuality legal in India¹⁴. In striking down the colonial-era law that made gay sex punishable by up to 10 years in prison, one judge said the landmark decision would "pave the way for a better future." This ruling also applies to [Jammu and Kashmir](#) state under Article 141 of the Constitution of India and [Delhi Agreement 1952](#), as section 377 of IPC and [INDIAN Penal Code](#) is part material and Judicial Pronouncements were extended to Jammu and Kashmir¹⁵.

There are no official demographics for the LGBT population in India, but the government of India submitted figures to the [Supreme Court](#) in 2012, according to which, there were about 2.5 million gay people recorded in India. These figures are only based on those individuals who have self-declared to the Ministry of Health. There may be much higher statistics for individuals who have concealed their identity since several homosexual Indians are living in the closet due to fear of discrimination.[\[16\]](#)

¹³ . Ashgate Publishing, Ltd. p. 368. [ISBN](#) 978-1-4094-7225-4 Retrieved 4 January 2014

¹⁴ Rautray, Samanwaya (6 September 2018). "Section 377: SC rewrites history, homosexual behaviour no longer a crime". *The Economic Times*. Retrieved 6 September 2018.

¹⁵ "[Section 377 verdict: Legally safe, socially targeted, Kashmir's LGBTQ face a huge challenge of acceptance](#)".

In recent years, however, attitudes towards homosexuality have shifted slightly. In particular, there have been more depictions and discussions of homosexuality in the Indian news media and [Bollywood](#). Before striking down the colonial-era law several organisations have expressed support for decriminalising [homosexuality](#) in India and pushed for tolerance and social equality for [lesbian](#), gay, [bisexual](#), and [transgender](#) people. India is among countries with a social element of a [third gender](#). But mental, physical, emotional and [economic violence](#) against the LGBT community in India prevails. Lacking support from family, society or police, many gay rape victims do not report the crimes.

Causes of homosexuality

The reasons for such type of sexual behaviour or choice are not yet fully known but several types of research have been done and different experts have found different results or theories. The reasons may be biological, psychological or both.

Theoretical Explanation of Homosexuality: Biological Reasons and Social and Psychological Factors

The causes of sexual orientation are currently under investigation. The general understanding is that there is a symphony of factors that act over a long time to determine each individual's sexual orientation. Nurture, Nature or some combination of the two is often thought to determine human sexual behaviour. Researches suggest that homosexuality is largely genetic in origin and it also states further that individuals with homosexual genes will feel less inclined to behave heterosexually and will thus reproduce less frequently. Several scientists have concluded that one is born with a particular kind of sexual orientation and it is in the genes. Thus it is a natural phenomenon. But no conclusive proof is there that homosexual behaviour is simply a biological thing. There may be a factor of genetics in determining one's sexual choice but other factors might also be there. Findings also suggest that homosexual men are feminized whereas other study found that homosexual men and homosexual women are masculine. Another cause stated is imitation, a major mechanism of cultural transmission, which also accounts for some homosexual behaviour. Irregular levels of sex hormones during the development of the child in the womb has also been cited as an influence. Family upbringing may also affect by failing to produce a strong sense of being male in the growing child or by inducing guilt about early heterosexual contacts or by blocking initial heterosexual behaviour. Experiences outside the family may also, of course, encourage

homosexual behaviour. It is a fact that the socio-cultural environment affects the development of a child in significant ways. One's family, friends, society, and experiences decide how one views life, how one feels and how he or she acts. Thus psychological factors are also very important in determining one's sexual preferences. But not one single factor but the combination of many things indeed determines one's sexual orientation. And whatever be the reason as it is natural for a person to decide what kind of food he/she wants to eat, what kind of living he/she wishes to have; similarly, it is also natural that with whom he/she wants to have a sexual relationship either with the opposite sex or with the same sex.

Organisational initiatives

Several organisations, including the [Naz Foundation \(India\) Trust](#), the [National AIDS Control Organisation](#), [Law Commission of India](#), [Union Health Ministry](#), [National Human Rights Commission of India](#) and the [Planning Commission](#) of India have expressed support for decriminalising [homosexuality](#) in India¹⁶. In September 2006, Nobel Laureate [Amartya Sen](#), acclaimed writer [Vikram Seth](#) and other prominent Indians publicly demanded the repeal of section 377 of the IPC. The open letter demanded that "In the name of humanity and of our Constitution, this cruel and discriminatory law should be struck down." On 30 June 2008, Indian [Labour Minister Oscar Fernandes](#) backed calls for decriminalisation of consensual gay sex, and [Prime Minister Manmohan Singh](#) called for greater tolerance towards homosexuals. On 23 July 2008, [Bombay High Court Judge Bilal Nazki](#) said that India's unnatural sex law should be reviewed¹⁷. The [Law Commission of India](#) had historically favoured the retention of this section in its 42nd and 156th report, but in its 172nd report, delivered in 2000, it recommended its repeal¹⁸.

Various Hindu organisations, based in India and abroad have supported decriminalisation of homosexual behaviours. In 2009, the [Hindu Council UK](#) became one of the first major religious organisations to support LGBT rights when they issued a statement "**Hinduism does not condemn homosexuality**". [Sri Sri Ravi Shankar](#), a prominent Hindu spiritual leader, has condemned sec 377 in a series of tweets, maintaining that "Hinduism has never

¹⁶ "[India has 2.5m gays, government tells supreme court](#)". BBC News. Retrieved 15 May 2016.

¹⁷ "[UN 2004 – NGO statement: LGBT rights in India](#)". Geneva: [International Lesbian, Gay, Bisexual, Trans and Intersex Association](#), 27 April 2004. Archived from [the original](#) 7 April 2014. Retrieved 3 April 2014.

¹⁸ "[Gay laws: Patil's stand finds support in Cabinet](#)". [The Indian Express](#). 17 April 2008. Retrieved 4 April 2014.

considered homosexuality a crime" and "to brand a person a criminal based on sexual preference would be absurd".

The [United Nations](#) has urged India to decriminalise homosexuality by saying it would help the fight against [HIV/AIDS](#) by allowing intervention programmes, much like the successful ones in [China](#) and [Brazil](#). Jeffrey O'Malley, director of the [United Nations Development Programme](#) (UNDP) on HIV/AIDS, has stated countries which protect men who have sex with men ([MSM](#)) have double the rate of coverage of HIV prevention services as much as 60%. According to him, inappropriate criminalisation hinders universal access to essential HIV, health and social services. Later talking to *The Hindu* in November 2008, he added concerns that the then in power [United Progressive Alliance](#) government was in a difficult position in regards to amending [Section 377](#) of the Indian Penal Code because of the then-upcoming elections, as such changes could be misrepresented. He further emphasised the need to change the laws, sensitise the police and judiciary. According to him, after the removal of discriminatory laws, marginalised groups would have better access to treatment and prevention facilities like condoms. He warned of the urgency and stated that India had succeeded in checking the spread of AIDS through commercial sex workers but transmission through gay sex and injectable-drug users was still an area of concern in the country.

The 'LGBT' acronym stands for lesbian, gay, bisexual, and transgender. A lesbian is a woman attracted to another woman. Gay is used to denoting men who are attracted to other men. Bisexual means that a person is attracted to more than one gender. A transgender person is someone whose gender identity differs from the one they were assigned at birth¹⁹.

India's Supreme Court on September 6, 2018, struck down a colonial-era law that made gay sex punishable by up to 10 years in prison, a landmark victory for gay rights that one judge said would "pave the way for a better future." *Time Out* (Delhi) has a dedicated column covering gay events in Delhi every week. LGBT people have increased access to health services and social events.[\[20\]](#)

¹⁹ <https://www.youthkiawaaz.com/2018/01/dont-ever-be-afraid-to-show-off-your-true-colours>.

Indian Queer Film Festivals

Other than specific Bollywood films that showcase homosexual characters or relationships, Indian Cinema, in general, has been branching out; one way is through queer film festivals that are held in India.

KASHISH Mumbai International Queer Film Festival is one way through which film is urging for a change in the way that the Indian community views homosexuality. The festival includes films from around the world, including Indian queer films.

Bangalore Queer Film Festival, is another film festival that has been running since 2008. The festival showcases both Indian and international films. The festival also seeks to voice concerns and issues that the LGBT community faces. In 2017, the festival featured 55 films from 21 countries.

Chennai International Queer Film Festival also known as *Reel Desires: Chennai International Queer Film Festival* is a three-day event that usually takes place on the last weekend of July. Its main organisers are [Orinam](#) in partnership with [Goethe-Institut](#), Chennai along with volunteers from various community groups and NGOs, including Nirangal, East-West Center for Counselling, RIOV and SAATHII. The screen short films as well as Feature-length films from all over the world. The last day is usually performances along with a panel discussion, usually to discuss and bring out the challenges faced by community members. In 2014, the event had a photography exhibition, featuring queer/trans photography Shilpa Raj. Calcutta International LGBT Film & Video Festival, also known as *DIALOGUES: Calcutta International LGBT Film & Video Festival*, was first launched in 2007. It's a three-day festival that happens in November each year. This Film Festival was started by '[Sappho For Equality](#)' and 'Pratyay Gender Trust', along with [Goethe-Institut](#) /Max Mueller Bhavan, Kolkata.

Delhi International Queer Theater and Film Festival is organised in Delhi by Harmless Hugs. There have been three consistent editions of this festival since 2015 and has received support from celebrities like [Kalki](#), [Kunal Kapoor](#) and [Piyush Mishra](#).

Celebrity Support to Decriminalize Homosexuality

Celebrities, represented in the general Indian media, have voiced their opinions and have advocated for the LGBTQ community in the country.

After the 2013 Supreme Court Decision to reinstate S.377, the court agreed to refer the decision to a five-judge constitutional bench based on a curative petition. Many celebrities have voiced their support for the curative petition and the decriminalization of homosexuality, by repealing S.377. A news article by Akshay Kaushal in the Hindustan Times (Feb. 3rd, 2016), outlines some of these public comments; this includes Onir, one of the few openly gay film directors who stated, “Now hopefully the five-judge constitution bench will decide in our favour. And this law should have been scrapped the day the Britishers left India. So hopefully, the 2009 verdict of the Delhi Court, that decriminalized gay sex among consenting adults, will be back soon.” Delhi-based fashion designer, who married his partner Rahul Arora stated, “I am hopeful and positive that the five-judge constitution bench will scrap section 377 and make this country a better place for us to live”. National Award-winning filmmaker Apurva Asrani, who wrote the film Aligarh, when referring to the five-judge constitutional bench stated, “The Supreme Court has allowed itself a chance to redeem itself from a blemish on its otherwise spotless image.” “This (homosexuality) has been accepted even in our Hindu scriptures. I stand by my gay friends” said Actor Raveena Tandon. “Today’s decision is a great step. However, I think a disparity that can easily be addressed by amending the Indian Penal Code shouldn’t have to be a 15-year-long struggle” said actor and gay rights activist Celina Jaitley.

Along with the curative petition, submitted by NGOs, to the Supreme Court of India, leading to the five-judge constitutional bench to reconsider the repeal of section 377, a petition was filed by five gay celebrities.

The petition was covered by various news articles, including The Times of India, stating, “The petitioners are lesbian, gay and bisexual (LGBT) citizens of India whose rights to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity and equality, along with the other fundamental rights guaranteed under Part-III of Constitution, are violated by Section 377.” This is the first time those that are directly affected by the 2013 decision have addressed the court in his manner. The petitioners are, *NS Johar (dancer)*, *Sunil Mehra (journalist)*, *Ritu Dalmia (chef)*, *Aman Nath (hotelier)*, and *Ayesha Kapoor (business executive)*. The petition was not reviewed or added by the Supreme Court; stating that there

are already petitions of the same nature that the court is reviewing at the moment, and advised the celebrities to wait till the decision is out before further pursuing this issue.

In 2019, Nartaki Natraj became the first trans person to receive the prestigious [Padma Shri](#). There are many organizations in many cities of India, such as *Humsafar(Mumbai)*, *Alternative Law Forum (Bangalore)*, *Sangama (Karnataka)*, *Chennai Dost and Nazariya (Delhi NCR)* are working for LGBT rights. There are also organisations which function nationwide like Human Rights India and Gaysi. Many of these organizations operate in a very informal way and locally funded. In Kerala, an organization named Queerla given a new face to LGBT rights. Apart from Non-governmental organization's and Community based organisation's LGBTQIA+ student movements which are registered under the government of India are *Srishti Madurai a student volunteer LGBTQIA* and [Genderqueer](#) movement based at Madurai. In June 2016, a platform named [Amour | amour.lgbtq.co.in] is launched in India to help LGBTIQ community members find long term companions.

Laws in India and homosexuality

India has a very dynamic and progressive Constitution which in a way is the backbone of this very vast and complex nation. The Indian Constitution provides rights and protections to every citizen of this country whether he is in majority or minority. The Constitution treats everyone equally without any discrimination. The State has to ensure that no one should be discriminated against.

LGBT community persons are in the minority and they too have equal constitutional rights. But their right to equality and right to get equal treatment in society are violated on a regular basis. Not only society as whole but State machinery also treats them differently, especially police. They are the regular victim of rights violations. They are deprived of their basic human right and right to life which includes the right to enjoy life properly²⁰.

Section 377 of IPC and Rights of the LGBT community

One of the major lacuna or contentious legal provisions in our laws is Section 377 of the Indian Penal Code, 1860.

²⁰ <https://economictimes.indiatimes.com>

Section 377 of the IPC says, Unnatural offences: “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.”

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Thus the section makes any sexual activity against the order of nature as a criminal offence. Even the voluntary act of such kind is punishable. Thus consent between two persons of the same gender for such activity is immaterial. Therefore, section 377 criminalizes homosexual activity and makes it punishable with as high punishment as life imprisonment.

This provision of IPC has become a major controversial point and topic of debate in recent times. People of the LGBT community are trying quite sometimes to convince and pressurize our lawmakers to decriminalize Section 377. In other words, LGBT social action groups are demanding that if two consenting adults of the same sex are involved in homosexual activities, it should not be a criminal offence.

But when their plea was not responded by our legislatures, they went to the Court for an appropriate and just solution to their grievances through a Public Interest Litigation (PIL). The said PIL was filed by an NGO namely Naz Foundation in Delhi High Court.

In the case Naz Foundation v Govt. of NCT of Delhi (2009 Delhi H C) passing a landmark judgment on 2nd July 2009, Delhi High Court declared Section 377 as illegal as far as it criminalizes same-sex sexual activity between two consenting adults done in private. Thus, in effect Delhi High Court, in its historic decision upheld and secured the LGBT people’s right to sexuality.

The SC and LGBT rights

The decision of Delhi High Court in the Naz Foundation Case was further challenged in the appeal at the Supreme Court of India. The SC in a far-reaching judgment quashed the decision of the Delhi High Court and reverted to the earlier position i. e. once again made homosexual relationship as a criminal offence. The decision came as a shock to the LGBT

community and also to the liberal members of the society. The SC reasoned that the Indian society is not yet fully mature to accept same-sex relationships and if necessary changes are needed to decriminalize Section 377 of the IPC, it must be done by the Parliament and not by the SC. Several legal and constitutional experts have criticized the decision as regressive and disappointing. Experts are of the view that the SC could have upheld the decision of Delhi High Court or could have advised the Parliament to make necessary changes in the IPC, but unfortunately, the SC fell short of in fulfilling such expectations and securing basic human rights of sexual minorities. Therefore as per the present scenario, LGBT community people are again feeling insecure and discriminated against. If the SC had given an authoritative judgment on the issue, the matter would have been settled for all times. And it was also expected of the highest Court of the country that it would recognize the rights of LGBT people and would decriminalize the same-sex relationship. But as many experts are pointing out, the SC has missed a historic opportunity to provide equal constitutional and human rights to LGBT people. Now again the ball is in the hands of our lawmakers to amend the law and decriminalize the same-sex relationship among consenting adults done in the private sphere. Because now the only hope for LGBT people is the country's Parliament.

International instruments

United Nations

ILO Convention (No. 111) on Discrimination in Employment or Occupation (1958) (article 1) This treaty of the [International Labour Organization](#) does not itself prohibit discrimination based on sexual orientation but permits state parties to add additional grounds. In Australia implementation of the Convention in domestic law contributed to the ban on lesbians and gay men in the armed forces in 1992.

International Covenant on Civil and Political Rights (1966) (article 2, 26)

For sexual orientation, the Covenant - the main international treaty on civil and political rights - is important because in 1994, in the case *Toonen vs. Australia*, the Human Rights Committee held that the references to "sex" in Articles 2, paragraph 1, (non-discrimination) and 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. As a result of this case, Australia repealed the law criminalizing sexual acts between males in its state of Tasmania. With this case, the Human Rights Committee created a precedent

within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (article 1) This treaty is important because it is not limited to state actors (governments), as torture is defined broadly in Article 1: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This shows the intention to address cases falling within the scope of the treaty when a state does not investigate or prevent them.

Convention on the Rights of the Child (1989) (article 2) *Article 2 of the Children's Convention* prohibits discrimination and requires governments to ensure protection against discrimination. This treaty can be relevant in addressing sexual orientation discrimination of lesbian, gay or bisexual children and/or parents.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1981) This treaty can be relevant in cases of discrimination against lesbian, bisexual or [transgender](#) women.

United Nations High Commissioner for Refugees Since April 1993 the United Nations High Commissioner for Refugees (UNHCR) has recognized in several Advisory Opinions that gays and lesbians qualify as members of a "particular social group" for the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. In its publication "Protecting Refugees," the UNHCR states: "Homosexuals may be eligible for refugee status based on persecution because of their membership of a particular social group. It is the policy of the UNHCR that persons facing attack, inhuman treatment, or serious discrimination because of

their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees.²¹"

Conclusion and Suggestions

The universal law of Human Rights states that social norms, tradition, custom or culture cannot be used to curb a person from asserting his fundamental and constitutional rights. If we were to accept the justification, given to us by cultural views, public policy and societal values, which are used to restrict a person's right then there would have been no progressive legislation enacted in our Country. Sati, dowry, child marriage and infanticides are practices derived from cultural belief, but the Government still took steps to prevent them. Based on the whole discussion on the aspect of same-sex marriage that is should it be legalized or not. This is more of a religious debate than a political one. Homosexuality is not an offence, it is just a way of the pursuit of happiness, a way to achieve sexual happiness or desire. There is absolutely no reason, apart from blind prejudice, which prevents two gay people going through a civil ceremony which will give them the rights and securities which heterosexual couples enjoy. . Aren't we living in an age which respects the individual's right to choose Isn't India supposed to be the land of the free In our society people have branded homosexuals as queer. Yet homosexuality is not new nor is it against the Indian culture, it has always existed and with much lesser prosecution, that under Section-377 of the IPC, which is based on British Offences Against the Persons Act.

What should be the right approach to deal with same-sex marriages, the issues are quite vast and complex. However, the desirability and feasibility of such an approach remain to be ascertained. In any event, there is a growing conviction that our present method of criminalizing same-sex sexual activity neither helps the homosexuals nor protects the society in general. We thus need to legitimate same-sex marriages to move forward in the direction of human rights.

India, in the 21st century, is trying to become a superpower and the world leader; in fact, it has all the potential to become one. But this potential would not be realized until and unless we as a society will not be able to freely accept and discuss so-called taboo issues such as homosexuality. And for that to happen above all mentality of the people will have to be

²¹ (UNHCR/PI/Q&A-UK1.PM5/Feb. 1996)

changed. The first step is sex education in schools and at homes. A child must feel comfortable to discuss his/her problems or issues related to sexual matters and even their sexual choices with their parents or teachers. And it is important that parents/teachers fully appreciate their wards' situation and guide them accordingly. Therefore, not only children but grown-ups or adults need more education and sensitization as far as matters related to sex are concerned. Law enforcement agencies such as police also need sensitization so that they will be able to appreciate the genuine concerns of LGBT people. Similarly, our media and film fraternity is required to be more considerate while depicting such people in their shows and films respectively. They can play a very important role in imparting knowledge and disseminating true information about LGBT people and their sexual choices so that society could get a real picture of their situation and conditions. Apart from all these, the most important single step in eliminating the stigma over LGBT people is to decriminalize section 377 of the IPC so that they could have a normal regular life like others and avail their basic human rights without harassment or discrimination. Hopefully, our lawmakers would soon listen to their rightful plea and make necessary changes in the law.



BRILLOPEDIA