

# Right To Choose And Homosexuality: An Overview

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## Abstract-

There has been ardent support for and opposition to the right to choose with relation to same sex marriage for a variety of social, political, and religious reasons. In some states, same-sex civil unions are also recognized, and regulated same-sex marriage is allowed. Legal sanctions against gay partnerships exist in other jurisdictions. In recent years, the highest court has established a vocabulary centred on autonomy, privacy, and constitutional morality. As a result, several rights were recognized, including their right to privacy and the choice to choose a life partner. However, in *Navtej Singh Johar v. Union of India*, the Supreme Court clearly defined the parameters of the freedom to engage in personal relationships. Numerous social issues are associated with homosexuality. As a result, a wide range of academics, including anthropologists, zoologists, psychologists, and theologians, have shown a significant interest in illuminating the origins of homosexuality. According to research, those who think sexual orientation is a choice have less tolerant attitudes toward gay men and lesbians than people who think it is a natural part of who they are. However, the space cleared by the legal judgement cannot be immediately available of by those affected by it because legally determined space doesn't necessarily become social space. Article 377 IPC, the LGBTQ community in India has become marginalized. One of their methods has been legal activism. Meanwhile societal attitudes towards homosexuality have changed and it has been decriminalized in most countries.

**Keywords:** Homosexual, Gay, Lesbian, LGBTQI, Transgender, Bisexual, Morality, Same-Sex Marriage.

## Introduction

Homosexuality, a sexual attraction to the same sex, was once illegal in the 1900s. However, modern society has accepted homosexual behaviour due to changing laws and social norms. Structural stigma, which refers to social, institutional, and cultural norms that negatively impact a group's opportunities and wellbeing<sup>1</sup>, perpetuates societal stigmatization of non-heterosexuals on an individual, interpersonal, and communal level. Does India homosexuality accepted? Actually, the answer to this question is rather simple: "Yes, homosexuality is legal in India." However, the battle to obtain it was not as simple as it might seem. The Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (hereafter referred to as the LGBTQI) community has fought many social conflicts to win freedom and treatment as equal citizens or human beings, starting from a position of total absence of rights. LGBTQI rights have been the focus of social reform movements throughout history, and these efforts are still active today. Many countries now treat this persecuted group of individuals with nearly equal rights. Decriminalization of homosexuality and the right to equal protection under the law are two movements that have started to. Most civilisations' religions, customs, and cultures fought reform initiatives for LGBTQI with the stereotypes they are always armed with.

## Objective

The goals of the study "Right to choose: Same sex Marriage" are as follows.

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<sup>1</sup> Hatzenbuehler M L, Link B. introduction to the special issues on structural stigma and health. *Social Science and medicine*. 2014; 103:1-6. 1016/j.socsimed.2013.12.017

1. To do study on how important it is for same-sex couples to comprehend how their legal rights under the Constitution and current laws apply to them.
2. To learn about and adhere to the laws that apply to same-sex couples who want to get married.
3. LGBTQ, or historical development, is a summary of key developments.
4. To investigate any flaws that render existing legislation pertaining to the right to privacy ineffective.
5. To assess the circumstances that led to the legality of same-sex unions.
6. What part did the court play in fostering an environment in India that was more accepting of LGBTQ people?

### Meaning, Definition and Concept

The term "homosexuality" describes the attraction between individuals of the same sex.

The word homos, which means "the same" in Greek, is where it "originated". When Charles Gilbert Chaddock translated Richard von Krafft-Ebing's *Psychopathic sexualise*, which was the study of sexual activities, the term homosexuality was first used in 1892. The term homosexuals literally mean "of the same sex" because it is a combination of the Greek prefix homo, which means "same," and the Latin root, which means "sex." Homosexuality can be simply defined as a romantic attraction or taking part in sexual behaviours between members of the same sex and gender throughout history. It has also been visible in art, religion, and cultural norms. The sexual orientation known as homosexuality is one that is stigmatized but actually occurs frequently in society.

Homosexuality is a sexual orientation, not a gender identity, and individuals may refer to themselves as gay, lesbian, LGBTQ, or queer.

The term "homosexuality" has multiple distinct synonyms due to its outdated usage.

LGBTQ refers to a collective of people including lesbian, gay, bisexual, transgender, queer, and questioning, who are attracted to others, often not identifying as heterosexual or cisgender, but as individuals.

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 19<sup>th</sup> century.

### Provision under Criminal Law

#### Section 377 states-

"Whoever voluntarily engages in carnal intercourse with any man, woman, or animal against the law of nature shall be punished with life imprisonment, 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 IPC refers to obscenity and there is ample scope to include homosexuality under this section. Gay males are likewise targeted by Section 294 of the IPC, which criminalizes any form of "obscene behaviour in public."

### Historical Perspective

It has varied throughout time and across cultural boundaries whether gay activity is accepted, tolerated, punished, or downright prohibited. Western classicists have recently turned their attention to how adults and young boys interact with one another. In ancient Greece and Rome, homosexuality was common. Islam and Judeo-Christianity have both historically seen homosexual conduct as sinful.

However, many Jewish and Christian leaders have gone to considerable lengths to make it clearly clear that their religions condemn acts rather than people or even their "inclination" or "orientation". On theological as well as social grounds, others have advocated for the complete acceptance of gay people and their relationships. These organizations range from organizations of reform rabbis to divisions within mainline Protestantism. Due to the topic, there have already been open schisms within some faiths.

### Indian ideology on Homosexuality

Hindu literature frequently portrays homosexuality as a natural and pleasurable experience<sup>2</sup>; the Kamasutra affirms and recognizes same-sex relationships<sup>3</sup>, and sculptures in a number of Hindu temples depict both

<sup>2</sup>Bonvillain, Nancy (2001). *Women and men: cultural constructs of gender*. Prentice Hall. p. 281. ISBN 978-0-13-025973-8

men and women engaging in gay practices<sup>4</sup>. The Vedas do not prohibit homosexuality, and some Hindu deities have been shown to be gender-fluid or to be members of the LGBTQ community<sup>5</sup>. Hinduism has depicted same-sex relationships and gender diversity through ceremonies, law documents, religious or narrative myths, commentaries, artworks, and even sculptures from the Vedic era to the present.

Although this applies to heterosexual intercourse as well, the Artha shastra argues that some gay intercourse is improper and promotes chastity. The dharma shastra reluctantly acknowledges the occurrence of homosexuality without outright condemning it on moral or religious grounds. The Manu smriti considers homosexual (and heterosexual) acts in an ox cart to be a source of ritual pollution that must be atoned for by brahmin males by ritual immersions<sup>6</sup>.

In 2009, the Delhi High Court legalized homosexuality in India, however the Supreme Court of India later overruled that decision. In 2018, the Supreme Court of India overruled its previous judgement and decriminalized gay relationships and sexual conduct. Some Hindu priests<sup>7</sup> have performed same-sex weddings in temples.

## Constitutional Provision

### Right to equality

Under Article 14 of the Indian constitution, everyone is entitled equal treatment under the law and equal protection from the law. "Any person" refers to any individual human being, regardless of caste, creed, religion, sex, or any other group that may be justified by prejudice.

### Equality of opportunity and right against all forms of discrimination:

Article 15 and 16 of the constitution prohibit discrimination based on sex, excluding all forms of gender discrimination. The drafters emphasized this to avoid stereotyped generalizations of binary genders. Gender traits and biological aspects are separate, making "sex-based" discrimination a part of this prohibition.

Additionally, it has been claimed that Articles 15 (2) and 16 (4) grant these communities social equality, including equality in employment with the government, and that the states have the power to make any special provisions for the benefit of these vulnerable minorities, who are now categorized as belonging to the socially and educationally disadvantaged classes.

### Right to Freedom of Speech and Expression

Article 19 also protect such type of rights under the freedom of expression.

(1) All citizens have the right to

(a) free speech and expression; but free speech is not absolute. Article 19(2) restricts the right to free expression and expression. Such restrictions are imposed for the sake of:

(i) Public order; and

(ii) Decency or morality.

### Right to life and personal liberty:

Protection of life and personal liberty- According to Article 21 of the Indian constitutions, no one should be deprived of his life or personal liberty unless in conformity with the means prescribed by law. The heart and soul of the Indian Constitution is Article 21, which concerns the right to life and personal liberty. The right to life is one of the most fundamental rights, and neither the state nor any other organization has the authority to limit or eliminate that right.

<sup>3</sup>Cush, Denise; Robinson, Catherine; York, Michael (2012-08-21). Encyclopaedia of Hinduism. Roulege. p. 354 ISBN 978-1-135-18978-5

<sup>4</sup>Keene, Manu (2002). Religion in Life and Society. Folens limited. p. 58. ISBN 978-1-84303-295-3

<sup>5</sup>Cousins, L.H. (2014). Encyclopaedia of Human Service and Diversity. SAGE Publications. P. 1158. ISBN 978-1-4833-4665-6. Retrieved 2023-04-04

<sup>6</sup>Puri, Jyoti (2002-09-11). Woman, Body, Desire in Post-Colonial India: Narratives of Gender and Sexuality. Routledge. p. 180. ISBN 978-1-135-96266-1

<sup>7</sup>Endsjo, D.O. (2012). Sex and Religion: Teachings and Taboos in the History of World Faith. Espiritualidad y religion. Reaction books. p. 164. ISBN 978-1-86189-988-0. Retrieved 2023-04-05

**Right against exploitation:**

Article 23 of the Indian constitution prohibits a wide range of inhumane behaviours, including human trafficking and beggary, and its application is extremely broad because it prohibits all forms of discrimination. In most societies, prostitution and other immoral behaviour are devalued.

**Right to Choose a Life Partner**

In 2006 in the case of *Lata Singh v. State of Uttar Pradesh*<sup>8</sup> a petitioner has filed demanding right to marry in inter-caste relation before the supreme court. In this case SC held that petitioner was a major, she had the right to marry whoever she wanted and there was no statute prohibiting an inter-caste marriage. This case has laid down the foundation of right to choose a life partner. Later on in the case of *Shafin Jahan v. Asokan K. M. & Others*<sup>9</sup> which is known as Hadiya Case or the Love-Jihad Case, where a Hindu girl Akhila converted to Islam (now called Hadiya). Father of Akhila (Hadiya) has filed a habeas corpus writ petition before the Kerala High Court under article 226 with contention that she had been subjected to influence or manipulation by religious extremists. A special leave petition has been filed before the SC by Hadiya's husband. SC declared the marriage null and void and further stated that the right to marry a person of one's choice is an integral part of Article 21 of the Constitution of India and society has no role to play in determining our choice of partners.

**Statutory Provision****The Citizenship Act, 1955**

Which neither directly nor indirectly implies that obtaining citizenship requires a specific sex or gender identity? It solely permits the acquisition and determination of Indian citizenship. To vote (be an elector), one must be an Indian citizen. The Indian committee has gone over and above to register transgender people as voters<sup>10</sup>.

**The Registration of Births and Deaths Act, 1969**

It makes no mention of how a person's "sex" or "gender" should be recorded in the event of birth or death. The act does not discriminate based on gender. The terms of the legislation do not appear to require that birth and death certificates include a person's sex or gender information when it is appropriate. It is probable that such a requirement was included in the formats for such certificates stated in the rules produced by the states<sup>11</sup> in compliance with the act.

**Section 377 of the Indian Penal Code, 1860**

Unnatural offence- Whoever voluntarily engages in sexual intercourse against the order of nature with any man, woman, or animal must be punished with [life imprisonment] or imprisonment of either sort for a term not exceeding 10 years, as well as a fine.

Explanation: Penetration is enough to constitute the carnal intercourse required for the offence indicated in this section.

The transgender persons (protection of rights) act of 2019, which provides legal recognition and protection for transgender individuals, and the personal laws (amendment) bill of 2021, which seeks to amend various personal laws to remove discrimination against same-sex couples and recognize their rights to marriage, adoption, and inheritance, are two recent legal developments. However, the bill has not yet been signed into law and remains a source of contention.

<sup>8</sup> 2006 (5) SCC 475 & AIR 2006 SCW 3499.

<sup>9</sup> (2018) 16 SCC 368 & AIR 2018 SC 1933.

<sup>10</sup> By Sourav Agrawal, Available on, <http://www.scribd.com/document/446281614/ARTICLE-ON-article>, last accessed on, 11/04/2023

<sup>11</sup> Available on web URL, <http://lawgupshup.com/2020/05/status-of-homosexuality-its-legal-and-constitutional-validity-of-section-377/>, last accessed on, 11/06/2020

## Judiciary

### Suresh Kumar Kaushal v. Naz Foundation<sup>12</sup>

- Two arguments essentially support this case. The initial form of homosexual behaviour is unlawful, and parliament has the right to decriminalise it.
- The second point is that the right to privacy does not cover LGBT behaviour. The Delhi High Court's decision was overturned by the Supreme Court of India, which reinstated the homosexuality criterion.
- Section 377 of the IPC was declared not to be unconstitutional because LGBTQ individuals were a "lesser minority" who did not require constitutional protection.

### K.S Putt Swamy v. Union of India<sup>13</sup>

- The Supreme Court of India's nine-judge bench is in responsibility of revising the 2013 verdict in Suresh Kumar Kaushal v. Naz Foundation.
- Many sections in the Indian constitution protect sexual orientation as a key part of privacy.
- Each individual's right to sexual equality must be upheld on an equal basis;
- the small number of LGBTQ people cannot be used to justify denying them access to their fundamental rights, and restrictions on their fundamental freedoms cannot be justified even if only a small percentage of LGBTQ people face discrimination.

### Naz Foundation Government v. NCT of Delhi<sup>14</sup>

- The Delhi High Court decided that Section 377 of the IPC, 1860 imposed an unjustifiable restriction on two adults having sexual relations in private with mutual consent and favoured decriminalization over legalisation.
- Whether it violates the fundamental rights protected by Indian Constitution Articles 14, 15, 19, and 21.
- That a component of Section 377 of the IPC, which criminalized homosexual behaviour, must be ruled illegal. In compliance with Indian Constitution Articles 21 and 15.
- No one may be discriminated against due of their sexual orientation without justification (the Indian Constitution recognizes homosexuality as a class).
- The first time an Indian court decriminalized homosexuality.

### Navtej Singh Johar v. Union of India<sup>15</sup>

- The Supreme Court of India's five-judge bench announced a major judgement on sexual orientation that partially decriminalized homosexuality under Section 377 of the Indian Penal Code, 1860, with the support of Article 14 of the Indian Constitution. Adults' consent to homosexual sex was determined to be invalid.
- With the help of Article 15, the Delhi High Court ruled in the Naz Foundation case that sex comprises biological sex as well as sexual orientation, which demonstrates better knowledge.
- Intelligible differentia means that it is not against nature's order, or that it is not a Rationale Nexus, which is founded on subjective tests such as morality, etc., and is not clearly intelligible.
- With the protection of Article 19, human sexuality cannot be defined in a limited fashion. As a result, discriminating against LGBT persons is completely illegal. It allows people to declare their sexual orientation freely.
- Article 21 upholds the right to life and liberty, which includes the right to privacy, dignity, and individuality. It can only be limited for valid grounds. However, in cases of force involving sex with children, non-consensual sexual acts and bestiality remain crimes.
- An apology to members of the LGBT community and their families for the delay in providing compensation for the harassment and avoidance they have faced over the years.

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<sup>12</sup> Civil Appeal No. 10972 OF 2013

<sup>13</sup> Writ Petition (Civil) No. 494 OF 2012

<sup>14</sup> WP(C) No. 7455/2001

<sup>15</sup> Writ Petition (Criminal) No. 76 of 2016



### National Legal Services Authority v. Union of India<sup>16</sup>

- The non-recognition of their identities, according to the court, breached Articles 14, 15, 16, and 21 of the Indian Constitution.
- The Supreme Court of India has directed the government of India to treat the LGBT community as a "third gender" and a socially and economically disadvantaged group. Furthermore, it was said that the government must establish suitable LGBT policies in compliance with Articles 15 (2) and 16 (4) to provide equality of opportunity in both education and employment.
- To provide the benefit of reservation in government employment and educational institutions to the third gender, they would be classed as other backward classes (OBC).
- The court also recognized that a difference between a person's gender at birth and gender identification does not always imply a pathological condition.

### Effect of same sex marriage on society

- Homosexual couples that use IVF or surrogate mothers intentionally generate a class of children who will live away from their mother or father<sup>17</sup>.
- If same-sex civil unions were widespread, most same-sex couples with children would be lesbian, leading to more kids being raised without their father. Dads are effective in reducing delinquency and antisocial behaviour, and research shows that intact families reduce early puberty and teen pregnancy rates<sup>18</sup>.
- Despite having a lesser possibility of producing children than lesbians, homosexual males are raising children and will continue to do so. There will be many more if homosexual civil unions are approved. These institutions do not offer mothers for the children. Mothers are especially good in reading the physical and emotional symptoms of newborns, as well as providing emotional stability to children. Naturally, they also provide specific advice to their daughters as they deal with the psychological, emotional, and social issues that occur with puberty and adolescence<sup>19</sup>.
- Lesbian parenting has the potential to liberate daughters and boys from a wide range of traditional gender expectations. Young adult children raised by lesbian mothers had far more homoerotic connections than those raised by heterosexual mothers<sup>20</sup>.
- One of the most serious risks that same-sex "marriage" brings to marriage is that it would likely undermine marriage's sexual fidelity rules<sup>21</sup>.
- Marriage and childbirth are closely related, but westerners' emotional views on marriage can lead to population reduction and social, political, and economic burdens. Same-sex marriage undermines the procreative norm associated with marriage, as it proves no connection between reproduction and marriage<sup>22</sup>.
- Same-sex civil unions could further de-genderize marriage in our culture, using gender-neutral language and social pressure. However, successful marriages often involve gender-typical partners focusing on spouse needs<sup>23</sup>.

### Conclusion and Suggestion

We must choose between a society in which people accept modest sacrifices for the greater good and a more contentious society in which factions selfishly safeguard their own interests.

<sup>16</sup> Writ Petition (Civil) No. 604 of 2013

<sup>17</sup> Kyle Pruett, *Fatherhood* (Broadway Books, 2001) 204.

<sup>18</sup> Ellis, Bruce J., et al., (Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?" *Child Development*, 74:801-821.

<sup>19</sup> Eleanor MacCoby, *The Two Sexes: Growing Up Apart, Coming Together* (Boston: Harvard, 1998).

<sup>20</sup> Judith Stacey and Timothy Biblacz, "(How) Does the Sexual Orientation of Parents Matter?" *American Sociological Review* 66: 1589-183. See especially 168-171.

<sup>21</sup> Esther Rothblum and Sondra Solomon, *Civil Unions in the State of Vermont: A Report on the First Year*. University of Vermont Department of Psychology, 2023

<sup>22</sup> For national fertility rates, see: <http://www.cia.gov/cia/publication/factbook/geos/sw.html>

<sup>23</sup> E. Mavis Hetherington and John Kelly, *For Better or For Worse*. (W.W. Norton and Co., 2002) 31.

Legalizing same-sex partnerships would have a huge bottom-up impact on society, beginning with the individual and couple and progressing to the family, community, and, finally, society. The immediate benefit would be felt at the individual level, with improved health outcomes such as a decrease in psychological pain and suicide rates. The individual would now be less stressed about travel and immigration. Marriage rates would skyrocket, abortion rates would plummet, and the possibility that Legalizing marriage will increase the validity of same-sex couples' relationships in the eyes of family members, bringing them greater peace and increased support as a result of changes in how cultural standards are viewed. Increases in the social inclusion of sexual minorities in the community would occur both directly (making positive remarks to the pair, attending wedding ceremonies) and indirectly (inclusion of same-sex spouses into the family network). Anti-gay sentiments would be significantly less common in society as a whole. Sexual minorities' rights would have more support, and such rights and safeguards could expand in the future. Same-sex weddings legalization may introduce new policy issues, necessitating economic and legal framework development focusing on equality and considering the impact on Indian society and culture. So, finally we can say that right to choose life partner being an integral part of article 21 the Constitution of India as a fundamental right but it creates socio- legal and cultural battle in the Indian society.

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