

THE SCRAPPING OF HOMOSEXUALITY IN INDIA: ANALYSIS AND RECOMMENDATIONS

-MEHRUSH CHANDHOK¹

ABSTRACT

Homosexuality is one of the most controversial and debatable issues in the world today. While there are countries that have legalized homosexuality, many still stigmatize it and India forming part of the latter group of countries makes it a sensitive topic to touch upon. A poll was conducted by International Lesbian, Gay, Bisexual, Trans and Intersex Association in 2016 where 35% of Indian people supported the legalizing of same-sex marriage whereas 35% were against it. In another poll carried out by ILGA in 2017, 58% of Indians favored LGBT people enjoying same rights as that of straight people and on the other hand, 30% disagreed.

The methodology used for this study is doctrinal research because homosexuality in India is frowned upon till today and is still on its way to be discovered and explored, thereby providing such a study with an extensive scope, only a handful of references for research.

The main objective of this study is to view homosexuality from different views and perspectives, the most paramount being the decriminalization and recriminalization of Section 377 of IPC and how the current status of homosexuals can be improved. If there is recognition of violation of human rights based on laws discriminating people then why homosexuals are not considered as a part of being “Human”? How can homosexuality be targeted as an influence from the western society and be asserted as not being a part of one’s culture when humans are creation of God and personal choice to life and liberty as a matter of fundamental right? The attitude of the people on same-sex relationships or even recognizing and respecting LGBT community are central to this whole debate on homosexuality in India.

¹ Student, B.A LL.B 5th Year Amity law school, noida

The Scrapping Of Homosexuality in India: Analysis and Recommendations

The public opinion, across the world till today, has varied views regarding the acceptance of homosexuality, about the laws regulating same sex unions and penalties prescribed for the same. This debate still continues dividing any State into two halves, the ones protesting for equal rights as that of other humans and on the other side, the ones criticizing such behavior and blaming the very existence of homosexuals as untraditional or uncultured.

There have been vast and eminent changes seen in the past two decades around the world which has encouraged more and more countries to get involved in this issue which has resulted in an open global discussion among various different nations about the invisible conflict taking place in their respective countries leading towards the welcoming of homosexuals into the society as equals with dignity and respect.

ANALYSIS

The movement for scrapping down Section 377 began in 1991 when AIDS Bhedbhav Virodhi Andolan published “Less than Gay: A Citizen’s Report” which mentioned the issues with section 377 and demanded its repeal. 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.”²

NAZ FOUNDATION V. GOVT. OF NCT DELHI³

It took many years after this to finally put a firm opinion before the judiciary which was initiated by a non-governmental organization called the Naz Foundation (India) Trust. They had filed a Public Interest Litigation (PIL) in Delhi High Court in 2001, seeking a legislation which does not prohibit homosexual intercourse between consenting adults.⁴ The petition was rejected by the Delhi High Court stating that the petitioners had no locus standi in the concerned matter. Aggrieved by this decision, the Naz Foundation appealed to the Supreme Court of India against

² The Indian Penal Code, 1860.

³ 160 Delhi Law Times 277.

⁴ News18 [test sharma](https://www.news18.com/news/india/chronology-8-year-long-legal-battle-for-gay-rights-319600.html), *Chronology: 8-year-long legal battle for gay rights*, CNN-IBN (Jul. 2, 2009, 12:12 PM), <https://www.news18.com/news/india/chronology-8-year-long-legal-battle-for-gay-rights-319600.html>.

the High Court's decision which dismissed the petition on technical grounds. The Supreme Court after considering the matter found that the party had a locus standi to file the petition and sent the case back to the Delhi High Court for reconsideration on merit.⁵

Thereafter, in 2006 an affidavit was filed by the National AIDS Control organization which stated that section 377 violated fundamental rights of homosexuals.⁶In addition to this, a demand to "read down" section 377 was made by "Voices Against 377", a Delhi-based coalition led by LGBT, women and human rights activists.⁷

The landmark judgment was delivered by a two-judge bench comprising of Chief Justice Ajit Prakash Shah and Justice S Muralidhar on 2 July 2009. The High Court in its judgment stated that homosexuality if, considered as a crime before the eyes of law, would violate fundamental human rights of citizens guaranteed by the Constitution which would include right to life, dignity, personal liberty and privacy, more specifically, Article 14, 15, 19 (1) (a), 19 (1) (d) and 21. Thus, the bench legalized consensual homosexual activities between consenting adults.⁸

The Court did not struck down the whole provision as unconstitutional but only the part that related to criminalization of homosexual activities between consenting adults in private. The Supreme Court also rejected a bunch of appeals demanding overruling of the Delhi High Court's judgment and on 27 March 2012, the Supreme Court reserved verdict on these.⁹ Afterwards, this judgment was challenged in the apex Court of India, in the case of Suresh Kumar Koushal v. Naz Foundation.

⁵ Sheela Bhatt, *Gay Rights is matter of Public Interest: SC*, REDIFF NEWS (Feb. 3, 2006, 20:58 IST), <https://www.rediff.com/news/2006/feb/03gay.html>.

⁶ TNN, *Govt's AIDS cell pushes to legalise homosexuality*, TOI (Jul. 20, 2006, 00:10 IST), <https://timesofindia.indiatimes.com/city/delhi/Govts-AIDS-cell-pushes-to-legalise-homosexuality/articleshow/1779097.cms>.

⁷ Shibu Thomas, *Delhi HC to take up PIL on LGBT rights*, TOI (May, 20, 2008, 02:59 IST), <https://timesofindia.indiatimes.com/india/Delhi-HC-to-take-up-PIL-on-gay-rights/articleshow/3054907.cms?>

⁸ "Gay sex decriminalised in India", BBC (Jul. 2, 2009, 11:02 UK), http://news.bbc.co.uk/2/hi/south_asia/8129836.stm.

⁹ "Verdict reserved on appeals in gay sex case", The Hindu (Mar. 27, 2012, 14:14 IST), <https://www.thehindu.com/news/national/verdict-reserved-on-appeals-in-gay-sex-case/article3250607.ece>.

SURESH KUMAR KOUSHAL V. NAZ FOUNDATION¹⁰

When the case came in appeal before the Supreme Court of India, the major issues which demanded attention and scrutiny were:

- Whether Section 377 is constitutionally valid or not?
- Does it violate any provisions of Part III of the Constitution of India?
- Whether criminalization of consensual activity between two consenting adults of the same sex would violate the right to life and personal liberty under Article 21 of the Constitution or not?

Appellants' Arguments

The appellants presented their arguments by defying the fact that Section 377 is unconstitutional. They emphasized that the High Court had committed a severe mistake of decriminalizing the provision and targeting it as being in violation to the fundamental rights. They alleged that the documents presented by the respondents in the previous case did not confirm that homosexuals were singled out for discrimination treatment by the law itself and also the statistics in the respondent's petitions did not clearly indicate the findings regarding Section 377 being the reason which adversely affected the control of HIV/AIDS.

They were strong in their opinion and urged that Section 377 was gender neutral and non-discriminatory towards any of the provisions in issue. Also, it was put forth by the appellants that if such a provision was declared unconstitutional then it would certainly affect India's social structure and be detrimental to the ideology of considering the institution of marriage as sacred. According to them, legislating on such an issue was not the task of the judiciary but should have been left to the Parliament.

¹⁰ Civil Appeal No. 10972 of 2013.

Respondents' Arguments

Respondents submitted that by targeting the criminalization of Section 377, one would directly target another's sexual orientation. If every person has sexual rights and in fact sexuality being a human right then the LGBT community were not getting their full moral human rights. They relied on the sole criteria that one of the core aspects of human experience is sexual intimacy which is important for both mental health and psychological well being of a person. It is a grave injustice to allow heterosexuals to have this human experience and the same being seen as a crime in case of homosexuals. They insisted that the Court must take into account the changing dynamics of the world and the constitution being a living document should be flexible enough to meet the needs of the emerging problems and challenges.

They also cited evidence in form of judicial reports and NGO findings that the power delegated to the police under section 377 results in abuse and violation of the rights of the LGBT community. They alleged that Articles 14 and 21 are interlinked and are at stake of violation, if Section 377 is revived. They also laid emphasis on the fact that the criminalization of this section will invite more stigma and continuation of harassment on homosexuals from the society and people will never be able to broaden their mindset nor welcome homosexuals into this world as equals.

Decision by the Court

On the first issue, the panel of two Supreme Court Judges namely, Justice G.S. Singhvi and Justice S.J. Mukhopadhyaya had set aside the 2009 judgment by the Delhi High Court on 11 December 2013. They stated that Section 377 IPC does not experience the ill effects of unconstitutionality or unlawfulness and the assertion made by the Division Bench of the High Court is legally unsustainable.¹¹

On the second issue, the Court accepted the appellants' arguments that, since Section 377 does not classify any particular group on the basis of gender, therefore the provision is not violative of any Article as aforementioned. Justice Singhvi was quoted as saying that Section 377 is a pre-

¹¹ [J. Venkatesan](https://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece), *Supreme Court sets aside Delhi HC verdict decriminalising gay sex*, The Hindu (Dec. 11, 2013, 10:53 IST), <https://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece>.

constitutional legislation and if there was anything violative in that section and it would have been noticed by the Parliament and repealed immediately. The Court relied on a quote from the case of *Re: Special Courts Bill*¹² which had said that the legislation need not treat all persons in exactly the same manner and that the State had the power to determine who should be regarded as a class for purposes of legislation, provided that such classification should not be arbitrary.

On the third issue with regard to Article 21, it held that Article 21 can be expanded and dealt with various interpretations but the implication it brings out is based on the notion brought about by the founding fathers of the Constitution who had given enough liberty to the State to deprive any person of his/her personal liberty in accordance just, fair and reasonable procedure established by law.

Aftermath

Thereafter, on 28th January 2014, a review petition was filed by the Central Government, Naz Foundation and others against the 2013 verdict but it was dismissed by the Supreme Court.

Shashi Tharor, the member of Indian National Congress, introduced a Private Members Bill in the Lok Sabha on 18th December 2015 for decriminalization of Section 377. Unfortunately, the motion got rejected by the House.¹³ On 12th March 2016, he tried to reintroduce the Bill but was rejected again for the second time.

The Supreme Court on 2nd February 2016 finally decided to reconsider the 2013 judgment and referred the matter to a five-member bench who could comprehensively conduct the hearing.¹⁴

An important judgment¹⁵ was delivered on 24th August 2017, where a 9-judge bench including Justice Chandrachud was of the view that the 2013 judgment on Section 377 is incorrect and held that Right to Privacy is a fundamental right under Articles 14, 19 and 21 of the Constitution of

¹² AIR 1963 SC 1295.

¹³ PTI, *Shashi Tharoor's bill to decriminalize homosexuality defeated in Lok Sabha*, The Indian Express (Dec. 18, 2015, 09:18 PM), <https://indianexpress.com/article/india/india-news-india/shashi-tharoors-bill-to-decriminalise-homosexuality-defeated-in-ls/>.

¹⁴ Rajagopal, Krishnadas, *Five-judge Constitution Bench to take a call on Section 377*, The Hindu (Feb. 2, 2016, 15:50 IST), <https://www.thehindu.com/news/national/Five-judge-Constitution-Bench-to-take-a-call-on-Section-377/article14056992.ece>.

¹⁵ Justice K.S. Puttaswamy and Anr v. Union of India & ors. W.P. (CIVIL) No 494 of 2012.

India.¹⁶ The judgment also quoted that discriminating an individual on the basis of sexual orientation is offensive to his/her dignity and self-esteem. "The right to privacy and the protection of sexual orientation lie at the centre of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."¹⁷

In the case of *Shayara Bano v. Union of India and others*,¹⁸ the Court observed that for declaring a provision unconstitutional, the ground of manifest arbitrariness is valid and it laid down principles to test this arbitrariness and held that Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.

On 10 July 2018, Justice D.Y. Chandrachud upheld the rights of LGBT community stating that every person has a fundamental right to choose their partners. In *Common Cause (A Registered Society) v. Union of India and another case*,¹⁹ it was held that right to life and personal liberty as provided under Article 21, is meaningless unless it encompasses within its sphere individual dignity and right to dignity includes the right to carry out such functions and activities as would constitute the meaningful expression of human self.

NAVTEJ SINGH JOHAR & ORS V. UNION OF INDIA²⁰

On 6th September 2018, the most important landmark judgment was delivered by the Supreme Court of India in the aforementioned case, where a five-judge bench consisting of Chief Justice Dipak Misra and justices Dhananjaya Y. Chandrachud, Ajay Manikrao, Indu Malhotra and Rohinton Fali Nariman, partially struck down Section 377 of IPC regarding the criminal offence of cardinal intercourse against the order of nature by reversing its own 2013 judgment.²¹ It is a breakthrough and a progressive step towards human dignity and equality. The Supreme Court in its ruling stated that consensual sexual acts between adults cannot be considered as a crime,

¹⁶ Meenakshi Ganguly, *India's Supreme Court Upholds Right to Privacy*, HRW (Aug. 24, 2017, 06:00 PM), <https://www.hrw.org/news/2017/08/24/indias-supreme-court-upholds-right-privacy>.

¹⁷ Marykate Jasper, *India's Supreme Court Has Ruled That Sexual Orientation Is A Fundamental Privacy Right*, The Mary Sue (Aug. 27, 2017, 12:25 PM), <https://www.themarysue.com/india-supreme-court-lgbt-privacy/>.

¹⁸ (2017) 9 SCC 1.

¹⁹ (2018) 5 SCC 1.

²⁰ W. P. (CrI.) No. 76 of 2016.

²¹ Deepshikha Ghosh, *Love, Equally: Homosexuality No Longer A Crime, Says Supreme Court*, NDTV (Sept. 06, 2018, 18:49 IST), <https://www.ndtv.com/india-news/homosexuality-no-longer-a-crime-in-india-supreme-court-ends-controversial-section-377-1912202>.

deeming the prior law as “irrational, arbitrary and incomprehensible.”²² The Court was of the view that criminalizing sexual activities of consenting adults in private is violative of Articles 14, 15, 19 and 21 of the Constitution of India.

The Court opined that the LGBT people in India are entitled to all the Constitutional rights as any other human of the country including the liberties that are protected under the Constitution of India.²³ The rights shall incorporate "the choice/decision of whom to partner, the ability to discover satisfaction in sexual affections and the right not to be subjected to discriminatory or biased conduct are the pillars of the constitutional protection of sexual orientation".²⁴ The Judgment also mentioned all LGBT people are entitled to an equal citizenship and protection under the law, without any discrimination against them.²⁵

However, this section still remains in force in cases relating to sex with minors, non-consensual sex and also bestiality.²⁶

RECOMMENDATIONS

Even after the legalization of homosexual activity, there is still a long way to go in order to achieve complete justice for the LGBT community. The main problem faced by the community is the legalization of homosexual marriages which is another intense topic which will require more effort for its social acceptance by the Indian society.

Giving legal and social recognition in a traditional society is not an easy task, the friction between legalization of homosexual marriage and sacrament of the institution of marriage is like the birth of a new conflict all over again. But, eventually the demand for marriage between homosexuals cannot be denied for long so this matter has to be handled carefully and sensitively to avoid fatal results.

²² TNN, *Gay sex is not a crime, says Supreme Court in historic judgment*, TOI (Sept. 6, 2018, 17:48 IST), <https://timesofindia.indiatimes.com/india/gay-sex-is-not-a-crime-says-supreme-court-in-historic-judgement/articleshow/65695172.cms>.

²³ *Supra*, note 14.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ Pundir, Pallavi, *I Am What I Am. Take Me as I Am*, VICE (Sept. 6, 2018, 07:42 PM), https://www.vice.com/en_in/article/7xq5yd/i-am-what-i-am-take-me-as-i-am.

I am of the opinion that homosexuals should be granted all the rights that any other human being born in this country is entitled to. It should have never been under the ambit of a criminal offence. In the landmark case of National Legal Services Authority v. Union of India and others,²⁷ the judgment clearly connects the concept of human rights with sexual orientation and gender identity, making homosexuality a fundamental human right, a right to live with dignity.

Our Constitution is one of the most dynamic constitutions in the world that has time immemorial been progressive and adaptive to the needs of the society. The courts have also played a major role in pragmatically interpreting the provisions to prevent miscarriage of justice and combat inequality. That's why if we were to accept the judgment in Suresh Koushal case then it would have been a step backward in the direction of progressive interpretation and denial of ongoing realization of rights that are manifest in the Constitution.

Below mentioned is a table which shall give us an idea about the rights that are available to a homosexual in India today-

²⁷ (2014) 5 SCC 438.

Accepted	Pending	Proposed	Not Proposed/ not Accepted
Same-sex sexual activity legal	Anti- discrimination laws concerning gender identity	Same- sex marriage	LGBT people allowed to openly serve in military
Equal age of consent		Recognition of same-sex couples (unregistered cohabitation, life partnership)	Access to IVF for the lesbian couples
Anti- discrimination laws in employment		Stepchild adoption by same-sex couples	Commercial surrogacy for gay male couples
Anti- discrimination laws in the provision of goods and services		Joint adoption by same-sex couples	MSMs allowed to donate blood.
Anti- discrimination laws in all other areas (hate speech, indirect discrimination)			
Right to change legal gender			
Third Gender option			

Courtesy: https://en.wikipedia.org/wiki/LGBT_rights_in_India#Summary_table.

There are a few recommendations that I would like to put forward:

- The government should adopt new policies and laws as soon as possible to meet the current needs of the people for example, inclusion of same-sex marriages in family law and Domestic violence laws should be expanded to include acts of violence against LGBT community.
- The government as well as NGOs should be encouraged to carry out more research regarding homosexuals by gaining new knowledge and making it available for everyone.
- Human Rights education should be promoted and encouraged to make people aware of human rights issues in the country including problems faced by the LGBT community.
- Special support should be extended to the most marginalized groups of the LGBT community like low-income, young and elderly people.
- Educational Institutions can help promote health and safety among LGBT groups through programmes and events.
- Homosexuality issues should be considered as a centre theme for all economic and racial justice work.
- Advocates who are engaged in philanthropic work can give free legal or financial assistance to LGBT community.
- The media should play the role of a friend by promoting same-sex issues and encouraging cultural tolerance and the right of freedom to minorities.
- PILs on homosexual issues should be taken into consideration and legal funds should be created.
- The health professionals should undergo training and research to understand identity and orientation of LGBT people so that potential health risks can be eliminated.
- The workplaces should be made cultural accepting and supportive of LGBT people.

- Special homes and helpline numbers should be initiated to protect and provide shelter to homosexuals.
- All government departments including police force must be sensitized with the issues of LGBT.

Therefore, it is high time for Legislature, Executive, Judiciary and the society to stop demeaning the existence of same-sex couples. But this does not mean that a new set of specific rights or standards are to be established, all that needs to be done is the acceptance of same-sex couples and recognizing their place in the already existing laws. Clearly, if one needs to be educated about the dos and don'ts of how to treat a person as a human then a new mindset is the need of the hour.

CONCLUSION

From all of the information that has been put forward, I am of the view that Indians are not ignorant about same-sex events happening around the world and that these relationships are being accepted by most of the countries but due to their reserved and conservative thoughts, the Indian society, by and large, doesn't approve of such relationships and tags it as a criminal offence. This attitude is mostly affected by religion, culture, the media and politics which people follow blindly. Such attitude in turn, creates hindrances and obstacles in the lives of homosexual people, such as exclusion, ignorance, ostracism and violation of various rights.

Chief Justice Dipak Misra in his 2018 verdict expressed his emotions towards the homosexuals and beautifully quoted them as, "History owes an apology to the members of this community and their families, for the postponement in providing redressal for the shame, ignominy and ostracism that they have endured through hundreds of years. The individuals of this community were constrained and compelled to live a life full of fear of reprisal, mistreatment and persecution. This was by virtue of the numbness or ignorance by the majority to recognize that homosexuality is a completely natural condition, part of a range of human sexuality." This judgment gave a new birth of freedom to the homosexuals and touched the hearts of millions who believed in the power of the Judiciary. As of today, a large chunk of the population is in

favor of homosexuals comprising of the general public, non-governmental organizations and intergovernmental organizations and I am of the view that, consensual sexual activities between two adults are not the business of the State to regulate upon.

Finally, the answer to the question, “Should homosexuality be considered as an unnatural offence?” is a big “NO”. I have strongly supported homosexuality since the time I gained knowledge about it and I will continue to do so forever. When animals have no issue in accepting homosexual orientation amongst them, then why should we?

Indians need to realize that sex orientation is biological and not an illness or disorder. Nagging them as a “taboo” and disrespecting them by calling them “a disgrace to the society” should be considered as a part of defamation. It is yet another long journey towards social and legal recognition of homosexual marriages in India but I have full faith in our legal system and the youth of today.

I am proud that I live in the world’s largest democracy that has decriminalized homosexuality. Better late than never!

“BOYS CAN BE PRINCESSES TOO”