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# **LGBT RIGHTS IN INDIA AND USA : A** **COMPARATIVE ANALYSIS**

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## **TABLE OF CONTENTS**

- Abstract
- Introduction
- LGBT rights in India
- LGBT rights in USA
  - 4.1. The constitutional basis of LGBT equality
  - 4.2. LGBT in schools
  - 4.3. LGBT demanding special rights and preferential treatment
  - 4.4. LGBT protection against discrimination
  - 4.5. Domestic partnership
  - 4.6. Supporting same sex marriage
  - 4.7. Sodomy law and working to protect them
- A comparative analysis between the LGBT people of India and USA
- Conclusion
- References

## ABSTRACT

LGBT has become a widely accepted community for minorities based on sexual and gender orientation. All members of these subgroups are subject to similar preconceptions rooted in beliefs and traditions about sexuality and gender. LGBT people, as members of a social minority group, are facing hardships from various forms of socioeconomic and cultural maltreatment. Due to the lacks of social recognition it has an effect on the LGBT people to completely enjoy their rights as citizens. They moreover experience bigotry, discrimination, harassment, and even the threat of violence due to their sexual orientation. Sexuality is linked to social oppression ideologies and structures such as patriarchy, capitalism, and fundamentalism. Hence, the struggle for these rights cannot be separated from human rights struggle for political, social and economic liberation. In this paper I will be highlighting about the rights of the LGBT community in India and USA as LGBT rights are human rights and everyone is equal in the eyes of law, will also analyze and compare the situation and rights of the LGBT community between the two countries India and USA.

Keywords: LGBT, Human rights, Equality, fundamental rights.

## INTRODUCTION

The word LGBT stands for lesbian, Gay, Bisexual, and Transgender these are used to identify people's sexual orientation or gender identity of homosexuals. At first this community was known as the Gay community. But only the term gay was not sufficient to include the ones who are different from normal human beings altogether in the gay community as it refers to only men. So, the initial LGBT was introduced in the mid-1980s. The LGBT people have different sexual orientation than a normal person where sexual orientation generally includes sexual behavior, social and lifestyle preferences and self-identification.

The term lesbian refers to women who are sexually attracted to people of the same gender i.e. to women only. They are like gay people only but only men are included in gay whereas only such women are called lesbians. They are not at all attracted to the people of opposite gender. A Gay is used to refer to the people who are attracted to the people of same gender. But the Lesbians, Bisexual, and Transgender are not included in the gay community.

Transgender is an umbrella term used to describe people whose gender identity differs from that usually related with their birth sex. Not all the people whose appearance or behavior is gender-atypical will be identified as a transgender person. Transgender people can be

identified as transvestite, transsexual or another gender identity.

A bisexual person is referred to a person who is sexually or emotionally attracted to the people of both sexes. They are not only attracted to one gender but finds interest in both the genders.

This initialism has become prevalent as self-identification and many of the countries have adopted this initialism to identify their sexuality and gender-identity based community centers and focuses on gender-based culture and diversity of sexuality. It indicates anyone who is non-heterosexual.

## **LGBT Rights in India**

The references of homosexuality were found in pre-colonial societies in India. Homosexuality was regarded as a major offence in Manusmriti and maltreatment/punishment was there for such an offence. Belonging to this community at that time in manusmriti was regarded as a serious offence and for this offence there were serious punishment. Even in Islamic period, the Muslim Shariat law homosexuality was a serious offence. Therefore in different religions there were different punishments for homosexual offences in India. The codification of laws began during the British period, the first enactment of uniform penal laws in India in 1860. In the form of Unnatural offences, its nature and punishments has been prescribed in the uniform prescription of homosexual behavior under the Indian Penal Code (IPC). In fact in India this group of sexuality minority has always existed whether it's in invisibility and quietness or culturally sanctioned, their issues/problems have never been taken seriously. Before 19<sup>th</sup> century these issues were only limited to the society but after this century the rights of LGBT minorities raised their issues relating to the violation of their basic human rights. These serious issues came into light through different civil organizations in the society in India. In India the first gay magazine was Bombay Dost which came in the 1990 and the beginning of a lesbian collective in Delhi called sakhi, lesbian, gay and bisexual issues were first vocal in a public forum. After the publishing of this magazine this LGBT minority movement in India increased.

In the final decade of 20<sup>th</sup> century the lesbian/gay/bisexual/transgender movement brought to the force the rights of those discriminated on the basis of their sexuality. There were movements taken place and rights given to this community in various countries at that time. People were fighting for their human rights, right to privacy, discrimination on the basis of their sexuality and equal rights for this minority and while the scope of human rights were

protracted to add hitherto marginalized communities globally , this kind of development was yet to take place in India.

In fact, most human rights organizations in India did not address to question the rights of lesbian, gay, bisexual, transgender and others who were dominated due to their sexuality.

Sexuality is sometimes viewed in liberal and radical circles as an illiberal and pointless issue. Sometimes homosexuality is verifiably seen as abnormal which is guarded as an individual opportunity yet not a matter of need for the human rights development. Issues of gender, poverty and caste oppression are given more importance than the issue of sexuality.

In 2009, The Delhi high court decision on Naz Foundation v. Govt. of NCT of Delhi found section 377 and there were other legal conditions against adult, private, consensual, and non-commercial same-sex strategy which were in direct violation of fundamental rights given by the Indian constitution (Naz foundation was the NGO, which raised the issue of LGBT in India in 2001 in Delhi high court).

*Section 377, Unnatural offences:* Anyone who willfully has carnal intercourse against nature with a man, woman or animal shall be punished to life imprisonment or imprisonment for any reason for a period of up to ten years, and also punishable by a fine.

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

The Ministry of Home affairs on 23 February 2012, conveyed the opposition to decriminalize homosexual activity, stating that homosexuality is seen as being immoral in India.

The Supreme Court on 11 December 2013 set aside the order of the Delhi high court about decriminalizing consensual homosexual activity within its jurisdiction.

According to human rights watch it demonstrated worry that the SC administering will render same-sex couples and other people who have come out about their sexuality after the high court's decision powerless against police provocation, saying that the Supreme Court's decision is disappointing aspect to humanity, and the basic rights to privacy. The Naz foundation said that it would file a petition for review of the court's decision. After the ruling of 2013, the two-fifths of the homosexuals in India faced blackmailing, reported by activist Kavi Humsafar's trust.

The Supreme Court of India on 28 January 2014, dismissed the review petition filed by the Central Government, the Naz foundation and few others against the 11 December verdict on Section 377. The bench said: "When reading Section 377, the High Court forgot that a tiny fraction of the country's population is lesbian, gay, bisexual or transgender people, and in

more than a hundred and fifty years past, less than 200 individuals have been prosecuted for committing the offence under Section 377, and this can not be created a sound basis for declaring that section ultra vires Article 14, 15 and 21.

There was a bill introduced for the repeal of section 377 but it got rejected within the house which was introduced by Shashi tharoor on 18 December 2018, who is a member of Indian National Congress.

The Supreme Court on 2 February 2016, decided to review the criminalization of homosexual activity. On August 2017, the Supreme Court collectively ruled that the Right to individual privacy is an intrinsic and fundamental right under the Indian constitution. The court also ruled that a person's sexual orientation is a private issue, which' type of gave hope to the LGBT community that section 377 will soon be stroked down.

The Supreme Court in January 2018 agreed to refer the question of section 377's validity to a large bench and heard several petitions on 1 May 2018. In response to the court's request for its position on the petitions, the government announced that it would not oppose the petitions, and would leave the case to the court.

A hearing began on 10 July 2018, with a verdict which was expected before October 2018. This case is viewed as the most significant and greatest breakthrough for Gay rights since the country's independence, and it could have be a great hope for the countries that still outlaw homosexuality.

### **2018 Navtej Singh Johar v. Union of India**

Later that year, the constitutional bench of the supreme court consisting of Dipak Misra (chief justice) and Dhananjaya Y. Chandrachud, Ajay Manikaro Khanwilkar, Indu Malhotra, and Rohinton Fali Nariman (5 justices) started the hearing of the challenge to constitutionality of section 377. The union government did not participate in this issue of section 377 and left it to the court. To argue against the section 377 the petitioners appealed to the right to sexual privacy, dignity, right against discrimination and freedom of expression. After listening to the petitioner's plea for 4 days, the court reserved its verdict on 17 July 2018. The bench gave its verdict on 6 September 2018. Announcing the verdict, the court explicitly overturned its own 2013 judgment of recovering section 377 by asserting that using section of IPC to victimize the homosexuals was unconstitutional and therefore a criminal act. The Supreme Court asserted that consensual sexual acts adults cannot be a crime deeming the law before "absurb, inconsistent and unfathomable. In fact it said that any kind

of discrimination on the basis of sexual orientation is a violation of the fundamental right of freedom of expression in the Indian constitution.

The Supreme Court also directed to take all the precautions to transmit the fact that homosexuality is not an offence.

The judgment also included that it cannot be revoked again under the “Doctrine of progressive realization of rights”.

## **LGBT rights in USA**

Lesbian, Gay, Bisexual and Transgender individuals has a vast background in the United States which incorporates social, strict acknowledgment and legitimate rights. LGBT rights in USA were been legalized by the Supreme Court of United States, but the rights are different from jurisdiction and discrimination in jobs and housing is legal in many states. The equality law which is present in the United States congress would outlaw discrimination based on sexuality and gender identity nationwide.

Despite all the developments into the American mainstream, LGBT people however tend to face significant prejudice in all the aspects of life. There is no federal law which prohibits an individual from being fired at work or refused a job based on their sexual orientation. The nation’s biggest employer the U.S. Army discriminates openly against the homosexuals and lesbians. Mothers and fathers lose the custody of their child because of their sexuality which is being gay or lesbian and the right to marry is denied to gay people.

One of the states even tried to leash the gay men and lesbians out of the process which used to pass laws. Colorado in 1992 implemented Amendment 2, repealing existing state laws and securing future laws to protect gay men, lesbians, and bisexuals from any kind of discrimination. It was overturned by the U.S. Supreme Court in the 1996 in Romer v. Evans judgment.

‘Amendment 2 classifies homosexuals not in order to achieve a proper legislative end, but in order to make them unequal to everyone else. Colorado can’t do that. The state can not so deem a community to be a stranger to its laws.’- Justice Anthony Kennedy (Majority opinion in Romer v. Evans I)

In June 1969 a modern gay right began dramatically in Greenwich Village of New York. During a standard raid, the police attempted to arrest people for simply their presence in a gay pub, but the people of the Stonewall Inn fought back and the gay rights movement was born. Using a number of grassroots and litigation strategies employed by several other

activists in the 20<sup>th</sup> century, gay rights advocates have made good progress:

- There are 10 states, The District of Columbia, several municipalities and many businesses and institutions now ban employment discrimination
- There is a “Domestic partnership” programs which exists in many municipalities and a larger number of private institutions, including several country’s largest corporations and universities.
- The Sodomy laws, was commonly used to justify discrimination against the people of this community, which existed once nationwide; they are currently on the books in 18 states and Puerto Rico.

In fact the raised empowerment of LGBT community has brought ev en more open and fatal anti-gay resentment:

- Though not related to an individual’s power, the criterion for employment decisions in most states and municipalities may still be sexual preference both in the public and private sectors.
- Serious hate crimes, such as the 1998 murder of a student of Wyoming, Matthew Shephard, represent a horrific backlash against the LGBT people or individuals considered to be gay.
- There is discrimination and harassment faced by LGBT students and teachers in the schools, and LGBT student groups in colleges and schools still face roadblocks.

In 1986, the American Civil Liberties Union formed a new lesbian and gay rights project after more than two decades of advocacy for lesbians and gay struggles. Working closely with ACLU affiliates across the nation, the project oversees the nation’s largest gay rights legal network. Increasing opposition from a well organized and well funded alliance of radical extremists and fundamentalists promises several fights and threats ahead.

### **The Constitutional basis of LGBT Equality**

There are a variety of basic constitutional values in the fight to ensure the legal equality of LGBT people.

The 14<sup>th</sup> and 15<sup>th</sup> amendments guarantee equal law protection and many federal, state, and local civil rights legislation is strengthened. While, at the time of the end of civil war, the 14<sup>th</sup>

amendment was intended to ensure African Americans legal equality, it was enacted by congress as a general promise for equality and the court has interpreted the equal protection clause as a ban against discrimination against people on grounds of gender, ethnicity, and disability. The ACLU argues that discrimination based on sexual identity is forbidden under the equal protection clause.

The 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, and 14<sup>th</sup> amendments guarantee the right to privacy or the right to be left alone. Griswold v. Connecticut enacted a state law in 1965, banning married couples from receiving contraception's. The 1972 case of Eisenstadt v. Baird judgment acknowledged unmarried person's right to contraceptives and Roe v. Wade recognized the right of women's reproductive options in 1973. All these rulings of the Supreme Court underline the concept of independent decision making about intimate relationships should be according to the individuals.

Freedom of speech and association are protected in accordance with the 1<sup>st</sup> amendment. This alteration defends the option to compose and encourages the government to end this separation of discriminating LGBT and getting them and pass enactment restricting private segregation. This also requires the right to create social and political groups, to socialize, march or demonstrate nonviolent, generate gay themed art and talk about LGBT issues publicly.

- **LGBT in schools**

Nothing is more essential than supportive and welcoming schools for the LGBT youth who often face tremendous hostility from their families and society during formative years. This includes kids from brutality, ensuring there privileges to arrange occasions and clubs and guaranteeing that gay instructors who may fill in as a sound example ought not themselves be defrauded by segregation. The ACLU fought harassment against students in Nevada, Ohio, California, and Washington, supported gay teachers in California, Utah and Idaho and advocated for gay student groups in Minnesota, Indiana, Utah, Wisconsin, and Alabama.

## **LGBT demanding special rights and preferential treatment**

According to the explanation given by the Supreme Court in Romer v. Evans, there is nothing unique about legislation that prohibits people from losing jobs and homes because of whosoever they are. The court has confirmed that many people have right to participate,

either because we have a legal right or because we are not discriminated. Legislation that forbids discrimination grants LGBT people the basic rights to engage fairly in their communities.

Most Americans do not recognize that there is no legal redress for many LGBT people facing discrimination against LGBT individuals. Extending discrimination protection to LGBT individuals is one of several important struggles in front of ACLU and other advocacy institutions.

## **LGBT protections against discrimination**

There are 12 states (California, Hawaii, Maryland, Connecticut, Minnesota, Massachusetts, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont and Wisconsin). The District of Columbia has adopted laws to protect gay, lesbians and bisexual people from discrimination on their jobs, in many municipalities and hundreds of business and universities. Fewer jurisdictions are safeguarding transgender people.

But discrimination against LGBT persons remains perfectly legal in most communities in the remaining 38 states. Companies openly fire the LGBT workers and lesbian and gay Americans are refused jobs every year and access to housing, hotels, and other public accommodation. Many more are forced into hiding their lives, denying their families and lying about their loved ones.

The ACLU argued that the best way to rectify discrimination is to modify all existing federal, state and local civil rights laws and discrimination should be banned on the basis of sexual orientation in existing business and universities policies.

## **Domestic partnerships**

Many cities have established Domestic Partnership registries, including New York, Los Angeles, San Francisco, Atlanta, Minneapolis and Columbia. Official status is given to same-sex couples who register with the city. The Government and private companies identify the domestic partnerships of their employees. The state Hawaii recognizes its domestic partners.

While these laws do not confer most of the rights and responsibilities of marriage, they grant partners some of the recognition which is granted to married couples usually the rights to visit sick or dying partners in hospital, sometimes and depression leave and in a few cases, health insurance and other important benefits.

Sometimes as important as that these policies gives small recognition to the intimate, committed relationship that is central to the lives of so many lesbians and gay men that society ignores otherwise.

## **Supporting same sex marriage**

The denial of lesbian and gay couple's right to wed is no more than a denial of the social and spiritual meaning of matrimony but also it has tragic, practical consequences. Since they cannot marry, lesbian partners and gay men are not next to each other in times of crisis; they are not consulted on crucial medical decisions; they are not allowed to care for them; they are not legal heirs of each other, if like most Americans they have no will. Marital status is often the basis on which employers extend health insurance, pensions and other benefits. The ACLU believes that since we have such attributed ormous social consequences to marriage, it infringes equal protection of the law to deny lesbian and gay couples the right to wed.

## **Sodomy law and working to repeal them**

Sodomy laws typically forbid oral and anal sex, even among adults who agree. Penalties vary from \$200 fine to 20 years imprisonment for the violation of sodomy rules and these vary state by state. While heterosexuals or lesbians or gay men are subject to most sodomy laws, they are mostly used against homosexuals. Some courts, for instance says that sodomy legislation justifies separating homosexual parents from their children. In some towns sodomy laws are used to prosecute gay people in discussions that are held every day in relation to sex.

The legislatures of Pennsylvania, Nevada and Rhode Island have joined the other 23 national legislatures in recent years, which abolished sodomy laws in the 1960s and 1970s. The laws have been created for courts in Georgia, Maryland, Montana, and Tennessee. In legislative and courts the remaining sodomy laws are questioned before all of them are repealed.

## **A comparative analysis between the LGBT people in India and USA**

On 6 September 2018 the Supreme Court of India invalidated part of section 377 of the Indian Penal code making homosexuality legal in India, striking down the colonial-era law

that made gay sex punishable by up to 10 years in prison, one of the judges said that landmark decision would ‘pave the way for a better future of the LGBT community’

Whereas in US in the 1969 Stonewall riots in New York City was the beginning of the modern gay civil rights. In late 20<sup>th</sup> century, social acceptance began to increase and legal rights followed.

In India in spite making homosexuality legal the LGBT people are still denied educational and training opportunities due to harassment, bullying, and violence.

In the USA the LGBT fight started long back and still there are major issues like the gay people don’t have the right to marry. The many rights of same-sex couples will acquire if same-sex marriage is legalized. And there are some of the benefits same-sex couples could receive if married:

- Automatic assumption of spouses pensions
- Automatic inheritance
- Automatic housing lease transfer
- Joint parenting
- Child custody.

The gay rights movement in the United States has experienced historic success in recent years. But progress in the associated transgender movement has lagged behind in comparison to transgender people in India. In fact in India justices has extended legal rights and equality to transgender people. In US state laws should be streamlined and updated to permit transgender people to change their names or legal sex on official documents without requiring invasive surgeries.

In 2012, in India a guide titled ‘creating inclusive workplaces for LGBT employees in India’ was developed by IBM, Goldman Sachs, and Google together with the community business, a non-profit organization.

In US, Seattle area opinion columnist and rights activist Dan Savage participated with his husband in making of a video which encouraged children and teenagers to avoid and overcome peer bullying, inaugurating an ongoing series of videos by politician, media personalities, business leaders, activists and others both within and outside the United states which was listed under ‘it gets better project’.

## Conclusion

People around the world face violence and inequality, maltreatment and even execution because of who they love, how they look, who they are. Sexual orientation and gender identity are important aspect of our selves and should never lead to discrimination or abuse.

Regardless of our sexual orientation, every single person is at risk for emotional or psychological difficulties coming from a variety of issues. LGBT people not only have to come to terms with their own sexuality or gender but they have to overcome the homophobic attitudes and misunderstandings of those around them.

There should be equal rights for LGBT community in all the aspects as even if the fight for the rights of LGBT started long back in the USA but there is still discrimination on the basis of sexuality and as in India the rights were given recently but there is still a long road to go for LGBT

LGBT rights are human rights and these people should also be treated equally and there should be more rights given to them so that they don't face the problems they are facing in their everyday life. There should be more policies formed for them and in society also people should be aware and spread awareness that the people belonging to this community are not different but are one of us only. Everyone has the right to make their own choices whether it is related to everyday lives of people or choosing their partners, everyone should be free to choose the person they love and should not be discriminated on the basis of that.

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