

COMPARATIVE ANALYSIS OF LAWS DEVELOPED IN INDIA, BRITAIN & GERMANY WITH SPECIAL REFERENCE TO LGBT RIGHTS

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ABSTRACT

Across the globe, lesbian, gay, bisexual, and transgender people (LGBT) continue to face endemic violence, legal discrimination, and other human rights violations on account of their sexual orientation or gender identity. After years of fighting for their very fundamental human right, many countries have started recognising the LGBT community. A gender identity is considered to be an inherent part of a person which may or may not need surgical or hormonal treatment or therapy. What is also realised is that sexual characteristics of a person may vary in nature and all persons must be empowered to make their decisions affecting their own bodily integrity and physical autonomy. However, level of recognition and acceptance varies for country to country. This article shall be analysing how three different nations, with three distinct backgrounds and cultures have adapted themselves to the changing notions of society and to what level have they recognised the LGBTQ+ community.

Keywords: LGBT, Human Rights, Gay, Bodily Autonomy, Sexuality, Gender Justice, Same-sex, Discrimination, Gender Violence.

INTRODUCTION

LGBT is the code word for Lesbian, Gay, Bisexual, and Transgender, which was introduced in the mid-1980s.ⁱ Further, nowadays, the LGBTIQ or LGBT+ is used by some people meaning LGBTIQ as intersex people questioning their sexual identity and LGBT+ embracing spectrums of gender and sexuality.ⁱⁱ The LGBT community has faced innumerable difficulties in the society where the only accepted orientation is heterosexuality and homosexuality is regarded as ‘abnormal’. Abuse becomes a part of their daily routine, so much as to, that they are more likely to experience intolerance, discrimination, harassment, and threat of violence due to their sexual orientation than those that identify themselves as heterosexual.ⁱⁱⁱ Furthermore, many LGBT youths are placed in foster care or end up in juvenile detention or on the streets, because of family conflict related to their LGBT identity.^{iv}

In recent years, the issues regarding the LGBT clan has become a source of estrangement among the nations.^v This had called for nations all over the world, take initiative towards gender justice and recognition of the minority. The aspect that shall be mainly dealt by the author is how the notion of same-sex marriage and adoption by people belonging to the LGBT is socially perceived as well as legally recognized in various countries. Therefore, this particular paper shall be elucidating the very fact about how the laws have developed all over the globe, with a special emphasis put on India, Britain and Germany, in order to compare the conception held in common law vis-à-vis civil law countries.

The paper shall be divided into four parts; the first one comprising of the LGBT rights in India, about section 377 and its unconstitutionality, the second chapter shall state the LGBT situation in Britain, in the sense, that how the LGBT movement started in UK and where it stands today. The third chapter will elaborate the take of Germany with regard to LGBT rights and how it has evolved over the period of time. Finally, the last chapter will be the conclusion, wherein the author shall be summarising as well as comparing the stance between all the three countries.

LGBT RIGHTS IN INDIA

Over the past decade, LGBT people have gained more and more tolerance and acceptance in India, especially in large cities. Nonetheless, most LGBT people in India remain closeted,

fearing discrimination from their families, who might see homosexuality as shameful. On 6 September 2018, the Hon'ble Supreme Court of India, decriminalized homosexuality by declaring Section 377 of the Indian Penal Code unconstitutional. Across the country, the decision sparked celebrations among sexuality, lesbian, gay, bisexual and transgender (LGBT) groups, which see decriminalisation of homosexuality as a vital step on the road to their acceptance by the wider society.

Constitutional rights of LGBT people

The Constitution provides every person an equal status before the law and an equal protection of laws within the territory of India. The word "any person" here means every individual, without any discrimination based on any of the category which includes, caste, creed, religion, sex, etc. The discrimination on the ground of "sex" under Articles 15 and 16 of the Indian Constitution includes discrimination on the ground of gender identity as well.^{vi} These Articles have also been interpreted to provide social equality to these communities such as equality in public employment, it provides that the states shall have the power to make any special provision for the enhancement of these vulnerable minority who are now included within the category of socially and educationally backward classes.^{vii}

The expression of "sex" is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. Recognition of gender identity provides the recognition of their right to dignity and non-recognition violates the same, they have full right to express and live their life without fear. The right to choose one's own identity is one of the most essential right under this article to life with dignity, and this aspect is covered and protected by this Article as it symbolizes the most important right being a human, a right to live, which the State is required to protect from violation.^{viii}

History of Section 377

Section 377 of the Indian Penal Code was authored by Lord Macaulay, the President of the Indian Law Commission, in 1860, as part of Britain's efforts to impose Victorian values on its biggest colony.^{ix} Laws such as Section 377 have long been abandoned in most Western democracies, although they persist in many post-colonial countries in Asia and Africa (except South Africa and Nepal). In the 1980s, the European Court of Human Rights ruled that criminalising same-sex sexual behaviour was a violation of protections of private life.^x Britain,

the author of the Indian Penal Code and Section 377 during the colonial period, decriminalised homosexuality in 1967.

As a response to all the harassments, the non-governmental group Bhedbhav Virodhi Andolan (ABVA) organised the first-ever protest demonstration that openly demanded “gay rights”, in August 1994.^{xi} However, although few cases against consenting adults have gone to trial, the existence of Section 377, and the threat of possible arrest, have allowed the authorities to discriminate against homosexuals and organisations working with them. Thus, Section 377 has had an enormous negative impact on many people's lives.

Legal Trajectory of Section 377

In modern India, Shakuntala Devi was the first to publish a study on homosexuality in 1977. Section 377 of Indian Penal Code talks about unnatural offenses stating homosexuality is illegal in India. Bhedbhav Virodhi Andolan, in 1991, published an article regarding annulment of Section 377. In 2001, it again gained a momentum when a Public Interest Litigation was filed by Naz Foundation in Delhi High Court.^{xii} Below is the trajectory of how the legal position of Section 377 has evolved in the past couple of decades, through the landmark judgments illustrated:

NAZ Foundation v. Government of NCT Delhi ^{xiii}

Facts: The case was instituted by a non-governmental organization based in Delhi, Naz Foundation, which is devoted to the working of the issues of HIV/AIDS. The petition was filed in order to “read down” section 377 to exclude adult consensual sex from within its purview

Issue: The unconstitutionality of section 377 of the IPC.

Arguments: They filed a writ petition arguing that Section 377 of Indian Penal Code was unconstitutional as it were violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. There was discrimination faced by the gay community, the petitioners submitted, which resulted in the denial of fundamental human rights, abuse, harassment and assault by public authorities, thus driving the gay community underground and subjecting them to greater vulnerability in violation of their fundamental rights.

Judgment: The Delhi High Court in 2009 stated that Section 377 violates Article 14, 15, and 21. The Court analysed Article 14 that distinction or classification should be on an intelligible differentia which has a rational relation to the objective sought.^{xiv} Further, Article 15 of the Constitution forbids discrimination based on certain characteristics, including sex. The Court held that the word ‘sex’ includes not only biological sex but also sexual orientation, and therefore discrimination on the ground of sexual orientation is not permissible under Article 15.^{xv} The Court also noted that the right to life under Article 21 includes the right to health, and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts. The Court did not strike down Section 377 as a whole. The section was declared unconstitutional insofar it criminalises consensual sexual acts of adults in private.

Suresh Kumar Koushal v. NAZ Foundation^{xvi}

Facts: The decision given by Delhi High Court about decriminalization of homosexuality attracted many appeals in the Supreme Court challenging the judgment of High Court in the *Naz Foundation* case. One of such was this particular case.

Issue: The constitutional validity of section 377, IPC.

Arguments: Section 377 is gender neutral and includes the acts of carnal intercourse which are committed voluntarily irrespective of gender. It does not violate Right to Privacy under Article 21 and right to privacy does not include right to commit any offense under Section 377. It was also argued that the judgment of High Court affects the social structure of India and the system of marriage would be adversely affected. Moreover, whether a law is moral or immoral should be left to the parliament to decide.^{xvii} Further, it was also noted that pre-Constitution laws, since parliament has had an opportunity to remove them and hasn’t, should be given a presumption of constitutionality equal to a post-Constitution law.

Judgment: The panel of two Supreme Court judges overturned the judgment of Delhi High Court on 11 December 2013, and held that Section 377 of Indian Penal Code does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offense. Such a prohibition regulates sexual conduct regardless of gender identity and orientation’.^{xviii} The Court held Section 377 of IPC constitutional and re-criminalized homosexuality, i.e., sexual intercourse against the order of nature.^{xix}

Navtej Singh Johar And Ors. v. Union of India^{xx} Became a historic judgement for the entire country as it served the justice that was long due. It puts India in the list of almost 150 countries^{xxi} where homosexual activity is legal. The decriminalization of sexual intercourse between *all consenting adults* was an eagerly anticipated first step towards recognizing the rights of the LGBT community in India.

This Is indeed a huge step towards progression but what needs to be duly noted is, that marriage amongst the same-sex and adoption is still not legalised in India. In terms of the LGBT rights, we have a long way to go, this particular step taken by the Supreme Court on the 6th of September 2018, can be the first step towards it.

LGBT RIGHTS IN BRITAIN

The England is quite a liberal state and thus has legally allowed homosexuality.^{xxii} This is ironic itself considering that in 1861, the English themselves came about and added buggery and Section 377 in the Indian Penal Code, made during the time India was a British colony. Now that the “mother” country has progressed and gone on to give such major rights to the LGBT community, the “colony” even after independence could not move on and progress due to major societal resistance coming in from all parts of the country.

Historical Developments

Before and during the formation of the Britain, Christianity and homosexuality fundamentally clashed. Same-sex sexual activity was characterised as ‘sinful’ and, under the *Buggery Act 1533*, it was outlawed and punishable by death. LGBT rights first came to prominence following the decriminalisation of sexual activity between men, in 1967 in England. However, sexual activity between women was never subject to the same legal restriction.

In 2003, regulations were introduced for discrimination protections on sexual orientation in employment providing for the prohibition of discrimination in employment on the grounds of sexual orientation.^{xxiii} The *Sex Discrimination (Gender Reassignment) Regulations 1999* created certain legal protections for transgender people for the first time in British history. Further, on 30 April 2007, the Sexual Orientation Regulations came into force which provided a general prohibition of discrimination in the provision of goods and services on the grounds

of sexual orientation. Similar legislation had long previously been in force in respect of discrimination on the grounds of sex, race, disability and marital status.^{xxiv}

Since the turn of the 21st century, LGBT rights have increasingly strengthened in support. Some discrimination protections had existed for LGBT people since 1999, but were extended to all areas under the *Equality Act 2010*. In 2016, Her Majesty's Armed Forces removed its ban on LGBT individuals serving openly with the *Armed Forces Act 2016*, though it had adopted a policy of non-enforcement in 2000.

The age of consent was equalised, regardless of sexual orientation, in 2001 at 16 in England. Transgender people have had the right to change their legal gender since 2005. The same year, same-sex couples were granted the right to enter into a civil partnership, a similar legal structure to marriage, and also to adopting England. Same-sex marriage was legalised in England in 2014.^{xxv}

Current Scenario

Today, LGBT citizens have most of the same legal rights as non-LGBT citizens and the UK provides one of the highest degrees of liberty in the world for its LGBT communities. In ILGA-Europe's 2015 review of LGBTI rights, the UK received the highest score in Europe, with 86% progress toward “respect of human rights and full equality” for LGBT people and 92% in Scotland alone.^{xxvi} Recent polls have indicated that a majority of British people support same-sex marriage,^{xxvii} and 76% of the UK agreed that homosexuality should be accepted by society, according to a 2013 Pew Research Center poll.^{xxviii} Additionally, the UK currently holds the world record for having the most out LGBTI people in Parliament with 45 out LGBTI MPs elected at the 2017 election.^{xxix} Following are the legal rights given in England, in a nutshell:^{xxx}

HOMOSEXUALITY		MARRIAGE	
			
✓ Legal		✓ Legal	
CHANGING GENDER	✓ Legal, but requires surgery	ADOPTION	✓ Legal
HOUSING DISCRIMINATION	✓ Sexual orientation and gender identity	EMPLOYMENT DISCRIMINATION	✓ Sexual orientation and gender identity
AGE OF CONSENT	✓ Equal	DONATING BLOOD	✗ Banned (1-year deferral)
		DISCRIMINATION	✓ Illegal
		MILITARY	✓ Legal
		CONVERSION THERAPY	Ambiguous

It is also estimated that the trans population of the UK is between 300,000 and 500,000 people,^{xxxii} but Stonewall^{xxxiii} concludes that it is hard to define the LGBT population of the UK because some LGBT people are not out. LGBT rights organisations and very large LGBT communities have been built across the UK, most notably in Brighton, which is widely regarded as the UK's unofficial "gay capital", with other large communities in London, Manchester, Birmingham, Bristol, Leeds, Liverpool, Newcastle upon Tyne and Edinburgh, which all have gay villages and host annual pride festivals.

LGBT RIGHTS IN GERMANY

Lesbian, gay, bisexual and transgender (LGBT) rights in Germany have evolved significantly over the course of the last decades. During the 1920s and early 1930s, lesbian and gay people in Berlin were generally tolerated by society and many bars and clubs specifically pertaining to gay men were opened. Although same-sex sexual activity between men was already made illegal under Paragraph 175 by the German Empire in 1871, Nazi Germany extended these laws during World War II, which resulted in the persecution and deaths of thousands of homosexual citizens.^{xxxiii}

History of the LGBT Rights

The influence of the Napoleonic Code in the early 1800s sparked decriminalisations in much of Germany. However, in 1871, the year the federal German Empire was formed, Paragraph 175 of the new Penal Code recriminalized homosexual acts. The law was extended

under Nazi rule, and convictions multiplied by a factor of ten to about 8,000 per year. Penalties were severe, and 5,000–15,000 suspected offenders were interned in concentration camps, where most of them died. The Nazi additions were repealed in East Germany in 1950, but homosexual relations between men remained a crime until 1968. West Germany kept the more repressive version of the law, legalising male homosexual activity one year after East Germany, in 1969.^{xxxiv} The age of consent was equalized in East Germany through a 1987 court ruling, with West Germany following suit in 1989; it is now 14 years (16/18 in some circumstances) for female-female, male-male and female-male activity.

Present Stand in terms of LGBT Rights

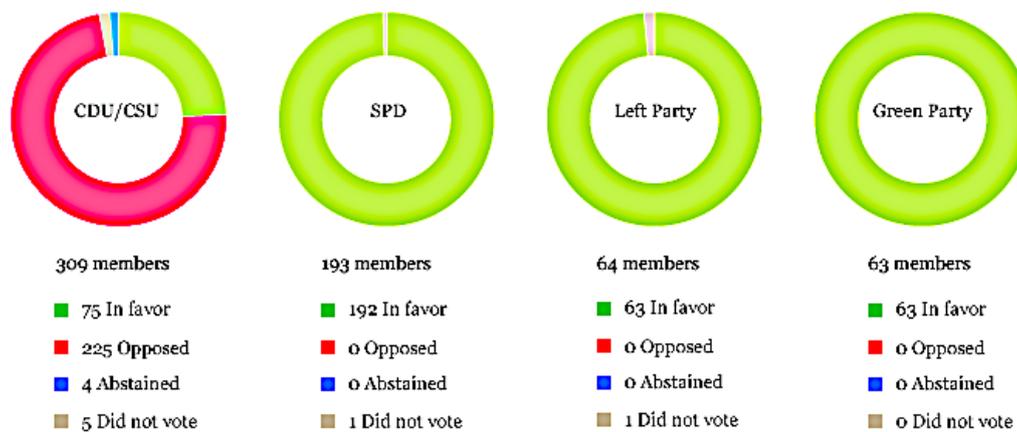
Same-sex marriage has been legal since 1 October 2017, after the Bundestag passed legislation giving same-sex couples full marital and adoption rights on 30 June 2017.^{xxxv} Prior to that, registered partnerships were available to same-sex couples, having been legalised in 2001. These partnerships provided most though not all of the same rights as marriages, and they ceased to be available after the introduction of same-sex marriage. Same-sex stepchild adoption first became legal in 2005 and was expanded in 2013 to allow someone in a same-sex relationship to adopt a child already adopted by their partner.^{xxxvi} Discrimination protections on the basis of sexual orientation and gender identity vary across Germany, but discrimination in employment and the provision of goods and services is banned countrywide.

Following are the legal rights given in Germany, in a nutshell:^{xxxvii}

HOMOSEXUALITY		MARRIAGE	
			
✓ Legal		✓ Legal	
CHANGING GENDER	✓ Legal, surgery not required	ADOPTION	✗ Step-child adoption only
HOUSING DISCRIMINATION	✓ Sexual orientation and gender identity	EMPLOYMENT DISCRIMINATION	✓ Sexual orientation and gender identity
AGE OF CONSENT	✓ Equal	DONATING BLOOD	✗ Banned (indefinite deferral)
		DISCRIMINATION	✓ Illegal
		MILITARY	✓ Legal
		CONVERSION THERAPY	✗ Not banned

Transgender people have been allowed to change their legal gender since 1980. The law initially required them to undergo surgical alteration of their genitals in order to have key identity documents changed. This has since been declared unconstitutional. Further, Germany has frequently been seen as one of the most gay friendly countries in the world.¹ Another poll in 2013 indicated that 87% of Germans believed that homosexuality should be accepted by society, which was the second highest score in the world.

Bundestag vote on gay marriage



Erika Steinbach, not a member of any parliamentary group, voted against the bill.

Source: www.bundestag.de

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In 2013, the Supreme Constitutional Court ruled that if one partner in a same-sex relationship has adopted a child, the other partner has the right to become the adoptive mother or father of that child as well; this is known as ‘successive adoption’.^{xxxviii} The same-sex marriage law, passed in June 2017, gave same-sex couples full adoption rights.^{xxxix} On 10 October 2017, a court in Berlin's Kreuzberg district approved the first application for joint adoption of a child by a same-sex couple.^{xl}

CONCLUSION

Many States have made a determined effort to strengthen human rights protection in each of these areas. An array of new laws has been adopted – including laws banning discrimination, penalizing homophobic hate crimes, granting recognition of same-sex relationships and

making it easier for transgender individuals to obtain official documents that reflect their preferred gender.

After all the discrimination that the LGBT community has faced, many nations have indeed progressed towards gender justice and progression. Most of the countries have recognised same-sex consensual intercourse, however many are yet to legalise same-sex marriage. What was deduced from this paper was that while Britain and Germany have legalised same-sex marriage and the right for adoption to the LGBT community, India still hasn't progressed in this particular aspect. Further, while same-sex intercourse was legalised in Germany in 1969 and in England, back in 1967. It took India more than 50 years to do the same. When we analyse in terms of the distinction between how civil law has perceived LGBT rights, we see that in most of the civil countries, like France, Spain, Canada, same-sex intercourse as well as laws regarding marriage and adoption have been duly recognised. But there are fewer common law countries who have prescribed to such LGBT laws, countries such as Australia and New Zealand. However, there are also common law countries which have not recognised marital and adoption laws, more so, many countries like Pakistan and Bangladesh have not even recognised homosexuality. What could be deduced here is that the rate of acceptance and implementation of LGBT laws are way higher in civil law countries than in common law countries. However, in the coming years, much more needs to be done to confront prejudice and protect LGBT people in all countries from violence and discrimination.

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