

# INDIAN JOURNAL OF LEGAL REVIEW



VOLUME 1 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



**Indian Journal of Legal Review**  
**(Free Publication and Open Access Journal)**

**Journal's Home Page – <https://ijlr.iledu.in/>**

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**Volume 1 and Issue 1 of 2023 (Access Full Issue on – <https://ijlr.iledu.in/category/printed-version-volume-1-and-issue-1-of-2023/>)**

**Publisher**

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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## SODOMY LAWS AND THEIR EVOLUTION INTO HOMOPHOBIA

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**Best Citation** - JAYA MAHATY MANDALAPARTHY, SODOMY LAWS AND THEIR EVOLUTION INTO HOMOPHOBIA, Indian Journal of Legal Review (IJLR), 1 (1) of 2023, Pg. 32-37, ISBN - 978-81-961097-8-3.

### ABSTRACT

Sodomy is a term that was initially defined as anal intercourse. Slowly, it included acts of sex with animals and oral sex as well. Laws against sodomy were put into place by governments across the world to prevent sexual assault. This pure intention tainted over time. With a rise in homophobic population and circulation of anti-gay ideas, sodomy laws were used to oppress and punish homosexuals for merely being themselves. The LGBTQ community in the 20<sup>th</sup> century was subject to witch hunts and their rights and freedom were curbed, if not snatched away. Sodomy was a concept brought to India by the British Raj, along with social homophobia. For ages this statute was used to accuse homosexuals of horrific acts such as child molestation despite their innocence. While many states of the US have already taken measures to remove this law, it only came to the notice of Indian judiciary not long ago. In recent times, thankfully, people are opening their eyes and finally fighting against this unjust precedent. In 2018, the Supreme Court of India decriminalized sodomy in a landmark judgment. This was a steppingstone for the queer community in India. Due to the intense backlash they face for their sexuality, this judgement provided them with protection and freedom to be themselves without as much fear. Many countries that were previously colonized and had this statute present in their law also removed it for protection of human rights. This paper aims to inform the reader about the very concept of sodomy, how it evolved in India and the US and its slow descent to decriminalization.

**Key words:** sodomy, sex, homosexual, oppression, decriminalization

### INTRODUCTION

#### What is sodomy?

The term 'sodomy' has a multitude of definitions which differ from place to place and from case to case. In Great Britain, the term 'buggery' was used, which had slight connotations of the gay community. John Boswell, a renowned historian, says that over time sodomy has meant 'everything from ordinary heterosexual intercourse in an atypical position to oral sexual contact with animals.' It is quite a wide umbrella and most countries around the world have laws in relation to it.<sup>59</sup>

In the case of *Bowers v. Hardwick* (1986), Chief Justice Warren Burger defined sodomy as 'a sexual crime against nature.'<sup>60</sup> In the state of Georgia in the United States of America, GA Code § 16-6-2 (2020) defines 'sodomy' as 'performance or submission to any sexual activity involving the sex organs of one person and the mouth or anus of another.' This statute further states one's legal liability if they commit the act of sodomy. A person convicted of the act of sodomy will be punishable by imprisonment, which can range from 1 to 20 years, whereas culprits of aggravated sodomy are punished with life imprisonment or a split sentence which contains imprisonment not less than 25 years and probation for life.<sup>61</sup> Previously, in the case of *Bass v. State*, sodomy was defined

<sup>59</sup> <https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/sodomy>

<sup>60</sup> <https://slate.com/news-and-politics/2002/12/what-is-sodomy.html>

<sup>61</sup> <https://law.justia.com/codes/georgia/2020/title-16/chapter-6/section-16-6-2/>

as 'any sexual act involving the sex organs of one person and the mouth or anus of another.'<sup>62</sup> American courts were also seen using the definition 'penis inside the rectum of an animal, a woman or girl, or another man or boy' with respect to sodomy.

In the case of India, sodomy was codified as early as 1860 by the British. Section 377 of the then Indian penal Code defined sodomy as 'carnal intercourse against the order of nature.' It made oral and anal sex illegal throughout India to both homo- and heterosexuals.

All in all, sodomy laws generally prohibited acts of sex with animals or where one's genitals came in contact with another's mouth or anus irrespective of consent and sexuality of the adults.

### RESEARCH QUESTIONS

1. What is the difference between sodomy laws of India and the US?
2. At which point in time did sodomy take a turn for homophobia?
3. When did decriminalization of sodomy start and how did it impact societies across the world?

### Sodomy laws

#### (i) The United States of America<sup>63</sup>

In America, sodomy was initially listed alongside bigotry<sup>64</sup> (disapproving of or disliking others who carry a different opinion or follow a different way of life), adultery, incest, etc. and sought to protect women, children and 'weak men' from sexual assault. Surprisingly, court records show that sodomy laws were used to prosecute assault and rape in the 19<sup>th</sup> century. Consenting adults were not charged for committing sodomy in the privacy of their own homes either. All in all, sodomy laws were able to prosecute sexual offenders and protect citizens of the US.

This positive way of enactment was short-lived. In the 20<sup>th</sup> century, oral sex was added to the definition of sodomy, which resulted in the imprisonment of a whole new group of citizens: gay men. They were charged with public indecency, sexual solicitation and even child molestation in some cases. The practice of McCarthyism spread like wildfire across the nation and male homosexuals were targeted and slapped with the charge of child molestation. Legal bodies like the American Law Institute frowned upon this and in 1955 voted to decriminalize consensual sodomy among adults. The Supreme Court of United States on the basis of the Due process Clause of the Fourteenth Amendment declared that the citizens had a right to privacy and the state had no authority to 'interfere with people's control of their bodies, disrupt personal relationships and intrude into the innermost sanctum of their home, the bedroom.'

#### (ii) India<sup>65</sup>

After a 2018 judgment legalising homosexual relations, many millennials argued that this was the effect of westernization and how we must stay true to our roots and culture instead. It might come as a shock to them that same-sex relations and homosexuality have existed in India from as early as 4000 BC. Hindu texts from 1500 BC have mentions of 'hijras', those who do not fit into the category of men or women and belong to a third gender. In fact, hijras and eunuchs held esteemed positions in Mughal courts as advisors to the king. The Vedas also have numerous mentions of same-sex relations and gender morphing deities such as Lord Shiva himself, often worshipped in cohesion with his wife Parvati in the 'Ardhanarishwara' form. In the Kama Sutra and pre-colonial Urdu poetry, there are mentions of characters engaging in gay and bisexual relations. Many temples in Madhya Pradesh are observed to have carving of homosexual orgies and erotic scenes. So, it is safe to say that gender fluidity and sexuality are

<sup>62</sup> <https://www.law.cornell.edu/wex/sodomy>

<sup>63</sup> <https://journalofethics.ama-assn.org/article/decriminalization-sodomy-united-states/2014-11>

<sup>64</sup> <https://dictionary.cambridge.org/dictionary/english/bigotry>

<sup>65</sup> <https://www.nyayshastram.com/post/sodomy-laws-in-india-and-the-us>

not western concepts but our very own and a part of our culture as well.

Historians speculate that this law was used to control the Indian population and what they did with their bodies. The idea of shaming the queer community for their sexuality started with colonialism, when the British frowned upon our practices and enforced Christian sexual norms on our society. Strict gender roles and brain washing people into believing only the binary exists led to Indians forgetting their own history and culture. This prolonged indoctrination led to India being what it is now: intensely homophobic and unwelcoming to anyone who isn't a man, woman or straight. They criminalized homosexuality in 1861 by enforcing their statute's Section 377 and ruled sodomy as an offence punishable with a sentence of 10 years to life. Even though the British left our country in 1947, their statute stayed. This statute was also enforced in 42 other colonized countries, alongside those who haven't like Nepal. Nepal stands tall as the first south Asian country to legally recognise third gender people and now their constitution protects the gay community against abuse and discrimination. Pakistan too, in 2018, introduced their Transgender Persons (Protection of Rights) Act that prevented any discrimination towards them in areas of employment and residence. They are even given the option to choose their gender on their official government documents.

As mentioned in the paper before, many middle-aged Indians believe that homosexuality is not our own but a western concept adopted by newer generations for 'trend.' Followers of Hindutva, who are right-wing Hindu supremacists, have called homosexuality a rancid western substance for decades now. One of the top BJP politicians even went to the extreme of saying homosexuality is abnormal and 'against Hindutva.' Following the legalisation of same-sex relations, the Rashtriya Swayamsevak Sangh, also known as RSS, released statement in which they said that the traditional Indian

society will in no way accept or support these relations, despite history proving otherwise.<sup>66</sup>

### **Why are sodomy laws harmful?**<sup>67</sup>

Sodomy laws were rarely used but when they were, they were used against people of the queer community, especially in the U.S., where sodomy laws were enforced mostly against homosexuals. It was presumed, up until the 1960s, that this law is only applicable to queers and not the 'straight' community. Laws against sodomy were rarely used in convictions against heterosexual culprits for sexual offences. Slowly, sodomy laws took a turn to discriminating the queer community and subjecting them to legal homophobia. It subjected people to harassment merely due to their sexual orientation. Sodomy laws, over the ages, have also been used to deprive the queer community of equal job opportunities and other rights. In the case of *Shahar v. Bowers*, a lesbian attorney was denied employment due to her sexuality, but the court ruled no discrimination since she was legally a 'criminal' under the sodomy law. These laws were also used as a basis for divorce and custody of any children. Gay parents had restricted visitation rights and the Alabama Supreme Court stated that this was to protect the children from exposure to an 'illegal lifestyle.'

### **Decriminalization of sodomy**

#### **(i) In the United States**

Illinois was the first American state to repeal its sodomy laws in the year 1961. Subsequently, in the following 10-15 years, until the early 1980s, 21 other states disposed of their sodomy laws. Consensual sodomy was seen as non-criminal in nature and same-sex sodomy was ruled to be a misdemeanour. However, due to rise in involvement of anti-gay groups in this period and the judgement of *Bowers v. Hardwick*, the attempt to eliminate sodomy laws was quashed. Other states, unwilling to let go of their sodomy laws, accused these actions of

<sup>66</sup> <https://theconversation.com/indias-sodomy-ban-now-ruled-illegal-was-a-british-colonial-legacy-103052>

<sup>67</sup> <https://www.criminaldefenselawyer.com/resources/sodomy-laws.htm>

promoting homosexual behaviour and 'unnatural conduct.' Some states even recriminalized sodomy for this very reason. The American Civil Liberties Union, also known as ACLU, introduced the ACLU's Lesbian and Gay Rights Project, which helped promote this ban and succeeded to do so in Kentucky, Tennessee, Montana, Georgia, Maryland, and Minnesota in the span of 9 years. Currently, 14 American states still have laws against sodomy in place.<sup>68</sup>

## (ii) In India

On September 6<sup>th</sup> of 2018, in a judgement that was never seen before, the Supreme Court of India struck down Section 377 of the IPC. The case of *Naveej Singh Johar v Union of India*<sup>69</sup> brought upon this annulment. This was major for the brown queer community, whose relations were now deemed legal after 157 years of tussle with the legal bodies of India. The court stated that one must not be discriminated for who they want to love or what they do in their bedroom. In a unanimous hearing, Section 377 was called 'irrational, arbitrary and incomprehensible' before its removal. Now, the homosexual and transgender community is entitled to complete constitutional protection under Indian and international law, and sexuality is no longer a basis for ill-treating someone. The queer community breathed sighs of relief upon hearing this judgment since it was a long and hard battle to achieve this decriminalization.<sup>70</sup>

The Naz Foundation in 2001 contended Section 377 on grounds of violation of the Indian constitution and international laws. The court ruled in their favour in 2009, which was followed by an overturn in 2013. This reversal led to increased discrimination and violence against the LGBTQ community, especially police brutality. When multiple activists filed numerous petitions regarding this judgment, the initially evasive Supreme Court finally heard the case in

2018 and stated that they would revisit the case. Though this did not result in an immediate equality for the queers, it is a step towards it. Chief Justice Dipak Misra rightly said that "the law had become a weapon for harassment of the LGBT community" and that any discrimination because one's sexuality was a clear violation of their fundamental rights.<sup>71</sup>

## Case laws

### 1. *Shahar v. Bowers*

Appellant sued the Attorney general in this case. This was because the Attorney General's office withdrew their job offer to her after discovering she was in a same-sex marriage, which was not recognized in Georgia's law. The office stated that their reason for doing so was to not jeopardize the office's functions due to her addition. Shahar approached the court and sought damages, relief, and revocation of employment. It was held by the court that under Georgia State's statutes the Law Department's interest is greater than that of the appellant's personal ones.<sup>72</sup>

### 2. *Bowers v. Hardwick* (1986)<sup>73 74</sup>

In the year of 1982, Michael Hardwick, a gay bartender, was accused of public drinking despite his claims of not doing so. The officer who arrested him provided him with the wrong date for his summons, which resulted in him not appearing to court followed by an arrest warrant. In the officer's second attempt to track him down, Hardwick was arrested for having sexual relations with another man in his own home, which were in violation of the then Georgia's sodomy law. Various courts gave differing and even conflicting judgements in this regard. The 11<sup>th</sup> Circuit Court of Appeals cited cases from the past with similar circumstances and stated that homosexual relations are one's 'private and intimate association that is beyond

<sup>68</sup> <https://www.aclu.org/other/update-status-sodomy-laws>

<sup>69</sup> AIR 2018 SC 4321

<sup>70</sup> <https://www.hrw.org/news/2018/09/06/india-supreme-court-strikes-down-sodomy-law>

<sup>71</sup> <https://slate.com/human-interest/2018/09/india-supreme-court-sodomy-ban-lgbtq.html>

<sup>72</sup> <https://www.casebriefs.com/blog/law/family-law/family-law-keyed-to-weisberg/alternative-families/shahar-v-bowers/#:~:text=Brief%20of%20Summary,Synopsis%20of%20Rule%20of%20I.aw.>

<sup>73</sup> <http://web.uncg.edu/dcl/courses/viccrime/m5/part1.asp>

<sup>74</sup> 478 US 186, 189 (1986)

the reach of the State.' However, the US Supreme Court in 1986 overturned this judgement, stating the Constitution did not provide homosexuals with the fundamental right to engage in sodomy. The majority of this 5-4 decision said that sodomy was considered a crime in the original colonies and hence it was a crucial part of the country's foundation. The case minority, on the other hand, argued that it was merely the right to be left alone and not about the gender and sexuality of the participants. They also argued that the court had no moral reason to prevent sodomy, such as paternalism or concern for public health. This judgment was a huge blow to the gay community in the US.

### 3. Lawrence v. Texas<sup>75</sup>

A landmark judgement dated to the year 2003, this case struck down sodomy laws across the United States and legalizes homosexual activity in all states and territories of the US. The 6-3 majority in this case believed the previous ruling of *Bowers v Hardick* was a violation of sexual privacy mandated by the constitution. This case provided a path for the case *Obergefell v Hodges*, in which same-sex marriage was recognized as a fundamental right under the Constitution of the USA. This case helped remove the legal liability sodomy entailed and suffrage to anyone who committed sodomy.

## CONCLUSION

Despite starting off as a statute against 'abnormal acts of intercourse', sodomy laws slowly evolved to discriminate and undermine the rights of homosexuals. Like numerous other statutes, this law was also used as a tool to oppress minority communities by the majority. Currently, 57 countries actively advocate against same-sex relations, making their countries unsafe for anyone belonging to this community. It also shows disregard to accept people for who they are forcing them to fit into 'conventional' norms to live with basic freedom and rights every human being needs. The

removal of these laws not only brought legislation on par with modern sexual norms but also set an example as to how far gay acceptance has come in society. It removed a method of oppression towards the LGBTQ+ community and it is clearly observed that maintaining these laws causes more harm than good.

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