



Know your Rights

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Are You a 'Man Who Has Sex With other Men [MSM]'?

Do you know your Rights?

Do you know that in India it is a crime for two men to have sex with each other: Well that's what section 377 of the Indian Penal Code says. This section punishes 'Carnal intercourse against the order of nature' with up to life imprisonment. Although it is not defined what 'against the order of nature' means, the courts have ruled that this includes anal sex and oral sex. The question is how valid is this law, and is it implemented?

This law was made in 1860, and was based on the English anti sodomy laws. In England the anti sodomy laws have been undone. But this law remains in force in India. But with the change in understanding and attitude towards homosexuality, there is growing demand for a repeal of this law even in India. The Law Commission of India has recommended that this law should be repealed. Also this law is against the fundamental rights guaranteed to all citizens including MSM.

This law is rarely applied. But it is an excuse that the police and other law enforcement agencies use to harass, blackmail, and extort money from MSM. Raids in cruising areas are an example of such harassment that you often face. Also as long as this law exists, proper HIV/AIDS intervention work amongst MSM cannot take place. Distribution of condoms amongst MSM or giving information about safe sex may be seen as an abetment to the crime given in this law. Other rights of MSM, including their human and fundamental rights also suffer and cannot be protected and promoted.

The High Court or the Supreme Court can declare this law null and void. But no such judgement exists as yet. Currently it is under challenge in the High Court of Delhi.

But.....

Does that mean that you have no rights?

Well no. You do have certain rights that no law can take away. These are the **Fundamental Rights**, which is given in the constitution. These are the most basic of all the rights of the citizens, and the High Courts or the Supreme Court can declare void any law that is against the fundamental rights. Some of the important Fundamental rights that you should be aware of are:

§ **Right to equality [Article 14]:** This means that all citizens, be they MSM or not, have to be treated equally and given equal protection

under the law. This article forbids the state [state means the government or agencies of the government like the police etc.] from acting with discrimination against anybody. For you as a MSM it becomes important since MSM have been traditionally discriminated against.

§ **Rights to various Freedoms [Article 19]:** This article guarantees certain freedoms, which are:

- **Freedom of speech and expression:** This means that if you are a koti and want to dress up like like women or put on make up, then it is your personal expression and you cannot be targeted or harassed for that. You can also seek police protection against such harassment. If police are the ones who are doing the harassment, then complaint can be lodged against them, or they can be hauled to the courts. It also means that you can air your concerns and views without fear.
- **Freedom to assembly peaceably and without arms:** This means that you and other MSM have the right to visit public cruising areas as long as you are not doing anything un-peaceful, or any other act that may be obscene or create problems to others. You can also hold meetings and gatherings in these areas. It also means that in the absence of any prohibitory orders, the police cannot harass or target you in cruising areas.
- **Freedom to form Associations or Unions:** This freedom implies that you have the right to form support groups and NGOs who work for your concerns. As long as there is no illegal activity going on in these support groups, they are protected from any form of interference and harassment by the government or the police.
- **Freedom to move freely throughout the territory of India:** This freedom guarantees that you can travel in any part of India without any obstruction. On a smaller scale, no public space like parks etc. that you or other MSM may access for cruising or socialisation, can be closed specifically to you. If you are a Male Sex Worker, you cannot be removed from public spaces, nor can any restriction be put on your movement. However in the public space, if you indulge in

an actual sexual act, you may be booked under the obscenity laws or for lewd conduct. For actual sexual acts or for soliciting in public you may also be booked under the “Immoral Traffics Prevention Act”.

- **Freedom to reside or settle in any part of the territory of India:** This means that you cannot be denied residence in any part of India. If you are a legal resident of a premises, then the state cannot evict you for being MSM. You can also file a police complaint against any harassment or obstruction caused to you in any such residence.
- **Freedom to practice any profession, or carry out any occupation trade or business:** This freedom is extremely important for you, especially if you are a Male Sex Worker. Sex work is an occupation, and you have a right to carry on with it. Although Section 377 of IPC makes anal and oral sex illegal, the “Immoral Traffic Prevention Act”, which is the law relating to sex work does not make sex work illegal by itself, even for Male Sex Workers. This means that unless the state can prove that the sex work involves anal or oral sex, it cannot stop you from doing sex work.

Note: The above freedoms are not absolute. The state can put restrictions on their enjoyment on the grounds of public order, decency, morality etc. But since no such specific restriction with regards to MSM has been put as yet, you can enjoy these freedoms as though they are absolute.

§ **Right against illegal punishment [Article 20(1)]:** This right guarantees that no person can be punished arbitrarily for anything that is not a crime. Although technically anal and oral sex is a crime under Section 377, but it has to be proved in a court by conducting a trial, before anyone can be punished for it. Effectively however, it is seen that anal or oral sex is very difficult to prove.

§ **Right to life and personal liberty [Article 21]:** This is probably the most important fundamental right and implies that the state can not only not take away your life, it can also not do anything that affects your standard or quality of life. Also the State can not hurt your dignity in any way, or take away your liberty to act as you please, as long as you do nothing illegal. Since male to male sex is fundamental to your existence, happiness, and quality of life,

it can be said that this article provides you with protection against harassment or criminalisation for such sex. But this would have to be confirmed by a judgement of the court, which is not there as yet.

§ **Protection against detention and arrest in certain cases [Article 22]:** This article becomes important since the police often pick up MSM from cruising areas. As per this article, the police are bound at the earliest to disclose to the person arrested, the ground for such arrest. If you are arrested, you have to be produced before a magistrate within 24 hours of your arrest. You also have the right to be represented by a lawyer of your choice. We shall deal with your rights on arrest in details later.

Are these the only rights that you have?

Actually you have various other rights under **civil** and **criminal** law.

Civil rights means that you cannot be denied your right to property, or the right to participate in civil activities like voting, travelling by public transport, inherit property, going to school or college, getting married, adopt children [if allowed under your personal law], etc. simply because you are MSM. Under civil law you can also sue for compensation for any damages or injury that you may have suffered at the hands of any person.

Criminal Law provides protection to you against any form of mental harassment or bodily harm, and punishes the offender. In this regard it is important to know that all forms of threat and/or violence is a criminal offence. So if you are a MSM and are faced with any of the following situations:

- You are either being threatened with physical violence, or being subjected to such violence.
- You are being wrongfully restrained or confined [for e.g. you are being locked up] by your family or by anybody else.
- Somebody is causing you hurt and injury to either extort money from you or extracting a confession from you.
- Somebody is forcefully having sex with you when you do not want to have sex with him.
- Somebody is blackmailing you or threatening you with exposure.

- Somebody is otherwise harassing you.

You can take legal action against such person and can have him criminally prosecuted. Such prosecution depends on whether the crime committed by the person is cognisable or non-cognisable.

What are **Cognisable** and **Non-Cognisable** offences and how can you act in each case?

Well **cognisable** offences are those that the police can investigate on their own accord and can arrest a person if they find him guilty. Therefore if you have been subjected to a cognisable offence, you have to file a complaint and insist with the police that a FIR has been registered. A FIR is the first step to a prosecution. Thereafter the police shall on their own accord investigate and prosecute the person. If however the police refuse to file a FIR, you can have your complaint sent over to the Superintendent of Police by a registered letter, and that suffices as a FIR. If the police still do not act, you can file a writ petition against them in the High Court, and ask for a direction compelling them to act on the FIR.

A **non-cognisable** offence is one where the police needs the permission of a magistrate before they can investigate the crime. They also need an arrest warrant before they can arrest the person. Therefore in such cases, you can file a complaint in the general diary of the police station. The Station I/C will most probably then direct you to a magistrate for permission to prosecute the person. But you can also directly go to a magistrate, file a complaint before him, and ask for prosecution of the person. Going directly to the magistrate is a better idea if the person involved is a policeman.

Often you can ask the police station to tell you whether the crime is cognisable or non-cognisable. It is also a good idea to consult a lawyer, for he can assist you in the whole proceeding.

Other than the above provisions, you can also ask the Executive Magistrate to make the person involved sign a bond for keeping the peace. He can thereafter be punished if this bond is broken. If the persons involved are police personnel, you can make a police complaint and can ask for departmental inquiry against them. You can also file a writ petition against the police in the High Court. Now days, you can also approach the National or the State Human Rights Commission for violation of your rights by the Police.

Remember that the police have no right to harass you. The police cannot violate the law, nor are they above the law. Harassment or extortion by the

police amounts to misconduct and action may be taken against them for this. They may also be suspended if a complaint is filed against them. For specific crimes they may be punished under the Indian Penal Code.

So what are your rights if the police arrest you and what can you do?

§ You have the following rights when you are arrested:

- To be informed the **Reason** for your arrest.
- You also have the right to inform at least one friend, acquaintance, or relative of the fact of your arrest and where you are being held.
- You have a right to consult a lawyer, and be represented by the lawyer.
- If you cannot afford a lawyer, you have the right to ask for **free legal aid**. Ask the magistrate when you are produced before him for being provided with such legal aid.
- You cannot be **handcuffed**. However necessary force may be used against you or to restrain you, if you resist arrest.
- You have to be produced before a magistrate within 24 hours of your arrest. You may insist on this if you are not so produced.
- If you are charged with a bailable offence, you have the right to be released on bail.
- You have the right to apply for bail before the magistrate/ court, if you are charged with an offence that is non-bailable.
- You have the right to be examined by a doctor at the time of your arrest and any injury marks on your body must be recorded.
- You also have the right to be examined by a doctor every 48 hours of your detention.
- You have the right to meet your lawyer during

interrogation.

- The police cannot force you to give evidence against yourself. Therefore you may keep quite and not answer any question during interrogation.
- It is important to understand that anything that you tell the police cannot be used as evidence against you.
- The police cannot use force or third degree measures against you.

§ These are some of the things you may do in case you are arrested:

- It is always best to keep the telephone number of either a reliable lawyer, or such person who can get you a lawyer always with you, and insist on calling that person after you are arrested.
- If you anticipate an arrest, it is advisable to apply for and obtain an order of anticipatory bail.
- When you are being arrested, there is no point in resisting arrest. It is best to seek legal help afterwards.
- Feel confident to tell the police that you are aware of your rights and that some of their actions are illegal.

Are there any other rights that you, as an MSM, should be aware of?

Well certainly! You must also be aware of your **Health Rights** and **Sexual Rights**.

§ **Health Rights** arise from right to life, which has been described above. No person can interfere with your body unless you give free, specific, and fully informed consent for the same.

Fully informed consent means a doctor cannot treat you in any manner that he thinks fit, unless he has informed you of the possible adverse consequences of the treatment, and you have thereafter agreed to be treated. A doctor or anybody else cannot test you for HIV either unless you have been counselled and have agreed to be tested. Your consent also has to be free, which means that nobody

can force or coerce you to agree to anything. If you have been tested for HIV against your will, or if you have been subjected to any treatment that you did not agree to undergo, you can seek legal remedy against the doctor or the medical institution.

You also have a right that the confidentiality of any treatment that you undergo be maintained. If your confidentiality has been breached, you can take legal action. If you are HIV positive, you need not be afraid to take legal action for fear of your status being disclosed in the court. Now, you can sue under a false name [*this is called suppression of identity*], without revealing your identity.

You also have the right to seek medical treatment from any state run medical establishment without discrimination on the ground that you are MSM. In fact a state run medical establishment cannot deny you treatment on any ground. If they do, you can take legal action against them and seek compensation.

§ **Sexual Rights** arise from the fact that you are the absolute master of your body and no one can interfere with it against your will. Therefore no one can force you to have sex with him or her. Also if you have agreed to have only safer sex, then no one can forcefully have unsafe sex with you. Such acts tantamount to sexual assault, and criminal action may be taken against the person who does this. Such a person can also be sued in a civil court for compensation.

Often, the local MSM sexual health agency can help you if you are facing any kind of problem or if your rights are being violated. These agencies also can assist you in seeking legal help. It is therefore best to keep the contact number of these agencies with you and to call them for help when you need it. Unless you know your rights and start exercising them, others will continue to violate them.

For support call: