



# **SAME SEX MARRIAGE AND IT'S ADVERSITY IN INDIA**

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## **Abstract**

The historical backdrop of same-sex relationships in India is rich, revealing a more progressive society in ancient texts compared to post-colonial India. The criminalization of such relationships under Section 377 of the Indian Penal Code was introduced by the British, creating a hostile environment with penalties of imprisonment and fines. India's social structure failed to support this vulnerable community. In the 21st century, global movements against discrimination sparked similar activism in India. The landmark Navtej Johar case led to the decriminalization of same-sex relationships by the Supreme Court of India, bolstered by the privacy judgment, providing a foundation for advancing LGBTQ rights. However, resistance persists within legislative bodies, evident in cases like the one before the Delhi High Court. This paper will conduct a doctrinal analysis of the LGBTQ movement in India, focusing on the judiciary's role and the Supreme Court's liberal interpretation to protect the interests of this marginalized group. It will also explore recent developments, particularly regarding marital rights in the Delhi High Court case, and speculate on future actions in India.

Keywords: same-sex, LGBTQ rights, Navtej Johar, privacy, India

## INTRODUCTION

The acronym 'LGBTQ+' encompasses a diverse range of individuals who do not conform to traditional norms regarding gender and sexuality. While there isn't a single, definitive definition of the term, it typically includes lesbian, gay, bisexual, transgender, and queer individuals. This term addresses both sexual orientation and gender identity. Gay, lesbian, and bisexual individuals refer to sexual preferences, while transgender individuals do not identify within the traditional male/female gender binary. 'Queer' is a broad term used to represent the diverse experiences within this community. Additionally, terms like intersex and asexual are also part of this spectrum. Understanding LGBTQ+ involves recognizing the complexities of gender and sexuality. This collective challenges the heteronormative standards that are often considered the norm, aiming to assert their own identities within the spectrum of gender and sexuality.

The LGBTQ community has made significant strides globally towards achieving social acceptance. However, in India, the journey has been arduous, with the judiciary playing a crucial role in safeguarding the rights of sexual minorities. The Indian legal system, influenced by English law, previously oppressed sexual minorities under Section 377 of the Indian Penal Code, which has since been repealed. This clause criminalized "unnatural offences," effectively targeting LGBTQ individuals and fostering an atmosphere of fear, oppression, and violence perpetrated by both society at large and law enforcement agencies.

The Supreme Court's decision marked a pivotal moment in normalizing the existence of sexual minorities in India and provided a legal framework for their protection. While transgender individuals have gained recognition as the third gender, legislation pertaining to them has faced considerable criticism. Despite this legal progress, sexual minorities continue to face systemic oppression, often leading lives of secrecy and anonymity.

Discrimination persists in various forms; transgender individuals frequently face exclusion from social organizations and encounter barriers to employment. Same-sex couples are denied essential rights such as marriage, reproduction, adoption, and maintenance. Despite the decriminalization of same-sex relationships, the denial of social rights persists. One significant battle before Indian courts is the issue of marriage rights for same-sex couples, which is perceived as the next crucial step towards ensuring equality and a semblance of normalcy for the LGBTQ community. However, government opposition has made achieving this goal exceptionally challenging, prolonging the struggle for equal rights.

## INTERNATIONAL PERSPECTIVE

LGBTQ rights have primarily been addressed at the national level rather than through international conventions. The United Nations (UN) has not formulated any specific treaty on this subject but has taken steps to combat

stigma and bias through campaigns and programs. The UN Free & Equal campaign exemplifies such advocacy, advocating for equal rights and fair treatment for the LGBTQ community worldwide.

Achieving uniformity on LGBTQ rights at the international level has been challenging due to differing degrees of acceptance and lack of consensus among nations. In many countries, same-sex relationships are stigmatized and punishable as criminal offenses, sometimes carrying severe penalties such as life imprisonment or even capital punishment.

In 2006, a significant initiative was undertaken with the convening of a meeting in Yogyakarta to address LGBTQ concerns. This gathering involved prominent non-governmental organizations, activists, and academics, resulting in the drafting of the landmark Yogyakarta Principles. These principles outline human rights related to sexual orientation, gender identity, gender expression, and sex characteristics. They not only enumerate various rights for the LGBTQ community but also place obligations on states to implement these rights.

In 2017, a revised version known as Yogyakarta Plus 10 was drafted and adopted, offering additional rights and responsibilities for states to ensure equality, dignity, and respect for the LGBTQ community. These documents represent important steps towards combating discrimination and promoting equal treatment for LGBTQ individuals globally.

## THE INDIAN EXPERIENCE

India is inherently a conservative nation, despite its status as a secular state that guarantees freedom of religion. Religious beliefs deeply influence many aspects of Indian society, including personal laws and attitudes towards same-sex relationships. The historical analysis of same-sex relationships in India reveals a transition from a more open and liberal society to one that is increasingly conservative. This transition was facilitated by legal interventions introduced by the British through the Indian Penal Code, particularly Section 377, which criminalized same-sex relationships and subjected individuals to imprisonment and fines. This legal sanction contributed to an atmosphere of domination and discrimination against same-sex couples. The journey towards decriminalization was lengthy, culminating in the landmark Navtej Johar case in 2018.

Throughout Indian history, there have been numerous references to same-sex relations and transgender individuals across various kingdoms. Vedic texts, Hindu scriptures, as well as art and architecture, reflect notions of gender fluidity and acceptance of diverse sexualities. These historical references underscore the presence of a more liberal attitude towards gender and sexuality in ancient India, which is in contrast to the more conservative stance

prevalent in contemporary society.<sup>1</sup> Among the most well-known examples are found in Valmiki's Ramayana, when Hanuman is described as seeing rakshasa ladies kissing in Lanka.<sup>2</sup> King Bhagirathi's birth; the temples of Khajuraho, the Ellora caves in Maharashtra, and the Sun Temple in Kornak; and the well-known Kama Sutra, written by Vatsyayana and discussing sexuality, sensuality, and the emotional fulfillment of life.<sup>3</sup>

The Khajuraho temples serve as a prime illustration of the community's previous tolerance.<sup>5</sup> The Chandela dynasty constructed these temples between the years 950 and 1050 A.D. There are depictions of same-sex relationships in the temple sculptures, such as an open portrayal of nude men and women erotically embracing with fluid sexuality. These same photos can be found at Kornak's Sun Temple.<sup>4</sup> There are murals in the Ellora caves that show the life of Gautam Budha, the founder of Buddhism, that also show men and women having sex. These several instances demonstrate the existence of a liberal society that is free from prejudice and that freely portrays them in such prestigious settings as a temple.

The most famous text in Islamic literature about same-sex attraction is Baburnama.<sup>5</sup> Some well-known authors who have demonstrated similar allusions are Sufi poets like Sarmand Kashani and Sufi Saint Bulleh Shah.<sup>6</sup>

With the arrival of the British Empire in India, significant changes occurred in societal and legal norms as the nation adopted a more anglicized framework. Western ideologies, heavily influenced by Church doctrines, were imposed on Indian society. The legal framework in India was shaped by British influence, notably through the drafting of the Indian Penal Code by Lord Macaulay, which criminalized homosexuality.

This legal prohibition coincided with societal views on morality, particularly as influenced by religious interpretations emphasizing concepts of right and wrong and notions of morality linked to life after death. Consequently, such practices were widely perceived as immoral, stripping them of civility and humanity. This mindset became deeply ingrained in Indian society, persisting even after independence, as evidenced by the retention of the Indian Penal Code and Section 377 within it.

<sup>1</sup> Ray S, "Indian Culture Does Recognise Homosexuality, Let Us Count the Ways" *The Quint* (September 11, 2018) <<https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377>>

<sup>2</sup> Desk ITW, "Homosexuality in Ancient India: 10 Instances" (*India Today*, July 10, 2018) <<https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>>

<sup>3</sup> In the chapter titled, 'Aparishtaka', gay men have been referenced in context of oral sex. Homosexual men assumed a passive role and were referred to as 'mukhebhaga' or 'asekya'.

<sup>4</sup> Nair SS, "Life360" (*Life360*, November 28, 2019) <<https://jomec.co.uk/life360-2019/uncategorised/religion- has-always-been-the-biggest-tool-to-create-taboo-in-india>>

<sup>5</sup> Salam ZU, "An Emperor with Foibles" *The Hindu* (February 15, 2014) <<https://www.thehindu.com/books/books-columns/an-emperor-with-foibles/article5692770.ece>>

<sup>6</sup> Khalid H, "From Bulleh Shah and Shah Hussain to Amir Khusro, Same-Sex References Abound in Islamic Poetry" *Scroll.in* (June 17, 2016) <<https://scroll.in/article/810007/from-bulleh-shah-and-shah-hussain-to-amir-khusro-same-sex-references-abound-in-islamic-sufi-poetry>>

Interestingly, while the British repealed similar provisions in their own nation in 1967, the struggle to overturn Section 377 in India continued until 2018. This discrepancy reflects the complex intersection of colonial legacies, societal attitudes, and legal reform efforts within the Indian context.

## JUDICIAL REVIEW OF LGBTQ RIGHTS IN INDIA

A judicial analysis of LGBTQ rights in India underscores the proactive role of the judiciary, especially in light of the legislative inertia on this matter. In recent years, the Supreme Court has delivered several crucial judgments that have been instrumental in recognizing the basic rights of this marginalized group. This trend highlights a notable contrast with the conservative stance often exhibited by the Parliament, necessitating intervention by a more liberal judiciary. Here are some significant judgments by the Supreme Court:

*Naz Foundation v. Government of NCT Delhi*<sup>7</sup> :

In this landmark case, the Delhi High Court deemed Section 377 of the Indian Penal Code unconstitutional. Initiated by a Public Interest Litigation filed by the NGO, this judgment initiated the legal re-evaluation of the archaic British-era law. The Court found it to be in violation of various articles of the Indian Constitution pertaining to equality (Articles 14, 15, and 16).

*NALSA v. Union of India*<sup>8</sup>:

Following the criticized judgment in *Suresh Kumar Koushal v. Union of India*, where the Supreme Court re-criminalized Section 377 after its decriminalization in *Naz Foundation*, the National Legal Services Authority (NALSA) advocated for the rights of the transgender community. This judgment recognized transgender persons as the third gender and established comprehensive guidelines safeguarding their rights and freedoms. Subsequently, legislative measures were undertaken to further enshrine these rights, resulting in the enactment of the Transgender Persons (Protection of Rights) Act, 2019. However, the Act has faced criticism due to its requirement for administrative recognition of transgender identity through a certificate issued by a district magistrate, which raises concerns regarding administrative interference and the sensitivity of the issue.

*Justice (Retd.) K. S. Puttaswamy v. Union of India*

This ruling recognized the right to privacy as a component of the Article 21 Right to Life and Liberty. It concluded that everyone has the right to privacy, regardless of their gender or sexual orientation.<sup>9</sup> Judge Chandrachud said in the ruling that the LGBTQ community ought to have a right to privacy, specifically autonomy and independence

<sup>7</sup> 160 Delhi Law Times 277. (India)

<sup>8</sup> AIR 2014 SC 1863. (India)

<sup>9</sup> AIR 2017 SC 4161. (India)

from government meddling. Particular attention was paid to the freedom of sexual orientation, autonomy, and partner selection. The Court noted that "the fundamental rights guaranteed by Articles 14 (right to equality), 15 (discrimination on grounds of sex), and 21 (right to life and personal liberty) of the Constitution lie at the core of the right to privacy and the protection of sexual orientation." This ruling served as the main impetus for the historic Navtej Johar case.

Navtej Singh Johar v. Union of India<sup>10</sup>

The judgment in the case of Naz Foundation v. Government of NCT Delhi marked the decriminalization of homosexuality in India by striking down Section 377 to the extent that it criminalized consensual intercourse between two consenting adults. The judgment found that this section violated various articles of the Constitution, including Articles 14, 15, 16, and 19(1)(a), recognizing the right to live with dignity and the freedom to autonomy and choice in personal life, drawing inspiration from the Puttaswamy judgment.

The Abhijit Iyer Mitra case concerns the recognition of same-sex marriage under the Hindu Marriage Act and the Special Marriage Act in India. The petitioner argues that with the recognition of same-sex relationships following decriminalization, the state should acknowledge and conform to international standards and conventions that India is a signatory to. However, Solicitor General Tushar Mehta contends that under Hindu law, the term 'spouse' can only refer to a male and a female, and judicial interference in this matter would disrupt the delicate balance of personal laws.<sup>11</sup> According to the central government, such partnerships would not immediately be granted the right to marry just because Section 377 was decriminalized. Given that marriages in India are founded on ethos, rituals, and social values and that marriages have a spiritual component, same-sex marriage rights cannot be decided by a court; instead, this is a matter that the government and legislature should consider and decide.<sup>12</sup>

## THE PATH FORWARD

A crucial step forward for LGBTQ rights in India involves the enactment of clear legislative measures that protect and safeguard various legal rights of this community. This legislative framework should include provisions for marriage equality under the Indian Special Marriage Act, 1954, drawing inspiration from documents like the Yogyakarta Principles and Yogyakarta Plus 10. These principles, originating from Indonesia, offer a comprehensive human rights perspective founded on principles of equality and freedom.

Furthermore, meaningful engagement with the LGBTQ community is essential in addressing their concerns effectively. This engagement should begin with open-minded discussions on sex and sexuality within families and

<sup>10</sup> AIR 2018 SC 4321. (India)

<sup>11</sup> Ojha P, "Same-Sex Marriage Is Not a Fundamental Right :Delhi HC" (*LAW TIMES JOURNAL*, February 25, 2021)

<sup>12</sup> The Tribune India, "Same-Sex Marriages Not Recognised by Our Laws, Society and Our Values: Centre to Delhi HC" *The Tribune India* (September 14, 2020) <<https://www.tribuneindia.com/news/nation/same-sex-marriages-not-recognised-by-our-laws-society-and-our-values-centre-to-delhi-hc-141139>>

communities. It's imperative to integrate the LGBTQ community into mainstream society, respecting and protecting their privacy. As emphasized in the Puttaswamy judgment, equality demands the protection of each individual's sexual orientation on an equal platform.

To facilitate this, comprehensive training and sensitization programs are necessary to dispel misconceptions surrounding sexual orientation, such as the false belief that it is a matter of choice rather than biology. Education on LGBTQ issues should be integrated into school curricula as part of sex education, presented without shame or discrimination. Additionally, the training of police and law enforcement personnel is critical, as they play a pivotal role in upholding the rights and safety of the LGBTQ community. Addressing issues of insensitivity and violence within law enforcement agencies is crucial to ensuring the protection of LGBTQ rights in India.

## CONCLUSIONS

It's time to accept that there is a group of people among us who identify as non-heterosexual and that their sexual preference is just one facet of who they are. They share the same humanity as all heterosexual people. The goal should be social participation with an eye toward inclusivity. It is important to normalize this and do away with the concept of shame. One's choice of sexual partner should not be taken personally; it is a matter of personal preference. In addition to establishing consistency in the legal protection of social, economic, and cultural rights, a well-drafted law can also be a very useful tool for ensuring justice. Their voice will be crucially given by a legislative enactment that will enable them to question incidents of abuse, assault, and prejudice.

