
THE EVOLVING LEGAL STATUS OF LGBTQ+ RIGHTS IN INDIA: THE WAY FORWARD

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ABSTRACT

Homosexuality has undergone massive transformation in India over the past decade. Until the Navtej Singh Johar case. What was a criminal offence under section 377 of the Indian penal code, is now a legally recognized right, as an expression of constitutional liberty, a matter of freedom of expression and one's identity. However, decriminalization is not complete freedom and is not equality. This article aims to study the journey of LGBTQ+ rights with a brief on the history of homosexuality throughout various periods and the judicial journey from Naz foundation (2009) to Navtej Singh Johar (2018) and examines, with, the Supreme Court's 2023 decision in Supriyo v. Union of India, which declined to recognize same-sex marriage. The article argues that while the courts have taken a huge step in affirming LGBTQ+ dignity, the absence of legislative action continues to leave a significant legal vacuum, one that requires legislative and judicial attention, while drawing from constitutional provisions, comparative analysis and the difference among a legal right and society. This article calls for a framework that protects individuals of the LGBTQ+ community.

Keywords: Section 377, LGBTQ+ Rights, Naz foundation, Navtej Singh Johar, Supriyo, Same-Sex Marriage, Article 14, Article 15

Introduction

‘Each assault on LGBTQI+ people is an assault on human rights and the values we hold dear. We cannot and will not move backwards. The United Nations firmly stands with the LGBTQI+ community, and will continue working until human rights and dignity are a reality for all people.’ - António Guterres, UN Secretary General, 11 May 2023.¹

The concept of human rights is based on the premise that all human beings are equal. Anything that undermines the dignity of an individual is a violation of the principles of equality. The rights of LGBTQ+ individuals in India have evolved in the recent years, however they still face significant social and legal difficulties. Discrimination against individuals of the LGBTQ+ community undermines the human rights principles provided in the Universal Declaration of Human Rights. Homophobia, biphobia, transphobia and discriminatory attitudes towards intersex people remain deeply embedded in many cultures around the world. For example, intersex people face institutional violence within healthcare systems, which causes lifelong consequences that are both physical and psychological. Apart from the Principle of Equality under International law, the Constitution of India provides for the right against discrimination for individuals on various bases under Article 15. The Indian Judiciary has also decriminalized homosexuality by abolishing Section 377 of the IPC (Indian Penal Code)².

Homosexuality is “the state of being sexually or romantically attracted to people of the same sex”.³ Those who identify as homosexual belong to the LGBTQ+ Community.

The term ‘LGBTQ+’ is used to denote following sects of people:

1. **Lesbian:** A lesbian means, a woman who is sexually attracted to a woman.
2. **Gay:** A gay means, a man who is sexually attracted to the man.
3. **Bisexual:** A bisexual person is someone who is sexually attracted to people of both sexes.

¹ About LGBTI people and human rights, United Nations, accessible at- <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>

² Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament (*Repealed*), 1860 (India)

³ Homosexuality, Oxford Learner’s Dictionary, accessible at- <https://www.oxfordlearnersdictionaries.com/definition/english/homosexuality>

4. **Transgender:** It is a term used to define people whose gender identity and gender expression, differs from that usually associated with their birth sex.
5. **Queer:** Queer is a term used to refer to sexual and gender identities who are neither heterosexual nor cisgender (opposite of transgender).

Historical context of Homosexuality

Today, Homosexuality is defined as ‘sexual interest in and attraction to members of one’s own sex’. To understand where India stands today on homosexuality, one must understand the view individuals of society had towards homosexuality and such relationships hence in various periods of ancient history.

Ancient India

Ancient India was about acceptance and celebration of all forms of love. Indian texts authored during the medical period by Caraka and Suśruta respectively, namely the Caraka and Suśruta Samhitās respectively also discuss the topic of homosexuality and reference the individuals of the community in great detail⁴. Indian religious books which contained homosexual relationships were largely viewed as neutral in society.

The Kamasutra mentioned that lesbians were called “Swarinis”, who often married each other and raised children together. Another very visual example is the various temples of India and its carvings. The Khajuraho temple of Madhya Pradesh, built in the 12th century, is an example showcasing the existence of sexual fluidity between homosexuals. There is large mention of transgendered individuals as well, with the well-known Shikhandi mentioned in the Mahabharat, and playing several important roles in the progression of the story.

During the medieval times, there was some disapproval for homosexuality, but LGBT people were not ostracised. Society was tolerant towards them and nobody was mistreated for having a different sexual preference. Specifically Hindu traditions see various attributes to God, each having multiple forms. Including Lord Vishnu, who took the form of Mohini, or Lord Shiva, who took the form of Ardhanareshwara - a half woman.

⁴ OFC, Queerscope | Being Queer in Ancient India, (2019), accessible at-
<https://www.onefuturecollective.org/blog/queerscope-being-queer-in-ancient-india/>

The Dharmasastras, valued heterosexual relationships rather highly, in relation to the need for sons, however the acknowledged the existence of other forms of heterosexual and homosexual relationships.

In later texts including the Manusmriti, various punishments were fixed for homosexual relationships, involving 'cleansing' rituals, often calling to penalize women far more than men. The 'crime' also included far greater penalties when the same crimes were committed to women who were underage.⁵

The Kamasutra however called for free expression, discussing various sexualities and discussing lesbian relationships, and relationships among men, which were also later depicted in temple sculptures.

Buddhist and Jain texts also talk of 'desire' as among both genders, and talks on how to control one's desires in both heterosexual and homosexual relations, calling to leaving behind desires as a whole, valuing celibacy over all.

Medieval India and the arrival of the Mughals

The most speculated by far of homosexuality in Medieval India was the relation was that between Alauddin Khalji, and his slave Malik Kafur. Khalji bestowed power to Malik, raising his ranks to deputy ruler or 'Malik Naib'.

Mubarak, son of Alauddin Khalji was also known to be in a relationship with one of the noblemen in his court. Babur, who founded the Mughal Dynasty, wrote about his love for a boy named Baburi in Kabul and his writing faced no disapproval during his time or after it. There were many such incidents in which noble class Mughals engaged in homosexuality.⁶

Several Sufi saints have also recorded history of attraction to males, one included a poet Saint Shah Hussain, who rather rebelliously wrote about his attraction to a Hindu boy.

This is not to say homosexuality was legal as such. Islamic law forbade sodomy, with

⁵ Devdutt Pattanaik, What do Manusmriti and Dharmashastra have to say about homosexuality?, (2016), accessible at- <https://www.dailyo.in/lifestyle/dharmashastra-manusmriti-karma-devdutt-pattanaik-mythology-hindu-epics-14814>

⁶ The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western (Part I/III), Lawctopus, (2021), accessible at- <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/>

punishments. However, the practice was rather common among the elites, belonging largely to the Hanafi school, which saw punishments that were far less harsh, and decided by jurists and did not award the death penalty for the same.

The British period

In the 1800's, after the arrival of Britishers, sexual activities "against the order of nature" including all homosexual activities were criminalized under section 377 of the Indian Penal Code. This was majorly influenced by the Catholic Church's belief that a sexual act not related to procreation was sinful. The Abrahamic texts largely condemned acts of homosexuality which influenced the laws the British applied to India as well, condemning the case.

In the case of *Queen Empress vs. Khairati*, drew widespread attention where circumstantial evidence was used to prosecute an individual who cross-dressed with no clear practice of sodomy. The laws were largely racist in nature subjecting the Indians to far harsher punishments than the British.

This can also be observed with the laws against the Hijira community, which was continuously subjected to harsh treatment from the British. The British banned castration for the community, subjecting individuals to discrimination under the Criminal Tribes act.

The United Kingdom and Wales decriminalized homosexuality in 1967, the very law that Section 377 was based on, however the same remained in India, for a long period till decriminalization in 2018, leaving a colonial relic, affecting a large population for several decades after.

The Judicial Journey

1) Naz Foundation v. Govt. of NCT of Delhi (2009) ⁷

One of the initial judicial challenges to Section 377 of The Indian Penal Code, came from a public health organization. The Naz Foundation, that primarily worked with HIV/AIDS patients filed a petition challenging the law under section 377. The non-governmental organization, working in prevention of the spread of AIDS cited how the attitude of

⁷ *Naz Foundation v. Government of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009)

governmental officers and stigma associated with the same severely impacted their work.

They argued the law was discriminatory and violative of Article 14 (Equality before law)⁸, Article 15 (Prohibition of discrimination),⁹ Article 19 (Freedom of expression)¹⁰, and Article 21 (Right to life and liberty).¹¹

In July 2009, a Division Bench of the Delhi High Court comprising Chief Justice A.P. Shah and Justice S. Muralidhar delivered what was, at the time, one of the most progressive constitutional judgments in Indian history.

The court stated ‘In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is anti-thesis of equality and that it is the recognition of equality which will foster the dignity of every individual. ‘Hence the court distinguished between the morality a constitution provides as against discrimination individuals face in society, that is what is considered ‘popular’.

The court recognized the basic principles laid down by the constitution in the landmark judgement, decriminalizing homosexuality in so far as it involved two consenting adults. It also fostered a conversation on autonomy and dignity under Article 21 stating ‘These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.’

The court also had a deeper reading of Article 15 allowing the recognition of sexual orientation analogous to sex itself.

This judgement was a large breakthrough for the LGBTQ+ community, although several cases were filed against the same judgement, where several social groups questioned privacy and its link to committing an offence while others argued that decriminalization of Section 377 would be a catastrophe for the institution of marriage and the affect the same would have on young

⁸ INDIA CONST. art. 14

⁹ INDIA CONST. art. 15, amended by The Constitution (Hundred and Third Amendment) Act, 2019

¹⁰ INDIA CONST. art. 19, amended by The Constitution (Forty Fourth Amendment) Act, 1978

¹¹ INDIA CONST. art. 21

minds.

2) Suresh Kumar Koushal v. Naz Foundation (2013)¹²

The declaration and joy was however short lived. The Naz foundation judgement went on an appeal to the Supreme court. Justice G.S. Singhvi held that section 377 did not violate the Constitution and it was not a matter for courts to decide on. As stated, it was a matter better left to the parliament.

The judgement was largely criticized. The reasoning as individuals found was largely vague and troubling, offering very thin margins. The LGBTQ+ community was reduced to a minority. The court stated ‘this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section’, highlighting that the treatment individuals of the community suffered at the hands of law-making officials did not constitute a valid reason to strike down the section itself.

Justice G.S. Singhvi also wrote that ‘Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.’. This also drew widespread outrage on the classification.

The decision sent shockwaves through India's LGBTQ+ community. People who had, for four years, lived with a degree of legal dignity, suddenly found themselves once again subject to criminal law. The chilling effect was immediate, activists reported increased harassment, and many individuals who had come out went back into hiding.

3) NALSA v Union of India 2014¹³

Parallel to the courts procedure in debating gay rights, a case regarding the rights of transgendered persons cropped up. In 2014, a three-judge bench of the Supreme Court decided

¹² *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors* on 11 December, 2013 Equivalent citations: AIR 2014 SC 563

¹³ *National Legal Services Authority (NALSA) v. Union of India* (2014) AIR 2014 SC 1863

NALSA v. Union of India, a transformative judgment on transgender rights.

The court held that a transgendered person had the right to self-identify. their gender and that the State was obligated to recognize this identity as a third gender for all legal purposes. The judgment drew on international human rights law, including the Yogyakarta Principles, and anchored transgender rights firmly within Articles 14, 15, 19, and 21 of the Constitution.

This judgement was a beckon forward and a criticism of the courts previous view the court held, hence allowing for a more progressive path in furthering the rights of individuals of the community.

4) Navtej Singh Johar v. Union of India (2018)¹⁴

Respite came to the LGBTQ+ community in 2018, nearly 10 years after the first case filed in respect of the matter.

The decision in Navtej Singh Johar v Union of India, which read down Section 377 of the Indian Penal Code on 6th of September 2018 marked huge and historic victory.

A five-judge constitutional bench of the Supreme Court, comprising of the Chief Justice Dipak Misra and Justices Rohinton Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra, unanimously struck down Section 377 insofar as it criminalized consensual sexual conduct between adults.

Justice Indu Malhotra stated that society owed an apology, ‘History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by article 14 It infringed the Fundamental Right to non-discrimination under article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article’

¹⁴ *Navtej Singh Johar & Ors. v. Union of India* (2018) 10 SCC 1

This judgment was more than just a simple declaration; it was way forward. It allowed for Indian citizens to live fearlessly no matter their sexual orientation and the right to love whoever one pleases. The judgement explicitly overruled Suresh Kumar case.

What changed in the landscape following the Navtej Singh Johar judgment?

It's important to understand what happened following the judgement. The case did not lay down a significant protection or procedure. It simply decriminalized consensual adults in homosexual relationships. The judgement itself could not offer any protection and social stigma.

The recognition said nothing in matters of marriage, adoption, financial reliability etc. The financial system in India rewards and prefers heterosexual families in various ways, but not homosexual partnerships.

Marriage is not only about having a partner and cohabiting it also offers social recognition to the institution itself. Married couples can back each other's lives by buying life insurance and benefit from family floater health insurance policies of spouses. This is not available to gay couples.

This gap matters enormously in practice. A same-sex couple in India today can cohabit without fear of arrest. But if one partner is hospitalized, the other has no legal right to access medical information or consent to treatment. If one partner dies intestate, the other has no inheritance rights. If they wish to adopt a child, the law does not permit it. In employment, housing, healthcare, and education, there is no statutory protection against discrimination on grounds of sexual orientation.

Social stigma is also considerably important. A judicial recognition does not directly imply that society would quietly accept the same. The Madras High Court recognized increased queerphobia following the judgement. There was no guaranteed protection from individual of society, and or official. Simply because a charge cannot be levied, did not mean individuals didn't suffer stigma and discrimination.

Comparative analysis- South Africa and USA

South Africa

South Africa is perhaps one country that can easily be compared to the landscape of India. Post the struggle for independence and against apartheid, south Africa adopted its constitution in 1996. This right was given only post democratic rule.

In *Minister of Home Affairs and Another v Fourie and Another ZACC 19, 2006 (1) SA 524 (CC)*¹⁵ the applicant challenged the constitutional validity of the common law definition of marriage and section 30 of the Marriage Act 25 1961, which excluded same sex couples. The Constitutional Court recognized the right of same-sex couples to marry, holding that the exclusion of same-sex couples from marriage was an affront to their dignity. Parliament subsequently enacted the Civil Union Act, 2006, giving legal force to that ruling.¹⁶

In South Africa, This Civil Union Act was a momentous step in the right direction for the development and protection of same-sex partners' rights. The country showcased how the court set the standard and the parliament followed. India however has a different understanding. Sexual orientation is not explicitly mentioned in the constitution, leaving the same to interpretation.

United States of America

The United States of America has also seen large shifts in its understandings of LGBTQ+ community. The path from decriminalization to the right to marriage took just over a decade. *Lawrence v. Texas (2003)*¹⁷ struck down sodomy laws as violations of liberty under the due process clause. Twelve years later, *Obergefell v. Hodges (2015)*¹⁸ recognised a constitutional right to same-sex marriage, with Justice Kennedy writing memorably that the Constitution grants same-sex couples 'equal dignity in the eyes of the law.'

The US courts also demonstrated how courts must sometimes take the ultimate step to law and law making. It demonstrated how constitutional courts can move ahead with legislature when the matter questioned fundamental rights to an individual.

¹⁵ *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19

¹⁶ Lorinda Venter, LGBTQIA+ rights in South Africa, Accessible at- <https://www.ibanet.org/article/854B8E51-E931-403D-BDC3-1386B30F9591>

¹⁷ *Lawrence v. Texas* 539 U.S. 558 (2003)

¹⁸ *Obergefell v. Hodges* 576 U.S. 644 (2015)

Supriyo v. Union of India¹⁹

The question of same-sex marriage reached the Supreme Court in 2023, in a batch of petitions that raised one of the most significant constitutional questions in recent history. The five-judge constitutional bench comprising of Chief Justice D.Y. Chandrachud and Justices Sanjay Kishan Kaul, S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha heard extensive arguments from petitioners, the Union of India, and several interveners.

The courts refused recognition of same sex marriage under the special marriage act. The verdict was divided. The majority, led by Justices Bhat and Kohli and concurred in by Justice Narasimha, held that the Constitution does not confer an unqualified right to marry and that the recognition of same-sex marriage was a matter for Parliament debate, not the courts. The majority also declined to read down the Special Marriage Act, 1954²⁰ to include same-sex unions.

This reluctance has led to desperation among individuals of the community for recognition. The resistance by the judiciary, and its decision to leave the same to the parliament was disappointing when contrasted with earlier decisions such as *Shafin Jahan v. Asokan K.M. (2018)*²¹, where the Court had expansively interpreted the right to choose one's partner under Article 21.²²

Chief Justice Chandrachud and Justice Kaul, in dissent, took a more expansive view. The Chief Justice held that there was a constitutionally protected right to enter into a union with a person of one's choice and that queer couples had the right to civil unions even if not marriage in the traditional sense.

The judgement itself was deeply unsatisfying, especially considering the contrast of South Africa and USA, which constituted the same into the understanding under their specific constitutions. The dissatisfaction lies not with the law itself but with the limits of the judiciary. When the courts do not act or cannot act and parliament refuses to act in matter relating to the same effects only individuals of society who seek basic rights and the result is a community

¹⁹ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, 2023 INSC 920

²⁰ Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India)

²¹ *Shafin Jahan v. Asokan K.M.* (2018) AIR ONLINE 2018 SC 1136

²² Bhavya Pareek, *Beyond Marriage Equality*, VIDHI, (2025), Accessible at-
<https://vidhilegalpolicy.in/blog/beyond-marriage-equality-2/>

waiting simply for recognition.

The framework and way forward

The Supriyo judgement, although with a dissatisfying outcome made one thing clear, the power to amend or create additions lies solely with the parliament. This is not a comfortable situation, with historical silence from parliament.

Arguments still stand under the basic structure of our constitution under Article 14, guarantees equality before law and equal protection of laws. The exclusion of same-sex couples from the institution of marriage and with its attendant legal benefits that arise from the institution creates a classification that lacks any rational nexus to a legitimate State objective, and thus fails what Article 14 mandates.

The courts read sexual orientation as analogous to 'sex' for the purposes of Article 15 in the Navtej Singh judgement, meaning discrimination on the basis of sexual orientation is presumed to be unconstitutional Article 19 protects freedom of expression, which includes the right to express one's identity, and Article 21, the most expansive includes the right to life with dignity and the right to marriage and children

The law denying a minority group its right is compressing their rights guaranteed to them under the constitution itself. India holds onto a colonial relic when its history has been rich and fairly neutral to sexual identity and individuals having same sex partners.

While nations that imposed these rules onto India themselves have amended their laws allowing for same sex couples to enjoy equal rights to their heterosexual counter parts, India has not done the same. The learnt stigma in relation to homosexuality still affects society today.

A good alternative is to offer civil unions so the law recognizes the partnership. This would require the parliament to further investigate and suggest a comprehensive report as suggested by Justice DY Chandrachud. A statute that grants same-sex couples' legal recognition and the rights that flow from it, including inheritance, adoption, medical decision-making, and protection from domestic violence. Such a law need not be framed as 'same-sex marriage' if that language proves politically contentious. It can be framed as a recognition of a civil union, a legal relationship that confers equivalent rights and protections.

The individuals also face sever discrimination and this requires intervention from legislature to protect them, especially in matters of housing, employment, healthcare and education. A protective statute for the same will play well into system providing a system to coexist and protect members of the LGBTQ+ community protection.