

RESEARCH PAPER ON- PAVING THE PATH TO EQUALITY: THE JOURNEY OF SAME-SEX MARRIAGE RIGHTS IN INDIA

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Abstract: This paper delves into the study of complex evolution of same sex couples of India, in pursuit of recognition of their right to marry and adoption of a child. It demonstrates their roots from ancient India, and the current day legal struggle to fulfil a basic human right. It concerns itself with the succession of judicial pronouncements ranging from recognition of their identities to rejection of their claim to marry. It strives to formulate the most attainable course of action, which the legislature may contemplate. This paper takes into account, the recent recognition patterns of the globe. It further analyses the contemporary statutory laws of India to deduce its findings. It signifies the proactive role the judiciary might have performed, while the legislature played its part. It thus attempts to suggest a practicable conduct for protecting the rights of same sex couples.

Keywords: *Same-sex marriages, LGBTQAI+, Right to marry, Adoption, Section 377, NGO Naz Foundation, Navtej Singh Johar case, Supriyo judgement.*

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I. INTRODUCTION

“The right to enter into union includes the right to choose one’s partner and the right to recognition of that union. A failure to recognise such associations will result in discrimination against queer couples.”¹

-Chief Justice D.Y. Chandrachud

The acronym LGBTQAI+ denotes comprehensively all the people who do not fit into the heteronormative description of sex. It is a non-exhaustive indication of The Lesbians, Gay, Queer, Intersex, Bisexual, Transgender, and Asexual persons. In India, the Hijras also fall into this category. They are referred to as third-gendered people who are neither men nor women. This community is aimed towards establishing its own identity in a hetero-biased society. The LGBTQAI+ community has globally advanced far, yet it has much further to go. Several countries of the world, such as Liechtenstein, Greece, Estonia, Cuba, Andorra, Slovenia, Chile, and Switzerland, have legalized marriage equality recently. In India, the community was long suppressed since the enactment of Sec 377,² which was based on English law. It criminalized homosexual relations as “*unnatural offenses*.” The discrimination faced by the community was acknowledged after decades in *Navtej Singh Johar and Ors. v Union of India*.³

However, mere decriminalization doesn’t ensure social and legal parity as granted to heterosexual couples. They are deprived of the basic benefits of life such as right to claim their succession, inability to adopt a child, claiming maintenance, and are devoid of pension as given to the married persons. Such deprivations are discriminatory and induce anonymity among the queers. There is a need for an observant, informed, and reformatory legislature to bring about a positive change with respect to the fundamental rights of queer persons. If the aforementioned cannot be maintained, the judiciary must exercise its power of Judicial Review so that justice can be served.

¹ Saikat Kumar Bose, ‘No Recognition To Same-Sex Marriages From Supreme Court. Over To Centre’(NDTV, 17 October 2023)< <https://www.ndtv.com/india-news/centre-to-set-up-committee-to-decide-rights-of-persons-in-queer-unions-chief-justice-4488067>> accessed January 13, 2025

² Indian Penal Code 1860, s 377

³ *Navtej Singh Johar and Ors. v Union of India* [AIR 2018] 10 SCC 1

II. ROOTS OF SAME-SEX MARRIAGES IN INDIA: DEBUNKING THE MYTH OF URBAN ORIGINATION

India is a land of rich cultural heritage and diversity of opinions, beliefs, practices, religions, languages, traditions, spices, and geography. The ancient Indian society was progressive, rational, and way ahead of the post-colonization one. Its advancement can be traced to its respect for homosexuality, the acceptance, recognition, and celebration of love in all of its forms.

In the *Rigveda*, the phrase '*Vikriti Evam Prakriti*' states that, what might appear unnatural is also natural.⁴ According to Thadani, the Rig Vedic period witnessed the concept of Dyava or twin females in the form of sisters, lovers, or mothers who were basically homosexual deities.⁵ *Kama sutra* mentions '*Swarinis*' or '*Lesbians*,' who often married and brought up a child together. It enlists three genders namely pums prakriti, stri prakriti and tritiya prakriti- man, woman, and the third sex which further consists of lesbian and gay.⁶

The advent of Arabic, Persian, and Islamic cultures gave homoeroticism an official patron. Baber, in his Baburnama, had romantically discussed about his male lover, Baburi.⁷ According to Vanita and Kidwai, there is a mention of same-sex love in the early medieval literature, though not in a systematic form. However, we can find plenty of literary works on homosexual relations in the late medieval period.⁸

Mir's Ghazal *Shola-I-Ishq*, a medieval work, illustrates the romantic affair between a Hindu and a Muslim man.⁹ The Khajuraho temple of Madhya Pradesh is living archaeological evidence that has sculptures of homosexual couples engraved on its external walls. Some of its depictions include the exterior of the Kendriya Mahadeva Temple, where a male figure openly pleases another male, flanked by two heavenly deities.¹⁰

During the era of British colonization, Indian sexuality faced suppression and domination in many forms. They were subjected to social and legal inequity as imperialist Britain had its set

⁴ Priyanshi Jain, 'Is India ready for Same-sex marriage?' [2021] Jus Corpus Law Journal 476 <<https://www.juscorpus.com/wp-content/uploads/2021/06/52.-Priyanshi-Jain-1.pdf>> accessed 13 January 2025

⁵ Giti Thadani, *Sakhiyani : Lesbian Desire In Ancient and Modern India* (Cassell 1996)22

⁶ Vatsyayana, *The Kama Sutra* (Richard F. Burton tr, 1st edn, The Kama Shastra Society of London and Benaras 1883)79

⁷ Sherry Joseph, *Social Work Practice and Men Who Had Sex With Men* (Sage Publications 2005)75

⁸ *Ibid.* 76

⁹ *Ibid.*

¹⁰ Vishavjeet Dhaliwal, 'The Queer Story Of South Asia' (Brown History, 31 October 2023) <<https://brownhistory.substack.com/p/the-queer-story-of-south-asia>> accessed 14 January 2025

notions of sexual orientation. The adoption of Section 377¹¹ criminalized consensual homosexual intercourse between adults as well.

Today, there is a belief in the minds of people that queerness is an urban concept that only exists for the elites and is unknown to the rural areas. This notion is far from practicality as several incidences of queer marriages have been found in the rural areas as well. In 1933, an incident of two women of Faridabad was reported, where they married one another in the Banke Bihari temple;¹² in 2004, a twenty-four-year-old Dalit woman and a twenty-two-year-old Jat woman, who were friends since their early years, travelled to Delhi and got married in a temple.¹³ Much more evidences of homosexual unions can be found from varied sources, such as Two Adivasi women got married according to the customs of their tribe, in a small village in Korput district, Orissa;¹⁴ Young, gay men in a small town called Barasat expressed their desire to be a part of the queer community.¹⁵

It is thus justified to conclude that queerness is not a mere urban elitist concept; rather, it is an innate characteristic. It can be traced to India's historical past and is equally present in urban and rural areas. It is thus deeply rooted in the origination of mankind and transcends the religious and geographical stigma.

III. POST-INDEPENDENCE JUDICIAL EVOLUTION OF LGBTQ+ RIGHTS IN INDIA

In the year 2001, The Imperial Era Section 377 was first questioned in The High Court of Delhi, by the *NGO Naz Foundation*. Eight years later, in 2009, The Honourable High Court of Delhi declared the criminalization of the consensual physical union of adults in a confidential setting as an infringement of the right to life, right to liberty and right to equality. It stated that “discrimination is anti-thesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”¹⁶

¹¹ Indian Penal Code 1860, s 377

¹² Ruth Vanita, *Love's Rite: Same Sex Marriage In India And The West* (first published 2005, Palgrave Macmillan 2005) 37

¹³ *Ibid.*

¹⁴ Satyanarayan Pattnaik, 'Two Orissa girls defy norms, get married' *The Times Of India* (Koraput, 5 November 2006) <<https://timesofindia.indiatimes.com/india/two-orissa-girls-defy-norms-get-married/articleshow/322874.cms>> accessed 14 January 2025

¹⁵ Paul Boyce and Rohit K. Dasgupta, 'Utopia or Elsewhere: Queer Modernities in Small Town West Bengal' in Tereza Kuldova and Mathew A Varghese (eds), *Urban Utopias* (Palgrave Macmillan 2017)

¹⁶ *Naz Foundation v Government of NCT of Delhi and Ors* [AIR 2009] 6 SCC 712

The above ruling was overturned in the *Suresh Kumar Kaushal case*,¹⁷ where the Supreme Court regarded “unnatural sex” as mere “perversity of mind” and upheld the Constitutional legitimacy of Section 377 as constitutional on grounds of public morality. The Supreme Court, which is the Highest Court of the Land held that “Section 377 IPC does not suffer from the vice of unconstitutionality and declaration made by the Division Bench is legally unsustainable.”¹⁸

In 2014, The Court of Final Appeal in the *National Legal Services Authority v. Union of India*¹⁹ categorized a third gender for the transgender persons. It observed that third-gender people are qualified for the fundamental rights enshrined under the authority of part III of the Constitution and that the government must take proactive action in terms of welfare and upliftment of non-binary genders. In 2019, the Transgender Persons (Protection of Rights) Bill was passed and became the Transgender Persons (Protection of Rights) Act, 2019.²⁰ Transgender person means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.²¹ The act further includes provisions as to Prohibition against discrimination, Social Security, Obligations of the government, Health of Transgender persons, Non –discrimination in employment, Education etc.

The Apex Court in the 2017 judgment of *K.S. Puttaswamy v. Union of India* asserted that an individual’s sexual orientation is an attribute of privacy, beyond question.²² It was further observed that no person can be denied the right to privacy because it affects a minimal proportion of the overall population.

The five-judge bench comprising Dipak Mishra, CJI; R.F. Nariman, J.; Dr. D.Y. Chandrachud, J.; A.M. Khanwilkar, J. and Indu Malhotra, J., in the landmark judgment of *Navtej Singh Johar v. Union of India*²³ Declared that Section 377²⁴ is violative of Articles 14,15,19 and 21 of the Constitution²⁵ as far as it criminalizes the voluntary sexual engagement of adults. It was done

¹⁷ *Suresh Kumar Koushal & Anr. v Naz Foundation & Ors.* [AIR 2014]1 SCC 1

¹⁸ Indian Penal Code, s 377

¹⁹ *National Legal Services Authority v Union of India & Ors.* [AIR 2014] 5 SCC 438

²⁰ Transgender Persons (Protection of Rights) Act 2019

²¹ Transgender Persons (Protection of Rights) Act 2019, s 2(k)

²² *Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors.* [AIR 2017] 10 SCC 1

²³ *Navtej Singh Johar* (n 3)

²⁴ Indian Penal Code, s 377

²⁵ Constitution Of India 1950, arts 14, 15, 19 and 21

in the light of the South African approach towards homosexuality. The Section, however, still holds value in case of sexual acts against adults without their lawful consent, acts of bestiality and unlawful sexual conduct with minors.

The primary objective of the above cases was striking down Section 377, with a negligent focus on the ancillary rights of same-sex couples and marriage equality. In a society where even consensual sexual acts were penal, the road to recognition of same-sex marriages, is fairly a long one, as it is implicit that consummation of such marriages would lead to criminality.²⁶ However, the 2018 judgment serves as a positive outlook on the life of the LGBTQ+ community. It embarks as a beacon of hope for further reformatations, both socially and legally.

The High Court of Madras in the judgment of *Arun Kumar Anr. v. Inspector General of Registration & Ors.*²⁷ validated the marriage solemnized between a Hindu Male and a Hindu trans-woman in accordance with Section 5 of the Hindu Marriage Act, 1955. It determined that the term 'bride' not only includes a woman but also a trans-woman.²⁸

A stack of cases was filed throughout the nation, in the multiple High Courts and the Apex Court, seeking the recognition of equal marital rights for same-sex couples. The petitioners argued that the exclusion of homosexual couples outside the scope of Section 4 of the Special Marriage Act²⁹ is against their right to marriage, and not protecting the rights of such couples exposes them to societal and domestic brutality.

In November 2022, two gender-diverse couples, namely, Supriyo Chakraborty and Abhay Dang, Parth Phiroze Merhotra and Uday Raj Anand, submitted writ petitions in the Hon'ble Supreme Court of India for recognition of homosexual marriages in India. The petitioners requested the court to announce Section 4(c) of the Special Marriage Act, 1954, as unconstitutional on the ground that it is discriminative in recognizing only 'male' and 'female' as persons eligible for marriage under the act. They argued for being deprived of basic protections and benefits arising out of marriage, such as adoption, surrogacy, pension rights, maintenance, and succession, which is against their dignity, right to equality, and the freedom of expression. In response, the Supreme Court bench comprising Chief Justice D.Y. Chandrachud and Justice Hima Kohli mandated the Union to look into this matter. The bench,

²⁶ Rohit Beerapalli, 'Same Sex Marriages In India: A Socio-Legal Analysis'(2021) 1(4) International Journal For Legal Developments And Allied Issues < <https://ijldai.thelawbrigade.com/publications/vol-1-issue-4-november-2015/>> accessed 13 January 2025

²⁷ *Arun Kumar Anr. v The Inspector General of Registration & Ors.* [AIR 2019] MADRAS 265

²⁸ Hindu Marriage Act 1955, s 5

²⁹ Special Marriage Act 1954, s 4

on 6th January 2023, transferred two similar pending petitions of Delhi and Kolkata High Court into the main petition. Further, in March 2023, the case was escalated to a five-judge bench.

On 17th October 2023, the constitution bench in *Supriyo Chakraborty & Anr v. Union of India*³⁰ headed by Chief Justice D.Y. Chandrachud, consisting of Justice Sanjay Kishan Kaul, Justice Ravindra Bhatt, Justice P.S. Narasimha, and Justice Hima Kohli delivered a split verdict of 3:2 in recognition of same-sex marriages. The apex court laid the following observations:

- The Apex Court unanimously held that the Constitution does not explicitly acknowledge fundamental right to marry;
- The majority bench observed that there exists no legal obligation on the state to recognize civil unions;
- It further held that Section 4 of the Special Marriage Act³¹ and the Foreign Marriage Act³² are valid in accordance with their constitutionality;
- In a split verdict of 3:2 it was held that Section 57(2) of the Juvenile Justice Act³³ relates to married couples. Regulation 5 (3) of the Adoption Regulations was held intra vires the JJ Act;
- Transgender and Intersex couples who are in a heterosexual relationship can marry within the scope of authority, the Special Marriage Act and the personal laws;
- Under Articles 245 and 246 of the Indian Constitution³⁴, read with entry 5 of List III of the Seventh Schedule, the power to enact laws relating to queer marriage lies with the Legislature, that is, the Parliament and the State Legislatures;
- The court cannot either invalidate or read words into the Special Marriage Act owing to its institutional scope.

The below-mentioned judgment matrix breaks down the opinion of each judge in this case in a detailed format:

³⁰ *Supriya Chakraborty v Union of India* [AIR 2023] INSC 920

³¹ Special Marriage Act 1954

³² Foreign Marriage Act 1969

³³ Juvenile Justice Act 2015, s 57(2)

³⁴ Constitution Of India 1950, arts 245 and 246

Issues	D.Y. Chandrachud CJI	S.K. Kaul J	S.R. Bhat J, Hima Kohli J	P.S. Narasimha
Is there a fundamental right to marry?	No. Declaring the right to marry as a fundamental right would put an obligation on law makers to create an institution of marriage which they have not created.		No. Marriage exists independently of the state. The Court cannot compel the state to create social or legal status.	No. It is a fundamental freedom, not a right.
Do queer persons have a right to enter into civil union?	Yes. Article 19 permits queer persons to form intimate associations by exercising the expression of their gender identity, choice of partner and sexual desires.	Yes. The right to form civil unions is a feature of personal liberty and freedom of expression. This has right has to be made available to all, regardless of sexual orientation and gender.	No. Creation of a new social institution would require a completely different legal framework with "new universe of rights and obligations." The Court cannot oblige the state to do so.	No. The doctrine of separation will be violated if the state is mandated to create law to recognise a civil union
Is the Special Marriage Act, 1954 unconstitutional for excluding non-heterosexual couples?	No. Declaring the SMA as unconstitutional would take India back to the pre-independence era where inter-faith and inter-caste relationships were impermissible. The Court cannot eradicate one form of discrimination to permit another.	Yes. There is a clear distinction between non-heterosexual and heterosexual persons under the SMA. There is no reasonable explanation for drawing that distinction. The intent of the SMA to facilitate inter-faith marriages does not justifying excluding non-heterosexual couples.	No. The "sole intention" of the SMA was to facilitate interfaith marriages. As long as an objective of a law is clearly discernible, it cannot be attacked solely because it does not make a better classification.	No. Agree with Justice Bhat
Can the right to marry be read into the provisions of the Special Marriage Act, 1954?	No. Reading down the Special Marriage Act to include marriages between queer persons would be to enter into the realm of the legislature.	No. There are "multifarious interpretive difficulties" when it comes to including non-heterosexual persons under the SMA. The Court has no adequate remedy due to "limited institutional capacity."	No. The law cannot be interpreted to include something completely different from what Parliament intended. Gender neutral reading will impact gender specific aspects of the statute.	No. Agree with Justice Bhat
Can the Supreme Court award legal recognition to queer persons' right to marry?	No. The state must recognise queer relationships. The freedom to choose a partner would be rendered "otiose" if the state does not recognise the "bouquet of entitlements."		No. The Court may feel that that measure or norm is lacking, but cannot venture into legislative domain.	No.
Can unmarried non-heterosexual couples adopt?	Yes. The Central Adoption Resource Authority guidelines are discriminatory as they only permit single individuals and married heterosexual couples to adopt a child. It prohibits queer couples from adopting.		No. If one parent abandons the relationship, marriage is essential to ensure that the child and other parent enjoy the protections flowing from marriage (maintenance, custody, guardianship etc.) State must urgently create statutory frameworks to give legal recognition to adoption by queer couples.	No. Agree with Justice Bhat
Can transgender or intersex persons in heterosexual relationships marry under the existing legal framework?	Yes. A transgender or intersex person in a heterosexual relationship is entitled to marry their partner. Denying this would amount to discrimination, which is in violation of Article		Yes. Agree with the CJI.	

IV. A GLOBAL ANALYSIS

IN 2025 Liechtenstein – The Government of Liechtenstein proposed a bill favouring marriage equality on May 16, 2024. The aforesaid bill with a vote of 24-1, received the royal assent on July 9, 2024. It was enacted on 1 January, 2025 and brought an amendment in the Marriage Act, to define marriage as a “full and undivided life partnership of two people.” Liechtenstein was the last the German speaking country to do so.

IN 2024 Greece – On February 15, Greece became the first Christian Orthodox majority country to legalize same sex marriages and their adoptions.

Estonia – On 1 January, Estonia became the first post-Soviet Union Country to give legal recognition to give homosexual marriages.

IN 2022 Cuba – In a National Referendum of September 25, the citizens of Cuba voted in favour of legalization of same sex marriages.

Andorra – On July 21, the General Council of Andorra amended the Civil Union laws to include same sex marriages within its scope.

Slovenia – The Constitutional Court of Slovenia is the highest court established in the country to ensure the protection of the Constitution and the Fundamental rights. On January 8, it ordered the legislature to enact a law for recognizing the same sex marriages in Slovenia, as such deprivation is a violation of the Constitution itself. Thus, on October 4, it was lawfully recognised.

IN 2021 Chile – Chile recognised same sex civil unions in 2015. However, the bill seeking recognition of same sex marriages was passed by the Senate on December 7 and by the lower house on November 23, 2021. The then president Sebastian Pinera announced his assent to the bill on December 9.

Switzerland – In a public referendum of September 2021, the citizens of Switzerland voted for legalization of same sex marriages and their adoptions. On December 16, the Parliament passed a legislation, extending the marriage and adoption rights to such couples.

Countries such as Costa Rica and Austria have legalised same sex marriages in 2020 and 2019 respectively. Many other countries around the globe have extended their support to same sex marriages.

V. THE WAY FORWARD

Despite the decriminalization of consensual sexual acts, homosexual couples cannot express their true selves as they continuously live in fear of exclusion by society and their own families. They either choose to stay single throughout or are forcefully married heterosexually. Due to the non-recognition of same-sex marriages, they become devoid of basic marital benefits and face immense discrimination when their identity is revealed.

According to the *Supriyo Judgement* and Articles 245 and 256 of the Constitution³⁵, read with Entry 5 of List III to the Seventh Schedule, the enactment of laws relating to queer marriages falls within the authority of the State Legislatures and the Parliament. Thus, as stated by the Apex Court, legal acknowledgement of same-sex marriages does not lie within its jurisdiction. However, the Supreme Court, under Article 32(2)³⁶ of the Constitution, can exercise its power by issuing orders, directions and writs for enforcement of fundamental rights. Recognition by means of creating an entirely separate community for LGBTQAI+, with their customs and practices, will not endure as such persons come from different cultural backgrounds and personal laws. Hence it would be hard to formulate a common agreed-upon practice.

The State must recognize that it is empowered to institute changes in the social institutions in accordance with constitutional values. For recognition of same-sex marriages, an inclusion in the personal laws would invite strong societal backlash on religious grounds. Also, the amendment in Section 4 and the second schedule of the *Special Marriage Act, 1954* and inclusion in the *Foreign Marriage Act, 1969*, does not serve as a practical course of action. The most achievable modus operandi is by the way of enacting a separate, Special Law, governing the marriage, adoption and other ancillary rights of same sex couples. This separate enactment will not only protect the rights such couples, but will also save the time of legislature from the ordeal of molecular level amendments in the existing laws.

VI. CONCLUSION

The manifestation of a discrimination-free society can become a reality only through equality. The LGBTQAI+ community must be granted equal human rights and liberties as the other individuals. Like heterosexual couples, they must also have the right to choose a partner, right to marry, and right to autonomy. The role of the society and, most importantly, the State is

³⁵ Constitution of India, arts 245 and 246

³⁶ Constitution of India, art 32(2)

crucial in determining the quality of lives of the community. Hence, for the functioning of a dynamic society, the laws must also evolve.