



# CHANGING DYNAMICS OF LGBTQA+ ACTIVISM IN INDIA

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**ABSTRACT:** While the Constitution recognizes every individual as equal, there is a need for reform in certain laws to achieve equality truly. The landmark Supreme Court judgment in *Navtej Singh Johar v. Union of India* marked a significant step towards equality for the LGBTQA+ community in India. However, there is still a considerable journey ahead to secure the full range of human rights for this community.

The paper delves into the current status of same-sex marriages in India. Through research, the researcher analyses how Countries all over the world can provide equal rights and status as that given to heterosexual couples. The research papers attempt to present a compelling rationale for legalizing same-sex marriage in India and recognizing it as a basic human right in the country, drawing on constitutional provisions, court precedents, and other relevant laws.

## INTRODUCTION

The term 'LGBTQ' encompasses individuals who do not conform to traditional norms of gender and sexuality. It includes lesbian, gay, bisexual, transgender, and queer individuals, with the acronym often extended with a '+' to acknowledge the diversity within the community. While gay, lesbian, and bisexual refer to sexual preferences, transgender individuals do not identify with the traditional male or female genders. 'Queer' is a broad term used to represent the diversity and uniqueness of the collective, including intersex and asexual individuals. This term challenges the heteronormative standards and encourages individuals to explore and define their own identities within the spectrum of gender and sexuality.

The LGBTQ community has faced significant challenges globally, with India experiencing a prolonged struggle for acceptance. The Indian legal system, influenced by English law, historically oppressed sexual minorities through Section 377 of the Indian Penal Code, leading to fear, oppression, and violence against LGBTQ individuals. However, a landmark Supreme Court decision marked a significant advancement in normalizing sexual minorities and providing a legal basis for their rights. In *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1 the Supreme Court of India Partially struck down Section 377 of the Indian Penal Code, 1860 which was used as a weapon to penalize consensual same-sex activities. In various judicial pronouncements, our Indian judiciary has provided protection to some same-sex couples despite that it still lacks legal sanction.

While transgender individuals have gained recognition as the third gender, their legal protections have faced criticism. Despite the decriminalization of same-sex relationships, social rights remain elusive for LGBTQ individuals in India, with issues such as exclusion from social organizations, employment discrimination, and lack of marriage rights continuing to persist amidst government opposition.

## INTERNATIONAL PERSPECTIVE

There are thirty-four countries across the globe wherein same-sex marriage is legalized. In 2001, the Netherlands legalized same-sex marriage for the first time in the world. Some countries like Malta and Italy recognized same-sex union and civil union in the year 2015 and 2016 respectively<sup>1</sup>. Whereas, there are around eleven countries in the world namely Iran, Saudi Arabia, Sudan, Yemen, some provinces of Somalia and Nigeria, controlled parts of northern Iraq and northern Syria which implement the death penalty for same-sex sexual acts. Apart from these, Greece recognized the same-sex civil partnership in the year 2015. The United States is one of the thirty-four nations that has allowed same-sex marriage, and even those Western democracies that do not allow for marriage equality, often consider civil unions as a valid alternative.

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| <b>North America</b> | In 2005, Canada emerged as one of the pioneering nations to sanction same-sex marriage, thus paving the way for a jurisdictional transformation.<br>Consequently, in 2015, the United States embraced the legalization of same-sex matrimony after the influential verdict delivered by the Supreme Court in the <i>Obergefell v. Hodges case</i> .                         |
| <b>South America</b> | A multitude of South American nations, namely Argentina, Brazil, Colombia, Uruguay, and Ecuador, have embarked on a progressive trajectory by enacting legislation that endorses same-sex marriage, thereby fostering a more inclusive society.   |
| <b>Europe</b>        | Several European nations, such as the Netherlands, Belgium, Spain, Norway, Sweden, Iceland, Portugal, France, the United Kingdom (excluding Northern Ireland), Ireland, Germany, and others, have embraced the legalization of same-sex marriage. The Netherlands, in particular, is the first country in the world to do so, with this progressive move occurring in 2001. |
| <b>Oceania</b>       | Within Oceania, both New Zealand and Australia have enacted legislation to legalize same-sex marriage, acknowledging the importance of equal rights and inclusivity   |
| <b>Africa</b>        | South Africa stands as the sole African country where same-sex marriage has been deemed legally permissible, showcasing a unique and progressive stance within the continent.   |

## UNITED NATIONS ON LGBTQA+

At the international level, LGBTQ rights are primarily addressed by individual nations rather than through a unified global framework. The United Nations has not established a specific convention on LGBTQ rights but has initiated discussions and campaigns to combat stigma and bias against the community. The United Nations Free & Equal campaign advocates for equal rights and fair treatment for LGBTQ individuals worldwide. Despite efforts, achieving consensus and uniformity on LGBTQ rights remains challenging due to varying levels of acceptance globally.<sup>2</sup>

<sup>1</sup> [CLEARIAS TEAM](#), "Same-sex Marriage".

<sup>2</sup> Saif Rasul Khan, "SAME-SEX RELATIONSHIPS AND MARRIAGE IN INDIA: THE. PATH FORWARD", Melbourne Law School.

In 2006, the Yogyakarta Principles were drafted by prominent organizations, activists, and academics to address human rights related to sexual orientation, gender identity, and expression. These principles aim to ensure equal treatment and dignity for the LGBTQ community, with a revised version known as Yogyakarta Plus 10 adopted in 2017 to enhance rights and responsibilities for states in protecting LGBTQ individuals.

## HISTORICAL BACKGROUND OF LGBTQ+ IN INDIA

In the Indian context, the historical transition from an open, liberal society to a conservative one regarding same-sex relationships was influenced by British colonial laws, particularly Section 377 of the Indian Penal Code, which criminalized such relationships. Historical references in Indian culture, such as in Vedic times, Hindu scriptures, and architectural marvels like Khajuraho and Ellora caves, reflect gender fluidity and diverse expressions of sexuality.

The temples constructed in Khajuraho<sup>3</sup>, during the period of 950-1050 AD by the Chandela dynasty, along with the Sun temple in Karnak and the Ellora caves, which portray the life of Gautam Buddha, exhibit depictions of same-sex relationships, including instances of same-sex intercourse involving both men and women. These architectural wonders serve as symbolic representations of a progressive society that openly embraced diverse manifestations of sexuality and gender fluidity.

In stark contrast, the influence of British colonial rule in India resulted in the criminalization of homosexuality through the enactment of laws such as Section 377 of the Indian Penal Code, indicating a shift towards more conservative social and legal norms influenced by Western ideologies and religious interpretations. Despite the British repealing similar laws within their own nation in 1967, India persisted in enforcing Section 377 until its eventual decriminalization in 2018, thereby underscoring the ongoing struggle for LGBTQ rights in the country.

## JUDICIAL REVIEW OF LGBTQ RIGHTS IN INDIA

Over the last decade, the Supreme Court has delivered significant judgments that have paved the way for recognizing the basic rights of the marginalized LGBTQ community. The judiciary's active role in addressing LGBTQ rights contrasts with the conservative nature of the Parliament, which has failed to act effectively in this regard. Some of the notable Supreme Court judgments on LGBTQ rights have played a crucial role in advancing the rights of this community in India.

### *Naz Foundation v Government of NCT Delhi*<sup>4</sup>

In the landmark case of *Naz Foundation v. Government of NCT Delhi*, the Delhi High Court declared Section 377 of the Indian Penal Code unconstitutional. This decision was based on a Public Interest Litigation filed by an NGO and paved the way for a legal review of the British-era law criminalizing homosexuality. The Court ruled that Section 377 violated Article 14, Article 15, and Article 16 of the Indian Constitution, which encompass rights related to equality.

### *NALSA v. Union of India*<sup>5</sup>

The *NALSA v. Union of India* case followed the criticized judgment in *Suresh Kumar Koushal v. Union of India*, where the Supreme Court re-criminalized Section 377 after it had been decriminalized in the *Naz Foundation* case. In the *NALSA* case, the Supreme Court recognized transgender persons as the third gender and established comprehensive guidelines to protect their rights and freedoms. This judgment led to legislative

<sup>3</sup> Pandey BV, "Why Legalising Gay Sex in India Is Not a Western Idea" (*BBC News*, December 31, 2018).

<sup>4</sup> A.I.R 2018 SC 4321

<sup>5</sup> AIR 2014 SC 1863

developments culminating in the Transgender Persons (Protection of Rights) Act, 2019. While the Act has positive aspects, it faces criticism for administrative interference, as individuals must be recognized as 'transgender' based on a certificate of identity issued by a district magistrate, raising concerns about the sensitivity of the subject

### ***Justice (Retd.) K. S. Puttaswamy v. Union of India*<sup>6</sup>**

The judgment in Justice (Retd.) K. S. Puttaswamy v. Union of India recognized the right to privacy as an essential aspect of the Right to Life and Liberty under Article 21 of the Indian Constitution. It emphasized that privacy is a fundamental part of every individual's life, regardless of gender or sex. Justice Chandrachud highlighted that the LGBTQ community should have the right to privacy, ensuring autonomy and freedom from state interference. The judgment specifically mentioned the right to choose partners freely, sexual freedom, and autonomy. It underscored that the protection of sexual orientation and privacy are fundamental rights guaranteed by Articles 14 (right to equality), 15 (prohibition of discrimination based on sex), and 21 (right to life and personal liberty) of the Constitution. This judgment laid the groundwork for the landmark Navtej Johar case, which decriminalized homosexuality in India.

### ***Lata Singh v. State of Uttar Pradesh*<sup>7</sup>**

The Supreme Court recognized the right to marry as an integral part of the right to life enshrined in Article 21 of the Constitution. The court emphasized that in a free and democratic nation once an individual reaches adulthood, they have the freedom to marry whomever they choose. Even if the parents disapprove of an inter-caste marriage, their actions are limited to severing social ties with their son or daughter. Threats, violence, or harassment directed towards the individuals opting for such marriages are unlawful. In this case, both parties were adults, thereby possessing the liberty to marry according to their preferences.

### ***Navtej Singh Johar v. Union of India*<sup>8</sup>**

The Navtej Singh Johar v. Union of India judgment in India decriminalized homosexuality by interpreting Section 377 in a way that no longer criminalized consensual intercourse between two consenting adults. The court ruled that this section violated various articles of the Constitution, including Articles 14, 15, 16, and 19(1)(a). The judgment recognized the rights to live with dignity, autonomy, and personal choice, drawing inspiration from the Puttaswamy judgment

### ***Abhijit Iyer Mitra case*<sup>9</sup>**

The Abhijit Iyer Mitra case revolves around the issue of recognizing same-sex marriage under the Hindu Marriage Act and the Special Marriage Act in India. The petitioner argues that following the decriminalization of same-sex relationships, the state should acknowledge and adhere to international standards and conventions that India has signed. However, Solicitor General Tushar Mehta contends that Hindu law defines 'spouse' as only between a male and a female, warning that judicial intervention could disrupt the delicate balance of personal laws. The central government asserts that the decriminalization of Section 377 does not automatically grant same-sex couples the right to marry. They argue that marriage in India is deeply rooted in rituals, ethos, and social values with a spiritual dimension, suggesting that the issue of same-sex marriage should be addressed by the government and legislature rather than through judicial intervention.

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<sup>6</sup> (2017) 10 SCC 1

<sup>7</sup> AIR 2006 SC 2522.

<sup>8</sup> AIR 2018 SC 4321

<sup>9</sup> W.P.(C) 6371/2020.

*Supriyo @ Supriya Chakraborty & Anr v. Union of India*<sup>10</sup>

The five-judge Constitution bench refused to accord legal recognition to marriage between persons of the same sex. Chief Justice of India D.Y. Chandrachud and Justice Sanjay Kishan Kaul were of the view that homosexual couples possess the entitlement to pursue validation of their partnership, however, they refused to modify the provisions of the SMA to that extent. Conversely, Justices S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha dismiss the stance, asserting that any acknowledgment of such nature can solely be founded upon legislation.

Supreme Court Views on Key Issues<sup>11</sup>

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| <b>Adoption Rights for Same-Sex Couples</b> | The Supreme Court bench delivered a split 3:2 verdict regarding adoption rights. In this decision, the Court upheld the existing law, which does not extend adoption rights to same-sex couples.  |
| <b>Right to Marriage</b>                    | All the judges reached a unanimous consensus in asserting that there is no absolute right to marriage, and same-sex couples cannot assert it as a fundamental right.  |
| <b>Special Marriage Act</b>                 | The Court also unanimously rejected the challenge to the provisions of the Special Marriage Act.  |
| <b>Civil Union for Queer Couples</b>        | The majority opinion stated that the state should support and enable this choice for those who wish to exercise it.<br><br>In their separate minority opinions, CJI Chandrachud and Justice Kaul ruled that same-sex couples are entitled to have their relationships recognized as civil unions and can avail of consequential benefits. |

**CONCLUSION**

A crucial need of the hour is a clear legislative enactment that addresses the protection and safeguarding of various legal rights for the LGBTQ community in India. This legislation should provide clear directions and recommendations for states to implement the law effectively. It should also include the right to marriage under the Indian Special Marriage Act, 1954.

Furthermore, active engagement with the LGBTQ community is essential in the Indian context. Initiating open and broad-minded discussions on sex and sexuality within families and communities is crucial. It is important to recognize that one's sexual orientation, whether gay or lesbian, does not impact society negatively. Upholding the principle of equality, as highlighted in the Puttaswamy judgment, is essential to protect the sexual orientation of every individual on an equal platform.

To address misconceptions within the community, there is a need for training and sensitization programs. It is crucial to dispel myths, such as the belief that sexual orientation is a matter of choice rather than biology.

Fostering societal understanding and acceptance of homosexual individuals requires multifaceted efforts. By launching educational campaigns to challenge stereotypes, supporting openly homosexual role models, and advocating for legal reforms to address discrimination. Additionally, there is a critical need to focus on sensitizing the police and law enforcement agencies, as instances of abuse and violence against the LGBTQ community by law enforcement have been reported.

<sup>10</sup> 2023 INSC 920<sup>11</sup> NEXT IAS Content Team, "Same Sex Marriage Hearing: Supreme Court Verdict", October 20, 2023.