

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES
[ISSN 2581-5369]

Volume 6 | Issue 1
2023

© 2023 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of any suggestions or complaints, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the International Journal of Law Management & Humanities, kindly email your Manuscript to submission@ijlmh.com.

“IN WITH THE NEW” - Comprehending the Legality of Same-Sex Marriages in India

AANANDITA ANEJA¹

ABSTRACT

Law is a discipline that defines policies and guidelines for human behavior in a specific scenario or set of circumstances and tends to make those standards enforceable via the application of state sanctions. It is thought that perhaps the government must respect and protect the dignity of its citizens; so, Part III of the Indian Constitution grants citizens Fundamental Rights that safeguard them from any unlawful activity and provide them with officially recognized liberties. Queer/LGBTQ people in India are generally familiar with ethical and social inequalities. Same-sex matrimony is a new level of social development in Indian society that deserves global attention. Homosexuality has been a socially accepted idea since the Vedic time, until Section 377 of the Indian Penal Code was adopted, which exacerbated the situation worse for the LGBTQ population, resulting in harassment of the entire society. Section 377 resulted in the alienation of the community as a whole as a result of majoritarian policies, which resulted in the erosion of basic human rights. The Supreme Court's decision in Navtej Singh Johar v. Union of India in 2018 eventually gave homosexuals the right to privacy and dignity. Same-sex couples faced numerous issues because the judgment was simply a mid-ticket to the destination, allowing individuals to live together and yet never providing acknowledgment of their relationship. This paper attempts to understand, analyze and focus on the societal and legal status of same-sex marriages across India.

Keywords: Same-Sex Marriages, Section 377, Homosexuality, Third gender, Legal recognition.

I. INTRODUCTION

“Being homosexual is no more abnormal than being lefthanded.”² This sentence by Abhijit Naskar may appear to be a regular combination of words implying recognition of things as they are, but it is more than that. It refers to the acknowledgment of all those dead, albeit alive, souls who were attempting to battle who they are, to hide their affections for that very same gender as themselves, and to refuse to be who they are. According to the Oxford Dictionary³,

¹ Author is a student at UILS, Panjab University, Chandigarh, India.

² Abhijit Naskar, *Either Civilized or Phobic: A Treatise on Homosexuality*

³ Principal historical dictionary of the English language

homosexuality is the trait of being romantically linked primarily to people of one's own sex. Homosexuality was regarded as a mental disease. Homosexuality has been prevalent since the beginning of time. This group, on the other hand, was discriminated against and abused, and their actions were deemed unethical, a misdemeanor, and a shame. For the longest time, homosexuality was considered and believed to be a mental illness and was believed that it is immoral and needs to be corrected, but now it is gradually being accepted that it is normal and natural for some individuals to be usually attracted to the people of their same gender. Same-sex partnerships have long been a source of contention among those with orthodox beliefs, and those who believed in the usual path of cohabitation, and such couples are frowned upon from engaging in a statutory or religious ceremony to be recognized and receive all the advantages of marriage, culminating their love in the presence of their loved ones, and ultimately being entire as one in the eyes of the law, as there no prescribed legislations or social recognition by the majority around them.

Marriage, as an institution, is regarded as sacred and the purest of all relationships. It is the legal recognition and societal acceptance of the cohabitation of two individuals. Traditionally, it is believed marriage to be a union of individuals of opposite genders, for instance, The court stated in *Mr. X v Hospital Z*⁴, that "marriage is the spiritual union, legally acceptable, of two fit bodies of opposite sexes," while defining marriage as part of the "right to privacy" within Article 21 of the Constitution. The decision demonstrates the traditional view of marriage as a heterosexual partnership Even though there is no clear requirement requiring the marriage to be heterosexual, it is assumed. The choosing of partners is the most important stage in marriage. Although there are no formal criteria for picking a spouse, standards have been devised on occasion to govern partner selection. According to Article 21⁵ of the Indian Constitution, every inhabitant of our nation is entitled to pick their spouse and marry whomever they want, yet the members of the LGBTQ community face numerous challenges in marrying the person they want. The shifting concept of marriage and relationships "in the nature of marriage" or homosexual marriages, have significant ramifications for the concept of marriage and attempts to redefine the traditional view of marriage.

Same-sex marriages have always been looked down upon by the conservative section of society, as they find it unacceptable and are still entangled between their old and narrow practices, disregarding the needs and terms of the present generation. Personal laws for Hindus,

⁴ *Mr X v Hospital Z* (1999) SC 495

⁵ Constitution of India 1950, art. 21

Christians, and Muslims, in addition to the liberal Special Marriage Act, 1955⁶, govern marriage laws in India, all of which recognize exclusively heterosexual partnerships between a man and a woman. Persons are thus denied the same governmental privileges as married people and social and legal acknowledgment of their partnership.

II. HOMOSEXUALITY

Homosexuality refers to those who are physically, emotionally, and sexually attracted to people of the same sex. Gay, lesbian, bisexual, transgender, and queer are the most commonly used phrases to describe persons who are attracted to others of the same sex, and it has become more popular in recent years. Regardless of medication and medical conflict, gay orientation is a traditional variety of individual physiological property, mental, and governmental fraternity, and the Indian government requires a straight posture on the issues of varying wide prevalent prejudicial within society.

LGBTQ+ is a phrase that has been abbreviated. This sexual preference is the polar opposite of "heterosexuality," which is defined as "romantic arousal to the person of the opposite sex" and is informally referred to as "straight" and includes the sexual relationship between a male and a female (the polar opposite genders). Homosexuality is defined as a romantic or sexual attraction to or sexual engagement with individuals of the same gender; comprising or pertaining to same-sex desire or sexual practices. Briefly explain the terms in detail- 'Gays'- one man sexually attracted to another man, likewise, 'Lesbian'- one woman sexually attracted to another woman, 'Bisexuals'- Individuals who are sexually attracted to both the genders, be it male or female, 'Transgender'- People whose gender identity does not well along with their assigned gender by birth, 'Queer'- This refers to the individuals who have not confirmed their sexual identity.

III. TRACKING THE HISTORY AND PREVALENCE OF HOMOSEXUALITY IN INDIA

Homosexuality, as a phenomenon, has been in existence since time unknown. These same-sex relationships were not always frowned upon, as evidenced by their inclusion in ancient monuments/buildings. The iconic Khajurao temples, known for their sexual images, have scriptures that document same-sex unions. Even Hinduism, the religion, has long accepted such relationships as entirely natural and even joyous. The Khajuraho temple sculptures, created by the Chandela clan between 950 and 1050 AD, depict scenes in which males exhibit their sexual organs to other men. Scholars and historians interpret this as a recognition of sexual conduct and same-sex love at the time. These sculptures affirm men's, girls, and the third gender's

⁶ The Special Marriage Act, 1955.

sexuality. Hindu mythology consists of several instances of homosexuality present and the unions of people of the same sex. The literature adopted and devised by various religions like the Hinduism, Buddhism, Muslims, and contemporary fiction provides confirms the existence of same-sex relations since time immemorial. Sexual behavior is discussed in ancient books such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads, and Puranas⁷. The Rigveda, one of Hinduism's great texts, mentions 'Vikriti Evam Prakriti,' which means that what appears to be strange is entirely natural. The term 'tritiya-prakriti' is used by the Kamasutra⁸ to define homosexual males and to describe their activities in great detail. It relates to lesbians, bisexuals, transgender persons, and intersex people. The temples of thirteenth-century India like the Sun temple, Tanjore, and Puri showcased similar pictures of either sexual scriptures of Kamasutra or the pictures of couples who were queer, which provides us an insight into the mindset of the people at that time about the presence and acceptance of homosexuality in the country. There is a well-known acceptance of same-sex relationships and their marriage. The Mahabharata is a world-renowned scripture. Shikhandini had been born a woman. He was expelled from the realm because he recognized himself as a male. He went on to say that he changed himself into a man, switching his identity to Shikhandi, who subsequently marries a woman.

Furthermore, these portrayals of one's gender astounded the British, who strictly monitored such vivid demonstrations of gender and were opposed to the expression of their sexuality. Thus, land conquerors influenced India's perception of sexuality on the other side of the 'perverse' sex prohibition. They also anglicized India's ethical lens, among other things.

IV. JUDICIAL EXERTION REGARDING LAWS ON HOMOSEXUALITY

Britishers had a negative approach toward homosexual activities and took serious action against the people who were involved in it, as they had criminalized it under Section 377 of the Indian Penal Code which states, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable for fine”⁹ and explained as - Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section. The presence of homosexuality is difficult to measure for various reasons, including the related shame and social restrictions, the atypical populations surveyed, and the inability to distinguish between intention, behavior, and identity.

⁷ Sandeep Roy Chowdhury, 'The best of both worlds? South Asian bisexuals speak out,' (February 1996) *India Currents*

⁸ Ancient Indian Sanskrit text on sexuality, eroticism and emotional fulfillment in life

⁹ Indian Penal Code, 1860 Section 377

Mutually acceptable consensual sex between same-sex people is classified as an "unnatural offense" that is "against the natural order of things" under Section 377 of the IPC. It has called for a ten-year sentence of imprisonment. The clause is a Victorian-era statute that lasted until the twenty-first century. This Law has been prevalent for more than decades now, even in times when society is changing, progressing, and accepting societal changes with open hands. The legislation has imposed an anachronistic morality on them. Their right of being treated as equal members of a community guided by the values of the Constitution is denied by the consequences of Section 377. The ghosts of a bygone era confront their yearning for fulfillment. A private member bill intending to legalize same-sex marriage was introduced in 2015, however, it failed to move forward due to a lack of momentum¹⁰.

The legality of Section 377 of the IPC was questioned before the Delhi High Court in *Naz Foundation v. NCT Delhi*¹¹. The court observed that article 15¹² of the Indian Constitution, which prohibits discrimination based on 'sex,' is broad sufficient to encompass discrimination based on 'sexual orientation,' and thus held that section 377 of the IPC violates constitutional provisions insofar as it criminalizes consensual sexual things of adults in private. In *Suresh Kumar Koushal v. NAZ Foundation*¹³, India's Supreme Court overturned the high court verdict, defining 'unnatural sex' as a 'perversity of mind,' and declaring section 377 IPC to be constitutional on the basis of public morality. The court noted that it is pre-constitutional legislation and that if it violated the fundamental rights protected by the Constitution, Parliament would not have kept the clause. The topic of same-sex relationships in the sense of marriage or companionship was not addressed in this case. The lawsuit exclusively concerned section 377 of the IPC, which outlaws carnal intercourse/sexual relations against natural law. However, the case demonstrates that same-sex marriage is illegal in India.

In a landmark judgment of *National Legal Services Authority (NALSA) v. Union of India*¹⁴, the Supreme Court recognized the rights of transgender and pronounced that they are entitled to enjoy all the fundamental rights enshrined in the Indian Constitution. Yet, until there is clear legal acceptance of same-sex marriage, the dread of public policy lurks big in terms of overseas same-sex marriage recognition. Transgender people now have the status of third gender under

¹⁰ A. Mandhani, "Shashi Tharoor submits private members bill to scrap S.377; Jaitley, Chidambaram and Bhushan opine SC must review Kaushal Judgment" (2015), available at: [http:// www.livelaw.in/shashi-tharoor-submits-private-members-bill-to-scrap-s-377-jaitleychidambaram-and-bhushan-opine-sc-must-review-kaushal-judgment/](http://www.livelaw.in/shashi-tharoor-submits-private-members-bill-to-scrap-s-377-jaitleychidambaram-and-bhushan-opine-sc-must-review-kaushal-judgment/) accessed (last visited on Mar.3, 2017).

¹¹ *Naz Foundation v. Government of NCT of Delhi*, 2009 (160) DLT 277

¹² Constitution of India 1950, art. 15

¹³ *Suresh Kumar Koushal v. NAZ Foundation* (2014) 1 SCC 1.

¹⁴ *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

the NALSA decision. The verdict recognizes transgender people's right to choose their self-identified gender and directs the state and federal governments to recognize their gender identity as male, female, or third gender. As a result of the decision, transgender people have the legal right to marry. This judgment, however, will not apply to same-sex couples because the judgment specifically indicates that the term transgender will be given a narrow construction for the purposes of the judgment.

Right from the period of 1980s same-sex couples began attempting suicide in order to oppose the legislation which does not enable same-sex unions, a duo named Lalitha and Mallika¹⁵, couldn't stay together, so they committed suicide. Suicides committed by same-sex couples became increasingly common during the first decade of the twenty-first century, owing to the non-recognition of same-sex marriage.

Section 377 had previously been criticized for its highly flawed nature. Articles 14 and 21 of the Indian constitution explicitly address the underlying legal foundation of human life. This represented the main cause for its critics. Article 19 added fuel to the fire, claiming that it infringes on homosexuals' freedom of speech and expression. As a result, it is correct to state that it contradicts the golden triangle. Another reason for its resistance was that it violated the constitution's preamble, which concerns the individual's right to dignity. It also implies that homosexuals are less valued than other individuals. It not only violates the Indian constitution, but it also violates international law.

So, in its resistance, numerous petitions were made in the honorable courts, and the homosexual community had many ups and downs, but finally, justice was served, and the provision was decriminalized in the case of *Navtej Singh Johar v Union Of India*¹⁶, the landmark judgment on the legality of same-sex couples, a significant focus was placed on love as well as its jurisprudential element, with Justice Indu Malhotra issuing an apology in favor of the LGBTQI community. "History owes an apology to the members of this group and their families for the delay in offering reparation for the ignominy and ostracism that they have suffered throughout the centuries," it was observed. Members of this community have long had their love eroded by the draconian laws that have subjected them to great prejudice and persecution. The democratic conception of fairness accepts cultural, ideological, and orientation diversity. The foundation's stability is based on its efforts to conserve diversity in all of its forms: beliefs, ideas, and ways of life.

¹⁵ Ruth Vanita Love's Rite: Same Sex Marriage in India and the West p. 6, 2005.

¹⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

V. CONSTITUENTS OF SAME-SEX MARRIAGE

The concentration on an individual's unique existence has been the salt of his or her life. Denial of reality invites death. Respect for oneself is granted by the irreplaceability of one's originality and uniqueness. This epiphany is one's personal style and personality. One's identity is defined. That is a magnificent type of originality. Justice Dipak Misra has rightly observed, “Stigmatization, identity isolation, and exclusion from the social mainstream are still stark realities for individuals today, and we can only call ourselves a truly free society when each and every individual is liberated from the shackles of such bondage and is able to work towards the full development of his/her personality.”

The legalization of same-sex marriage will help LGBTQ individuals in a wide range of ways. A few of these advantages are as follows-

- Same-sex couples have numerous social issues, one of which is the Registration of marriage. Couples who are already married outside India, and when they enter India, they have to again register their marriage, and up until now, these people face various difficulties while registering their marriage, as their marriage is yet not recognized. So, once the legalization process of same-sex marriage is done, it will make the registration process much simpler.
- Maintenance is an essential element of every marriage, therefore, if the marriage of same-sex couples will be legalized, the partners or individuals engaged in such a relationship would be eligible to have maintenance as a right. The maintenance laws under the Code of Criminal Procedure¹⁷ will then pertain to same-sex couples getting married together, in order to prevent the individual from being abandoned completely and save him from the state of helplessness.
- Same-sex couples, presently, face a lot of issues in society due to the lack of their recognition legally. But, once their marriages are legally accepted, the numerous issues they face daily will reduce- society will gradually become more accepting of their marriages, ease the laws of transfer of property, and life insurance policies for such couples, and thus, with the legal recognition of these couples, their Right to live with dignity will uphold.

¹⁷ Code of Criminal Procedure, 1973. Section 125

VI. SOCIETAL OBSTACLES AND DIFFICULTIES ENCOUNTERED AS A HOMOSEXUAL IN INDIA

Being a homosexual in a country like India is not a cakewalk, as homosexuals even at present face numerous issues in society, wherein they are neither given dignity nor respect in the society, making their life difficult. They are constantly harassed by the community, socially, financially, and so on, and the situation worsens because they are even harassed by their own blood relatives, which in itself is their final option for feeling safe.

Following are some of the challenges faced by homosexuals in our country-

- The first difficulty they face is economic inequality and insufficiency to even meet the basic requirements of life. Homosexuals earn much less than heterosexuals. Homosexuals suffer more discriminatory practices in their jobs than others. They are compelled to leave their occupations and face the high state in addition to poverty.
- Another issue faced by homosexuals in India, is that they are excluded from society, as they as individuals, are frowned upon by society and are even abandoned by their own families. In a world based on the philosophy of equality, we notice that homosexual people are still isolated from society; they are not given any significant value in any way. They have fewer choices, poor dignity, and lack the courage to face the world.
- Social programs designed to ensure equitable welfare either do not reach them. Because of their exclusion, they lack fundamental requirements such as respect, professional training, shelter, and livelihood. As individuals, they suffer from difficulties such as segregation, gender inequality, unemployment, or other variables such as prejudice or transphobia that have a negative impact on their mental condition.
- Another kind of issue they face, is regarding legal protection, as even though yet, laws have not yet been made to protect their rights in society and even though formed, lack overall application and judicial shelter.
- Homosexuals also go through a lot of mental torture and sexual harassment, due to a lack of acceptance by society at large and complete isolation from society. Their own families abandon them, and as a result, they are highly prone to ill mental health and the fear of coming out to their individuality creates a lot of mental pressure on them.

VII. SUGGESTIONS AND CONCLUSION

Even while the judiciary in each case attempts to bring a new dimension to the Rights of homosexuals and makes it more inclusive, there is still a need for established legislation on the

subject. Although the Supreme Court of India has widely accepted the decriminalization of Section 377, the author of this article believes that homosexuals in India still suffer in various aspects of their regular life. Despite the fact that the government's primary role is to protect citizens' fundamental rights, incidences of harassment and mental torture of homosexuals still continue to occur in society at large. This underscores the importance of strict and well-defined legislation for protecting and conserving the rights of homosexuals to live a respectable and dignified life. The citizens of our country need to have an open outlook and approach towards the homosexual individuals in the country, accept them, and treat them with respect and dignity, which are the bare minimum necessities of life of any individual.
