

HOMOSEXUALITY AND SAME-SEX MARRIAGE: THE INDIAN CONTEXT

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Abstract

Discussions over homosexuality and same-sex marriage have always been complicated in India due to deep-rooted cultural norms and differing legal viewpoints. By closely examining the historical development, the legal system, and the societal views that influence the experiences of the LGBTQ+ (LGBTQ is an acronym that stands for “lesbian, gay, bisexual, transgender and queer) population in India, this study aims to clarify these difficulties.

The article seeks to advance knowledge of the changing dynamics around same-sex marriage and homosexuality by examining significant case laws. This study explores the complex relationship between same-sex marriage and homosexuality in India. The study intends to provide a thorough understanding of the difficulties experienced by the LGBTQ+ community in India by exploring the historical, legal, and sociocultural aspects. It also examines pertinent case laws and the changing narrative towards greater tolerance and acceptance.

Objective of the study:

This research aims to provide an in-depth and detailed analysis of all aspects related to homosexuality and same-sex marriage in the context of India’s distinct sociocultural and legal environment. The research aims to examine how society currently perceives homosexuality, understand what impacts public opinion, and examine how history, religion, and culture connect to shape these viewpoints. The study also aims to give a comprehensive analysis of the legal framework that governs homosexuality and same-sex unions in India, looking at how laws have changed over time, their possible effects on the LGBTQ+ population, and their evolution. Additionally, the study will look into the psychological effects of societal perceptions and legal restrictions on people who identify as homosexual, with a particular emphasis on issues like stigma, discrimination, and mental health. By addressing these dimensions, the study aspires to contribute valuable insights to the ongoing discourse on LGBTQ+ rights in India and foster a more informed and inclusive societal dialogue. Through this article, we tried to answer some questions relating to homosexuality and same-sex marriage. The following aspects have been dealt with in the article:

- Historical Perspectives on Homosexuality and Same-Sex Marriage in India

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- Sociocultural Challenges in the Indian Context of Homosexuality and Same-Sex Marriage
- Changing Perspectives on Homosexuality and Same-Sex Marriage: The Indian Context
- Legal Reforms
- Viewpoint of SC as to homosexuality in Navtej Singh Johar v. Union of India (2018)
- Judgment of Supreme Court on same-sex marriage in Supriyo v. Union of India (SC 2023)
- Future Directions and Challenges

Keywords: Homosexuality, same-sex marriage, LGBTQI community

Historical Perspectives on Homosexuality and Same-Sex Marriage in India

Interpreting the current discussion requires an understanding of the historical viewpoints in India toward homosexuality and same-sex marriage. Although there is a wide variety of views regarding sexuality in India's rich cultural substance, historical perspectives on same-sex relationships are complicated and multidimensional.

1. Ancient Texts and Art:

- a. The Kama Sutra: Old Indian writings, most notably the Kama Sutra, reveal a complex conception of sexuality that cuts beyond heteronormative limits. Although these scriptures recognize a range of sexual orientations, societal perspectives have changed over time, and interpretations differ.
- b. Temples and Artwork: The idea that same-sex partnerships were completely prohibited in ancient Indian civilization is challenged by temples like Khajuraho, which feature sensuality depicting same-sex relationships. These creative interpretations point to a broader conception of human sexuality.

2. British Colonial Era:

India's views on homosexuality were greatly influenced by British colonialism. Same-sex

relationships became illegal in 1860 when Section 377 of the Indian Penal Code was introduced, outlawing "carnal intercourse against the order of nature. The stigmatization of non-heteronormative partnerships was largely a result of Victorian morality's strong influence on colonial views on sexuality. Long after independence, the effects of these colonial-era views remained.

Section 377 of the Indian Penal Code, 1860 provides that – "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 to fine."

3. Post-Independence Era:

Following India's 1947 independence, Section 377 was kept in place, which aided in the continuous criminalization and stigmatization of homosexuality. LGBTQ+ identities were suppressed at this time due to social and legal constraints. The British colonial era significantly impacted India's stance on homosexuality. The introduction of Section 377 in the Indian Penal Code in 1860 criminalized "carnal intercourse against the order of nature," laying the foundation for the criminalization of same-sex relationships.

The Right to Privacy: The recognition of the right to privacy as a fundamental right by the Supreme Court has far-reaching consequences for LGBTQ+

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rights, including the right to choose one's life partner. This section will analyze the legal implications of the right to privacy in the context of same-sex marriages.

Despite the legal challenges, the post-independence era saw the emergence of early LGBTQ+ activism, laying the groundwork for future movements advocating for the rights and acceptance of the community.

Sociocultural Challenges in the Indian Context of Homosexuality and Same-Sex Marriage

Social and cultural obstacles are a major factor in determining how members of the LGBTQ+ community in India experience themselves. Views toward homosexuality and same-sex marriage are greatly influenced by the complex environment that is created by the interaction of cultural norms, societal expectations, and historical viewpoints.

1. Stigmatization and Discrimination:

In India, there are several deeply rooted customs that continue to stigmatize and discriminate against those who identify as non-heteronormative. People who fall outside the traditional mould of heterosexual partnerships may find themselves rejected as a result of the expectation of conformity.

2. Family and Community Dynamics:

Marriage-related expectations from family and culture, which are often rooted in tradition, can provide serious difficulties for LGBTQ+ people. Internal conflicts can arise from the expectation to uphold heterosexual norms for the sake of family honour. LGBTQ+ people may face severe consequences from pressure to fit in with traditional family structures and expectations, such as isolation, rejection, and even forced marriages. The fear of social rejection continues to be a major obstacle for people to express their sexual orientation publicly.

3. Media Representation:

Although there have been improvements in how LGBTQ+ characters are portrayed in the media, their

visibility is still restricted. A broader level of societal acceptance may be impeded by the absence of authentic and diverse representations.

4. The Difficulties of Coming Out:

Fears of social rejection and familial rejection make coming out a difficult endeavour. People's unwillingness to publicly accept their sexual identities is partly due to the powerful impact of India's extended family and community systems.

5. Stereotyping:

The way LGBTQ+ people are portrayed in the media in India frequently encourages stereotypes, which in turn creates a limited perspective that could fail to represent the variety of the community adequately. This may encourage additional stigmatization and misconceptions.

6. LGBTQ+ Activism:

In India, LGBTQ+ community activism has experienced both setbacks and victories. Conservative groups have opposed the movement for acceptance and equal rights, but it has also sparked improvements that have improved awareness and led to legislative amendments. In an effort to challenge social conventions and promote a feeling of community, LGBTQ+ pride events and visibility initiatives have gained traction. Nonetheless, conservative social groups frequently oppose and criticize these measures.

Changing Perspectives on Homosexuality and Same-Sex Marriage: The Indian Context

The changing perspectives on homosexuality and same-sex marriage in India reflect a dynamic societal landscape. Shaped by evolving cultural attitudes, legal reforms, and advocacy efforts, this shift signifies a broader transformation in the understanding of LGBTQ+ rights and the acceptance of diverse sexual orientations.

1. Empowerment of the Community: The LGBTQ+ movement has given people the confidence to

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tell their stories, which has strengthened their sense of belonging and fortitude. Together, advocacy groups, social media campaigns, and grassroots movements combat discriminatory practices and advance inclusivity.

2. **Educational Efforts: Integrating All Students:** More and more educational establishments are realizing the value of inclusive curricula covering various sexual orientations. A shift in perceptions among the younger generation can be attributed to initiatives that foster awareness and sensitivity.
3. **Legal Literacy Programs:** In order to debunk myths and prejudices, legal literacy programs that educate the public about LGBTQ+ rights and legal reforms are essential. Communities with more knowledge are better able to confront discriminatory practices.
4. **Intersectionality and Inclusivity:** Understanding the intersections of identities—such as those based on gender, caste, and religion—helps us comprehend LGBTQ+ experiences from a wider perspective. This nuanced approach promotes diversity and challenges preconceptions.
5. **Inclusive Policies:** The creation of inclusive policies in a number of industries, including healthcare and the workplace, is indicative of a larger cultural movement in favour of accepting and recognizing a range of sexual orientations. These laws help to make places safer for people who identify as LGBTQ+.

Legal Reforms

Naz Foundation Vs Government of NCT of Delhi (Delhi HC 2009)

The main issue in this case was that Sec 377 IPC does not specify whether the consenting adults would also be liable. The language suggests that even with consent, they will be liable. The court held that sec 377, to the extent that it makes consenting adults liable, is unconstitutional as

- a) It violates the right to privacy under article 21.

- b) It is an unreasonable classification under Article 14, i.e. treating homosexually differently.
- c) It is a violation of freedom of speech and expression also, as a person should have the right to express his sexual preferences.
- d) Article 15(1) prohibits not only discrimination on the grounds of sex but also discrimination on the grounds of sex orientation.

However, later on, in Suresh Kumar Kaushal vs Naz Foundation (2013 SC), the Supreme Court, speaking through Singhvi J., held that sec 377 is constitutional as it is a matter of legislative policy and the court shall not interfere in it. Also, the Naz Foundation judgment is based upon foreign judgments, and hence, it is overruled.

Decriminalization of Homosexuality: The decriminalization of consensual same-sex relationships in India, following the historic judgment in Navtej Singh Johar v. Union of India (2018), marked a significant legal milestone. This decision, overturning Section 377, contributed to altering societal perceptions by acknowledging the fundamental rights of LGBTQ+ individuals. The Supreme Court has laid down the following major points as follows -

The Supreme Court tested the constitutionality of Section 377 against the principles of equality, liberty, and dignity under Articles 14, 19 and 21.

Right to Equality and Non-Discrimination: The Court observed that those who have same-sex relationships are arbitrarily punished by Section 377. In support of this, the Court pointed out that in order to safeguard women and children, Section 377 categorizes and punishes those who participate in carnal intercourse as being against the natural order. However, as unnatural offences are also punished separately under Section 375 and the POCSO Act, this goal has no legitimate connection to the classification. Consequently, the Court decided that it is against Article 14 to treat LGBT people differently. Furthermore, the Court determined that because Section 377 does not distinguish between adult consensual and non-consensual sexual conduct, it is arbitrary. It discriminated against those who

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made specific decisions, treating them as “less than humans,” and it promoted stereotypes and biases along with debilitating social effects. This violates Article 14, which is the very basis of non-discrimination.

Freedom of Expression: The Court recognized that everyone, including members of the LGBTQI community, had the freedom to express their preferences without fear. It acknowledged same-sex relationships as a typical form of human sexuality. The Court specifically pointed out that transgender people are considered inferior and subjected to discrimination under Section 377. The Court then considered whether Article 19(1)(a) permits reasonable restrictions on the right to manifest one’s sexual orientation in accordance with public order, decency, and morality. It was mentioned that private, consenting acts that do not violate public decency or morals or disturb public order are illegal under Section 377. It is impossible to see sexual behaviours only through the prism of morality, which limits them to being done for the purpose of procreation. Unreasonably restricting someone’s ability to operate in their personal space will hurt freedom of choice. For these reasons, the Court held that Section 377 is disproportionate and violates the fundamental right to freedom of expression.

Right to Life and Personal Liberty: The Court held that Section 377 violates human dignity, decisional autonomy and the fundamental right to privacy. Every individual has the liberty to choose their sexual orientation, seek companionship and exercise it within their private space. As Section 377 inhibits the exercise of personal liberty to engage in voluntary sexual acts, it violates Article 21. It socially ostracizes LGBT persons and does not permit the full realization of their personhood. Denying the right to determine one’s sexual orientation curtails the right to privacy of an individual. Therefore, the Court held that the scope of the right to privacy must be widened to incorporate and protect ‘sexual privacy’.

Recognition of Transgender Rights: Judicial recognition of transgender rights in cases like the National Legal Services Authority (NALSA) v. Union of India (2014). The Court had to decide whether persons who fall outside the male/female gender

binary can be legally recognized as “third gender” persons. It deliberated on whether disregarding non-binary gender identities is a breach of fundamental rights guaranteed by the Constitution of India. It referred to an “Expert Committee on Issues Relating to Transgender” constituted under the Ministry of Social Justice and Empowerment to develop its judgment.

The Court upheld the right of all persons to self-identify their gender. Further, it declared that hijras and eunuchs can legally identify as “third gender”. The Court clarified that gender identity did not refer to biological characteristics but rather referred to it as “an innate perception of one’s gender”. Thus, it held that no third-gender persons should be subjected to any medical examination or biological test which would invade their right to privacy.

This was a landmark decision where the apex court legally recognized “third gender”/transgender persons for the first time and discussed “gender identity” at length. The Court recognized that third-gender persons were entitled to fundamental rights under the Constitution and international law. Further, it directed state governments to develop mechanisms to realize the rights of “third gender”/transgender persons.

In conclusion, a transformative path highlighted by legal reforms, developing media depictions, LGBTQ+ activism, educational initiatives, and a dedication to inclusivity has resulted in changing perceptions of homosexuality and same-sex marriage in the Indian setting. Even if there are still obstacles to overcome, these shifting viewpoints point to a positive trend for India’s LGBTQ+ community toward a more fair and accepting society. Continued efforts in advocacy, education, and policy reforms are crucial for sustaining and accelerating this positive shift.

Supriyo v. Union of India (SC 2023) is a case involving same-sex marriage and marital equality. The five judges on the historic Constitution bench, led by Dr. DJ Chandranand, CJI, and Sanjay Kishan Kaul, S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha, JJ., provided four distinct opinions in this case. In a 336-page ruling, the Honorable Judges came to the unanimous conclusion that there is no constitutional right to marriage and that the Supreme Court cannot

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judicially amend the Special Marriage Act of 1952 to make it more gender-neutral. However, the court assigned this procedure to Parliament to manage. The lengthy ruling addressed a wide range of issues related to the LGBT community's constitutional rights. However, the primary arguments made in support of or opposition to these claims are as follows:

1. **Fundamental Right to Marry:** The Judges unanimously agreed that there are no constitutional foundations for the fundamental right to marry. CJI Chandrachud extensively discussed the issue in his verdict of 247 pages, where he said there is no explicitly declared fundamental right to marry, as the constitution states. However, the content given to the institution by law cannot be used to elevate the institution to the level of a fundamental right. Nonetheless, various aspects of the conjugal relationship constitute manifestations of Constitutional values, such as the right to human dignity and the right to life and personal liberty. Justice Bhat further wrote along with Justice Kohli, saying, —There cannot be a per se assertion that an unqualified right to marry requires treatment as a fundamental freedom.
2. **Gender Neutral Interpretation of Special Marriage Act:** The petitioners demanded that if the Court found such a provision to be inconsistent with part III of the Constitution, then
 - a) The court should pronounce that article as unconstitutional or alternatively.
 - b) The court must read down some of its provisions and add or substitute.

According to CJI Chandrachud, if Section 377 is struck down for discriminating against same-sex couples, it will be a return to colonial times when marriage was prohibited between populations who practised different religions. This type of judicial ruling will return the nation to a period when discrimination and religious differences were founded on class division, leading to prejudice and inequity. In this instance, the Court chooses to take the second approach and insert new language into the Special Marriage Act of 1952 and other relevant laws, including the Hindu Succession Act of 1956

and the Indian Succession Act of 1925. This will obstruct the legislative process. Therefore, Justice Bhat concluded that gender-neutral interpretations of the Special Marriage Act can put women in disadvantageous situations when efforts are made to counteract the societal order that has historically favoured heterosexual men.

Future Directions and Challenges

As India grapples with evolving perspectives on homosexuality and same-sex marriage, the future presents a canvas of possibilities and challenges. This note explores potential directions for the LGBTQ+ rights movement and outlines the persistent challenges for a more inclusive and accepting society.

Legislative Reforms:

The prospect of legalizing same-sex marriages in India remains a crucial avenue for future progress. Advocacy efforts and legal reforms are essential to create a framework that recognizes and protects the rights of individuals irrespective of their sexual orientation.

While strides have been made, the absence of comprehensive anti-discrimination laws remains a challenge. Future directions should focus on enacting legislation that explicitly prohibits discrimination based on sexual orientation and gender identity in various spheres, including employment, education, and healthcare.

Cultural Sensitization:

Future efforts should prioritize the incorporation of LGBTQ+ perspectives into educational curricula. Inclusive education programs can challenge stereotypes, promote understanding, and foster acceptance from an early age. Supporting cultural initiatives that highlight LGBTQ+ experiences and contributions can play a pivotal role in shaping societal attitudes. Literature, art, and media can contribute to creating a more empathetic and inclusive cultural landscape.

Mental Health Support:

Addressing the mental health challenges faced

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by LGBTQ+ individuals requires accessible and culturally sensitive mental health services. Future directions should focus on destigmatizing seeking mental health support and creating safe spaces for counselling. Building strong community support networks is essential for the mental well-being of LGBTQ+ individuals. Future initiatives should prioritize creating community spaces and support groups that offer understanding and solidarity.

Public Awareness and Sensitization:

Ongoing media campaigns should continue challenging stereotypes and promoting positive representations of LGBTQ+ individuals. These campaigns can contribute significantly to changing public perceptions and fostering acceptance. Future directions should involve fostering dialogue and engagement with religious communities to build bridges and challenge prejudices. Encouraging open conversations can lead to greater understanding and acceptance.

International Collaboration:

The LGBTQ+ rights movement in India can benefit from international collaborations and shared best practices. Engaging with global organizations and learning from the experiences of other nations can propel the movement forward.

Advocating within the broader human rights framework can strengthen the LGBTQ+ rights movement. Framing LGBTQ+ rights as intrinsic human rights reinforces the urgency and necessity of legal and societal acceptance.

Conclusion:

Summarizing the findings, the conclusion underscores the complexities of the Indian context regarding homosexuality and same-sex marriage. While legal strides have been made, societal attitudes continue to be influenced by cultural norms. The evolving narrative reflects a delicate balance between cultural heritage and the pursuit of individual freedoms, laying the groundwork for continued research and advocacy in pursuing LGBTQ+ rights and equality in India. The future of homosexuality and same-sex marriage in the Indian context lies in a collective commitment to inclusivity, legal reforms, cultural sensitization, and ongoing advocacy. While progress has been made, persistent challenges demand sustained efforts from activists, policymakers, and society. Future directions should be guided by a vision of India that embraces diversity and upholds the rights and dignity of all its citizens, regardless of their sexual orientation or gender identity.

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