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Marriage Equality in India: A Look through the Lens of Indian Jurisprudence

Sudhanwa Sandeep Joshi^a

^aGovernment Law College, Mumbai, India

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The landscape of homosexual rights in India represents a complex narrative of resilience, legal struggle, and gradual social transformation. From historical cultural acceptance to colonial suppression and contemporary legal challenges, the LGBTQIA+ community has navigated a challenging path towards recognition and dignity. This research examines the multifaceted journey of homosexual individuals in India, exploring the intricate intersections of legal, cultural, and social dynamics that have shaped their experiences. By critically analyzing landmark judicial interventions and legislative frameworks, the study offers a comprehensive understanding of the ongoing quest for equality. The paper traces a critical trajectory from the colonial imposition of Section 377¹, which criminalized homosexual relations, to landmark Supreme Court judgements that progressively dismantled discriminatory legal structures. These judicial milestones, including the Naz Foundation², Navtej Singh Johar³, and Supriyo Chakraborty⁴ cases, represent pivotal moments in the community's struggle for fundamental rights. It also puts forth fundamental questions about individual dignity, constitutional protections, and the process of social transformation. The study reveals how colonial legacies, religious interpretations, and contemporary legal mechanisms have collectively influenced the status of homosexual individuals in Indian society. Beyond a mere historical account, this paper serves as a critical lens for understanding the evolving nature of social

¹ Indian Penal Code 1860, s 377

² Naz Foundation v Government of NCT of Delhi and Ors (2009) 6 SCC 712

³ Navtej Singh Johar v Union of India (2018) SC 4321

⁴ Supriyo alias Supriya Chakraborty v Union of India WP No 1011/2022

justice and individual rights. It explores the challenges of creating an inclusive society, highlighting the ongoing struggle for legal recognition, social acceptance, and full equality. By documenting this journey, the research contributes to broader discussions about human rights, sexual diversity, and social inclusion in contemporary India. It invites readers to critically reflect on the complex path towards true social equality.

Keywords: *marriage equality, same-sex marriage, special marriage act, gender neutrality, uniform civil code.*

INTRODUCTION

The recent years have been highlighted by a valiant pursuit of achieving recognition and rights by the LGBTQIA+ Community worldwide. In India too, from the Delhi High Court's Naz Foundation⁵ judgement which laid the foundation for de-criminalizing homosexual relations in Navtej⁷, to the Supreme Court's Navtej Singh Johar⁶ and NALSA⁷ judgements – the horizon of rights and privileges at the disposal of the community has continued to expand via a multifaceted and robust campaign.

The recent Supriyo⁸ judgement, which put the onus of providing marriage and associated rights to LGBTQIA+ individuals in the Parliament, marks the next chapter of this struggle – a valiant pursuit of Full Marriage Equality. While this issue now comes into the spotlight of Indian politics much more than ever before, it is imperative to take a look into the Hindu and by-extension Indian cultural perspective on the Issue, juxtaposed against the imposition of colonial Mughlai-Victorian mores, as well as the journey of the community to secure rights and dignity so-far in modern India, to have a holistic review of the struggle till now, and foresight of what lies ahead.

HISTORICAL PERSPECTIVES ON SEXUAL DIVERSITY IN HINDU CULTURE

Homosexuality and Indian Culture share a special relationship. Polytheism, particularly in Hinduism, has served as a catalyst for inculcating the celebration and acceptance of diversities,

⁵ *Naz Foundation v Government of NCT of Delhi and Ors* (2009) 6 SCC 712

⁶ *Navtej Singh Johar v Union of India* (2018) SC 4321

⁷ *National Legal Services Authority v Union of India* (2014) SC 1863

⁸ *Supriyo alias Supriya Chakraborty v Union of India* WP No 1011/2022

and diverse religious and cultural practices. Hindu texts include various colourful descriptions of homosexual relations, transgender deities, and various practices today associated with the LGBTQIA+ Community. Dharmic religions, especially those directly emanating from Hinduism have scriptures written in Sanskrit – whose concept of *Tritiyaprakriti* or *Napumsakalinga* (‘the third gender’) has been an integral part of Hindu mythology and folklore as well as Vedic and Puranic literature.⁹ Lord Ayyapan’s mother, Mohini, is the feminine avatar of Lord Vishnu; and his father is Lord Shiva.¹⁰ Lord Rama was greatly moved by the transgender community’s (‘hijra’) love and loyalty to him during his exile from Ayodhya and sanctioned them the power to confer blessings on auspicious occasions. Arjuna’s stint as Brihannada, a transgendered dance teacher is an apt example too.¹¹ The inscriptions at Khajuraho in Madhya Pradesh which display lesbian and gay intercourse, and the vivid sex positions exclusive to lesbian and gay sex as detailed in the Kama Sutra by Acharya Vatsa constitute archaeological and literary evidence of the openness and sexual diversity in ancient Indian culture.¹²

ORIGINS OF HOMOPHOBIA: MUGHLAI AND COLONIAL ANTECEDENTS

One might ponder the reason behind the stigma associated with and the discrimination accorded to the LGBTQIA+ community in India in modern times, given the acceptance (if not normalisation) in ancient Indian society and religious texts. As with many of India's modern-day conundrums, this too bears the fingerprints of a certain tea-loving empire. Up to the 16th Century, i.e. before the arrival of Islamic (Mughals) and Evangelic (British, French, Portuguese, etc.) colonizers, there was no record of any Indian being killed for engaging in homosexual activities. The first reported killing of such kind was in Portuguese-administered Goa when a

⁹ Shiva Prakash Srinivasan and Sruti Chandrasekaran, ‘Transsexualism in Hindu Mythology’ (2020) 24(3) Indian Journal of Endocrinology and Metabolism <<https://pubmed.ncbi.nlm.nih.gov/33083261/>> accessed 09 January 2025

¹⁰ ‘HAF Policy Brief: Hindu Teachings Inclusive of LGBT People’ (HAF, 16 June 2016) <www.hinduamerican.org/press/haf-policy-brief-hindu-teachings-inclusive-lgbt-people> accessed 26 September 2024

¹¹ Krishnakant Lahangir, ‘Homosexuality Is Not A Sin In Hinduism’ (Youth Ki Awaaz, 06 October 2022) <www.youthkiawaaz.com/2022/10/homosexuality-hinduism-and-the-concept-of-sin/> accessed 26 September 2024

¹² Prabhash K Dutta, ‘Homosexuality in ancient India: 10 instances’ *India Today* (10 July 2018) <www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> accessed 26 September 2024

boy was burned to death for the crime.¹³ The chief architect of India's erstwhile penal code, Thomas Babington Macaulay, had sinister plans for Indians and the supposed re-education in terms of British tastes, morals, and intellect that they were in need of, which he voiced in 1835. His sinister plans couldn't be executed till after the Indian War of Independence, 1857, when the Indian spirit and cultural pride lay low. As the chief architect of the Indian Penal Code 1860¹⁴, he oversaw the insertion of the draconian Section 377¹⁵, in 1861. Section 377¹², as it would come to be dreaded by homosexuals in India, penalized 'carnal intercourse with any man, woman, or animal, against the order of nature'. Widely worded and aimed at curtailing consensual homosexual relations the law was used liberally by the British and later the Indian dispensation to curb and punish homosexuals merely for engaging in consensual sexual acts. S. 377¹² was Macaulay's attempt at enforcing Victorian sexual mores which involved brutal punishments and torture even for heterosexual non-vaginal coitus apart from penalizing homosexual relations, on the Indians. After India attained independence in 1947, the tea-loving empire departed, leaving its carnal commandments (namely Section 377¹²) back. Despite the fact that in 1967 the UK repealed its anti-sodomy laws, thereby providing equal rights to heterosexual and homosexual citizens, India's Section 377 and forceful sexual re-education, which had, by that point, deeply ingrained in the society's consciousness, remained firm.¹⁶

JUDICIAL ODYSSEY OF ESTABLISHING LGBTQIA+ RIGHTS

Perhaps one of the cornerstones of judicial precedents on Section 377 was the case of *Naz Foundation v Govt. of NCT of Delhi*¹⁷ wherein the constitutionality of Section 377¹⁸ was challenged. It was one of the earliest judicial recognitions of the rights of homosexuals. The impugned section was found to be violative of articles 14,¹⁹ and 15²⁰ as the Court determined 'sexual

¹³ Ruth Vanita, 'Homophobia was a part of Macaulay's plan to 'educate' Indians' *Hindustan Times* (New Delhi, 09 January 2014) <www.hindustantimes.com/ht-view/homophobia-was-a-part-of-macaulay-s-plan-to-educate-indians/story-MNdokvnV6j41K14rUEeb2I.html> accessed 26 September 2024

¹⁴ Indian Penal Code 1860

¹⁵ Indian Penal Code 1860, s 377

¹⁶ Alok Gupta, 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism' (*Human Rights Watch*, 17 December 2008) <www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism> accessed 28 November 2024

¹⁷ *Naz Foundation v Government of NCT of Delhi and Ors* (2009) 6 SCC 712

¹⁸ Indian Penal Code 1860, s 377

¹⁹ Constitution of India 1950, art 14

²⁰ Constitution of India 1950, art 15

orientation’ to be analogous to ‘sex’, & art 21²¹, the right to life and dignity, as it invades the privacy of individuals to engage in consensual sexual acts. It partially read down Section 377 and declared it unconstitutional insofar as it criminalized consensual sexual acts. The reasoning applied in the judgement continues to be cited in various Supreme Court cases, and it changed Indian Constitutional and Personal-Law jurisprudence significantly. An appeal was filed on the case, and a two-judge bench of the Supreme Court struck it down in the case of *Suresh Kumar Koushal v Naz Foundation*²², calling the High Court’s reliance on foreign precedents wrong. It had several distressing observations, including putting the entire onus of striking down or reading down Section 377²³ on the parliament, despite acknowledging the potential penalization of consensual homosexual coitus which it rationalizes by citing the few (200) prosecutions that have been made using the section in its 150-year history. It reversed the Delhi High Court judgement providing flimsy grounds and generalizations which came to be heavily criticized in the *Navtej Singh Johar*²⁴ judgement. Despite the terrible news of the *Suresh Koushal*²⁵ judgement for the LGBTQIA+ community, the Supreme Court provided reasons for celebration in the NALSA judgement. The SC, in *National Legal Services Authority v Union of India*,²⁶ ruled that transgenders had a right to assert their identity in all sorts of public documents including passports. It directed the state to ensure that there was no discrimination against transgenders, inter alia, in matters of employment, public distribution, and education, thereby ensuring dignity in the community. The guidelines of the SC in this case were later crystallized in the Transgender Persons (Protection) Act 2019.²⁷ Meanwhile, the issue of the constitutionality of Section 377 finally came to be settled in the *Navtej Singh Johar v Union of India*²⁸ judgement of the Supreme Court of India. This time, a proper forum i.e., a constitution bench opined on its constitutionality unanimously striking it down insofar as it criminalized consensual homosexual intercourse. It upheld the Delhi High Court’s judgement and adopted a similar approach to the *Navtej* judgement²⁵. It held that LGBTQIA+ community members were equal

²¹ Constitution of India 1950, art 21

²² *Suresh Kumar Koushal and Anr v Naz Foundation and Ors* (2014) 1 SCC 1

²³ Indian Penal Code 1860, s 377

²⁴ *Navtej Singh Johar v Union of India* (2018) SC 4321

²⁵ *Suresh Kumar Koushal and Anr v Naz Foundation and Ors* (2014) 1 SCC 1

²⁶ *National Legal Services Authority v Union of India* (2014) SC 1863

²⁷ Transgender Persons (Protection of Rights) Act 2019

²⁸ *Navtej Singh Johar v Union of India* (2018) SC 4321

citizens, and must be treated in such a manner. It upheld the Delhi High Court's observation in Naz Foundation that Art. 14 and 15 included 'sexual orientation' as a ground against discrimination. It made wide-ranging comments and observations that highlighted the plight of the community and the need to eliminate statutory discrimination that is faced by them.

THE PURSUIT OF MARRIAGE EQUALITY: AN ONGOING STRUGGLE

Supriyo: A Redefining Moment in the Marriage Equality Struggle: In recent years, the ambit of rights claimed by the LGBTQIA+ community has widened considerably, including the rights to adopt, marry, and inherit. In 2023, the Supreme Court was faced with the question of whether it could provide the Right to Marry via the Special Marriage Act 1954²⁹ under existing statutory provisions in the case of *Supriyo alias Supriya Chakraborty v Union of India*³⁰. It held that there was as such no absolute constitutional right to marry that it could enforce, and that provision for marriage between homosexuals under the SMA²⁶ or another legislative framework as it is solely the Parliament's prerogative and it could not enter into the domain of legislation. It also highlighted the substantial revisions that would be necessary to give effect to homosexual marriages and bring them to par with heterosexual marriages; something that would not be appropriate for a judicial body to do. It also rejected the demands of a 'civil union' due to similar intricacies and complications and refused to legislate citing the Montesquieuan doctrine of separation of powers. Despite this, it held that the Union must constitute a committee headed by the Cabinet Secretary to consider implementation of the demands of the petitioners. It also remarked that the right to live-in relationships of homosexual couples would not be impacted by the verdict, and there should be adequate protection for such couples, inter-alia, from harassment, denial of rental accommodation, and discrimination. It also clarified that transgender individuals involved in heterosexual relationships had the right to marry under existing provisions. Despite its rejection on grounds of want of jurisdiction over the issue of legislation for legalizing homosexual marriages, it highlighted how systemic denial of marriage and its associated rights such as inter-alia, spousal privilege, medical kinship, social security

²⁹ Special Marriage Act 1954

³⁰ *Supriyo alias Supriya Chakraborty v Union of India* WP No 1011/2022

benefits, adoption rights, and taxation benefits amounts to discrimination against LGBTQIA+ communities.

Importance of Societal & Parliamentary Acceptance & Limits to Judicial Activism: One of the most prominent observations of the Supreme Court in the Supriyo case was that it was beyond its legitimate and enforceable powers to allow for full marriage equality or even the proposal of a civil union, considering that it would be trespassing into well-established contours of parliamentary authority, if it were to give directions to such effect. The Supreme Court opined that in cases where specific legislation already exists on a matter, the Court cannot intervene or modify such legislation without demonstrating clear and substantial grounds of adequate constitutional ultra-vires. Unlike the Vishakha Guidelines,³¹ which supplemented the legislative vacuum of laws dealing with the prevention of workplace harassment, there already are established marriage laws in India which satisfy the test of constitutionality – therefore, it would be squarely out of the Court’s jurisdiction to read them in a manner or to compliment them via guidelines which allow for homosexual marriages.

Given this, it is clear that the issue has to be taken up in the Parliament where an amalgamation of factors come into play, including, social and cultural acceptance, religious approval as well as electoral polarization. Therefore, the LGBTQIA+ Community’s public perception is paramount to their upcoming struggle to gain more rights and privileges, in parity with their heterosexual counterparts. If the earlier Pride Parades were about coming out as distinct and free from their closeted and socially imposed identities, the next struggle entails connecting with the people emphatically and displaying how they are not so different from them and deserve the same rights and privileges that heterosexuals do.

As far as the Parliament of India is concerned, through the years, it has enacted several legislations which serve the interests of the LGBTQIA+ Community. For instance, the new criminal laws endeavour to create parity between genders in offenses, removing demeaning practices in the Criminal Procedure against women and transgenders, and ensuring the safety and protection of women, children, and transgenders from police excesses. A more direct

³¹ *Vishakha and Ors v State of Rajasthan and Ors* (1997) SC 3011

example would be the legislature giving effect to the guidelines issued in *NALSA v Union of India*³² via the Transgender Persons (Protection of Rights) Act, 2019. With the proposal of a Uniform Civil Code being vociferously advocated by the current dispensation, the momentum of ensuring marriage equality, not only between religious denominations but also between people of diverse sexualities, undoubtedly rests in this golden opportunity. The New Criminal Codes, as well as the Uniform Civil Code, have been explored in depth in the following sections.

India's New Criminal Laws: Decolonization, and a notable step towards Gender Neutrality:

India's new criminal code, effective July 2024, replaces the colonial-era IPC³³, CrPC³⁴, and IEA³⁵ with the Bharatiya Nyaya Sanhita³⁶, Nagrik Suraksha Sanhita³⁷, and Sakshya Adhiniyam³⁸. The BNS introduces gender-neutral language for sexual offenses against children and raises the age of consent for a minor wife to 18, aligning with the Supreme Court's ruling in *Independent Thought v Union of India*³⁹. However, it retains the marital rape exemption and drops Section 377 entirely. Problematically, the offence of rape (Section 63, BNS⁴⁰) remains gender-specific, recognizing only male perpetrators and female victims. This creates a legal gap for homosexual and transsexual rape cases, previously covered under the read-down Section 377⁴¹. Other offenses like dowry death and domestic violence retain gender-biased definitions, leaving LGBTQIA+ individuals inadequately protected.⁴²

UNIFORM CIVIL CODE: THE WAY FORWARD

But perhaps to address the issue of the provision of marriage rights to LGBTQIA+ individuals, a peek into India's personal laws is called for. India does not have a unified personal law system,

³² *National Legal Services Authority v Union of India* (2014) SC 1863

³³ Indian Penal Code 1860

³⁴ Code of Criminal Procedure 1973

³⁵ Indian Evidence Act 1872

³⁶ Bharatiya Nyaya Sanhita 2023

³⁷ Bhartiya Nagarik Suraksha Sanhita

³⁸ Bharatiya Sakshya Adhiniyam 2023

³⁹ *Independent Thought v Union of India* (2017) SC 4904

⁴⁰ Bharatiya Nyaya Sanhita 2023, s 63

⁴¹ Indian Penal Code 1860, s 377

⁴² 'Sexual offences now gender neutral, as BNS introduces key changes' *Business Standard* (New Delhi, 03 July 2024) <https://www.business-standard.com/india-news/sexual-offences-now-gender-neutral-as-bns-introduces-key-changes-124070300464_1.html> accessed 10 September 2024

meaning there are several religious laws governing marriage, adoption, divorce, and succession. For instance, Muslim Personal Law does not grant a Muslim woman the right in succession at par with her Hindu sisters, similarly, Hindu Personal Law criminalizes polygamy by Hindu men, a privilege that is granted to Muslim men. In all of these, the provisions rely on the conventional theological conception of marriage that is between a man and a woman. The SMA too, is based upon this conception of marriage. Therefore, it would be a grueling task to implement provisions for homosexual marriages within the contours of the existing system of personal laws. A possible solution is a Uniform Civil Code (UCC) which harmonizes the system of personal laws to be gender-neutral and non-theological. It is one of the provisions of the Directive Principles, as embodied in Art. 44 of the Constitution⁴³. With the current political climate fostering the development of a UCC, LGBTQIA+ individuals must make all efforts to ensure that their rights are respected and protected, as well as adequate representation is provided in the new civil code.

CONCLUSION

The Supreme Court in *Supriyo*⁴⁴ refrained from stepping into the legislative domain to recognize same-sex marriages under the Special Marriage Act⁴⁵ or through the establishment of civil unions. While it acknowledged the discrimination faced by LGBTQIA+ individuals in the absence of legal marriage, the Court emphasized that any reform in this area lies squarely within the jurisdiction of Parliament, which must balance social, religious, and electoral factors when deciding on such pivotal issues.

The Court's approach underscores the importance of societal acceptance and parliamentary action in the realization of marriage equality. As the LGBTQIA+ community moves from demanding decriminalization to seeking full legal recognition of their relationships, the fight is no longer about asserting their rights to live freely but about achieving parity with heterosexual citizens in matters like inheritance, adoption, and spousal benefits. This transformation will

⁴³ Constitution of India 1950, art 44

⁴⁴ *Supriyo alias Supriya Chakraborty v Union of India* WP No 1011/2022

⁴⁵ Special Marriage Act 1954

require not only legal reform but a broader shift in public attitudes, and socio-religious perceptions.

With the new criminal laws such as the Bharatiya Nyaya Sanhita⁴⁶ taking important steps towards gender neutrality, and with the Transgender Persons (Protection of Rights) Act 2019⁴⁷ addressing the protection of transgender individuals, there is a clear indication that gender inclusivity is making its way into Indian law. However, the BNS's limitations, especially in dealing with same-sex and transgender rape cases, highlight that significant gaps remain, emphasizing the need for continued advocacy and legislative action.

Within the legislative domain, The Uniform Civil Code (UCC) presents a potentially transformative solution for harmonizing the diverse personal laws that govern marriage and inheritance across religious lines. A gender-neutral, non-theological UCC could provide the legal foundation for recognizing same-sex marriages, addressing the current disparities in personal laws and ensuring equal treatment for all citizens, regardless of sexual orientation or gender identity.

However, the road to full marriage equality will be a long and arduous one, shaped not only by judicial decisions but also by the political will and the evolving public discourse surrounding LGBTQIA+ issues. The future of this struggle rests in Parliament's hands, where lawmakers must engage with the issue not just from a legalistic perspective, but with a view to fostering social harmony and human dignity.

Ultimately, the LGBTQIA+ community stands poised for the next chapter of their struggle - a valiant pursuit of full marriage equality that promises to be as challenging as it is necessary in the evolving tapestry of Indian jurisprudence and society.

⁴⁶ Bharatiya Nyaya Sanhita 2023

⁴⁷ Transgender Persons (Protection of Rights) Act 2019