

# 1. Evolution of Laws Concerning LGBTQI+ Individuals in India: Past Struggles for Inclusion to Scope for Future Possibilities

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## **Abstract:**

*Discrimination based on sexual orientation and gender identity has been prominent worldwide. However, with the advent of HIV/AIDS as an issue of concern, people belonging to the LGBTQI+ community were particularly impacted in varied ways in different countries. On the one hand, in the USA or UK, where LGBTQI+ groups already existed, their activism found strength in consolidation; on the other hand, in India, the issue exposed the travesty of anti-sodomy laws. In India, while people with HIV/AIDS lived hiding the illness due to fear of societal stigma, those with high risks who were involved in same-sex activities feared to openly come out for prevention and detection of the disease since they could be penalized under Section 377. Starting from health-based issues, the struggle went on to claim equal rights for people identifying as LGBTQI+. Although some legal inclusion for transpersons has been recently evident, this chapter highlights the need for a more substantive inclusion of transpersons in legal and policy discourse.*

## **Keywords:**

*LGBTQI+ community, Fundamental Rights, Crisis, Same-sex marriages, Inclusion.*

## **1.1 Tracing the History of Struggles for Equal Rights of LGBTQI+ Communities:**

LGBTQI+ groups like the International Lesbian and Gay Association (ILGA), International Gay and Lesbian Human Rights Commission (IGLHRC), and organizations like Amnesty International and Human Rights Watch have played a crucial role in spreading awareness about discrimination on the grounds of homosexuality and advocating for LGBTQI+ rights in International human rights discourse, which led to the deletion of homosexuality as a mental illness from the International Classification of Diseases was achieved in 1991 (Borah, 2018). The European Court of Justice Verdict in *Dudgeon v. United Kingdom*, where Northern Ireland was held responsible for violating the European Commission of Human Rights Convention by criminalizing homosexuality and infringing on Dudgeon's rights, became a landmark judgment giving a clear signal on decriminalizing homosexuality as a requisite for members of the Council of Europe (Thoreson 2009, 327). In the case of the United Nations Human Rights Commission, it is only after the *Toonen v. Australia* judgment that held Tasmania's anti-sodomy laws to be contravening the equality and

privacy rights that UN bodies started urging states for decriminalizing consensual same-sex sexual conduct' (International Commission of Jurists 2011, 8).

In India, it was the AIDS Bhedbhav Virodhi Andolan that spearheaded the movement calling for the decriminalization of homosexuality. The organization found Section 377<sup>1</sup> of the Indian Penal Code, a colonial law that criminalizes homosexuality as a roadblock obstructing high-risk people involved in same-sex activities from coming out for HIV/AIDS detection and prevention. At first, the organization knocked on the doors of Parliament in the year 1991 to withdraw the law but to no avail. Changing the strategy, a petition was filed in the Delhi High Court in 1994. Facing delays in hearing, another incident involving Section 377 occurred in 1997 when a program conducted by Azadi Bachao Andolan broadcasted on All India Radio was challenged in court by a metropolitan magistrate in Delhi on the grounds of promoting homosexuality which was a crime back then. While these incidents ignited initial discussions regarding homosexuality in India, the issue was yet to be debated extensively. Two significant events took place in 2002 that further intensified the call for repeal of Section 377. First was the complaint addressed to NHRC against a psychiatrist in AIIMS hospital who forced a gay man into conversion treatment even though the Indian Psychiatric society continued categorizing homosexuality as an illness? The NHRC quashed the complaint due to Section 377, which still featured as a law. The second instance was about the detention and torture of officers and outreach workers of Bharosa Trust and Naz Foundation (India), organizations working on HIV/AIDS prevention.

The arrest of the officers and outreach workers for 47 days under Section 377 led Naz Foundation to file a writ petition in December 2001 against the law in Delhi High Court. While the earlier petition filed by ABVA focussed on privacy and health as issues compromised under the law, the petition by Naz Foundation primarily focussed on a range of fundamental rights, including equality before the law, the Right to life, and personal liberty. However, the writ petition was dismissed by the Delhi High Court in September 2004, stating that Naz Foundation had no locus standi on the matter. A review petition filed before the Delhi High Court for reconsideration was also dismissed, leading to the Foundation filing of a Special Leave Petition in the Supreme Court in February 2005. The Naz Foundation faced challenges as, in 2002, Joint Action Council Kannur (JACK) filed a counter affidavit to the petition filed by Naz in December 2001. The counter affidavit stated the importance of Section 377 in preventing HIV/AIDS by making same-sex activity a criminal offense. Later, the then Government filed a response affidavit in favor of Section 377, which stated homophobic reasons. Such tempests consolidated the LGBTQI+ movement in India when an alliance of 12 organizations formed a movement called 'Voices against 377' (Voices) in mid-November of 2003 to offer support to the petition filed by Naz. Campaigns were launched to spread awareness of the cause. In the reply affidavit filed by the government in September 2005, aversion to repealing the law was visible as public

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<sup>1</sup> 377. Unnatural offences.—whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[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. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

morality was cited in favor of the law. However, the Supreme Court judgment in 2006 offered a ray of hope as it accepted the need for reconsidering the law.

Meanwhile, the Voices filed an intervention application with enormous evidence in terms of FIRs against the claim by the Health Ministry regarding no arbitrary use of Section 377. Even the reply affidavit filed by the Health Ministry unintendedly justified the concern regarding AIDS in homosexuals. Finally, it was the Delhi High Court judgment in the case in 2009 that found Section 377 in contravention of certain fundamental rights in India, stating “insofar as it criminalizes consensual sexual acts between adults in private” (*Naz Foundation v. Government of NCT of Delhi*, 2009, 76). However, the victory was short-lived since many Special Leave Petitions were filed in Supreme Court against the Naz judgment. The respondents for the same were the Naz Foundation and Voices. In December 2013, Supreme Court refused to accept Section 377 as unconstitutional and put the onus on the legislature to decide whether Section 377 can offer exemption for same-sex activity between adults in the *Suresh Kumar Koushal* judgment. Review petitions were filed against the judgment, including the one by the Government, but the court quashed the pleas after considering the same in a closed hearing. A series of Curative petitions were filed against the judgment, which was accepted and was to be decided by the five-judge Constitution bench. Meanwhile, the *NALSA* judgment in 2014 called for treating the transgender as ‘the third gender’ under Articles about fundamental rights and focus on their right to choose. (*National Legal Services Authority v. Union of India*, 2014). The judgment led to the filing of writ petitions by people identifying themselves as LGBT, claiming that a paradoxical situation has emerged where transgender people are given the status of the third gender, implying equal rights as that of the other two genders, but the *Koushal* judgment has denied sexual rights, to them. (*Dr. Akkai Padmashali Ors Vs. Union Of India*, 2016).

It was in June 2016 that a petition was filed by Navtej Singh Johar and four other people from the LGBTQI+ community, claiming that Section 377 violates Articles 14, 15, 16, 19, and 21 of the Indian Constitution. (*Navtej Singh Johar and Ors v. Union Of India*). Distinct from the curative petitions, it sought redressal under Article 32 of the Constitution. Some more petitions were also filed with similar objectives as the Johar one. All six petitions were heard together by the five-judge Constitution Bench, comprising Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice R.F. Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra in 2018 striking down the criminalization of same-sex activity among adults, thereby decriminalizing homosexuality. The judges found the Section to be violating Article 14 (Equal protection of laws), 15(1) (Non-discrimination on the grounds of sex), 19(1)(a) (Freedom of expression), and 21 (Right to life and personal liberty) of the Constitution (*Navtej Singh Johar and Ors. vs. Union of India*, 2018). Justice Indu Malhotra underlined the fact that the LGBTQI+ community has the same rights to privacy and dignity as other people; further, as a sexual minority, they have all the rights to receive protection under Article 15 as others. She viewed homosexuality as a different form of sexuality that is not unnatural and, therefore, should not be stigmatized. Justice D.Y. Chandrachud, presently the Chief Justice of India, striking down Section 377 not just implies the decriminalization of consensual sexual activity but aims at securing the constitutional rights of the LGBTQI+ community who have been historically marginalized and discriminated against. The verdict, therefore, seeks to ensure their equal citizenship as that of others. Justice Dipak Misra, then Chief Justice of India, and A.M. Khanwilkar focused on the Indian Constitution as a transformative, living, dynamic document that allows for changes according to changing

times. Its pragmatic interpretation by the judiciary is needed to ensure that the document remains so. He further emphasized that a genuinely free society is imbued with inclusivity and openness, and constitutional morality envisions the same. Justice R.F. Nariman pointed out that homosexuality is not a mental illness as per the Mental Health Care Act, 2019, and since Section 377 violates the privacy of individuals who are not causing any harm to others, it attacks their fundamental rights and therefore needs to be read down. There was broad consensus that the Section restrains the LGBTQ+ community from access to healthcare due to the stigma surrounding homosexuality which keeps them from accessing the most fundamental rights (Supreme Court Observer, 2021). While the judgment was lauded for its commitment to ensuring that Constitutional rights are guaranteed for people identifying themselves as LGBTQ+, it opened horizons for them to embrace their identity with legal sanction. The government then pondered over making laws that offer an inclusive and pluralistic space to sexual minorities one such law is analyzed in the next section.

## **1.2 Transgender Persons (Protection of Rights) Act 2019:**

Post the judgment, the government brought The Transgender Persons (Protection of Rights) Bill 2019 (now a law) to support the LGBTQI+ community by warding off discrimination against them. Introduced in Lok Sabha on July 19, 2019, by the Minister for Social Justice and Empowerment and passed in both houses in the same year, the Act aimed at improving the living conditions of Transgenders through penalties in case of discrimination against them and various other welfare measures. Although the Act is a significant step by the government toward the betterment of transgenders, it included specific provisions that left scope for change or improvement. For instance, the provision for the Right of residence for transpersons under 18 can backfire since discriminatory attitudes and humiliation against them also occur in the family (Transgender Persons (Protection of Rights) Act, 2019).. A certificate of identity issued by the District Magistrate is needed to change gender identity (Transgender Persons (Protection of Rights) Act, 2019). The Act did not provide reservations for the community in educational institutions or employment avenues but penalized begging (Transgender Persons (Protection of Rights) Act, 2019). While the Act seeks to safeguard transgender persons from discrimination at various levels, it challenges their identity claims by undermining the right to self-determination of one's gender. The Act, therefore, goes against the NALSA judgment where, as mentioned above, the provision of "third gender" apart from the binary division was called to be recognized and ensured the fundamental rights enshrined in Part III of the Constitution. It is worthy to note here that the judgment secured the right of transgender persons to "decide their self-identified gender" (National Legal Services Authority v. Union of India, 2014). The Act, however, mandates a certificate of identity from the Magistrate to affirm one's identity. Even the definition of 'transgender' in the Act is limited in scope, not involving a range of expressions of sexual identity. The Act was put up for public opinion when the country was affected by the pandemic, thereby limiting the scope for widespread discussion on the same. This fueled the dissatisfaction of the LGBTQI+ community, who felt that their voices remind unheard under the garb of paternalistic protection by the State.

It is significant to point out here that Section 15 of the Act deals with healthcare facilities for transgenders, but in the pandemic crisis that shook the country in 2020, transgenders remained a neglected section by and large.

### **1.3 COVID-19 Pandemic and the LGBTQI+ Community:**

The pandemic halted the ever-moving life of people, both physically and financially. When the “homes” were a primary shield from the virus, transpersons failed to access them since natal homes proved repressive for many, and trans-friendly places on rent are hard to find.

While people with serious ailments faced delays in their much-needed treatment, trans individuals faced delays in their hormone replacement therapy (HRT), leading to further anxieties. Apprehensions regarding vaccines with HRT causing blood clots fuelled vaccine hesitancy among LGBTQI+ people. Their concerns, even if guided by rumors or misinformation, remained to be resolved by the state. Even the quarantine centers were not made exclusively for the LGBTQI+ community to offer them a safe space to recuperate (Rastogi, 2021). Lockdowns posed a severe challenge to people from the LGBTQI+ since companies used the pandemic as an excuse for their sudden mass layoffs. This led them to return to their natal homes, which proved traumatic. While sex workers faced stigma as “carriers of virus” in tandem with the trend of equating sexual deviance with ailment, trans sex workers were doubly disadvantaged since they had less scope for negotiations ensuring protection from Sexually Transmitted Diseases (STDs) during sexual activity as compared to other sex workers.

Except for the government in Maharashtra, almost no state or national-level policy included transpersons as a separate category. The schemes catered to economically weaker populations failed to address the transpersons since they needed more documents to claim the benefits (*Not ‘Sailing in the Same Boat’: Why the COVID-19 Pandemic Has Been*, 2021). They failed to produce the same due to the circumstances that led them to flee or their existing conditions where they lived without rent agreements. Since the proposal to include sex workers as informal laborers was withdrawn, they could not even access the benefits designated for them (*Not ‘Sailing in the Same Boat’: Why the COVID-19 Pandemic Has Been*, 2021). Further, there is a need to go beyond claiming informal laborer status for sex workers since they have specific, distinct needs that remain to be acknowledged. While violence against transpersons continues, whether from a high class or a backward one, the pandemic induced policing made them more vulnerable with the additional trauma of the loss of community support owing to lockdowns (*Not ‘Sailing in the Same Boat’: Why the COVID-19 Pandemic Has Been*, 2021). Therefore, there is an urgent need to formulate a different set of laws and policies catering to transpersons that provide them a guardrail from future crises.

### **1.4 Issues of Same-sex Marriage and Adoption Rights:**

As of December 22nd, 2022, same-sex laws are legal in thirty-three countries, with some accepting same-sex civil unions. Research has shown a correlation between the rights of the LGBTQI+ community and democracy in societies since wherever restrictions on individual rights, like freedom of speech and expression, are seen, violence against the LGBTQ+ community is also evident (CFR.org Editors, 2022). In a recent turn of events, The Standing Committee on Personnel, Public Grievances, Law and Justice, Chaired by Mr. Sushil Kumar Modi, submitted its report on ‘Review of Guardianship and Adoption Laws’ on August 8, 2022, where suggestions were made for formulation of a single law for adoption,

irrespective of religion since the existing two laws on adoption are fraught with inconsistencies related to upper age limit and other requirements. Further, it sought to incorporate the LGBTQI+ community into the same (Kumar, 2022).

As per the existing Juvenile Justice Act, 2015 (JJ Act from hereon), people identifying themselves as LGBTQI+ are allowed to apply for adoption by filing an application in Central Adoption Review Authority (CARA), or under the Hindu Adoptions and Maintenance Act 1956 (HAMA, from hereon), they can apply by entering into an adoption deed. However, it can only be done as a single parent, thereby leading to discrimination against LGBTQ couples who wish to go for adoption (*Parliament Panel Recommendation on Adoption Raises Bigger Question of Recognizing Same-sex Union: Experts*, 2022).

The Parliamentary Panel accepted the need for a new law since JJ Act and HAMA only allow married couples or single parents to go for adoption, thereby neglecting the LGBTQ community (Pandit, 2022). The gravity of the matter is evident in a PIL filed by Parth Phiroze Mehrotra and Uday Raj Anand. Being in a relationship with each other for 17 years, they are raising two children together; however, they cannot legally register as the children's parents since their marriage is yet legally recognized. Although Section 4 of the Special Marriage Act of 1954 allows any two persons to register their marriage, the restriction on sexual orientation concerning males or females enshrined in sub-Section (c) acts as an inhibitor for same-sex couples. (LIVELAW NEWS NETWORK, 2022b). The issue at hand, therefore, is not just about adoption rights but also about the legal recognition of same-sex marriage since it affects several fundamental rights of which surrogacy or adoption are a part. Refusal to allow same-sex marriage is tantamount to discrimination against same-sex, homosexual couples, violating Articles 14, 19 (1)(a), 21, and 25, called "the four-pronged test" by Aman Anand and Ashish Chauhan. Further, the legal means open for people identifying themselves as LGBTQI+ include amendments in the Special Marriage Act 1954 to allow homosexual marriages or arguing for civil partnership systems that would provide similar legal protections to same-sex couples as that of heterosexual ones (Anand & Chauhan, 2022).

Same-sex marriages are opposed on account of reinforcing patriarchal institutions that maintain caste and class hierarchies, like the matrimonial advertisement posted by a mother inviting applications for a "suitable groom" for her son, where she mentioned caste preferences. Another reason for rejection is the claim that such arrangements imply neoliberal lifestyles and class hierarchies, as evident in the wedding of an American and Indian woman settled in the US. The lavish Shannon Seema wedding exemplifies the neoliberal lifestyle of same-sex marriage (Bhattacharya, 2019). For scholars like Michael Warner, marriage is a means for the State to regulate people's lives. He states, "In the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives; it is the zone of privacy outside which sex is unprotected (Warner, 1999)." Therefore, for Warner, the concept of marriage is imbued with State surveillance on individuals' freedom and privacy and acts as another mechanism of state control over people and exclusion of those who do not comply with the norm. Judith Butler finds the state's legitimacy as critical in gaining fundamental rights and recognition of relations, belonging, and even materialistic requirements, such as receiving the deceased partner's dead body; she also challenges the ordering of legitimacy and questions thinking in terms of binaries about the same-sex marriage as essential issues to be

addressed. Sara Ahmad eloquently critiques the “ideal queerness,” which creates divisions among queer people; rejection of all norms to fit into the category of queer raises pertinent questions on possible exclusion within the community (Bhattacharya, 2022). During the hearings on Section 377, the solicitor general had argued on behalf of the Indian government about the right to sexual orientation percolating to same-sex marriages, and in case the court is in favor of same-sex marriage, then the government should be given sufficient time to respond, due to the repercussions that such a decision would have on the Hindu Marriages Act that acquire a mainstream position in India (Bhattacharya, 2022). Although Article 16 of the Universal Declaration of Human Rights (UDHR), a document of prominence in the UN, of which India is a signatory, states, "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family" therefore implying the right to marry for everyone, an explicit mention of discarding the limitation of sex along with race, nationality or religion is needed to enable same-sex marriages in member states.

### **1.5 Conclusion:**

Debates concerning people identifying as LGBTQI+ point to the schism between the dimensions of inclusion and exclusion, whereby although legal inclusion is offered through recent judgments, other related, substantial rights concerning private life are excluded. Contestations regarding same-sex marriage should move away from value perspectives and focus on offering a choice to the people belonging to the community to decide. Access to avenues and the exercise of rights need to be made available to everyone. At times, everyday negotiations and resistance to carve out space for one’s identity require interaction with the heteronormative norms rather than their absolute rejection. Marriage is one such area where having the right to legal recognition offers ground to contest heteronormativity within the State regulation and existing environment, which is not always welcoming for the LGBTQI+ community. Another important aspect concerning people belonging to LGBTQI+ is the class dimension, where higher receptivity and acceptance for them can be seen in well-off families, but those at the lower rungs of class hierarchies face several challenges, ranging from health to occupation. Further, the state’s neglect of the community in times of crisis, like that of the COVID-19 pandemic, reflects that their enfranchisement is symbolic. Therefore, there is an urgent need for substantial inclusion of transpersons in state laws and policies in consultation with them so that their interests could be better represented and a genuinely inclusive and plural society be formed.

### **1.6 References:**

1. Akkai Padmashali v. UoI, WP(C) No.572 (2016).  
<https://clpr.org.in/dr-akkaipadmashali-ors-vs-union-of-india/>
2. Anand & Chauhan. (2022, December 30). *Same Sex Marriage: The Current Conflict and the Way Forward*. Live Law. Retrieved November 15, 2022, from
3. <https://www.livelaw.in/columns/same-sex-marriage-supreme-court-lgbtqicommunity-fundamental-rights-article-14-217731?infinitemscroll=1>
4. Bhattacharya, S. (2022). Reading Queerness: Same sex marriages in India. In Kaustav Chakraborty (Ed.) *The Politics of Belonging in Contemporary India: Anxiety and Intimacy* (pp. 75–86). Routledge.

5. CFR.org Editors. (2022, December 22). *Marriage Equality: Global Comparisons*. Council on Foreign Relations. Retrieved 15 November 2022, from <https://www.cfr.org/background/marriage-equality-global-comparisons>
6. International Commission of Jurists (2011) *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*. Geneva: Atar Roto Presse SA, ISBN 978-92-9037-156-0
7. Kumar, O. (2022, August 29). *Committee Reports*. PRS Legislative Research. Retrieved November 17, 2022, from <https://prsindia.org/policy/report-summaries/review-of-guardianship-and-adoption-laws>
8. LIVELAW NEWS NETWORK. (2022b, November 30). *Supreme Court Issues Notice to Centre, Attorney General on Pleas to Recognize Same-Sex Marriage under Special Marriage Act*. Live Law. Retrieved November 15, 2022, from <https://www.livelaw.in/top-stories/breaking-supreme-court-issues-notice-to-centre-attorney-general-on-pleas-to-recognise-same-sex-marriage-under-special-marriage-act-215021>
9. National Legal Services Authority v. Union of India, Writ Petition (Civil) 400/2012 (2014), [http://supremecourtindia.nic.in/outtoday/wc\\_40012.pdf](http://supremecourtindia.nic.in/outtoday/wc_40012.pdf).
10. Navtej Singh Johar and Ors. v. Union of India W.P. (Crl.) 76 (2016). <http://orinam.net/377/wpcontent/uploads/2016/06/Johar-UoI-2016.pdf>.
11. *Not 'Sailing in the Same Boat': Why the COVID-19 Pandemic Has Been*. (2021, September 13). Economic and Political Weekly. Retrieved November 22, 2022, from <https://www.epw.in/engage/article/not-sailing-same-boat-why-covid-19-pandemic-has>
12. Pandit, A. (2022, August 9). *Allow LGBTQ community members to adopt a child: Parl panel*. The Times of India. Retrieved November 18, 2022, from <https://timesofindia.indiatimes.com/india/allow-lgbtq-community-members-to-adopt-child-parl-panel/articleshow/93441324.cms>
13. *Parliament panel recommendation on adoption raises bigger question of recognizing same-sex union: Experts*. (2022, August 9). The Economic Times. Retrieved November 20, 2022, from <https://economictimes.indiatimes.com/news/india/parliament-panel-recommendation-on-adoption-raises-bigger-question-of-recognising-same-sex-union-experts/articleshow/93455670.cms>
14. Rastogi, S. (2021, June 15). *Complex Registration, Limited Research: Why India's LGBTQ Feel Left Out from Vaccination Drive*. News18. Retrieved November 20, 2022, from <https://www.news18.com/news/buzz/complex-registration-limited-research-why-indias-lgbtq-feel-left-out-from-vaccination-drive-3847049.html>
15. Supreme Court Observer. (2021, October 22). *Judgment of the Court in Plain English*. Retrieved 20 November 2021 from, <https://www.scobserver.in/reports/navtej-singh-johar-section-377-judgment-of-the-court-in-plain-english/>
16. Thoreson, Ryan Richard. (2009). *Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name*, *Journal of Human Rights*, 8(4), pp. 323-339.
17. *Transgender Persons (Protection of Rights) Act (2019)*. [https://www.indiacode.nic.in/handle/123456789/13091?sam\\_handle=123456789/1362](https://www.indiacode.nic.in/handle/123456789/13091?sam_handle=123456789/1362)