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Reclaiming our Roots: India's Ongoing Journey towards Accepting Same-Sex Relationships

Saloni Bhambi^a

^aILS Law College, Pune, India

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*Marriage is a legally and socially sanctioned relationship, often between a man and a woman, governed by laws, norms, conventions, beliefs, and attitudes that define the partners' rights and responsibilities. The concept goes back to 2350 BC, but it is only recently that we have begun to discuss something that is out of the ordinary for society, namely, same-sex weddings, or the practice of marrying two men or two women. Even though same-sex weddings have been common for a long time, Indian law has yet to provide gay couples with the same privileges as heterosexual couples. No nation had legislation that recognized the validity of same-sex unions until the beginning of the twenty-first century. Twenty-eight nations have recognized same-sex unions in the last two decades. However, African countries are increasingly criminalizing homosexuality and executing draconian laws with heavy consequences. The legal position of same-sex weddings is slowly changing across the world. Many Western countries have decriminalized homosexuality and are on the verge of legalizing same-sex marriage. With a few noteworthy exceptions, the Middle East and Africa are the only regions that have begun to criminalize gay activity. The Supreme Court of India decriminalized homosexuality in the case of *Navej Singh Johar v. Union of India*. Marriage, on the other hand, in India is more of a community issue than a state one, resulting in a conflict between public policy, religion, and social norms whenever a group of individuals is included or excluded from being allowed to marry.*

Keywords: *homosexuality, homophobic, section 377.*

INTRODUCTION

"All men, queer, women, plants and animals are all equally dear to me if they approach me with devotion and without malice"¹

- Ram to Kakabhusandhi in Goswami Tulsidas' Ramcharitmanas

The acceptance and tolerance of numerous types of eroticism, including homoeroticism, may be seen in early Sanskrit texts, art, and architecture. However, in terms of personal liberty, India has been reduced to the ranks of some of the world's most backward nations, and India's sexual puritanism, discrimination, and homophobia are stunning. Polygamy, prostitution, sexually explicit art, courtesans, and other such practises were popular throughout the Vedic period. Scriptures such as the Bhagavata Purana, which dates to about 3000 B.C., mention same-sex relationships.

God is formless, rock, plant, animal, male, feminine, androgynous, and queer in Hindu mythology.² God's gender is continuously changing in the Puranas: to make the Goddess calm, each God absorbs a feminine Shakti: Vinayaka has Vinayaki, Varaha has Varahi, and Shiva becomes Ardhanareshwara or half-woman. To accompany Krishna in the Raas Leela, he takes on the appearance of Gopeshwar, a milkmaid. In Baul's beliefs, Shiva assumes the form of Radha when Kali resolves to become Krishna. Vishnu takes on the form of the maiden Mohini to charm demons and sages. The narrative of Ayyappa's birth from Shiva and Vishnu (Bhagavata Purana) is one example of same-sex pairings resulting in God-like people. There is no such thing as a "one-size-fits-all" solution. For various individuals with various inclinations and dispositions, there are various gods. However, they are all manifestations of the same God. That is the concept of variety in oneness.

¹ Editorial, 'Who is a Hindu? Vedanta and LGBTIQ' (*Mumbai Mirror*, 22 July 2018) <<https://mumbaimirror.indiatimes.com/others/sunday-read/who-is-a-hindu-vedanta-and-lgbtiq/articleshow/65086846.cms>> accessed 29 April 2021

² Devdutt Patnaik, 'Hatred Is Not Divine' (*Devdutt*, 23 September 2019) <<https://devdutt.com/articles/hatred-is-not-divine/>> accessed 29 April 2021

Shikhandi represents all queer people, including homosexuals, lesbians, Hijras, transgendered people, hermaphrodites, and bisexuals. The ancients used this method to give voice to the LGBT debate. Same-sex relationships have always been in the heavenly realm, but man-made civilizations often ignore, deny, ridicule, and label them deviant, stigmatizing them as oddities, ill, and barred by laws like Section 377. Simply because they love in various ways, they've been compared as rapists and molesters. Some may argue that Vedanta opposes same-sex attraction. They are transforming Hinduism into an Abrahamic religion, like Islam, Christianity, and Judaism, in which God's permission is sought to be true to one's emotions. The Hindu leader has skillfully positioned themselves as God's messenger, an idea that is not at all Hindu.

The most permissive examples of same-sex activities may be found in Indian mythology. Bhagirath was produced through the copulation of two queens, and Karttikeya was produced when Lord Agni stole Lord Shiv's sperm, to name a few examples. Gender fluidity, general acceptance of personal preferences, and a celebration of sexuality in all its manifestations run through everything. Same-sex relationships were not common, but they were tolerated, and one of the anthology's virtues is the plethora of instances it provides. In contemporary times, a strange change occurs: the tiny homophobic voice of pre-colonial India becomes prominent, and frank sexual love between women is presented. Homophobia has taken the role of pleasure.

INDIAN LAWS AND STANCE ON SAME-SEX RELATION

After the 1857 Rebellion, the Crown acquired control of the East India Company and vowed to deliver "civilization" to its colonies.³ This civilizing discourse included altering how desire and love were expressed and accepted. However, India was neither monolithic nor cohesive at the time. India was affected not just by religion, geography, and race, but also by its great variety, which included how sexuality was seen. Even in socially conservative communities, though, same-sex intimacy was a way of life. Awadh had a monarch who would sometimes dress up as the opposing gender and switch sexual partners. This was in direct opposition to the British crown's vision of what a society should be. Any type of closeness that was not meant for bearing

³ 'The Revolt of 1857' (*Mumbai University*) <<http://mu.ac.in/wp-content/uploads/2014/04/FYBA-History-Paper-I-History-of-Modern-India-Revised-Syllabus-2018-19.pdf>> accessed 30 April 2021

and rearing children was considered improper in Victorian morality-based culture. As a result, they classified same-sex urges as one of the most serious offences. The empire-imposed Section 377⁴ in the Raj with such a rigorous worldview in mind. This was based on the Buggery Act of the United Kingdom.⁵ The legislation makes it illegal to engage in any type of “unacceptable carnal yearning.” The offender might face jail time, a hefty fine, or both. This antiquated statute was also transported to Australia, Southeast Asia, and the outposts of the Anglo-African empires. “They implemented this rule, but it did not reflect India’s stance on homosexuality.” This is linked to their Christian faith, according to Harbans Makhia.

“The word homosexuality and the laws outlawing unnatural sex were imposed by imperial strength and rigidity,” Devdutt Patnaik adds.⁶ They were neither universal nor timeless, even if they had a significant impact on later views. In a post on his website, he adds, they were creations of brains that were greatly impacted by the Christian Bible’s viewpoint on sex as sin. European definitions, regulations, philosophies, and attitudes utterly overlooked how identical sexual conduct was seen in other cultures, as is characteristic of colonial connivance.”

He argues that criminalizing homosexuality was a completely strange and unknown notion to Indians.⁷ Because there was no unifying narrative about homosexuality in India, there was no unrivaled protesting tone against the mandated and compelled introduction of same-sex intercourse criminalization in 1860. This was related to effective propaganda linking British military victory to strict masculinity and Indian subjection to masculinity among males.⁸ Historical pamphlets and publications on the military triumph in 1857, as well as the previous triumph at the Battle of Plassey, made explicit mention of the effeminate Indians' inferiority.

During the British colonial period in India, this led to the legalization of homophobia, sexism, and gay discrimination on the subcontinent. The challenge to Section 377 of the Indian Penal Code had faded with the rise of Indian independence movements in the twentieth century, and

⁴ Indian Penal Code 1860, s 377

⁵ The Buggery Act 1533

⁶ Devdutt (n 2)

⁷ *Ibid*

⁸ Michael Levy, ‘Gay rights movement: political and social movement’ (*Britannica*, 20 July 1998)

<<https://www.britannica.com/topic/gay-rights-movement/additional-info#history>> accessed 01 May 2021

both sides of the argument had erased any narrative for LGBT freedom. Even though Pakistan and India were moving toward new constitutions and criminal codes at the time of their establishment, many vestiges of colonial control survived. Section 377 was kept in their respective statutes. It was also preserved after Bangladesh got independence from Pakistan in 1971. It was upheld in all three nations of the former Raj – India, Bangladesh, and Pakistan – until very recently when India was freed from its shackles.

In fact, of the 72 nations in the world where homosexuality is prohibited today, 36 have law like section 377 in place.⁹ In places where religion seems to trump fundamental human rights, formal equality is a far-fetched fantasy. The Commonwealth of Nations, with 52 members, is the world's most homophobic group of nations, thanks to a poisonous hangover.¹⁰ In the 1930s, Mahatma Gandhi and Jawaharlal Nehru launched a “sexual wash campaign” to rid our temples of all evidence of homoerotic customs.¹¹ The heterosexual narrative controlled the same-sex lifestyle by blaming our forefathers and culture and failing to comprehend traditional Hindu teachings. Khajuraho in Chhattisgarh is one of the most popular medieval monuments in the country, being one of the few that remain.

Since then, our colonialists have abandoned their prejudices toward the LGBTQ community, beginning with the decriminalization of same-sex marriage in 1967.¹² India, on the other hand, only accomplished this in 2018 after a long fight that began in 1991.¹³ One of the causes behind this was the cause's political apathy. No government has ever backed the LGBTQIA+

⁹ Reality Check Team, 'Homosexuality: The countries where it is illegal to be gay' (*BBC News*, 12 May) <<https://www.bbc.com/news/world-43822234>> accessed 13 May 2021

¹⁰ Helen Davidson, 'The Commonwealth of Nations, with 52 members, is the world's most homophobic group of nations, thanks to a poisonous hangover' (*The Guardian*, 20 November 2013) <<https://www.theguardian.com/world/2013/nov/10/homosexuality-illegal-in-41-out-of-53-commonwealth-countries-report>> accessed 02 May 2021

¹¹ Lauren Frayer, 'Gandhi Is Deeply Revered, But His Attitudes On Race And Sex Are Under Scrutiny' (*NPR*, 2 October 2019) <<https://www.npr.org/2019/10/02/766083651/gandhi-is-deeply-revered-but-his-attitudes-on-race-and-sex-are-under-scrutiny>> accessed 03 May 2021

¹² David Shariatmadari, 'How 1967 changed gay life in Britain: I think for my generation, we're still a little bit uneasy' (*The Guardian*, 23 July 2017) <<https://www.theguardian.com/world/2017/jul/23/how-1967-changed-gay-life-in-britain-i-think-for-my-generation-were-still-a-little-bit-uneasy>> accessed 03 May 2021

¹³ Michael Safi, 'Campaigners celebrate as India decriminalises homosexuality' (*The Guardian*, 6 September 2018) <<https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>> accessed 04 May 2021

community's cause; in fact, they have attempted to further enslave them. The Delhi High Court momentarily decriminalized gay sex in 2009,¹⁴ but the Supreme Court overturned that decision in 2013.¹⁵ In 2018, Chief Justice of India Dipak Misra, Justices Rohinton Nariman, A.M. Khanwilkar, and D.Y. Chandrachud heard the subsequent plea. Consensual sex between adults was decriminalized in this part, although sexual behavior with animals, non-consensual sexual activity, and other related provisions remained illegal.¹⁶

“It is difficult to correct a historical injustice. We can, however, chart a trajectory for the future. Much more is at stake in this case than simply decriminalizing homosexuality. It's about folks who desire to live a dignified life.”¹⁷

- Justice DY Chandrachud

Even in sophisticated cities, the sexual minority still suffers many problems, including surveillance, unemployment, and rejection from housing societies, despite the landmark judgement handed down on September 6, 2018. “Equality is the essence of the constitution,” Justice Misra says, “Section 377 is arbitrary.” The ruling protects rights, but it does not guarantee societal acceptance.¹⁸

The government must now focus on putting the judgement into practice so that the community's perception changes for the better. According to the Supreme Court, the first step is to modify government officials, and police officers' mindsets by making them more aware of and respectful of the LGBTQIA+ community.¹⁹ The Law Commission of India was presented with a

¹⁴ Manoj Mitta & Smriti Singh, 'India decriminalises gay sex' (*Times of India*, 3 July 2009) <<https://timesofindia.indiatimes.com/india/india-decriminalises-gay-sex/articleshow/4726608.cms>> accessed 05 May 2021

¹⁵ J Venkatesan, 'Supreme Court sets aside Delhi HC verdict decriminalising gay sex' (*The Hindu*, 11 December 2013) <<https://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece>> accessed 05 May 2021

¹⁶ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321

¹⁷ Anurag Bhaskar, 'Key Highlights of Justice Chandrachud's Judgment in the Right to Privacy Case' (*The Wire*, 27 August 2017) <<https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy>> accessed 05 May 2021

¹⁸ *Navtej* (n 16)

¹⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR))

draft of a new Uniform Civil Code in October 2017 that will legalize same-sex marriage.²⁰ “There are various religious laws in India that mandate marriages based on the religion of the couple getting married, but none of them allows same-sex couples to marry. The union between the bride and the bridegroom is the focal point of the Hindu Marriage Act.²¹ Marriage is defined in the proposed draught as a legal union between a man and a woman, a man and another man, or a woman and another woman, as defined by this Act a transgender with another transgender or a guy or woman. Adoption is available to all married couples in partnership. The married couple's or partners’ sexual orientation should not be a barrier to adoption. Non-heterosexual couples will have the same opportunity to adopt a child as heterosexual couples.”

Several applications for same-sex marriage are currently pending in the courts. The Uttarakhand High Court ruled on June 12, 2020, that while same-sex marriage is banned, cohabitation and “live-in partnerships” are legal.²²

“As of February 25, 2021, the Central government was opposing a suit filed in the Delhi High Court by Abhijeet Iyer Mitra, Gopi Shankar M, Giti Thandani, and G Oorvasi, claiming that the idea of an Indian family and the legislative intent recognize a union only between a biological man and a biological woman.”²³ The government argued that marriage is not a private matter between two people and that a family should consist of a husband, wife, and children, as well as age-old customs, rituals, traditions, cultural ethos, and societal values. As a result, the LGBTQIA+ community is once again denied The Right to Marry, which is guaranteed under the Human Rights Charter to everyone, regardless of sexual orientation or gender identity. The legislation prohibits LGBTQIA+ couples from adopting a child together, proving that they are

²⁰ Scroll Staff, ‘Allow gay marriages, give couples police protection if needed, suggests draft Uniform Civil Code’ (*Scroll.in*, 12 October 2017) <<https://scroll.in/latest/853850/allow-gay-marriages-give-couples-police-protection-if-needed-suggests-draft-uniform-civil-code>> accessed 06 May 2021

²¹ Hindu Marriage Act 1955

²² HT Correspondent, ‘Same sex couples can live together’: Uttarakhand HC (*Hindustan Times*, 20 June 2020) <<https://www.hindustantimes.com/india-news/same-sex-couples-can-live-together-uttarakhand-hc/story-WDjvNH3JzJvaGDtpfzZOxL.html>> accessed 06 May 2021

²³ Vakasha Sachdev, ‘Delhi HC to Hear Petitions for Same-Sex Marriages on 25 February’ (*The Quint*, 8 January 2021) <<https://www.thequint.com/neon/gender/delhi-hc-same-sex-marriage-hindu-marriage-act-special-marriage-act-foreign-marriage-act>> accessed 07 May 2021

not equal in the eyes of the law.²⁴ It has been suggested that a child should not be given to an inferior family, one that is physically, emotionally, and financially healthy, in a country where 10 million children are without a family. A household in which the child can learn the values of his or her mother and father. As a result, rather than being raised by homosexual parents, the law expects abandoned children to be raised without a family.

The right to serve in the military is denied to the LGBTQ community. A measure submitted by Jagdambika Pal, a Member of Parliament, would change the respective acts of the Indian Army,²⁵ the Indian Navy²⁶ and the Indian Air Force Act of 1950,²⁷ to allow them to serve in the military.²⁸

The Indian Psychiatric Society (IPS) made a statement in 2014 about homosexuality's natural nature.²⁹ They disproved the idea that homosexuality is a disease or a mental ailment. Despite this, electroconvulsive therapy, hypnosis, the delivery of nausea-inducing medications, and talk therapy are still used as conversion therapies. Outside of India, organizations such as GALVA,³⁰ the UK Hindu Organization, and others aim to educate the Hindu population about such issues by referring to traditional writings. The Hindu Organization in Australia had endorsed same-sex marriage at the time of the passage of their pro-same-sex law in 2017, intending to push the globe forward in a positive direction.

²⁴ Dhamini Ratnam, 'Adoption by same-sex couples may be barred' (*Live Mint*, 8 August 2014) <<https://www.livemint.com/Politics/J3opALtv29XMrLV6keC2IO/Adoption-by-samesex-couples-may-be-barred.html>> accessed 07 May 2021

²⁵ The Army Act 1950

²⁶ The Navy Act 1957

²⁷ The Air Force Act 1950

²⁸ Amrita Nayak Dutta, 'Indian Army is worried now that men can legally have sex with other men' (*The Print*, 7 September 2018) <<https://theprint.in/defence/indian-army-is-worried-now-that-men-can-legally-have-sex-with-other-men/113644/>> accessed 09 May 2021

²⁹ Malathy Iyer, 'Homosexuality is not a disease, psychiatrists say' (*Times of India*, 7 February 2014) <<https://timesofindia.indiatimes.com/india/Homosexuality-is-not-a-disease-psychiatrists-say/articleshow/29965430.cms>> accessed 10 May 2021

³⁰ Amara Das Wilhelm, 'Homosexuality, Hinduism & the Third Gender (A Summary)' (*GALVA-108: Gay & Lesbian Vaishnava Association*, 2 January 2015) <<https://www.galva108.org/single-post/2014/05/15/homosexuality-hinduism-the-third-gender-a-summary>> accessed 11 May 2021

CONCLUSION

The Indian Constitution guarantees social, economic, and political equality for all citizens. The liberalization of Section 377 ushered in the protection of LGBTQIA+ Indians' fundamental constitutional rights. However, this does not imply that they are treated equally by their fellow citizens. There is a divide between urban and rural India, as well as differences in language, caste, class, and gender, which complicates understanding the concerns of the no longer "minority". Although the LGBTQ community still has a long way to go in terms of formal equality, they are no longer mute in their efforts to reclaim their place in society. It rightly says by a queer character in the Indian show *Made in Heaven*, "Homosexuality in India is nothing new, intolerance is what it is."