



## BEYOND SECTION 377: THE NEXT STEP IN LGBTQ+ RIGHTS IN INDIA

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“I am what I am, so take me as I am” is a quote by J. Wolfgang is a very apt quote regarding the LGBTQ+ issue in India.

A country’s legal system is significantly influenced by its religion and culture. Historically, Abrahamic faiths tend to avoid same-sex relations, let alone marriage. Whereas, indigenous and native faiths tend to be quite accepting of queer relationships. For example, two spirit<sup>1</sup> do the native Americans use a word as a separate identity differentiated from naturalized queers from the LGBTQ+ community. Indian culture, before colonization, had been very pro-queer.

The Indian Society, especially within Hindu tradition, concepts of non-binary gender and queer identity are deeply rooted, i.e. mythology, ritual practices, and religious institutions have long acknowledged and even revered gender diversity. Stories of Shikhandi, Chudala, Ratnavali, and Alli<sup>2</sup> show the intensity of queer acceptance in India. Even Gods, at times, are depicted as queer. It was not held to be unnatural.

Amongst the Muslims in pre-colonial India, homosexuality was practised. The Mahmud of Ghazna was in a sexual relationship with his male slave, adding to it, Shibli Nomani, provides an interesting take on same sex male love in the Arabic tradition. He says that ‘Arab soldiers were uninitiated in pederasty... fell in love with them because they were away from women and ‘amradparasti’.<sup>3</sup> A form of ‘lesbian poetry’ was introduced called Begumati Zaban<sup>4</sup>, which was essentially a love letter to her lover.

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<sup>1</sup> <https://www.pointofpride.org/blog/what-does-it-mean-to-identify-as-two-spirit>

<sup>2</sup> Devdutt Pattanaik, *Shikhandi and Other queer tales they don’t tell you*, Penguin Books India (2014)

<sup>3</sup> Rohit K Dasgupta, *Queer Sexuality: A Cultural Narrative of India’s Historical Archive*

<sup>4</sup> Petievich, C (2002), ‘Doganas and Zanakhis: The Invention and Subsequent Erasure of Urdu Poetry’s “Lesbian” Voice,’ Ruth Vanita (ed) *Queering India: Same Sex Love and Eroticism in Indian Culture and Society*, London: Routledge, pp.47-60

Meanwhile, the British Buggery Act of 1533 was passed which targeted anal sex and bestiality. After India became a colony, the same rule against homosexuality was launched. Once revered as cultured artists, courtesans, known as ‘tawaifs,’<sup>5</sup> were increasingly marginalized under British colonial rule, derogatorily rebranded as ‘nautch girls.’ Simultaneously, the ‘third gender’, including hijras and khwajasaras, who previously held respected spiritual and socio-cultural roles, were criminalized through laws like the 1871<sup>6</sup> Criminal Tribes Act and coerced into forced surveillance, ostracism, and poverty. Together, these colonial interventions fundamentally reconfigured India’s queer landscape.

For over two centuries, loving someone of the same sex was outlawed in India—thanks entirely to a colonial-era law imposed by Victorian Britain.

Lord Macaulay came up with the Indian Penal Code. It contained section 377, which stated that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal" would be punished with imprisonment or fines.

He modelled the Statute on the Buggery Act of 1533 and thought that it would modernise the Indian Society. Even today, remnants of Section 377 survive in former British colonies across Asia, like Pakistan, Bangladesh, Malaysia, Brunei, Myanmar, Sri Lanka<sup>7</sup>, and, until recently, Singapore, continuing to criminalize queer love long after colonization. This colonial-era law inflicted deep and lasting damage on queer communities, many of which once embraced diverse sexuality and gender identities. The criminalization of queer love under Section 377 created pervasive stigma, mental trauma, and societal exclusion that continue to haunt these countries to this day.

In the colonial era, one judge said the community was an "opprobrium upon colonial rule". Another claimed that their existence was a "reproach" to the British government, regarding the Third Gender.<sup>8</sup>

Victorian Europeans viewed non-Western societies as more permissive of gender variance and queer identities, using this belief to pathologize and legislate away existing acceptance. The

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<sup>5</sup> <https://inkstickmedia.com/discrimination-against-courtesans-is-a-colonial-holdover-in-india/>

<sup>6</sup> <https://blog.ipleaders.in/criminalization-of-transgender-people-in-colonial-india-criminal-tribes-act/>

<sup>7</sup> <https://www.humandignitytrust.org/news/end-criminalisation-of-same-sex-intimacy-across-the-commonwealth-says-human-dignity-trust/>

<sup>8</sup> <https://www.bbc.com/news/world-asia-india-48442934>

British also co-opted Hindu texts like the Manusmṛti<sup>9</sup>, distorting them to justify discriminatory policies. These actions undermined centuries of social and spiritual legitimacy for queer and gender-diverse identities in India.<sup>10</sup>

Although queer freedom in India still has a long way to go, LGBTQ+ communities have protested tirelessly for nearly 17 years, ultimately succeeding in decriminalizing homosexuality despite Britain's colonial legacy. On 6 September 2018, the Supreme Court of India unanimously ruled that Section 377 is unconstitutional 'insofar as it criminalizes consensual sexual conduct between adults of the same sex.' This landmark decision was celebrated by LGBTQ+ campaigners outside the court. However, the law still applies to non-consensual acts, sex with minors, and bestiality<sup>11</sup>. The Court affirmed that LGBT individuals in India are entitled to every constitutional right, including freedoms guaranteed by Articles 14, 15, 19, and 21. It held that 'the choice of whom to partner with, the capacity to find fulfilment in sexual intimacy<sup>12</sup>, and the right not to face discriminatory treatment are intrinsic to the constitutional protection of sexual orientation.

Recently, a same sex couple had filed a writ petition in the Supreme Court, which was centred around the constitutionality of the Special Marriage Act, 1954. The petitioners argue that Section 4(c) of the Special Marriage Act restricts marriage to a 'male' and a 'female,' discriminating against same-sex couples by denying them essential matrimonial benefits, such as rights to adopt, access to surrogacy, and receive employment or retirement benefits. It was ultimately held that the right to marry is not a fundamental right for queer persons. All five judges agreed that transgender persons in heterosexual relationships have the right to marry under the existing legal framework. In a 3:2 majority, the bench held that same-sex couples did not have the right to form civil unions and that they could not adopt. All five judges agreed that transgender persons in heterosexual relationships have the right to marry under the existing legal framework. In a 3:2 majority, the bench held that same-sex couples did not have the right to form civil unions and that they could not adopt.<sup>13</sup>

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<sup>9</sup> Biswas, Soutik. "How Britain tried to 'erase' India's third gender." BBC News, May 31, 2019

<sup>10</sup> Megan Mehta, Understanding Evolving Public Perceptions of Queer Identities in Pre- and Post-Colonial India, Berkeley Undergraduate Journal - Volume 38 (2024)

<sup>11</sup> Navtej Singh Johar & Ors v Union of India & Ors (2018) 10 SCC 1

<sup>12</sup> [https://www.hindustantimes.com/india-news/freedom-from-fear-what-the-sc-judges-said-in-their-historic-verdict-on-section-377/story-8hiwvSNWuEHLjFUQ5VnwGK.html?utm\\_source=chatgpt.com](https://www.hindustantimes.com/india-news/freedom-from-fear-what-the-sc-judges-said-in-their-historic-verdict-on-section-377/story-8hiwvSNWuEHLjFUQ5VnwGK.html?utm_source=chatgpt.com)

<sup>13</sup> Supriyo @ Supriya Chakraborty & Anr. Union of India 2023 INSC 920

The Court had recognized the difficulty faced by the queer people, who have been denied the basic human Right to marry, but, showing Judicial Restraint, refused to do anything about it and left it to a high-powered committee to make law on the same. Despite that, it has been a historic landmark judgment as it acknowledged the shortcomings of Indian Society when it comes to queer people.

Support for queer people has strengthened significantly since 2010. Nevertheless, alarming levels of violence persist: in a survey of six Indian cities, approximately 78.7% of gay men and 44% of bisexual men reported enduring verbal, physical, or sexual abuse.<sup>14</sup> Muslims are more susceptible to violence than Hindus. This juxtaposition is deeply concerning, though not to the extent that it suggests same-sex marriage will remain an unfulfilled dream.

Progress can only be achieved through awareness. The LGBTQIA+ community remains one of the most marginalized and overlooked groups, to the extent that the Geneva Convention does not consistently recognize them as individuals entitled to protection during times of war. The persistent stigma surrounding queer identities must be dismantled and a new era of tolerance and acceptance must begin.

Awareness should be brought about at the grassroots level.

Awareness should start in schools. LGBTQ+ teens consider suicide and make suicide attempts at about *four times* the national rate for all adolescents.<sup>15</sup> This is especially alarming as the suicide rate in India among adolescents is already high. The incessant bullying, damaging innuendos from teachers, looks from other parents, and unacceptance at large can be very detrimental to an adolescent's self-esteem. This damage is especially harmful as it may even lead to suicide. Sensitization training must be provided to students, teachers, and parents alike. Any form of discrimination must be avoided and shall be punished with the utmost severity. The right to live life as one pleases (without causing any unreasonable harm to others) is not just a fundamental right guaranteed by Article 21; it's a human right.

Religion mustn't come in the way of any queer identity. While the Constitution of India guarantees the right to religion, it is not an absolute right. The State retains the authority to enact laws in the interest of public welfare, order, morality, and health. Hence, the government

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<sup>14</sup> [https://www.thehindu.com/news/national/high-prevalence-of-sexual-violence-among-gay-bisexual-men-across-six-cities-study/article68856217.ece?utm\\_source=chatgpt.com](https://www.thehindu.com/news/national/high-prevalence-of-sexual-violence-among-gay-bisexual-men-across-six-cities-study/article68856217.ece?utm_source=chatgpt.com)

<sup>15</sup> <https://www.newportacademy.com/resources/mental-health/lgbt-suicide-rates/>

should make laws for the betterment off queer people. Changes should be brought about gradually. Laws are made quickly and efficiently if the country's citizens approve of the law. Hence, awareness and sensitization of same sex relationships are an important way to pave the path for the acceptance of same sex marriage.

Same-sex couples deserve recognition, even if the legal right to marry is not granted immediately. Delaying recognition only deepens injustice and denies countless individuals their dignity and humanity. While some religious groups may initially resist such changes, true progress lies in dialogue, not denial. India's history, which is rich with stories of queerness, fluid identities, and diverse expressions of love, offers a powerful foundation for acceptance. By reconnecting with this inclusive past, religious communities can find common ground and help lead the way toward a more compassionate and equal society. Unmarried couples can own a joint account and adopt children together. These are some necessary changes that one day may bring about changes in the Indian Marital scheme. Moreover, the recognition of queer relationships in a religious landscape would be the first step towards legalization of same sex marriage.

NGOs and other organizations and associations affiliated with the welfare of queer individuals must use precedents like the overturning of Section 377 as a basis for high-profile litigation to pave the way for legalizing same-sex marriage.

Protesting is a fundamental right protected by the Constitution, and it's a powerful way to shape government decisions, even when the government is resistant. A large-scale, organized protest to support same-sex marriage is urgently needed. Protests would send a clear message that the country needs a judicial and executive overhaul. India achieved independence through massive protests and public demonstrations, and similarly, protests can help us reach a state of queer liberation and break down the rigid notions of a cis-gendered, heteronormative society. Simply being seen can also bring about change. If something is repeatedly visible to the public, it eventually becomes normalized. Queer representation and visibility in the media can be a valuable tool for social change. By increasing visibility and representation, the community can relate to queer individuals and see that their lives aren't inherently dangerous or different from those of heterosexual, cisgender people. This would help humanize LGBTQIA+ couples and counter misinformation spread by bigoted groups. Increased visibility and representation have already led to positive changes in the lives of Latin American queer individuals. If this approach

gains enough momentum, international support, and backing from human rights advocacy groups, it could even win the government's recognition and approval.

As emphasized throughout this essay, the path to legalizing same-sex marriage must be approached gradually. A slow and deliberate process allows society the time to become more familiar with and accepting of the concept of queer love. This transitional period is especially important in the Indian context, where even expressions of heterosexual love are often met with social discomfort or avoidance. It should begin with the legal recognition of same-sex couples, along with anti-discrimination laws with harsh penalties to deter any person inclined to act in a discriminatory manner. Next, it is giving unmarried queer couples the right to adopt and inherit. Laws concerning the same should be a generalized specification, complete with all difficulties one can face with such changes in society. Essentially, what we must do is slowly and steadily give marital rights to the queer. When the entire nation is assimilated and ready to accept queer marriage, one must only then go ahead with the legalisation of queer marriage. India seems to be on the positive slope of things, has changes such as the overturning of Section 377 did not garner any protest from anti-queer groups and communities. This implies the start of the gradual acceptance of the queer.

In a secular country, it is absurd that the government would stall on making laws for the betterment of the citizens just because the religion of a certain community wouldn't allow it. However, this is what India is doing, with the 2023 judgement of leaving the decision to change the provisions in the Special Marriage Act, 1952, to the court, has inadvertently handed over this grave civil issue into the labyrinth of red tape. This has significantly slowed down the process, which once seemed promising due to the lack of reactions from the overturn of Section 377.

Every Individual has the right to love, marry whomsoever they may choose. Not legalizing same-sex marriage has displayed that the government considers them second class citizens, meanwhile heteronormative couples are not. This violates the very constitution that the government is supposed to embody.

The decriminalization of homosexuality through the striking down of Section 377 was a historic milestone in India's journey toward equality, but it was only the beginning. True equality goes beyond the absence of criminality; it demands legal recognition, social acceptance, and the protection of fundamental rights for LGBTQ+ individuals. The next step

must involve a broader, more inclusive legal framework, one that recognizes same-sex relationships, ensures protection from discrimination, and affirms the dignity of queer lives in all spheres of society.

India has a rich cultural and historical tapestry that embraces gender and sexual diversity. By reconnecting with this legacy and fostering empathy through education, awareness, representation and policy reform, we can move toward a society where queer love is not just tolerated, but respected and celebrated. The road ahead may be long and met with resistance, but the pursuit of justice, equality, and love makes it not only necessary but inevitable.