

**Legal Recognition to Same-Sex  
Marriages**

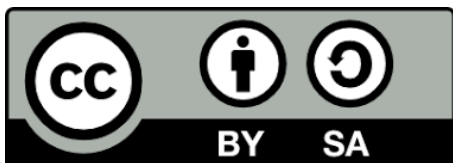
**Dr. K. Anandavelu**  
Department of History  
Muslim Arts College  
Thiruvithancode  
Kanyakumari District

Copyright © 2024 by author(s) of International Journal of Advanced Research and Emerging Trends (JARET). This is an Open Access article distributed under the terms of the Creative Commons Attribution License (CC BY4.0) <http://creativecommons.org/licenses/by/4.0>

**Abstract**

Feminist theory is the extension of feminism into theoretical, fictional, or philosophical discourse. It aims to understand the nature of gender inequality. It examines women's and men's social roles, experiences, interests, chores, and feminist politics in a variety of fields, such as anthropology and sociology, communication, media studies, psychoanalysis, home economics, literature, education, and philosophy. Feminist theory and gender studies have become significant cognitive enterprises III the last few decades. The societal- existential basis for the emergence and development of this branch of knowledge necessitates rigorous intellectual analysis within the paradigm of sociology of knowledge. The fact that gender studies are not bound by narrow boundaries of specific disciplines signifies the cognitive concerns which are interdisciplinary and cross disciplinary, encompassing diverse theoretical orientations and perspectives within its explanatory framework.

\*\*\*\*\*



**Introduction**

Coined by German psychologist Karoly Maria Benkert in the late 19th century, the term "homosexuality" has become a crucial descriptor in the realm of human sexuality . As per the Oxford Dictionary, "homosexuality" is defined as "the quality or traits of being sexually attracted exclusively to members of one's own sex." This term encapsulates the complex and diverse experiences within the spectrum of sexual orientation.

The acronym "LGBTQ" encompasses a diverse spectrum of individuals whose identities defy conventional norms related to gender and sexuality. While lacking a fixed definition, the abbreviation is often extended with a plus symbol (+) to signify its non-exhaustive nature. Essentially, it includes individuals identifying as lesbian, gay, bisexual, transgender, and queer, bridging both gender and sexual orientation. Unlike transgender, which pertains to a gender outside the binary of male and female, the terms gay, lesbian, and bisexual denote specific sexual preferences. Notably, "queer" is employed to capture the unique qualities of this collective. This all-encompassing term extends beyond conventional categories, embracing concepts such as intersex, asexuality, and more. Understanding the nuances of gender and sexuality is crucial in navigating the complexities inherent in this multifaceted concept. This community challenges

societal norms, seeking to carve out and assert their identities within the expansive spectrum of gender and sexuality.

On a global scale, the LGBTQ community has achieved notable progress in gaining social acceptance. In India, the judiciary has played a crucial role in navigating prolonged societal conflicts. The erstwhile Section 377 of the Indian Criminal Code, rooted in English law and suppressing sexual minorities, was an integral part of the legal system. This provision categorized members of the LGBTQ community under "unnatural offences," fostering an atmosphere of fear, oppression, and violence within society and law enforcement.

The pivotal intervention by the Supreme Court not only provided a legal foundation but also marked a significant stride in normalizing sexual minorities in India . While transgender individuals, recognized as the third gender, have experienced some advancements, criticisms persist regarding the legislation formulated for their protection. Sexual minorities, however, continue to grapple with systemic discrimination, leading to lives shrouded in secrecy.

The lack of understanding is glaring, manifesting in various forms of discrimination, from the exclusion of transgender individuals from social structures to denial of employment opportunities.

Additionally, same-sex couples face hurdles in securing guaranteed rights related to marriage, reproduction, adoption, and maintenance. The issue of marriage rights for same-sex couples, despite decriminalization, is currently contested in Indian courts. This ongoing struggle represents a logical progression for the community towards achieving a normalized lifestyle. However, persistent governmental opposition poses significant challenges to this pursuit.

### 1.2 National and International Perspective

India, deeply rooted in conservatism, has traditionally shaped societal norms and personal laws under the influence of religious tendencies. This conservatism extends to aspects such as same-sex partnerships, reflecting a historical transformation from a liberal, open culture to a more conservative one. The stigmatization of same-sex relationships, once perceived as immoral or criminal, has deep historical roots, even dating back to the Mughal era. Notably, under British rule, Section 377 of The Indian Criminal Code, 1860, criminalized voluntary carnal intercourse against the order of nature.

This section, aimed at punishing bestiality and sodomy, reflected societal values that deemed such behaviors as sinful or criminal. Consequently, the LGBTQ community faced severe discrimination and humiliation, bearing the brunt of societal

prejudices unjustly. The criminalization of same-sex partnerships not only subjected individuals to oppression but also impacted marriages, leading to frustration and self-hatred as parties concealed their sexual orientation.

Recent medical research has shed light on homosexuality as a prevalent, innate trait, challenging the notion that it is an offense or a sin. As awareness of human rights and modern thinking grows, the LGBTQ community is increasingly conscious of their fundamental rights to a satisfying personal life, privacy, and dignity. Advocacy for equal rights has gained momentum, with support from entities such as the Naz Foundation, The National Aids Control Organization, Law Commission of India, and prominent individuals like Navjit Singh Johar, Menaka Guruswamy, and Ritu Dalmia. The culmination of this advocacy manifested in the landmark 2018 Navtej Johar case, marking a significant step in the long-awaited process of decriminalization.

**International Viewpoint:** Internationally, LGBTQ rights have largely been curtailed at the national level rather than a supranational level. There is no formal convention on the topic that the UN has drafted. Nonetheless, through ads and programmes, it has sparked a conversation about eliminating the stigma and ingrained prejudice against the group.

The United Nations Free & Equal campaign is one such example of activism working for equal rights and just treatment for the LGBTQ community globally.

The United Nations has found it difficult to achieve uniformity because of the community's lack of agreement and diverse levels of acceptance. Same-sex relationships are frowned upon and, in some situations, are punishable by life in prison or the death penalty as crimes in many countries. The gathering in Yogyakarta to discuss the community's problems was one attempt made in the year 2006. At a conference in Yogyakarta, Indonesia, a number of prominent academics, activists, and non-governmental organisations drafted the historic Yogyakarta Principles. The core ideas of gender identity, sexual orientation, gender expression, and sex traits as human rights were delineated in this proclamation. These Principles not only give the community a variety of rights, but they also place duties on the government to carry out those rights. This was updated in 2017, and a new text known as Yogyakarta Plus 10 was created as well as approved. It gave the states certain additional rights and obligations in order to guarantee that the community could be freed from discrimination and treated equally, with the bare minimum of respect and dignity.

### 1.3 Recognition of the Rights of Homosexuals by the Indian Judiciary

An examination of LGBTQ rights through a judicial lens in India highlights a notable contrast with the legislative branch, which has been slow to address this crucial issue. Over the past decade, the Supreme Court has emerged as a leading force, delivering a series of landmark rulings that paved the way for recognizing the fundamental rights of this marginalized community. The conservative composition of the Parliament, evident in its reluctance to address the matter, underscores the proactive role assumed by a more liberal judiciary. Noteworthy among the significant Supreme Court decisions in this realm are the pivotal strides made in decriminalizing Section 377 of the Indian Penal Code, 1860, and affirming the rights of the LGBTQ community.

**Union of India v. National Legal Service Authority**  
: In this pivotal legal precedent, the Supreme Court of India delivered a groundbreaking verdict acknowledging transgender individuals as a 'third gender.' This landmark ruling not only granted them the right to self-identify their gender but also marked a significant stride in promoting gender equality.

Naz Foundation v. Government of NCT of Delhi : The Naz Foundation India, an NGO dedicated to HIV/AIDS intervention, initiated a public interest action in the Delhi High Court challenging the constitutionality of Section 377 of the Indian Penal Code. This section criminalizes any 'unnatural' sexual act, essentially encompassing non-heterosexual intercourse. The Delhi High Court, in a historic decision , declared Section 377 unconstitutional. The court argued that it infringes upon the constitutional rights outlined in Articles 14, 15, and 21, as it criminalizes consensual private sexual activity. This landmark verdict not only triggered a legal reassessment of the British-era law but also highlighted violations of key constitutional rights focused on equality (Articles 14, 15, and 16).

Nevertheless, the Delhi High Court's decision was overturned by the Supreme Court, which came to the conclusion that people who engage in carnal intercourse in the regular course of things and those who do so against the laws of nature belong to different categories and that the latter group cannot claim that Section 377 unfairly and arbitrarily classifies people. Section 377 just defines a specific offence and specifies the sentence that may be granted provided the trial is conducted in compliance with Cr.P.C. provisions. As a result, Section 377 is constitutionally sound.

The LGBTQ community suffered a severe blow when the Supreme Court reversed the Delhi High Court's decision.

NALSA v. Union of India : Following the controversial ruling in Suresh Kumar Koushal v. Union of India , a subsequent legal challenge emerged. The Supreme Court, having initially decriminalized Section 377 in the Naz Foundation case, later reinstated its criminal penalties in Suresh Kumar Koushal case. In response, the National Legal Services Authority took proactive steps to champion the rights of the transgender community, asserting their classification as a third gender. This landmark decision not only established comprehensive regulations safeguarding the liberties and rights of transgender individuals but also paved the way for legislative changes aimed at advancing their rights.

The culmination of these efforts resulted in the Transgender People (Protection of Rights) Act, 2019, a legislative outcome arising from extensive deliberations and multiple proposed bills. Despite its significance, the law is not without its flaws, most notably its interference with administrative processes. The Act mandates the recognition of each individual as "transgender" based on an identification certificate issued by a district magistrate, posing a considerable challenge considering the sensitivity of the subject.

K.S.Putaswamy and Anr versus Union of India :  
In the case of K.S. Putaswamy and Anr v. Union of India, a nine-judge Supreme Court panel hearing an action challenging the biometric Aadhar card project unanimously determined that privacy is a fundamental right.

Given this recent decision, which deemed Sec. 377 of the I.P.C. to be unconstitutional, there is some optimism for those seeking to legalise homosexuality in India. The government and its agents must refrain from interfering with what occurs between two people of the same sex in their own private space. One step towards achieving the aforementioned objective is the right to privacy judgement.

In a pivotal verdict that acknowledged the right to privacy as an integral component of the constitutionally guaranteed right to life and liberty under Article 21, the ruling emphasized the universality of privacy, applicable to individuals irrespective of gender or sexual orientation. Judge Chandrachud underscored the importance of privacy for the LGBTQ community, affirming their entitlement to autonomy and freedom from government interference. A specific emphasis was placed on the freedom and autonomy pertaining to sexual activity, as well as the right to choose one's partners. The Court recognized that the fundamental rights enshrined in Articles 14 (right

to equality), 15 (prohibition of discrimination on the basis of sex), and 21 (right to life and personal liberty) of the Constitution are fundamental to the right to privacy and the protection of sexual orientation. This landmark ruling played a foundational role in setting the stage for the groundbreaking Navtej Johar case.

Navtej Singh Johar v. Union of India : Dancer and entertainer Navtej Singh Johar challenged Section 377 of the Indian Criminal Code in Navtej Singh Johar v. Union of India (2018), claiming that it violated his fundamental rights to equality, privacy, and freedom from discrimination. The court ruled that it violated people's right to privacy to make private, consenting sex between adults illegal. Denying someone their sexual orientation would be against their right to life because it is an integral part of who they are.

The momentous removal of Section 377 has made homosexuality lawful again in India. Part 377 of the Indian Criminal Code has been partially decriminalised, permitting consenting adult sexual relations between any two people, regardless of gender. The court's decision rendered the section unconstitutional since it prohibited voluntary sexual intercourse between two consenting adults, in violation of Articles 14, 15, and 19(1)(a) of the Constitution. The right to a dignified existence, along with the freedom of autonomy and personal

choice, were acknowledged by invoking the Puttaswamy verdict.

Abhijit Iyer Mitra case: This case was filed in response to the Suresh Kumar Koushal v. Union of India decision, which received criticism. Following the decriminalization of Section 377 in the Naz Foundation case, the Supreme Court later reinstated its criminal penalties in the Suresh Kumar matter. In a proactive move to advance the rights of the transgender community, the National Legal Services Authority highlighted pertinent issues. This landmark decision recognized transgender individuals as a distinct third gender and established a comprehensive set of guidelines safeguarding their liberties and rights. Subsequent legislative amendments aimed to create a clear statute enhancing their rights, resulting in the adoption of the Transgender Persons (Protection of Rights) Act, 2019, after extensive deliberation and consideration of various proposals.

Contrary to the assumption that the decriminalization of Section 377 automatically grants the right to same-sex marriages, the central government contends that such partnerships do not inherently possess this right. Citing the spiritual and traditional aspects of marriage, which are deeply rooted in rituals, ethos, and societal values, the government asserts that the question of same-sex marriage rights cannot be solely determined by

judicial decisions but necessitates examination and consideration by the government and legislature.

#### 1.4 Legal Recognition to Same-Sex Marriages in India and Abroad: The Future Path

Following its recent ruling on Section 377 of the Indian Criminal Code, the Supreme Court has made it simpler for same-sex couples to have consensual sexual relations in a legal manner. But the law is silent if these couples wish to consummate their relationship through marriage. In the current context, same-sex marriage is neither forbidden nor permitted in India. No Indian statute mentions penalties or fines in relation to it. Thus, the government should take steps to make such unions lawful.

Since the ruling in Navtej Singh Johar v. Union of India, a huge number of petitions regarding recognition of same-sex marriages are still ongoing before several high courts. The collection of petitions requesting a revision to India's laws governing same-sex marriage was approved by the Supreme Court. A bench made up of Chief Justice DY Chandrachud, Judge PS Narasimha, and Justice JB Pardiwala was presented with the case. The petition batch was scheduled for March 13, 2023.

The Supreme Court presented the cases of "seminal importance" to a five-judge Constitution

Bench on Monday, March 13, 2023, in order to obtain legal recognition for same-sex unions. Chief Justice D.Y. Chandrachud headed a three-judge panel that rendered a decision that included comments on the rights of transgender couples as well as the relationship between those rights and specific laws, including the Special Marriage Act. The bench declared:

“Having due regard to the broader context of the petitions...and the interrelationship between the statutory regime and constitutional rights, we are of the considered view that it will be appropriate if the issues raised are resolved by a Constitution Bench of five judges of this court having due regard to the provisions of Article 145(3) of the Constitution.”

Several countries, with Taiwan leading the way in Asia, have embraced same-sex unions. Across Europe, a multitude of nations, including the Netherlands, Belgium, Spain, Portugal, Norway, Sweden, Iceland, Denmark, France, the United Kingdom, Ireland, Finland, Germany, and Austria, have legalized same-sex unions.

In *Obergefell v. Hodges*, a landmark decision by the United State’s Supreme Court, established the right of marriage for same-sex couples in America on June 26, 2015 . Further, in 2016, the Italian parliament, the biggest nation in Western Europe

where same-sex marriage is prohibited, approved civil unions for couples who are of the same sex.

It is now legal for same-sex unions in South Africa . In 2005, Canada became the first country in the Western Hemisphere to legalise same-sex unions . It was followed by Argentina, Brazil, Mexico, etc. Same-sex unions have also been approved in Australia and New Zealand. Countries in South and Central Asia, including Yemen, Bangladesh, Pakistan, Iran, and Saudi Arabia, outlaw same-sex partnerships.

The modern family has replaced the traditional heterosexual marriage, with acceptance of homosexual unions and relationships in many countries. It is believed that marriage is a lifelong bond between two people who share both joy and grief. The couple's sexual relationship is acknowledged by the institution, with the blessings of elders and God. Legal rights and responsibilities are established between the parties through marriage. In India, marriages between homosexuals cannot be governed by present personal law. Moreover, couples of the same sex are not legally recognized to adopt child. They are also prohibited from using surrogates under the current legal system. So, a law change is required to grant the LGBTQ community their right to marriage and adoption. In light of the Supreme Court's decision to legalise consenting same-sex



relationships. By establishing rules covering homosexual marriages, adoption, inheritance, and other issues, the government should make same-sex unions legitimate.

Thanks to a number of regional and international agreements, including the American and European conventions, as well as international conventions like the UDHR, ICCPR, and ICESCR, an individual can today marry and raise a family without fear of discrimination, not even on the basis of gender. The member nations are required by these conventions to repeal their anti-homosexuality laws and enact anti-discrimination laws that outlaw discrimination on the basis of gender equality and sexual orientation.

The Madras High Court has taken a positive stride concerning the marriage rights of the LGBTQ community, as evidenced in the case of *Arunkumar v. The Madras High Court*. On April 22, 2019, the court affirmed the legitimacy of a trans-woman and a man to officially register their marriage under the Hindu Marriage Act, 1955, recognizing and validating the union.

### 1.5 Conclusion

The innate and unalterable nature of homosexuality makes it a natural and prevalent aspect of human sexuality. The concerning prevalence of discrimination and violence against the LGBTQ

community necessitates the enactment of anti-discrimination legislation by the state, explicitly prohibiting bias based on sexual orientation and gender identity. Alongside domestic legal reforms in India, there is a critical need for awareness campaigns to disseminate knowledge about LGBTQ rights and sexual orientation.

It is imperative to acknowledge that individuals with different sexual preferences coexist with heterosexuals, and their sexuality is merely one facet of their identity. Recognizing equal rights and freedoms for everyone, regardless of sexual orientation, should be the central focus. Emphasizing social inclusion as the norm is crucial, eliminating any sense of guilt associated with personal choices in sexual partners. Legislative measures play a pivotal role, providing the LGBTQ community with the means to challenge instances of abuse, assault, and discrimination, offering them a much-needed voice.

While the Supreme Court has already decriminalized adults' consensual homosexual conduct, paving the way for potential same-sex marriages, the absence of explicit provisions in Indian law leaves the matter silent. It is crucial for legal frameworks to evolve in tandem with societal changes. The government must consider legalizing same-sex unions, introducing comprehensive

legislation covering marriages, adoptions, inheritances, maintenance, and other critical aspects. A clear legislative framework can contribute to uniform legal protection of social, economic, and cultural rights, ensuring justice and offering guidance to Indian states on the application of the law. **Notes and References**

1 . Supriya Akerkar, "Theory and Practice of Women's Movement in India,"

Economic and Political Weekly, Vol.XXX, No.17, pp.2-3

2 . Ibid., pp.2-4

3 .Ruchi Banthiya, From Historicity to Postmodernity (Jaipur: Rawal, 1994) pp.139-143

4 . Schulasmith Firestone, The Dialectic of Sex (New York: Bantam Books, 1970) p.38

5 . Michele Barrett, Women's Oppression Today (London: Verso, 1980) p.13

6 . Cloude Meillassoux, Maidens, Meal and Money (Cambridge: Cambridge University Press, 1981)

7. Neera Desai and Maithreyi Krishmaraj, Women and Society in India (Delhi: Ajanta Publications, 1987)

8 . K. M. Kapadia, Marriage and Family in India (Bombay: Oxford University Press,

1958) p.252

9 . Vijay Agnew, Elite Women in Indian Politics (New Delhi: Vikas Publishing House, 1979) p.61

10 .Everett, Women and Social Change in India (New Delhi: Heritage Publishers, 1978) p.191