

THE EVOLUTION OF LGBTQ+ RIGHTS IN INDIA: A LEGAL AND HISTORICAL ANALYSIS

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INTRODUCITON

In the ancient period, there were several sculptures and texts that attest to the diverse sexual culture, showing a positive and supportive attitude with respect to sexual diversity. It can be seen in several examples of ancient Indian tradition such as Ardhnariswara, Shiva, is represented as half male and half female, in Mahabharata Shikhandi was a third gender, Vatsyana's Kamasutra, Queerness in Vishnu Sharma's Panchatantra, etc. are reflecting the acceptance of homosexual relationships in ancient culture. In the case of art, artists drew the postures of homosexuality in the temple of Khajuraho and Konark, examining themes of love and intimacy between same-sex people. There are records of acceptance and recognition of homosexuality in the Mughal period also, transgenders were appointed to respected positions in the royal court. It is significant to remember that in British Colonialism homophobia emerged in Indian society which was a result of the colonial influence. Finally, this influence gave rise to the introduction of section 377, which was included in the Indian Penal Code and became part of it for about seven decades. This seriously affected the rights of LGBTQ individuals in the country.

After independence, the Indian judiciary has observed significant cases that have formed discourse in respect of the rights of LGBTQ. This judgment played an important role in the recognition and protection of fundamental rights of LGBTQ people regardless of their sexual orientation and gender identity. In 2018, the Supreme Court of India criminalised section 377 of the IPC, in 2017, the right to privacy was recognised in favour of the community and many more judgments, which signify a wider societal shift towards inclusivity of the LGBTQ community. However, it is difficult to change the view of society, it always creates obstacles to the complete acceptance of LGBTQ people. In brief, the historical development of attitudes on behalf of LGBTQ people in India reflects a multifaceted interaction between religious, social, and colonial influences. The path, characterized by periods of acceptance, persecution, and legal acknowledgement, highlights the continuous struggle for social acceptance and equal rights.

HYPOTHESIS

1. The criminalization of homosexuality and the emergence of homophobia in India was not indigenous to ancient Indian culture and traditions but it was a direct imposition of Victorian morality and British Colonial law, specifically section 377 of Indian Penal Code.
2. After Independence Indian Judiciary has played a pivotal and transformative role in elevating the legal status and fundamental rights of LGBTQ+ community acting as the primary catalyst for dismantling colonial-era criminalization and driving a wider, albeit incomplete societal shift towards inclusivity and acceptance.

OBJECTIVES OF THE STUDY:

1. To study the plight of LGBTQ in ancient India.
2. To analyze the introduction of section 377 IPC during British regime.
3. To study the judicial approach towards these people post Independence.
4. To conclude with proper recommendations

ANCIENT HINDU TEXTS:

Hinduism is one of the world's oldest religions, and the scriptures, such as the Bhagwad Gita, the Upanishads, the Mahabharata, the Ramayana, and the Vedas, have always been sophisticated for their time. Since this literature contains no moral or religious prohibitions against homosexuality, Hindus have no justification for rejecting the LGBTQ individuals and that, "Given their inherent spiritual equality, Hindus should not socially exclude LGBTQ individuals but should accept them as fellow sojourners on the path to moksha." As per Hindu 'Sruti', the ultimate aim of existence is moksha, or escape from the endless cycle of life and death, which holds that all beings are manifestations of the everlasting soul, or atman. A person can achieve moksha by realising their own self, or atman, which is different from their ego, physical being, and external characteristics like

gender, sexual orientation, and race. In fact, “an LGBTQ person who lives selflessly and has mastered his or her impulses (sexual or otherwise) is actually closer to moksha than a non-LGBTQ person who is a slave to desires.” Thus, there is nothing mentioned in the Hindu Shruti texts that advocates considering members of the LGBTQ community as less valuable than non-LGBTQ people.

The Vedic literature and Kamasutra had divides human gender into three separate categorises based on nature, or "prakriti." These three are of the Stri-prakriti (female), Pums-prakriti (male) and Tritiya-prakriti (third gender). The Vedas reference about the 'third sex', roughly defined as people for whom sex is not procreative, either through impotence or a lack of desire for the opposite sex", The third gender has never experienced discrimination or been denied access to basic rights because of sexual orientation or gender identity. They are never degraded or deemed deserving of excommunication or expulsion; in fact, on multiple occasions, their divinity or other unique abilities are praised. Examples of these gods and heroes are Ardhanarishwara, Lakshmi-Narayana, Mohini, Shikhandi, Brihannala, and so on.

Several other texts written in ancient India such as Kama sutra and Arthashastra have frequently mentions about LGBTQ people. Kama Sutra, describes the delights of sexuality, it states that an individual need to behave in accordance with both personal desires and customs. According to the KamaSutra: “There are also third sex citizens, sometimes greatly attached to one another and with complete faith in one another, who get married together”. Likewise, Arthashastra of Kautilya mentions about non-vaginal sex (ayoni) which was punishable with very small fines. Thus, “homosexuality whether between men or women is not considered to be a serious offence in the Arthasastra”. Another manuscript Manu Smriti “exhorts a man who has sex with a man or a woman in a cart pulled by a cow, or in water or by day to bathe with his clothes on. The penalty for a man who has ayoni sex is a minor fine, the same as that prescribed for “stealing articles of little value.” Thus, it can be observed that not only do the Srutis state that moksha for LGBTQ individuals is permissible, but also that the ancient Indian codes of conduct and other texts either positively highlighted the LGBTQ phenomenon rather than persecuting it or positively focused on the abilities of LGBTQ individuals rather than their gender or sexual orientation. These stories are the few remaining pieces of evidence that demonstrate how progressive and well-accepted our ancient Indian culture was. where a person's choice was the only factor determining their gender and sexual orientation. These stories show how gender identity and sexuality are embodied in our society.

MEDIEVAL PERIOD:

During medieval period, homoerotic was spoken of in a non-derogatory manner. When Arab-Persian-Islamic culture entered the homosexuality received "official patronage." As a language of high literature, Persian had already begun to give way to Urdu, which emerged from the interplay of Hindi, Persian, and Turkish, by the 17th century. The majority of the early works in Urdu were homoerotic poetries. Furthermore, male writers of this era addressed their male lovers in the majority of their ghazals as a way to convey their love and affection; as a result, "the mediaeval Perso-Urdu literature seem to distinguish the role of the wife and the lover, whatever be the latter's sex and celebrate same sex sexuality among men". Urdu and Sufi poets highlighted the tradition of love for boys during this time, which was prevalent at the Muslim monarchs' court. Baber, India's first Mughal emperor, wrote poetically

COLONIAL PERIOD AND THE INTRODUCTION OF SECTION 377:

- British Influence: Discusses how British colonialism introduced homophobia into Indian society, often rooted in Victorian morality and Christian ideologies.
- Section 377 IPC: Details the enactment of Section 377 in 1861, drafted by Thomas Macaulay, which criminalized "carnal intercourse against the order of nature."
- Impact: Explains how this law was used to police sexuality and became an instrument for discrimination and harassment, particularly affecting the LGBTQ+ community and other sexual minorities like the *Hijra* and *Khawaja Sara* communities, who lost their respected status and were deemed criminals under the law.

POST-INDEPENDENCE PERIOD AND LEGAL BATTLES:

- Judicial Discourse: Describes the significant legal cases that shaped the discourse on LGBTQ+ rights in India.
 - *Naz Foundation v. Govt. of NCT of Delhi* (2009), where the Delhi High Court decriminalized consensual same-sex acts.
 - *Suresh Kumar Koushal v. Naz Foundation* (2013), where the Supreme Court re-criminalized the acts, deferring the matter to the legislature.
 - *Navtej Singh Johar v. Union of India* (2018), where the Supreme Court ultimately decriminalized consensual same-sex activities among adults, calling for a broader interpretation of fundamental rights including the right to privacy (recognized in 2017) and freedom of expression and identity.

○ In the case of *Supriyo @ Supriya Chakraborty & Anr. v. Union of India* (2023), the Supreme Court of India unanimously ruled there is no fundamental right to marry under the Constitution for any individual, regardless of sexual orientation, and thus declined to legalize same-sex marriages under the Special Marriage Act. The court stated that recognizing such unions falls under the Parliament's legislative authority, not the judiciary's, but directed the government to provide social benefits and protection from harassment to queer couples.

CONCLUSION AND RECOMMENDATIONS:

Therefore, it can be said that the legal and social history of LGBTQ+ individuals in India is characterized by a notable shift from pre-colonial acceptance to colonial-era criminalization, and back toward progressive judicial recognition in recent years. Ancient texts and art reflect a historical tolerance and recognition of diverse sexual and gender identities, which were subsequently suppressed by the imposition of Victorian morality through the British-era Section 377 of the Indian Penal Code.

The post-independence legal journey has been a long and arduous battle. The judiciary has played a transformative role through key judgments:

Nevertheless, the legal landscape remains incomplete. While consensual private conduct is no longer criminalized, significant challenges persist. The Supreme Court's 2023 decision on marriage equality in *Supriyo v. Union of India* placed the onus on the legislature to enact laws for same-sex marriage or civil unions, highlighting a gap between judicial progress and legislative action. The ongoing struggle for full equality, including rights related to marriage, adoption, and protection from discrimination in employment and healthcare, underscores the need for continued legal advocacy and societal transformation to ensure that all citizens can live with dignity and equal rights.

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