

EQUALITY AND INCLUSIVITY OF THE QUEER PERSONS: THE RESPONSE OF THE INDIAN SOCIETY

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Abstract

'This is how we are born, not abnormal and not by choice.' Indian society has always been prejudiced towards queer individuals, in the true sense of inclusion and equality in true sense. They have been marginalized with reference to education, employment, the workplace, the health sector, and many more. The query lies here: whether homosexuality is a choice or a creation of nature. Society splits its view into two sections; the majority considers it a choice, and few agree to the fact that it's natural. The queers are yet to be a part of the society in absolute manner as they still come under the 'not normal' clause. Social culture and morality have been prioritized, the reason why there is a tug of war between social morality and constitutional morality. Even after recognition of transgender's identity to 'third gender' in *NALSA* judgment, and decriminalization of homosexuality in *Navtej Singh Johar* judgment, our nation is falling short in the utter consideration of the queer community in the society, which guide them towards inclusivity and equality both in society and in legislative perspective. The study aims to discuss the historical existence of queer persons in the Indian society and their inclusivity in the ancient society compared to modern society. This paper focuses on the role of the judiciary and the government in ensuring queer rights to live with dignity and the response of the society.

Key words: Equality, Gender, Homosexuality, Inclusivity, LGBTQIA+, Morality, Queer

1. INTRODUCTION

'*Vasudhaiva Kutumbakam*' – one of the most powerful shlokas of Shrimad Bhagwat Gita, which signifies inclusion of everyone, and no exclusion based on differences. Homosexuality, like birth, is not under a person's control. Ancient Indian wisdom teaches us to honour the soul beyond the body. As society evolves, true dharma lies in acceptance, not judgment. Acceptance of homosexuality is not only a social need but a spiritual responsibility. The cosmic laws on the cyclical nature of life and death say, 'for one who is born, death is certain, and for one who has death, birth is certain'. This implies that one cannot choose when or where to be born, it is beyond human control. It is the responsibility of the society to understand the idea of homosexuality, which is not by adoption, but rather a creation that is not unnatural. Nevertheless, India's stereotypical mindset keeps the nation less urbanised. The stereotypical society takes a step back when it comes to the LGBTQIA+ community. We are one among. Even today, when we think of queering the nation and acceptance of the LGBTQIA+ individuals to be a part of the society, the cultural norms of the society come to the fore. This is why this community has been stigmatized, marginalized, and rejected from all aspects. So, when we say equality and inclusivity, it means the actual consideration, acknowledgment, and recognition in the society and permitting them to participate in the rituals and cultural affairs of the society.

Social inclusivity of LGBTQIA+ and other gender identities and sexualities is a complicated issue. These queer persons are a largely invisible community, even after a few initiatives for their recognition have taken place. This is since many queer societies are not easily recognized by outward signs, as this is a socially manufactured differentiation. Queer persons should be accepted as members of their larger community, notwithstanding their invisibility. The literature has long recognized the significance of belonging because of inclusion (Faith Ong and Clifford Lewis, 2021). Feeling included in the society in which one lives is an important part of belonging for LGBTQIA+ communities. Having a sense of belonging enhances one's sense of group purpose and, consequently, one's capacity to obtain the assistance required to enhance one's well-being and contentment with life. The idea of belonging has been studied more recently as political discourse influenced by hegemonic tactics that target marginalized or displaced groups. Although belonging is linked to individual well-being, such experiences are typically afforded to sections of society that fit the norm, with those who depart being relegated to the periphery. However, we need to identify the real significance of inclusion and equality. Only existence in the society doesn't imply inclusion or equality. For its actuality, queer individuals shall be provided with rights rather than prohibited from them. If we dig into the historical existence of queer persons in the Indian society, it throws an understanding

of equality and inclusivity, proving that this community is as equal as heterosexuals in the society and not under the 'abnormality' clause.

2. Historical existence

History speaks volumes on the existence of queer individuals and forming families as normal as heterosexual ones. These people were very much part of ancient times and were allowed to live according to their own conduct. Neither of them was punished for their own conduct nor treated differently or unequally in the ancient society. The research says that males having intimate relations with another male, and so do females, is considered quite natural during the Vedic period. Homosexuality is never a new concept that has emerged with time; rather, its presence has been discovered during the Vedic period. The Vedic literatures like Manusmriti, Dharma shastra, Kamasutra, homosexuality, and its existence are mentioned. The concept of the 'third sex' is not new, nor has it developed over time, as documented in the book named 'Tritiya Prakriti' by Amara Das Wilhelm, which dates to the Vedic period. Lesbian, gay, and bisexual are abbreviated as 'LGB', with lesbians referred to as 'Svairini', gays as 'Kliba', and bisexuals as 'Kami'. These three entities, i.e., the *svairini*, *kliba*, and *kami*, have existed since the Vedic era, acknowledged by the society completely and permitted them to live according to their own rules of behaviour (Amara Das Wilhelm, 2003). Further, it is mentioned that there are three different groups of sex and gender of human person in every part of Vedic literature, i.e., *pums-prakriti* (male), *stri-prakriti* (female), and *tritiya-prakriti* (third sex). These genders are not only determined their existence by the physical characteristics but also include gross body, i.e., physical body, subtle body, i.e., psychological body, and the social interaction, i.e., procreative status, which is quirky (Amara Das Wilhelm, 2003). The structural society builds up the human body as *pums-prakriti*, i.e., the male and *stri-prakriti*, i.e., the female, which is called the 'sex' of a person, whereas 'gender' indicates a human body as masculine or feminine. So, in general, the word 'sex' refers to biological sex, and the word 'gender' refers to the psychological behaviour and identity in a social framework (Anuja Agrawal, 2009). The concept of the third sex can be well described by putting an example of a mixture of black and white colours. The combination of these two colours would result in many shades of grey, but it will no longer be considered either black or white. Similarly, the third sex is that of those who are a mixture of both male and female. They are neither in the category of complete male nor female.

The concepts of homosexuality and gay activity are covered in a few Vedic texts, including the Kamasutra and the Vats Ayana. Although homosexuality was uncommon in medieval society, there are documented instances of it. According to the findings, even though it was forbidden by Islam at the time, several Muslim empires had romantic connections with men (Dr. Sushma Singh, 2023). Furthermore, it is emphasized in Hindu literature and texts that homosexuality is neither a disability nor anything that goes against societal standards. Indeed, Ruth Vanitha the famous academician, writer, and activist, in her book 'Love's Rite Same-Sex marriages in Modern India' and 'Same-sex wedding, Hindu Tradition and Modern India' details the acknowledgment from ancient periods and describes how the society has evolved from then. Vanitha says love has no bounds. It's not what we choose, it's what we are given.

2.1. Inclusivity in ancient society, in comparison with modern society

Ancient societal approach

Vanitha's literature gives a brief idea of the attitude of today's society towards homosexuality, and how the ancient society viewed homosexuality with a positive approach. Vanitha, in her literature, said modern Indian society has a more conservative approach and not so progressive view than the approach in Indian history (Ruth Vanitha and Saleem Kidwai, 2008). Our rich Indian history describes that the ancient societal approach to homosexuality and to queer individuals was largely tolerant, diverse, and non-punitive, especially when viewed in contrast to the colonial and modern conservative attitudes. While it is difficult to generalize across the subcontinent due to regional and temporal diversity, historical, literary, and cultural evidence suggests that homosexuality was known, acknowledged, and in many cases, socially accommodated. The pre-Vedic and Vedic period, the sexuality or sexual orientation of an individual is recognized as a natural human trait, including same-sex desire (Ibid). Rather than moralizing or criminalizing desire, it was seen as a matter of personal conduct, ritual significance, or aesthetic experience. The notion of 'dharma' did not necessarily conflict with personal sexual orientation unless it disrupted familial or social obligations.

As explained above, the hijras and transgender identities are referred to as Tritiya prakriti of 'third gender' (Amara Das Wilhelm, 2003), who are all recognized and integrated into social structures. They often held sacred or ritualistic roles such as singing blessings at marriage ceremonies and childbirth, which created a legitimate space in the society for them. In many regions, non-binary or queer individuals were respected, feared, or even revered, not necessarily marginalized. The ancient Indian texts, i.e., *Puranas*, *Mahabharata*, and *Jataka* tales, included characters with gender fluid and sexual roles, suggesting these identities were socially visible. For example, *Shikhandi*, who was born female and lived as a male warrior, was accepted by his society and family for his role in war (Devdutt Pattanaik, 2014). The stories of *Bhagiratha's* Lesbian mothers or Krishna's transformation into Mohini were widely told and accepted, which is neither hidden nor condemned. For making it more apparent and clearer, the temple sculptures depict same-sex erotic scenes alongside heterosexual ones, like at Khajuraho, Konark, and a few more temples in India, which indicates inclusivity of the expression without considering it as a taboo. These images were placed in public sacred spaces, reflecting a cultural comfort with diverse sexual acts

and desires. The erotic literature, including *Kamasutra* and *Anangaranga*, openly discussed male-male and female-female sexual practices, showing these were not shamed or erased.

In the ancient era, the urban centers and royal courts may have offered more tolerance and fluidity regarding sexuality and gender roles. Some religious sectors and ascetic traditions even embraced sexual experimentation as part of spiritual practice. Rural society may have been more conservative in practice, but there is slight evidence of institutional persecution for same-sex desire. Unlike British colonial laws, homosexuality was not a punishable offense, nor did it impose any criminal penalties. While texts categorized same-sex acts as ritual impurities or minor misdemeanours, they were not treated as crimes deserving harsh punishment.

In a nutshell, homosexuality in the ancient period was not based on criminalization or moral panic, but rather on recognition, spiritual integration, and cultural expression. Queer individuals and relationships existed within the societal fabric, i.e., in mythology, ritual, art, and community life. This tolerance and plurality

Modern societal approach

It is observed that the modern Indian societal attitude concerning homosexuality and queer individuals is marked by a complex blend of progress and prejudice, reflecting tensions among constitutional rights, traditional values, urban liberalism, and rural conservatism. While legal reforms and increasing visibility have fostered greater awareness and acceptance in some sections, widespread societal stigma, discrimination, and silence still prevail in major parts of the country.

Post-independence, homosexuality remained criminalized under section 377 of the Indian Penal Code, which had been inherited from British colonial law. This reinforced social stigma, as same-sex relationships were viewed as immoral, unnatural, and illegal. For decades, queer identities were largely invisible and heedless in public discourse, education, and media, creating a cultural shame, secrecy, and denial. Despite this, urban India has slightly shifted, especially among educated and younger populations. The visible change, i.e., the pride parades, LGBTQIA+ support groups, and queer collectives, are growing. Social media has empowered queer youth to express identity, seek community, and challenge stereotypes. However, even in urban areas, many face family rejection, mental health issues, or social isolation, especially within conservative families or religious groups.

3. Initiatives

3.1. Government

A mixed approach of the government is witnessed in shaping the attitudes and policies towards homosexuality in Indian society, i.e., oscillating between silence, resistance, and gradual acceptance. While the judiciary branches have lagged, reflecting societal conservatism and political caution. Even after independence in 1947, successive governments retained colonial-era laws, including Section 377 of the Indian Penal Code, which criminalized homosexual activity. This continued for over 70 years. The government did not attempt to repeal or amend action 377 on its own initiative, even as global momentum for LGBTQIA+ rights increased. This legal inertia reflected societal discomfort with queer identities and a reluctance to engage with taboo issues.

The government's response in the legal proceedings remained silent. The United Progressive Alliance (UPA) government initially did not oppose the Delhi High Court's decriminalization of homosexuality. However, it also did not take a clear stand in support of queer rights in the Supreme Court's appeal that is in *Suresh Kaushal v. Naz Foundation* (AIR 2014 SC 563), reflecting political ambiguity. In 2018, during the *Navtej Singh Johar* case (AIR 2018 SC 4321), the National Democratic Alliance (NDA) government took a neutral stand. It did not oppose decriminalization but refused to comment on the constitutional validity of section 377, leaving the decision to 'the wisdom of the court'. The Passive approach allowed the judiciary to decriminalize homosexuality without executive support or resistance. Despite the progressive Supreme Court verdict, the government has taken only limited steps to implement inclusive policies. Such as the Transgender Persons (Protection of Rights) Act, 2019, which recognizes the right of self-perceived gender identity, though with problematic medical certification provisions. Also, the act provides for non-discrimination in education, employment, and healthcare for transgender persons, excluding the LGB individuals. Nevertheless, some states, i.e., Kerala and Tamil Nadu, have extended welfare schemes and health services to transgender persons. The Ministry of Social Justice launched a National Portal for transgender persons, enabling ID cards and access to services. The Pride Celebrations and Sensitization in Bureaucracy in selected cities and states are mostly guided by local and state governments or specific departments, not a comprehensive central government initiative.

However, the government's role in shaping homosexuality in Indian society has been marked by caution, reluctance, and reactive policymaking. It has neither championed LGBTQIA+ rights nor systematically implemented inclusive reforms. Legal change has mostly been driven by the judiciary and pushed by civil society. While some state governments and departments have taken small steps, a coherent, national-level policy for LGBTQIA+ inclusion is still lacking.

3.2. Judiciary

The Indian judiciary has been playing a prominent role in shaping the legal discourse around homosexuality, moving gradually from criminalization to recognition and protection of LGBTQIA+ rights. Its involvement has been crucial in countering societal prejudice and pushing for constitutional morality over majoritarian morality. In the historic ruling in *National Legal Services Authority v. Union of India* (NALSA Judgment) (AIR 2014 SC 1863), the Supreme Court of India analysed 'gender identity' in great detail and for the first time recognized transgender persons as 'third gender' individuals. According to the National Legal Services Authority of India

(NALSA), People who identify as transgender and those who do not fit into the male or female gender binary, should be given legal recognition by the court as ‘third gender’. The court acknowledged that third gender individuals were entitled to fundamental protections under both international and constitutional law. Additionally, it instructed State governments to set up procedures for recognizing the rights of those who identify as ‘third gender’. The Supreme Court highlights that a person’s gender expression or identity is not based on their biological traits, but rather on their intrinsic understanding of their gender. As a result, it was decided that those who are classified as ‘third gender’ shouldn’t be exposed to any tests or operations that could violate their right to privacy. Article 21 of the Constitution states that ‘dignity’ includes a person’s gender identity as well as any other form of self-expression that permits a dignified existence.

On 6th September 2018, the Supreme Court gave its verdict in *Navtej Singh Johar V. Union of India* (AIR2018 SC 4321) that homosexuality under Section 377 of the Indian Penal Code violates the fundamental rights to intimacy, autonomy, and identity and decriminalized homosexuality by prohibiting consensual relations between adults of the same sex or gender. The Supreme Court in *Shafin Jahan vs Asokan K.M. and Others* (AIR 2018 SC 1933), (hidaya case), ruled that the freedom to select and marry a partner was guaranteed by the constitution. By doing this, the Supreme Court ruled that society has no say in a person’s choice of spouse and that the intimate aspects of marriage belong in an untouchable realm. Reading these rulings collectively leads one to conclude that any law or regulation that forbids same-sex and queer marriages must be ruled illegal and clearly in violation of Articles 14, 15, and 21 of the Indian Constitution. Contrary to what the Union Government asserts, marriage is no longer a bond between a biological man and a biological woman. The High Court of Madras in *Arun kumar & Sreeja v. The Inspector General of Registration and Ors* (WP (MD)No. 4125 of 2019), expands on the principles established by the Supreme Court in the above case. The Madurai Bench of the High Court of Madras used a beneficial and purposeful interpretation, concluding that the term ‘bride’ refers to transwomen and intersex individuals who identify as women under the Hindu Marriage Act, 1955. As a result, the Act considers a marriage consummated between a transwoman and a man who both identify as Hindu to be lawful. The significance of this ruling cannot be emphasized since it lays the groundwork for rethinking the LGBTQIA+ community’s marriage rights and progressive expansion of a term employed in the Hindu Marriage Act, 1955.

Recently, the Uttarakhand High Court confirmed that two people of the same sex are allowed to remain together, in *Madhu Bala v. State of Uttarakhand & Ors.* (Habeas Corpus Petition No. 8 of 2020). A live-in relationship is not illegal, despite the fact that same-sex marriage is not recognized. Additionally, the Court stated that the freedom to choose a spouse and live together is a basic right. In February 2020, Nikesh Pushkaran and Sonu, a married gay couple who are both Indian nationals, filed a writ petition in the Kerala High Court, requesting that their marriage be registered under the Special Marriage Act, 1954. Despite the fact that same-sex marriages are not expressly prohibited by the statute, petitioners contend that because it uses heterosexual terminology, the law is discriminatory and denies homosexual couples ‘equal access to the institution of marriage’.

The Odisha High Court in *Chinmayee Jena v. State of Odisha & Ors.* (W. P. (CRL) No. 57 of 2021), in August 2020, the court declared that same-sex live-in partnerships are protected by the constitutional rights to equality and life. The court ruled that, like opposite sex cohabiting couples, women in same-sex live-in relationships are protected by the 2005 domestic abuse law. In July 2020, in *Paramjit Kaur v. State of Punjab* (CRWP no.4338 of 2021 (O&M)), the Punjab and Haryana High Court ruled that same-sex couples are entitled to live-in relationships and the protection of their life and liberty as outlined in Article 21 of the Indian Constitution. In a related case, a lesbian couple from the Mahisagar region of Gujarat, petitioned the Gujarat High Court in June 2020 for acknowledgment of their cohabitation rights and police protection against their family. An arrangement known as a *maitri karar* (friendship agreement), which the couple had signed to establish their relationship in which the information on the ownership of the property, inheritance rights, and maintenance in the event of a split is provided, equivalent to a marriage. The High Court granted their request on July 23, 2020, and ordered the Mahisagar police to provide security for the couple.

On November 14th, 2022, in the case of *Supriyo Chakraborty v. Union of India* (W.P. (C) 1011/2022), two same-sex couples filed writ petitions in the Supreme Court seeking legal recognition of same-sex marriages in India. In order to enforce the fundamental rights protected by Articles 14, 15, 19, 21, and 25 of the Indian Constitution, i.e., the Special Marriage Act of 1954, the Hindu Marriage Act of 1955, and the Foreign Marriage Act of 1969, the petitioners, who were queer couples and individuals, asked the Supreme Court to recognize same-sex marriages between any two people, regardless of sexual orientation and gender identity, under the following marriage laws. Unfortunately, on 17th September 2023, the right to marriage among same-sex partners is denied. Nevertheless, allowed the heterosexuals under the LGBTQIA+ community to marry their partners of choice under the existing law as well as the personal laws.

4. The Response of the Society through the lens of heteronormativity

The society with the lens of heteronormativity lacks a liberal perspective towards homosexuality. Today’s Indian society is not so progressive in comparison to ancient Indian society. When it comes to queer individuals, homosexuals, or the LGBTQIA+ individuals, it is still believed that the concept is beyond traditional values. The idea of man loving man and woman loving woman, or the existence of transgender persons, falls outside the boundaries that is created by society. The research says most rural areas view this concept more liberally than urban (Ruth Vanitha, 2021).

Through the lens of heteronormativity, the response of the society deeply entrenched biases and structures that favour heterosexual relationships as the societal norms. Heteronormativity assumes that heterosexuality is the default or 'normal' sexual orientation, and this world shapes laws, institutions, family structures, and cultural practices accordingly. The family structures in our nation are largely structured around heterosexual marriage, procreation, and lineage continuity. Any deviation from this, like same sex relationships, is seen as a threat to familial 'honour' or societal stability. The widespread practice of arranged heterosexual marriage reinforces heteronormativity, making it difficult for queer individuals to come out or resist societal pressures. Even the school curricula lack comprehensive sex education and fail to acknowledge queer identities, reinforcing heterosexuality as the only valid orientation. So far, religious reinforcement is a concern; many mainstream religious interpretations fortify the belief that heterosexual unions are divinely ordained, further marginalizing non-heterosexual identities. Even cinema and media have historically glorified heterosexual romance while depicting LGBTQIA+ characters as comic relief, perverse, or tragic. This visual culture reinforces the centrality of heterosexual love and renders queer relationships invisible or deviant.

The fact that section 377 persisted for over 150 years shows how deeply the law upheld a heteronormative worldview. Indian laws still do not recognize same-sex marriage, adoption by queer partners, or civil unions. The law presumes heterosexual marriage as the only legitimate form of family. Also, legal forms often assume binary gender and heterosexual relationships, excluding queer experiences. This social exclusion and inequality guided many queer individuals to be subjected to conversion therapies, forced marriages, or psychological abuse to conform to heterosexual norms. Society often treats queer public displays of affection, fashion choices, or gender expressions as deviant, further policing non-heterosexual identities. Even after the decriminalization of homosexuality, queer representation in media still often attracts online trolling, moral panic, and calls for censorship.

Nonetheless, Indian society, through the lens of heteronormativity, can be seen as structurally and culturally biased in favour of heterosexual relationships. This has led to marginalization, invisibility, and stigmatization of queer identities. While legal and social resistance has begun to destabilize this norm, heteronormativity remains the dominant cultural force, dictating not only what is acceptable but also what is intelligible as 'normal' in society.

5. SUGGESTION AND CONCLUSION

For inclusivity and equality of queer persons in society, we must touch the root cause. It's not only the acknowledgment of existence that is sufficient, but rather legal majors shall also be taken for the absolute acceptance, leading them not to fall under the 'abnormality' clause. The government should enact a robust national anti-discrimination law that explicitly protects individuals from discrimination based on sexual orientation and gender identity in education, employment, housing, and healthcare. Integration of LGBTQIA+ issues and inclusive gender education into school curricula and conducting sensitisation programs for police, judiciary, medical professionals, and educators to eliminate systemic bias and ignorance. The recognition of marriage, civil union or partnerships for the same-sex couples would also lead to inclusivity and maintain equality in society and guide towards acceptance, which further would ensure equal rights in adoption, inheritance, and property laws. Establishment of queer-affirmative counselling services and crisis helplines is one of the ways for mental health support. Funding the communities of mental health initiatives, especially for transgender and non-binary individuals, might help the LGBTQIA+ persons become vocal about their issues. In addition, the government should ensure to strengthen laws against hate speech, online harassment, and hate crimes targeting queer individuals, inclusively creating a safe complaint mechanism and shelters for queer persons facing violence or displacement.

While India has taken a historic step by decriminalizing homosexuality in *Navtej Singh Johar* case, true equality goes beyond legal recognition; it demands social acceptance, institutional reform, and cultural change. Inclusivity cannot be symbolic; rather, it must translate into concrete rights, protections, and dignity for queer individuals in everyday life. An inclusive India is one where queer people are merely tolerated but affirmed, celebrated, and allowed to thrive without fear. By embracing constitutional morality over societal prejudice, India can fulfil its promise of justice, equality, and dignity for all, irrespective of whom they love or how they identify.

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