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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **RIGHTS OF THE LGBT+ COMMUNITY IN INDIA**

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## **A. INTRODUCTION**

2018 was a great year for the LGBTQ+ community. In that year, the Court finally recognized the fundamental rights of equality, dignity, expression, life and liberty of LGBTQ Indians. Since its establishment almost 70 years ago, the Supreme Court has been performing this role of balancing the rights of the individual and the social practices. It is only in the relatively recent past, however, that it has awakened in relation to questions of sex, sexuality and gender. This article talks about the development of LGBTQ+ rights in India in the context of numerous landmark judgements and conversion therapy in India. In addition, it also outlines the need to make the laws on marriage, adoption, surrogacy, guardianship, inclusive of LGBTQIA+ community and what Hindu mythology says about LGBTQ+ community.

## **B. MARRIAGE AND THE LGBT+ COMMUNITY:**

### **1. Relevance of Marriage:**

In India marriage is not just a union between two people but is considered as a ‘meeting of two souls.’ Why then must this union always be between a man and a woman? Sociologists define marriage as a socially supported union involving two or more individuals in what is regarded as a stable, enduring arrangement typically based at least in part on a sexual bond of some kind<sup>1</sup>. The recent years document how this social institution has come to evolve and no longer restricts itself to the relationship between a man and a woman but is inclusive of same-sex couples as well. Argentina, France, U.K., U.S.A., Australia are some of the countries where same-sex marriage has been legalised. But there are many countries where such marriages have still not been legalised, India being one of them. Only recently The Apex Court of India decriminalised consensual homosexual sex between adults however,

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<sup>1</sup>Ashley Crossman, *The Definition of Marriage in Sociology*, THOUGHTCO (November 01, 2019), <https://www.thoughtco.com/marriage3026396#:~:text=The%20Definition%20of%20Marriage%20in%20Sociology%201%20Social,the%20Western%20world%2C%20monogamous%2C%20heterosexual%20marriage%20is%20>

the country is yet to formulate laws giving effect to same-sex marriages.

Marriage is an important institution which is protected in any society. As a consequence, this institution also provides a certain degree of protection to the spouses involved generating certain legal rights and obligations. Hence for the protection of the individuals who identify themselves to be a part of the LGBT community, it is of utmost importance that same-sex marriages be legalised. This does not only benefit the individuals but society as a whole. Legalisation displays a positive message in society. Prejudice and discrimination always impact the society in the ugliest of ways. Denying a group of their right to marry sends the message that prejudice and discrimination are acceptable.<sup>2</sup> Same-sex marriages will also increase the number of successful adoptions. More often than not same-sex couples turn to adoption and this will in turn provide millions of children a stable and safe home. Such unions may also help in reducing divorce rates as there are instances where individuals marry under the pressure of their family or to hide their own sexuality so that they may not face the stereotypes attached to it but a marriage entered into without free consent and willingness is bound to sink and drown. The spouses and the children suffer in turn and ultimately such wedlock either end in divorce or an unhappy marriage continues affecting the child as well. A major problem that same-sex couples face is the difficulty in finding housing as many apartments have the restrictions of 'families only'. The legalisation of such marriages would not only provide housing for same-sex couples but it would help in letting out of apartments as well as increase the tax revenue of the government. Same-sex marriages will further reassert people's belief in democracy and the Constitution.

## **2. Marriage a legal right?**

The aftermath of World War II and the establishment of the United Nations can be traced to contemporary international definitions of human rights. The rights enshrined in the UN Charter are codified in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Bill of Human Rights. The family is the most basic and fundamental unit of society and thus is protected by the state. The law on human rights upholds the positive right of all persons to marry and to create a family. The types of families and relationships that are appropriate are not prescriptive, tacitly recognizing that there are

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<sup>2</sup>Legal Guide, *LGBT Love: Why Same-Sex Marriage Should Be Legal*, MARRIAGE.COM (June 02, 2020), <https://www.marriage.com/advice/same-sex-laws/lgbt-love-why-same-sex-marriage-should-be-legal/>.

many different kinds of social structures around the world<sup>3</sup>. The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948.

Article 16<sup>4</sup> of Universal Declaration of Human Rights provides –

- a) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- b) Marriage shall be entered into only with the free and full consent of the intending spouses.
- c) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 16 is concerned with an adult's right to marry and to find a family if they wish to as well as the equality between men and women in relation to matrimonial rights. This Article lays responsibility on the State to protect its individuals from suffering discrimination and to safeguard the institution of family which is the nucleus of civilization and the basic social unit of any society. Hence we can safely conclude that the right to marry is protected under human rights law on an international level and thus people's prejudice must not dictate an individual's choice in marriage.

In India marriage is considered a legal right as well. Article 21 of the Indian Constitution which provides for the "Protection of Life and Personal Liberty", also includes within its ambit the right to marry. In the case of *Shafin Jahan v. Asokan*

*K.M.*<sup>5</sup> more popularly known as the *Hadiya case*, the Supreme Court of India stated that "What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end"<sup>6</sup>. After the 2018 judgment in the case of *Navtej Singh Johar v. Union of India*<sup>7</sup>, the Apex Court unanimously declared Section 377<sup>8</sup> of the Indian Penal Code unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same-sex."<sup>9</sup>The issues raised

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<sup>3</sup> Legal India Admin, *Right to Marry under Right to Life: Panoramic View*, LEGAL INDIA (March 17, 2016), <https://www.legalindia.com/right-to-marry-under-right-to-life-panoramic-view/>.

<sup>4</sup> Universal Declaration of Human Rights, United Nations, <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>5</sup> (2018) 16 SCC 368.

<sup>6</sup> (2018) 16 SCC 368.

<sup>7</sup> (2018) 10 SCC 1.

<sup>8</sup> The Indian Penal Code, 1860, S. 377.

<sup>9</sup> (2018) 10 SCC 1.

in this case also included Article 14 and Article 15 of the Indian Constitution which provides for Equality before Law and Prohibition of Discrimination on grounds of religion, race, caste, sex, or place of birth respectively. Section 377 was deemed violative of not only Article 21 but of Article 14 and 15 as well. Article 14 propounds that all like should be treated alike. This article provides twin conditions –

- i) Classification must be based on an intelligible differentia.
- ii) The said differentia must have a rational nexus with the object sought to be achieved by the provision.

In *M. Nagaraj v. Union of India and Ors.*<sup>10</sup> it has been held that the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. The Justice J.S. Verma Committee on Amendments to Criminal Law has observed that the term “sex” occurring in Article 15 includes sexual orientation.<sup>11</sup>

This poses the question that if the consensual relationship between same-sex adults is no longer criminalised they why is it that even after a period of 2 years these couples still cannot register for marriage. Is it reasonable and justified that a particular section of the society cannot choose to get married to the person of their choice based on their sexual orientation? Does this meet with the reasonable classification of Article 14? Is this not propagating discrimination on the basis of sex prohibited under Article 15? What about being violative of Article 21? Even after decriminalisation of homosexuality, prejudice and disdain towards the LGBT community still remains and to add to that the ruling government refused to make any laws or make any changes in the current law structure relating to matrimony for the community.

### 3. Personal Laws and same-sex marriage

India is a country where various personal laws exist which deals with the institution of marriage and family. These personal laws are being followed by different groups of people having different religious beliefs. The citizens can get married under their chosen personal law or common law of civil marriage. When we talk about marriage most of the time without hesitation, we assume that it is a union between two adults of the opposite sex.

Section 5 of the Hindu Marriage Act, 1955 provides conditions for a Hindu marriage. The first line of this section starts by stating, “A marriage may be solemnized between any two

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<sup>10</sup> AIR 2007 SC 71.

<sup>11</sup> (2018) 10 SCC 1.

Hindus, if the following conditions are fulfilled, namely:”. The act itself nowhere mentions that this particular union is taking place between a man and a woman, it only talks about two Hindus. However, the underlying impression has always remained that the act codifies marriage between a man and a woman. This Act is applicable to any person who is a Hindu, Buddhist, Jain, or Sikh by religion. The Indian Christian Marriage Act, 1872, provides that, in compliance with the provisions of the Act, any marriage between individuals, one or both of whom are Christians, or Christians, shall be solemnized. Section 60 of the Act provides that the age of the man intending to be married is not less than 21 years and that the age of the woman intending to be married is not less than 18 years. The Muslims are governed by the Islamic Law and there is no codified law provided by the parliament. Marriage is a contract, as per Islamic law, and the object of marriage is to permit sexual intercourse for the procreation of children between a man and a woman.<sup>12</sup>The Special Marriage Act, 1954<sup>13</sup> states that the male must have completed the age of twenty-one years and the female the age of eighteen years. It further provides that the parties should not be within the degrees of prohibited relationship. Even though the Acts do not explicitly mention that marriage under a particular Act is a union between a man and a woman yet the impression given by them remains the same.

This does not mean that same-sex marriages have never taken place in India. After the 2009 verdict,<sup>14</sup> a case of legal recognition of same-sex marriage was granted by the Punjab and Haryana High Court in 2011, making Savita and Beena the first lesbian couple to be legally married.

It is regrettable that as of now there is no marital law which encompasses same-sex marriages within it in India. The country has a long battle to fight to remove heterosexism from the minds of its masses.

#### 4. Recent Developments

On September 8, 2020, a Public Interest Litigation<sup>15</sup> (PIL) was filed in the High Court of Delhi demanding for the recognition of same-sex marriages under the Hindu Marriage Act, 1955. It was filed by intersex rights activist Gopi Shankar, founder of Lesbian collective Giti Thadani, transgender rights activist G. Oorvasi, and Senior Fellow at the Institute of

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<sup>12</sup> Ananya Khanna, *Same-Sex Marriages in India*, ACADMIKE (January 12, 2015), <https://www.lawctopus.com/academike/same-sex-marriages-in-india/>.

<sup>13</sup>The Special Marriage Act, 1954, S. 4 (c).

<sup>14</sup> Naz Foundation v. Government of NCT of Delhi and Ors., 2009 SCC Online Del 1762 (India).

<sup>15</sup> Abhijit Iyer Mitra v. Union of India, W.P. (C) 6371/2020.

Peace and Conflict Studies Abhijit Iyer Mitra.

The petition brought into question Section 5 of the Act which provides Conditions for a Hindu marriage. The section only talks about the solemnization of a marriage between any two Hindus and has no mentioning of the marriage taking place between a man and a woman. The petition demanded that the Hindu Marriage Act be inclusive of the same-sex marriages as well. Since the year 2018<sup>16</sup> after the changes made in the Section 377 of IPC this was the first direct attempt made to make a marital law inclusive of the same-sex marriages. The PIL was filed because even after the decriminalization of consensual homosexual sex the couples were still unable to register for marriages. However, there are quite a few lacunas in this petition. The biggest one being that the petition only mentions the Hindu Marriage Act and the Special Marriage Act. It seeks marriage laws only for the Hindu LGBT couples and does not take into account other personal laws which are prevalent in India causing a rift between the Community itself. This petition further excludes the problems faced by the transgender men and women while registering for marriages. In the case of *Arunkumar v. Inspector General of Registration & Ors.*<sup>17</sup> the petitioner and his wife Sreeja both professing Hindu religion solemnized their marriage according to the Hindu rites and went to register their marriage however the Registrar refused to register the same as Sreeja was a transgender woman. In accordance with the Section 7(1)(c) of the Tamil Nadu registration of Marriages Act, 2009, if the documents submitted to the Registrar of Marriages do not prove the marital status of the parties, they can refuse to register the marriage. In this case, where the marriage between the parties was said to have been solemnized, the temple authorities had not given any certificate confirming that the marriage had been carried out.<sup>18</sup> The court directed the respondent to register the marriage while upholding the fundamental rights of the second petitioner. The court also cited the case of *National Legal Services Authority v. Union of India*<sup>19</sup> where the Apex Court upheld the transgender persons' right to decide their self-identified gender.

## 5. Same-sex marriages around the world

### Netherlands:

Netherlands became the first country to legalize same-sex marriage around the world on

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<sup>16</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>17</sup> 2019 SCC Online Mad 8779.

<sup>18</sup> 2019 SCC Online Mad 8779.

<sup>19</sup> (2014) 5 SCC 438.

April 1, 2001. A bill was passed for its legalization in House of Representatives on September 12, 2000 and by the Senate on December 19, 2000.

### **South Africa:**

Same-sex marriages in South Africa were legalized after the Civil Union Act, 2006 came into force on November 30, 2006. In the case of *Minister of Home Affairs v. Fourie*<sup>20</sup> the court held that common-law definition of marriage should include same-sex spouses. “Denying people access to marriage.... it’s denying them the status and dignity of being ordinary citizens in society” – South African Judge Albie Sachs, in Constitutional Court decision striking down statute defining marriage as “between one man and one woman.”<sup>21</sup>

### **United States:**

In 2015 all fifty states of America legally recognized same-sex marriages. It began with recognition from one state in 2004 to all in 2015. In June, 2015 the Supreme Court in the case of *Obergefell v. Hodges*<sup>22</sup> ruled that it is the fundamental right of the same-sex couples to get married on the same terms as heterosexual couples.

### **United Kingdom:**

The legalization of same-sex marriage in the United Kingdom began with England and Wales in 2014 followed by Scotland in the same year and finally Northern Ireland in the year 2020.

United Kingdom also happens to be the same country that brought the section 377 of IPC, 1860 in India during the British Rule which till recently criminalized homosexuality in India. The section was modelled on the Buggery Act of 1533 which was the country’s first civil sodomy law. The irony remains that those who criminalized homosexuality in India not only decriminalized the same in their country but also gave legal recognition to same-sex marriages before India. Those against such unions will provide all kinds of illogical and impractical reasons for berating them. The most common reason being unnatural as it does not result in the reproduction of children. Another commonly used reason is religion even though many Hindu scriptures are inclusive of the LGBT community. Prejudice and disdain

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<sup>20</sup> Minister of Home Affairs v. Fourie, [2005] ZAAC 19 (South Africa).

<sup>21</sup> Meredith Heagney, Albie Sachs on the struggle for Same-Sex Marriage Rights in South Africa, The University of Chicago, THE LAW SCHOOL (April 30, 2013), <https://www.law.uchicago.edu/news/albie-sachs-struggle-same-sex-marriage-rights-south-africa>.

<sup>22</sup> Obergefell v. Hodges, 576 U.S. 644 (2015).

for the community has become so deep sated in the years that people often do not take into consideration the origin of criminalization of same-sex relationships.

## C. ADOPTION, GUARDIANSHIP AND SURROGACY

### 1. Regulations on Adoption: -

#### a) Hindu Adoption and Maintenance Act, 2005

This law or HAMA provides that a married Hindu man or woman can have a child with the consent of his or her partner. However, in the event that the spouse is of an unsound mind, or has renounced the world or changed his/her children, this permission would not be needed. Similarly, this statute also enables an infant to be adopted by single men and women, given they have reached the age of majority and are not of unsound mind.

#### b) Adoption Regulation

The Adoption Regulation Act, 2017 is more complex in terms of regulations than HAMA. As in the case of HAMA, unmarried men and women can also be provided as long as they are mentally, emotionally and financially stable and do not suffer from any life-threatening illness. Apart from this, this act does not allow one man to adopt a girl child but the same limitation does not apply to a woman and she can have a male child. This is different from HAMA where even one man can have a baby girl as long as there is a 20-year gap between the two.

### 2. Same-sex couples and transgender people

Although Section 377 of the Indian Penal code, 1860 has been decriminalised, the law still undermines the LGBTQIA+ community in child-rearing. This shows that gay couples are not equal before the law.

#### a) How adoption law discriminates the LGBTQ+ couple<sup>23</sup>

- i. In terms of regulation 5 (3) of the Adoption Regulation Act, 2017, couples with only two years of stable relationship are allowed to have a child. In addition, this section uses the terms "husband" and "wife" which means that it does not respect the right of adoption in the case of same-sex couples.
- ii. Since there are different adoption rules applied in the case of men and women in that way, the application of these rules in relation to spouses will lead to understanding.

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<sup>23</sup> Diva Rai, *Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal*, IPLEADERS (June 2, 2020), <https://blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/amp/>.

- iii. In addition, according to the NALSA<sup>24</sup> ruling, people have the right to choose their sexual orientation and to be provided with sexual services. So, in the event that a woman has a child and then begins to change sex into a man, then there is very little clarity about the same legal implications.
- iv. It does not deny the fact that adoption is a complex problem and even couples who are not of the same sex also have a serious problem accepting adoption considering anti-trafficking laws. But the fact is that at least one gay couple can apply for adoption while same-sex couples are not even allowed.

**b) Inferior family argument**

Another reason after not allowing same-sex couples to take a child is that every child should be able to know the importance of mother and father. Same-sex couples should therefore be denied access to the child as the child has not been raised in a "low-income family". However, the irony is that the law would condemn a child raised as an orphan without both parents rather than being raised by same-sex couples.

Ironically the law continues to slander LGBTQIA + couples in child-bearing even though there are more than 20 million orphans and abandoned children in India, many of whom live in extremely poor conditions.

**c) Same-sex marriages are not recognised**

Another explanation of why homosexual couples are not permitted to adopt a child together is that same-sex marriages are not legal in India.

**3. Guardianship**

Guardianship refers essentially to a collection of rights and responsibilities that an adult has over a minor's personhood and property. Guardianship and custody are very closely related. In India, the Hindu Minority Guardianship Act, 1956 (HMGA) regulates guardianship in the case of Hindus, while the Guardianship and Wards Act, 1956 (GWA) is secular legislation applicable to all people.

**a) Background**

In India, traditionally only the father was considered a naturalist and had one right over the child. In addition, according to Section 6 of the Hindu Marriage Act, 1956 the mother may have authority over the child only after the father.

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<sup>24</sup> (2014) 5 SCC 438.

It was reinterpreted in the case of *Geeta Hariharan v. Reserve Bank of India*,<sup>25</sup> where the court pronounced that the expression “after the father” should not be construed that mother can have guardianship right after the father's death, but rather suggests that in the absence of a father, such right may also be exercised. Such as when the father does not financially, emotionally or materially care for the infant.

#### **b) Heteronormative Presumptions**

Although the verb language is not gender-biased, it is viewed in binary views. Therefore, in the presence of LGBTQIA + parents or transgender parents where sex is unclear, the application of these rules will create some problems, which is why it is important to define those terms.

#### **c) Best Interest of the child**

The principle of “interest in the offspring” is a key consideration in granting the right to custody or custody of any person. The court recognizes that child care is provided by a person who shows care, concern and can provide a normal place for the child. This policy is highly flexible and can be applied to a variety of realities.<sup>26</sup>

Therefore, in order to bring in a guardian law that includes the LGBTQ + community. in line with the judgment of NALSA and Navtej Singh Johar<sup>27</sup>, the legal language must go beyond the basics so that such people regardless of gender, relationship formation or sexual orientation become the guardians. In reality, however, this will depend on how the term “child interest” will be interpreted by the court in respect of LGBTQ + community.

### **4. Surrogacy**

According to a new parliamentary surrogacy bill<sup>28</sup> passed, LGBTQ + singles and couples have been barred from having children of their own. Although the bill was passed with a view to curbing the sale of foster care and preventing the exploitation of mother and child, instead of achieving the purpose it has been reduced to a "consistent" law that repeats the ideas of the ancient family system ".

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<sup>25</sup> (1999) 2 SCC 228.

<sup>26</sup> supra note 1.

<sup>27</sup> (2018) 10 SCC 1.

<sup>28</sup> The Surrogacy (Regulation) Bill, 2019.

### **Restrictions and Regulations**

The provisions of this bill are so strong that even gay couples cannot easily meet the legal requirements to be legally recognized. The bill, among other things, states that a mother by agreement must be a "close relative", without specifying a name, or the condition that those who marry should have been married for the past five years regardless of their age and how late they should have been, etc. In addition, the law does not allow any unmarried men or women, or LGBTQ + couples to become parents by adoption.

## **D. RELIGION AND LGBTQ+**

### **Diversity and the Queer in Hinduism:**

Manusmriti is one of the many, but most common, Dharmashastras, which became important after the British chose it to develop their design of India's legal system, particularly in Hindu personal law matters. Prior to British interference, its importance in regulating the ethics of Hindu society was questioned by some scholars.

Homosexuality has never been seen historically as unspeakable in Indian texts or religions. Hindu faith is complex because of the different religious lifestyles that prevailed in ancient India. One of the early treaties on Hindu Law, Manusmriti (Laws of Manu), prohibits men from practising 'ayoni' (non-vaginal) sex.<sup>29</sup> However, no evidence has been found that anyone in ancient India has been punished or prosecuted for same-sex relations.

According to the book,<sup>30</sup> I am Divine, so are you, the author stated that Hinduism has no 'sin' paradigm under which it locates homosexuality. He provided a personal viewpoint on how the dignity of queer people can be affirmed by karma-based religions such as Hinduism, Buddhism, Jainism, and Sikhism. This article drew some of the points from this book in order to draw attention to how LGBTQ+ people are mentioned in Hindu mythology as opposed to what people are told.

Vatsyayana's Kama Sutra is the most famous ancient text that deals most freely with desire. It accepts sexual activity as the central theme of our lives as a human, and gives the desire, in particular the desire of the body and the senses, its rightful place as a human activity. The text can be said to be more worldly and inclusive.<sup>31</sup>

Many of Indian temples openly celebrate erotic imagery and sexuality in their architecture,

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<sup>29</sup> MANU, MANUSMRITI: THE LAWS OF MANU (Sir William Jones trans., 1794).

<sup>30</sup> DEVDUTT PATTAIAK & JERRY JOHNSON, I AM DIVINE SO ARE YOU (Jerry Johnson, HarperCollins India 1st ed. 13 December 2017).

<sup>31</sup> DEVDUTT PATTAIAK & JERRY JOHNSON, I AM DIVINE SO ARE YOU 119 (Jerry Johnson, HarperCollins India 1st ed. 13 December 2017).

including many that portrayed homosexuality. The temples of Khajura and Chapri are striking examples of this. One of the sculptures in Khajura's Visvanatha Temple depicts a monk gently caressing a layman.<sup>32</sup>

In some instances, ancient books seem to be quite progressive in protecting homosexuals and the third-gendered from abuse by the general public. Arthashastra instructs parents to provide the basic necessities of food and clothing to their offspring of the third generation and not to neglect their needs. It goes on to state that in cases where there are no relatives, the King must assume responsibility for those individuals. Arthashastra also declares that it is an offence to vilify or publicly mock any person of the third sex and sets out various penalties for such crimes.<sup>33</sup>

So, while we can admit that in pre-colonial subcontinental thinking, homosexuals did not share the same status as heterosexual counterparts, evidence suggests that homosexuals and gender-responsible people have been widely recognised. Their existence has been recognised and studied. At least they were tolerated if not accepted as an expression of the world's natural diversity.<sup>34</sup>

This view is further validated when placed in the larger metaphysical the Rig Veda narrative of Hinduism: vikriti evam prakriti, which means that what appears to be unnatural is also natural, or that diversity is nature.<sup>35</sup>

## E. CONCLUSION

Hindu religion evidences LGBT+ presence in India in contrary to what is believed by many people. That is to say, homosexuality was not an offence until Britishers enacted Section 377 of IPC, 1860. This led to the beginning of homophobia in India. For many centuries, the LGBT+ community had been treated as an outcast or abnormal being. They had been persecuted, punished, discriminated and ostracized for expressing their gender identity. They had been denied their basic fundamental right to live with dignity. They face problems like lack of education facilities, unemployment, lack of medical facilities, and so on. Section 377 had reinforced stereotypes about sexual orientation.

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<sup>32</sup> DEVDUTT PATTNAIK & JERRY JOHNSON, I AM DIVINE SO ARE YOU 120 (Jerry Johnson, HarperCollins India 1st ed. 13 December 2017).

<sup>33</sup> DEVDUTT PATTNAIK & JERRY JOHNSON, I AM DIVINE SO ARE YOU 121 (Jerry Johnson, HarperCollins India 1st ed. 13 December 2017).

<sup>34</sup> DEVDUTT PATTNAIK & JERRY JOHNSON, I AM DIVINE SO ARE YOU 121 (Jerry Johnson, HarperCollins India 1st ed. 13 December 2017).

<sup>35</sup> DEVDUTT PATTNAIK & JERRY JOHNSON, I AM DIVINE SO ARE YOU 122 (Jerry Johnson, HarperCollins India 1st ed. 13 December 2017).

So, homophobia did not start in a day and in the flourish of a single decision of Navtej Johar<sup>36</sup>, it won't vanish either. Judgments, after all, are not magic wands that render homophobic people into empathetic people overnight. But the moral force of 2018 judgment where Section 377 was decriminalized will gradually remove the discrimination experienced by the LGBTQ+ community.

LGBT+ community are not lesser than citizen and hence, same-sex marriages should be legal in India and they should be given rights in terms of adoption, guardianship and surrogacy.

Law needs to be changes as the needs of the society changes and hence, it is essential to bring LGBT+ community from margins to the mainstream through judicial activism and the enactment of requisite legislation, along with providing gender and sexuality-based education to sensitize people about it so that rights of the LGBTQIA+ can be protected and they don't have to face discrimination.



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<sup>36</sup> (2018) 10 SCC 1.