



# Validity of Same Sex Marriage in India: An Analysis

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## Abstract

Marriage, initially defined as a union between a man and a woman, is gradually being replaced by partnerships of any gender in most industrialized countries. Marriages between two people of the same gender are referred to as same-sex marriages. Same-sex marriage remains a contentious issue in India, despite global advancements in LGBTQ+ rights. Despite continuous efforts to acknowledge and legalize them, same-sex marriages are nonetheless illegal in India. This subject is significant since it pertains to LGBTQ+ people's basic human rights as well as the acceptance and defense of their partnerships. In addition to giving LGBTQ+ couples legal status and protection, legalizing same-sex marriage would increase social acceptance and lessen prejudice against the community. It is a critical problem for LGBTQ+ rights activists and advocates around the world, and its significance extends beyond the legal sphere to encompass broader social and cultural attitudes of the LGBTQ+ community. In this context, two urgent questions arise. Is it possible for personal laws to legalise same-sex marriage? Should the rights of spouses resulting from same-sex marriages be governed by a completely separate law? This paper examines the validity of same-sex marriage in India, analyzing legal, social, and human rights perspectives.

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## INTRODUCTION

Same sex marriage is the union of two people of same sex or gender, entered into a civil or religious ceremony. A legal union between two people of the same gender is referred to as a "same sex marriage", and it usually carries with it the same right, obligations, and perks as marriages between people of different genders. It's an acceptance of love, fidelity, and companionship for people of all sexual orientations. The Indian legal system does not recognize same-sex marriages, and the country's laws define marriage as a union between a man and a woman. These marriages are not accepted in most of the Indian society.

This subject is significant because it pertains to the acknowledgement and defense of LGBTQ+ people's relationships as well as their fundamental human rights. People who don't fit the heteronormative definitions of gender and sex make up the LGBTQ community. However, lesbian, gay, bisexual, transgender, and queer are what the phrase stands for. It addresses both gender and sexuality at the same time. While lesbian, gay, bisexual are sexual preferences of persons, transgender is a gender who does not identify with the binary of male and female genders. The term 'queer' is broadly used to signify the queerness of

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the collective. Other terms like intersex, asexual etc., all fall within the term.

Proponents of same-sex unions believe that gay and lesbian couples should be treated the same as heterosexual couples and should be permitted to be married like everyone else. Activists assert that the campaign for marriage equity is motivated by more than just a desire to preserve the values of equality and nondiscrimination. For example, they draw attention to the fact that long-term gay relationships frequently lack the fundamental rights and benefits currently enjoyed by legally married heterosexual couples, such as the ability to share health and pension benefits and hospital visitation privileges.

Social conservatives and others who oppose same-sex unions assert that marriage between a man and a woman is the bedrock of a healthy society because it leads to stable families and, ultimately, to children who grow up to be productive adults. Allowing gay and lesbian couples to wed, they argue, will radically redefine marriage and further weaken it at a time when the institution is already in deep trouble due to high divorce rates and the significant number of out-of-wedlock births. Moreover, they predict, that giving gay couples the right to marry will ultimately lead to granting people in polygamous and other nontraditional relationships the right to marry as well.

Social acceptance of the LGBTQ community has advanced substantially on a global scale. The judiciary in India saved the community through-out a lengthy battle. The English-based Indian legal system, victimised sexual minorities under Section 377 of the Indian Penal Code, now repealed. The section that classified unnatural offences included the LGBTQ community and led to an atmosphere of violence, oppression, and terror from both the police and the broader public. The Supreme Court's ruling gave the community a legal basis and marked a significant advancement in the normalisation of the concept of sexual minorities in India.

Transgender persons are in a better position owing to their recognition as the third gender, though the legal enactment drafted for them has been subjected too much criticism. Systematically oppression

has forced sexual minorities to live in anonymity. Discrimination manifests in various forms, such as the exclusion of transgender individual from social organizations their denial of work or employment and the guaranteed rights such as marriage, reproduction or adoption and maintenance for same sex couples among others. Despite the decriminalisation, courts in India continue to deny social rights including the marriage rights of same-sex couples. This is the obvious next step for the community to ensure a normal life but the consistent opposition by the government has made it extremely challenging.

## History of Same Sex Marriage

The history of LGBTQ+ rights in India dates back to the colonial era when the British introduced Section 377 of the Indian Penal Code in 1860, which criminalized homosexual acts. Even after India gained independence in 1947 this law, continued to discriminate against and prosecute LGBTQ+ individuals for over a century.

The history of same-sex marriage is complex and varies across different cultures and time periods. However, the modern push for legal recognition of same-sex marriage gained momentum in the late 20th and early 21st centuries.

The Netherlands was the first country to legalize same-sex marriage in 2001, followed by others such as Belgium, Canada, Spain, and South Africa. The legal recognition of same-sex marriage has been a significant milestone in the fight for LGBTQ+ rights. In 2015, the US Supreme Court's landmark decision in **Obergefell v. Hodges** established marriage equality nationwide, declaring that same-sex couples have the constitutional right to marry. This ruling built upon previous legal victories, such as the repeal of the Defense of Marriage Act (DOMA) in 2013. Internationally, many countries have legalized same-sex marriage, including Argentina, Canada, and the Netherlands. However, some nations maintain restrictions or bans on same-sex marriage, often citing cultural or religious objections.

The legal position of same-sex marriage varies worldwide. Many countries have legalized it, either through legislation or court rulings, granting equal marriage rights to same-sex couples. However, some countries still prohibit same-sex marriage,

often due to religious or cultural reasons. Additionally, in some places where same-sex marriage is legal, there may still be social or political challenges to full acceptance and equality for LGBTQ+ individuals. It's essential to check the current laws and regulations in specific jurisdictions for the most accurate information.

India does not recognize same-sex marriage. In 2018, the Indian Supreme Court decriminalized consensual homosexual acts between adults, overturning Section 377 of the Indian Penal Code, 1860 (Navtej Singh Johar vs. Union of India). However, same-sex marriage remains unrecognized, as there has been no legislative or judicial action to legalize it. LGBTQ+ rights activists continue to push for legal recognition and equality of same-sex couples in India. However, the legal landscape regarding same-sex marriage has not changed significantly in the country.

## Problems Faced by LGBTQ+ Community

### *Marginalisation*

LGBTQ+ individuals may experience multiple forms of marginalization such as sexism, poverty, discrimination, social unacceptability or other factors alongside homophobia or transphobia that negatively impact their mental health. Often, such marginalisation leaves LGBTQ+ people without access to the basic services such as medical care, justice and legal services, and education.

### *Responses of Families to LGBTQ+ Children*

Rejection and serious negative reactions kept many LGBTQ+ youngsters from telling their parents about their feelings. In a society bound by a rigid set of social and cultural norms that dictate the terms and conditions of education, career and marriage, the lack of family support can prove to be a big blow to the mental and physical health of LGBTQ+ people.

### *Stigma and stereotypes*

LGBTQ+ people are labelled with negative stereotypes and made fun of, thereby robbing them of their goal of getting recognition and making them feel socially excluded.

## **Socially Unrecognized**

School uniforms, dress code and appearance, access points for travel (including ticket booking forms, security screening and toilets) are often gendered. Frequently, LGBTQ+ individuals are forced to negotiate their gender identity in public while on public transportation.

## **Same Sex Marriage under Personal Laws**

Marriages and weddings are very important in Indian society, both religiously and culturally. Religious rites are an integral aspect of marriage, which is regarded as a sacrament. This could account for the numerous lesbian marriages that occur, such as religious rites performed, garlands exchanged in temples, and quasi-legal friendship contracts (*maitrikarar*) in a number of documented instances. For example, in 1988 a Hindu ceremony was used to marry two policewomen. Their families and the community welcomed and supported their marriage even though it could not be legally recognized and they faced work suspensions.

Interestingly, the numerous reported lesbian marriages involves small town, lower-middle class, non-English speaking women who are not associated the LGBT + movement. In this context, the most satisfactory course would be to recognize same-sex marriages under Indian personal marriage laws. In India, Christians, Muslims and Hindus have different laws in relation to marriage, succession etc. The Hindu Marriage Act that governs Hindus, Sikhs, Jains and Buddhists states that a marriage may be solemnized between any two Hindus. It also specifically provides that the bridegroom should have attained the age of twenty one and the bride eighteen. The Christian Marriage Act provides that the age of the man shall be twenty one and the age of the woman eighteen. Since Muslim marriages are not governed by a statute, there is no statutory definition of 'marriage', but they are normally considered to be a contract for the purpose of procreation. Thus, all Indian personal laws appear to envisage marriage as only a heterosexual union.

## **Advent of Same Sex Marriage in India**

India, at its core, is a conservative nation. India is a secular country that upholds everyone's right to

freely practice, declare, and spread any religion. Many social norms and private regulation in India. Many societal standards and private rules are based on faith because of their religious orientations. This covers topics pertaining to same-sex relationships as well. An intriguing image of the shift from an open, liberal society to a conservative one may be seen by examining the history of same-sex partnerships. India is a secular nation which safeguards for all freedom to practice, profess and propagate any religion of choice. Being religiously inclined means that many aspects of society and personal laws are based on faith. This also includes aspects regarding same-sex relationships. An analysis of the history of same-sex relationships reveals an interesting picture of a transition from an open, liberal society to a conservative one. British introduced legal sanction in India through the Indian Penal Code, specifically Section 377 (Indian Penal Code, 1860). This provision made such relationships punishable with imprisonment and fine, thereby creating an atmosphere of domination and discrimination against same sex couples. The journey of subsequent decriminalization took decades, eventually being addressed in 2018 with the Navtej Johar's case.

Historically, there have been many references to same-sex relations and transgender persons in various kingdoms in India. The idea of gender fluidity reflected in Vedic times and Hindu scriptures, art and architecture. Some of the prominent examples include Valmiki's Ramayana which refers to Hanuman seeing rakshasa women kissing in Lanka the birth of King Bhagirathi; the temples of Khajuraho, Ellora caves in Maharashtra and Sun Temple in Kornak and the well-known text, Kama Sutra, which deals with sexuality, eroticism and emotional fulfillment of life, authored by Vatsyayana. The Khajuraho temples serve as a prime illustration of the community's previous tolerance. The Chandela dynasty built this temple between 950 and 1050 AD. There are depictions of same-sex relationships in the temple sculptures, such as an open portrayal of nude men and women erotically embracing with fluid sexuality. Comparable photos at Kornak's Sun temple and the Ellora caves which depict the life of Gautam Budha, the founder of Buddhism, have such paintings portraying men and women in same-sex intercourse.

These several instances demonstrate the existence of a liberal society that is free from prejudice and that freely portrays men and women in such prestigious settings as a temple. The Baburnama is the most well-known example of a text in Islamic literature discussing same-sex attraction. Some well-known authors who have demonstrated similar allusions are Sufi poets like Sarmand Kashani and Sufi Saint Bulleh Shah. Social and legal norms in India evolved alongside with the British Empire, adopting a more anglicized view of society. The Indian system was forced to adopt western ideals, many of which were shaped by the Church. The Indian legal system was established by the British, and homosexuality was made illegal when Lord Macaulay penned the Indian Penal Code. This legal need developed in tandem with the societal concept of morality what is right and wrong and the idea that it is unethical. Morality combined with religious belief in life after death led to social criticism of these customs, which was evidently a denial of civility and compassion.

This perspective was deeply embedded in society, and the Indian Penal Code and its Section 377 were kept in the legal system long after independence. The British, who had instituted this legal provision, removed it in their own country in 1967, but the fight persisted in India until 2018.

### ***Religious and Moral Validity***

Religious perspectives on same-sex marriage vary widely, with some denominations embracing marriage equality and others opposing it. Some argue that same-sex marriage contradicts traditional religious teachings, while others see it as a matter of personal freedom and love.

Moral arguments against same-sex marriage often center on natural law or traditional values. However, many counter that love, commitment, and mutual respect are the fundamental principles of marriage, regardless of sexual orientation.

### ***Psychological and Emotional Validity***

Research has consistently shown that same-sex relationships exhibit similar levels of love, commitment, and relationship satisfaction as heterosexual relationships. Marriage can provide emotional and mental health benefits, including reduced stress

and increased well-being.

The American Psychological Association recognizes that same-sex couples experience similar relationship dynamics and challenges as heterosexual couples, and that marriage can have positive effects on mental health.

## Status of Same Sex Marriage in other Countries

There are records of marriage between men dating back to the first century. The first same-sex couples to be married legally in modern times were Michael McConnell and Jack Baker Michael McConnell and Jack Baker in 1971 in the United States. The first law providing for marriage equality between same-sex and opposite-sex couples was passed in the continental Netherlands in 2000 and took effect on 1 April 2001. The application of marriage law equally to same-sex and opposite-sex couples has varied by jurisdiction, and has come about through legislative change to marriage law, court rulings based on constitutional guarantees of equality, recognition that marriage of same-sex couples is allowed by existing marriage law, and by direct popular vote, such as through referendums and initiatives.. The most prominent supporters of same-sex marriage are the world's major medical and scientific communities, along with human rights and civil rights organizations, while it's most prominent opponents are religious fundamentalist groups. Polls consistently show continually rising support for the recognition of same-sex marriage in all developed democracies and in many developing countries.

## Judicial Observation on Same Sex Marriage in India

While the legislature has been sluggish on this issue, the court has been very active in the last several years, according to a judicial examination of LGBTQ rights in India. In particular, the Supreme Court has rendered numerous significant rulings in the past ten years that have cleared the path for the acknowledgment of this marginalised group's fundamental rights. The failure of the lawmakers in this regard reflects the conservative nature of the Parliament which had to be addressed by a liberal judiciary.

Here are a few of the most well-known Supreme Court rulings on the matter.

### ***Naz Foundation v. Government of NCT Delhi (2010)CRI. L. J. 94***

The Delhi High Court ruled in this historic case that Section 377 of the Indian Penal Code was unconstitutional. One of the arguments from Naz Foundation was that section 377 violated Article 14 on two grounds:

First, because it was unreasonable and arbitrary to criminalise non-procreative sexual relations. Second, because the legislative objective of penalising "unnatural" acts had no rational nexus with the classification between procreative and non-procreative sexual acts.

The decision cleared the path for the British era statute to be legally reviewed because it was based on a Public Interest Litigation that the NGO had filed. The Court ruled that it violated Articles 14, 15, and 16 of the Indian Constitution, which cover all rights pertaining to equality.

### ***NALSA v. Union of India AIR 2014 SC 1863 and (2014) 5 SCC 438.***

This case was brought after the heavily condemned **Union of India vs. Suresh Kumar Koushal** AIR 2014 SC563. The Supreme Court decriminalised Section 377 in Naz Foundation but recriminalized it in Suresh Kumar. Led by the National Legal Services Authority, pertinent questions were raised in support of the transgender population. This verdict proclaimed the third gender to be transgender people. The ruling established a thorough set of rules that safeguard the liberties and rights of the transgender population. Legislative developments thereafter produced a precise statute that will advance their rights. The Transgender Persons (Protection of Rights) Act, 2019 is the result of lengthy discussions and numerous draft laws.

The requirement that every individual be recognised as "transgender" based on a certificate of identification issued by a district magistrate is a major problem with the law, despite its necessity and some of its favourable qualities. Taking into account how sensitive the topic is, this is a serious problem.

### **Justice (Retd.) K. S. Puttaswamy v. Union of India AIR 2018 SC (SUPP) 1841**

This ruling recognised the right to privacy as a component of the Article 21 Right to Life and Liberty. It concluded that everyone has the right to privacy, regardless of their gender or sexual orientation. Justice Chandrachud said in the ruling that the LGBTQ community ought to have a right to privacy, specifically autonomy and independence from government meddling. Particular attention was paid to the freedom of sexual orientation, autonomy, and partner selection.

The Court noted that “the fundamental rights guaranteed by Articles 14 (right to equality), Article 15 (discrimination on grounds of sex), and Article 21 (right to life and personal liberty) of the Constitution lie at the core of the right to privacy and the protection of sexual orientation.” This ruling served as the main impetus for the historic Navtej Singh Johar case.

### **Navtej Singh Johar v. Union of India AIR 2018 SC 4321, (2018) 10 SCC**

Supreme Court struck down the 158 years old law on homosexuality that made carnal intercourse against order of nature a criminal offence. This judgment decriminalised homosexuality in India by reading down the infamous Section 377. Striking down the section to the extent that it criminalised consensual intercourse between two consenting adults, the judgement held that the section violated Articles 14, 15, 16 and 19(1)(a) of the Indian Constitution. The right to live with dignity, the freedom to autonomy and choice in personal life were recognized, drawing inspiration from the Puttaswamy judgement.

**Justice Nariman** has optimistically directed that wide publicity to this judgement will remove ignorance and misplaced beliefs of Indian society at large.

### **Supriyo @ Supriya Chakraborty & Anr. v. Union of India W P (C) No. 1011 / 2022**

In this case, Hindu Personal laws, Special Marriage Act, 1954 and Foreign Marriage Act, 1969 all were challenged, but the case was heard on the ground of only Special Marriage Act, 1954. CJI DY Chandrachud, says that if the court reads down or inserts

words into section 4 of Special Marriage Act to give rights to LGBTQ+ community members then it would be getting into legislative domain. Homosexuality is not a urban concept of upper class of society. Queerness can be regardless of one's caste or class or social economic status. Without right to marry which can be given only by the legislature the LGBTQIA+ Community members have the right to choose partners and right to intimate association and state must recognise the rights to enable such couples enjoy the rights of association unhindered.

### **Review petition on the judgement of Supriyo @ Supriya Chakraborty and Anr. v. Union of India RP(C) 1866/2023**

As in 2023, a five judge constitution bench headed by CJI Chandrachud had refused to accord legal backing to same-sex marriage, saying that it is a matter for the legislature to decide.

Post that several review petitions were filed, faulting the judgment for not affording any legal protection to queer couples despite acknowledging the discrimination faced by them. This amounts to abdication of the court's duty to uphold and protect fundamental rights, they have argued. It has also been argued that judgment suffers from errors apparent on “face of the record” and is “self contradictory and manifestly unjust”.

The Supreme Court has power to review its own judgment under Article 137 of Indian Constitution. Many advocates asked for open hearing on review petitions but Supreme Court on July 9, 2024 refused to grant open court hearing in review petitions against its October, 2023 verdict that refused to recognise the right of same-sex couples to enter into marriages or have civil unions.

The case was stated to be heard in chamber by a CJI led 5 judge-benches on July 10, 2024. A five judge bench Chief Justice of India D.Y. Chandrachud and Justices Sanjiv Khanna, Hima Kohli, B.V. Nagarathna and P.S. Narasimha on July 10, 2024 are scheduled to consider-in-chamber the batch of plea seeking review. Justices S.K. Kaul and S. Ravindra Bhat, who have retired from the bench, have been replaced by Justices Sanjiv Khanna and B.V. Nagarathna. Justice Sanjiv Khanna recused on the ground of “personal difficulties”. CJI D.Y. Chandrachud will now reconsti-



tute the bench to hear case.

## Marriage Rights of LGBTQ+ Community

LGBTQ+ community does not have right to marry because right to marriage is not a fundamental right. But in Supriya Chakraborty's case, it was held that the LGBTQ+ Community members have the right to choose partners and right to intimate association and state must recognise the rights to enable such couples enjoy the rights of association unhindered. The CJI and Justice Kaul ruled in favour of recognising a right to form a civil union, but Justice Bhat, Kohli and Narsimha emphasised that there is no unqualified right to marriage under the Constitution and thus it cannot be recognised as a fundamental right. When the right to marry is not a fundamental right but just a statutory right, the majority held that there can be a right to civil union that can be legally enforceable.

It is agreed to setup an inter ministerial committee headed by the cabinet secretary, to examine the administrative steps that the Centre can consider for ensuring certain benefits for the same sex couples even in absence of a legal recognition of marriage.

## CONCLUSION

In summary, insufficient legal frameworks exist to safeguard the fundamental rights and human rights of individuals who identify as LGBTQ+. Marital equality makes homosexuals' lives happier and more fulfilling. Similar to heterosexual couples, consenting adults should be able to marry someone of the same sex. Unless authorised by personal laws, polyamorous marriages should not be permitted (Muslim law-polygyny). All the privileges accorded to heterosexual couples should be granted to the pair. A same-sex couple's fundamental rights are violated when their marital privileges are denied.

Since all of the essential rights are connected, they are unable to exercise any of them. Since they are unable to decide for themselves whether or not to get married, their right to life is violated. After reading Section 377 of the Indian Penal Code, 1860, they were granted a right that is rather tiny in comparison to the number of rights they are denied:

the right to engage in consensual sexual relations, not the acceptance of their identity. It goes without saying that since there is no marriage equality statute, the right to equality is violated. 30 nations across the globe have made same-sex marriage legal and accepted.

In 2001, the Netherlands became the first nation to acknowledge this. India can study the marriage equality laws that are now in place in these different nations and modify its own laws to best suit its constitutional framework. In the Netherlands, couples can choose to live together through a registered partnership or get married. In 2012, the Indian government reported that there were 2.5 million gay people, which is nearly the whole population of Namibia. This was almost ten years ago. This is not a little population. The Parliament must take the necessary action to safeguard this remote community's rights and preserve their health. Seven percent of the 2.5 million LGBT people were HIV positive. Regularising homosexual relations is essential after decriminalising it; otherwise, it will create health havoc as opposed to securing fundamental rights.

It is now essential to investigate these issues thoroughly. The researcher believes that legalising same-sex marriage is the next logical step towards achieving the objectives of human rights for the reasons mentioned above. Not only it is urgently necessary, but it also serves to safeguard the fundamental rights of gays in general. Because a sudden change in marriage laws can be extremely disruptive, it is crucial to modify current rules or make new ones without completely changing the original ones. The sooner we have appropriate marriage laws, the better, as the legal community says, "**Justice delayed is justice denied.**"

However, it is important to note that there is still resistance to LGBTQ+ rights in India, particularly from conservative religious groups. Any attempts to push for greater legal recognition and protection of LGBTQ+ rights could face opposition from these groups, leading to potential legal and political battles. Overall, the future of LGBTQ+ rights in India remains uncertain. While there are positive developments and potential for progress, there are also challenges and obstacles that need to be overcome. It is important for LGBTQ+ activists and supporters

to continue advocating for their rights and pushing for change, while also working to raise awareness and promote greater acceptance and understanding in society as a whole.

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