
THE GAMUT OF CHALLENGES IN INDIA PERTAINING TO SAME-SEX MARRIAGE

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ABSTRACT

“Same-sex marriage”, also referred to as “gay marriage”, is the union of two people who are of the same sex or gender. In more than 30 countries, marriages between “same-sex couples” are recognized and allowed. For a long time, heterosexual marriages have been accepted as the norm. In India, ceremonies involving marriages of homosexuals are still neither recognized nor protected by the law, despite recent developments in LGBTQ+ rights. This is mainly because these kinds of marriages don’t follow the established customs and cultural standards of Indian culture. India is a democratic nation with a multicultural populace that makes a strong effort to uphold the principles of equality and justice for all of its citizens. Despite the existence of the right to marry a person of one’s choice, acceptance of this very particular community in all terms seems to be more tough. The legislative and the judicial fights are still in run so that, one day there will be a brighter society and a better system that accepts and supports all forms of love and union between humans. The legal foundation for the community’s rights and identity was established by the Supreme Court’s decriminalization of Section 377 IPC, which was subsequently strengthened by privacy judgments. Yet, the challenges persist despite judicial progress, indicating the complex interaction between social and legal factors affecting same-sex partnerships in India. The purpose of this article is to examine the legislative developments, sociological viewpoints, and past backdrop of same-sex marriage and homosexuality in India.

Keywords: Same-sex marriage, gay marriage, same-sex couples, LGBTQ+ rights, homosexuality.

1.1 Introduction

Same-sex relationships may appear to be new in contemporary society, although they have existed for a long time. However, the same sex relationship is as natural as everything else on Earth that we call nature. In recent years, the acceptance of relationships between people of the same sex has provoked many discussions. First, LGBTQ+ rights have evolved into a movement that has elevated this oppressed community to a position of prominence in society. Although legal recognition is a new phase, it requires extensive debate and explanation. The decriminalization of the Sec 377 of IPC, 1860¹ marks a greater historical event in the present society. But the question still arises, whether the ground reality regarding the same sex relationship in India has changed or not? The ground reality may seem to have changed a bit but the actual scenario comes into light when we think of the same sex marriages in India. There are no proper laws relating to the marriages that would support LGBTQ+ relations. Today's present scenario is far more complex than just decriminalising the Sec 377 of IPC. People are thriving each day and each moment to fight for their rights and be able to put themselves forth. This article is an example of why this discussion should not just end in the courts, that keeps failing the society because the problem is complex and far more deeply rooted than we could imagine.

1.1.1 Historical and Sociological Background

When a child takes birth, we feel ourselves blessed because a child is a God's creation. We all are God's creativity and we are supposed to be the best decisions of the God. Who are we to judge what the God has created in this nature. Similarly, are we the ones to judge someone else who is also a God's creation on the basis of their genitals, sex, partners, lifestyle and clothing. In short, we all deserve to be the person we are because it is natural and we are a part of the nature.

2.1.1 Historical Viewpoint of Same-Sex Relationships

Regarded as the very first text published discussing homosexuality openly, "Phaedrus" by the Greek philosopher Plato is said to have been written about 370 BCE. It is not a thesis on homosexuality, but it does examine same-sex love in classical Greek society, especially amongst males, as a kind of emotional and intellectual tie. Every documented culture contains

¹ Indian Penal Code, 1860, No. 45 of 1860 (India Repealed 2023).

evidence of gay relationships and same-sex love, whether such relationships were permitted or punished. Homosexuality was present in ancient Israel and then was forbidden as it was not permitted in the Bible, yet it thrived among both men and women in Ancient Greece. Individuals who spent at least a portion of their life as a gender other than their assigned at birth have significant proof as well. Other possibilities to the Western gender roles and heterosexual binaries prospered across millennia and cultures, from Sappho's same-sex desire lyrics in the seventh century BCE to young people brought up as the opposite sex in cultures ranging from Albania to Afghanistan; from Kenya's "female husbands" to Native American "Two-Spirit."²

The ancient people of India respected and embraced all types of love. This is demonstrated by the presence of homosexual characters and themes in Indian religious scriptures that were tolerant of homosexuality.

The Rigveda has the phrase "Vikriti Evam Prakriti", which means that what appears unnatural is also natural. In several books lesbians were referred to as "Swarinis" and often wed and had offspring together. Another outstanding example is Madhya Pradesh's Khajuraho temple, which was established in the 12th century and features sculptures depicting sexual fluidity among homosexuals. The Mahabharata has an interesting account of 'Shikhandini', a feminine or transgender warrior who was responsible for Bhishma's defeat and death. There are numerous other examples of gender fluidity and same sex relationships that could be found in the Indian history and during the ancient times. As a result of the British invasion in 1861, all sexual activities "against the order of nature" were illegal under Indian Penal Code section 377. The idea held by the Catholic Church that a sexual act unrelated to reproduction was wicked had a significant impact on this.

2.1.1.1 Sociological Viewpoint

As the issue is deeply rooted in the society, it is hard to curb it out. The mind set of people in India relating to same sex relationships and marriages is still not normal. Here are some societal reasons why the problem still exists and why it is so tough to accept the LGBTQ+ as against the very old norms of 'biological- man' and 'biological-woman':

² Bonnie J. Morris, A brief history of lesbian, gay, bisexual, and transgender social movements, American Psychology Association (Mar 16, 2023), <https://www.apa.org/topics/lgbtq/history>.

- Cultural conservatism i.e., following old traditional values
- Religious conservatism
- Existence of the sec 377 since many long years had contributed a lot in believing that same sex relation is a criminal offence and hence not acceptable.
- Being from a community that belongs to minority
- Societal stigma of being different from the other majority who are not LGBTQ+
- Lack of awareness and education relating to one's sexuality.
- Lack of representation as they are often underrepresented and this causes low recognition.

3.1. Fundamental Right to Marry of One's Choice of Partner

At the moment, same-sex marriage is permitted in 36 countries. Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America, and Uruguay are among the countries that allows Equality in marriage and it has been made lawful in these nations by both legislative and judicial decrees.³ Marriage has been, since ancient times, one of the most important social institutions perhaps the greatest and most important of all institutions in human society. 'Gay marriage is good for mental health', is what the American Psychological Association said at its annual conference, when it passed a policy statement that same-sex couples should have the right to marry.⁴ Marriage is guaranteed by the constitution and is not merely a matter of personal law. According to the Article 16 of United Nations Universal Declaration of Human Rights, there are no limitations to marriage between men and women based on a person's race, religion, or nationality.⁵ In terms of marriage, they both have the same rights, both during and after the

³ Human Rights Campaign, Marriage Equality Around the World, HRC (Human Rights Campaign), <https://www.hrc.org/resources/marriage-equality-around-the-world>.

⁴ S. Nambi, Marriage, Mental Health and the Indian Legislation, 47(1) IJP 3, 3-4 (2005)

⁵ United Nations, Universal Declaration of Human Rights, United Nations, <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2016,marriage%20and%20at%20its%20dissolution.>, (last visited Sept. 20, 2024).

dissolution. Section 12 of the European Convention on Human Rights states that all men and women have the right to marry and have children after reaching the legal marriage age.⁶

The Indian Constitution is a living constitution that informs and guides individuals about their rights and responsibilities. The Indian Constitution is always evolving, and it has reached a stage where it appears more lucid and improved because it goes through continuous judicial reviews. Article 21 is among the greatest provisions included in the constitution. Its reach is greater than anyone could ever comprehend. The path of justice and awakening is found in article 21. The Indian Constitution does not specifically recognize marriage as a basic right. In India, the legality of marriage is governed by several sets of laws, but it has only been acknowledged as a basic or constitutional right by a number of court decisions. If we try to understand this, we have to go through the first ever case of *Lata Singh v. State of Uttar Pradesh*⁷ of 2006, where the Supreme Court upheld the right to marry as a fundamental right under Article 21 of the Constitution, which protects the right to life and individual freedom. The decision highlighted that everyone has the right to choose their spouse, regardless of caste or religion, and that this right must be respected. It also reaffirmed the notion that interfering with such private decisions may turn violent and therefore to be denounced. In *Shakti Vahini v. Union of India*⁸, Chief Justice Dipak Misra emphasized the intrinsic dignity in individual liberty to make choices on their own, including the choice to marry freely, as guaranteed by Articles 19 and Article 21 of the Constitution. The Supreme Court in *Shafin Jahan v. Asokan K.M*⁹ affirmed both the freedom to select one's own religion and the right to marry the person of one's choosing in this case. The Court stated that expression of choice was a basic right under Articles 19 and 21 of the Constitution and an essential component of exercising liberty and autonomy. Article 21 covered several liberties guaranteed by the constitution, including the right to make choices about things that shape one's identity and personality. The opinion of Justice Chandrachud also restated the notion that the choice of a spouse would fall under the purview of the right to privacy, citing the ruling in *K.S. Puttaswamy v. Union of India*¹⁰.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 12.

⁷ *Lata Singh v. State of U. P.* (2006) 5 SCC 475, (India).

⁸ *Shakti Vahini v. Union of India*, (2018) 7 S.C.C. 192 (India)

⁹ *Shafin Jahan v. Asokan K.M. and Ors.*, (2018) 16 S.C.C. 368 (India).

¹⁰ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

As it relates to basic human rights including equality, non-discrimination, and personal liberty, the right to marry has emerged as a crucial topic of discussion about same-sex couples. Many nations have made strides in recognizing same-sex marriages legally, emphasizing various rights and values. The ability to have a family, adopt children, and benefit from similar legal protections as heterosexual couples is also correlated with the legal recognition of marriage for same-sex couples. Same-sex spouses can take advantage of inheritance privileges, tax exemptions, adoption rights, and other advantages in nations where same-sex marriage is permitted. Even though homosexuality is no longer illegal in India, unions of the same sex are still not recognized by the law. Lawsuits and ongoing discussions might influence how the right to marry is interpreted in the future, notably for same-sex couples.

4.1 The Legal Landscape in India

4.1.1 Indian Legislation on Same-Sex Marriage: The Void Element

Personal laws in India, such as the Hindu Marriage Act¹¹, Muslim Personal Laws relating to marriage, and Christian Marriage Act¹², are essentially centred on the traditional paradigm of man and female. As a result, marriage between people from LGBTQ+ community is not expressly covered by these statutes. Because it offers a framework for marriages between those of various religions in addition to those of identical faiths, the Special Marriage Act, 1954¹³. It does not, however, expressly acknowledge marriages between people of the same sex. Various courts, including the Supreme Court, have received petitions for legalization of such marriages arguing that all consenting individuals, regardless of their sexuality, should be included by the Special Marriage Act. The Indians marrying outside of India are governed under the Foreign Marriage Act, 1969¹⁴. For Indian nationals planning to be married outside of India, the Act is applicable. It offers a structure for registering these unions, together with the necessary steps and requirements. The Act defines marriage as a union between a man and a woman, in accordance with conventional definitions. Provisions pertaining to same-sex marriages are non-existent. Indian nationals who married same-sex partners overseas may have difficulties in having their marriages recognized by law in India since the Foreign Marriage Act excludes

¹¹Hindu Marriage Act, 1955, No. 25 of 1955 (India).

¹²Christian Marriage Act, 1872, No. 15 of 1872 (India).

¹³Special Marriage Act, 1954, No. 43 of 1954 (India).

¹⁴ Foreign Marriage Act, 1969, No. 33 of 1969 (India).

marriages between people of LGBTQ+ community. This may have an effect on matters like adoption, inheritance, and the legal privileges that come with marriage.

4.1.1.1 Judicial Activism: The Legal Battle So Far

Shakuntala Devi's 1977 book "The World of Homosexuals" was the first study on homosexuality in India. It proposed complete unconditional acceptance of the homosexual people and not tolerance and pity. The legal battle in India began with controversial movements that started with writings and made their way to the streets, where more individuals joined forces, whether they were from the same community or not. It all began with the LGBTQ+ community's quest for identification recognition.

Agra hosted the first-ever All-India Hijra Conference shortly after, in 1981, and 50,000 people from the community nationwide engaged. In 1994, the court recognized the Hijra group as a distinguished third gender, validating their individuality as well as their rights under the law. That permitted Hijras to register as voters in the third gender category, allowing them to actively engage in the political process with no needing to declare themselves as male or female.

Naz Foundation filed a Public Interest Litigation (PIL) at the Delhi High Court in 2001 to contest section 377. The Delhi High Court determined in 2009 that section 377 clearly violated the Indian Constitution's guarantees of equality, privacy, life, and liberty. This meant that although homosexual intercourse was no longer illegal, it was still not acceptable and the question of marriage was far to touch.¹⁵ Legal conflicts over sexuality and rights in India were made possible by the Naz Foundation case, which was a landmark event for LGBTQ+ rights in India. But in the 2013 case of *Suresh Kumar Koushal v. Naz Foundation*¹⁶, the Supreme Court reversed this ruling and restored Section 377. The significant *NALSA v. Union of India*¹⁷ case in 2014 strengthened the rights of transgender people, including their legal status and rights. Even while the NALSA ruling was a significant step forward for the LGBTQ+ community's rights, the question of same-sex marriage was not touched. The case concentrated on the rights of transgender people, such as the acceptance of their gender identification,

¹⁵ Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277 (India).

¹⁶ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India)

¹⁷ National Legal Services Authority v. Union of India, (2014) 5 S.C.C. 438 (India).

although it did not particularly address the legality of same-sex marriages or relationships. This case set the stage for later legal gains for transgender rights in India.

Section 377 was not decriminalized until the *Navtej Singh Johar v. Union of India*¹⁸ lawsuit in 2018. The Supreme Court reversed the Suresh Koushal ruling, abolishing same-sex relationships yet again. While this case did not specifically recognize a constitutional right to marry, it did uphold Article 21's guarantees of the right to a union that includes different aspects of companionship in a way that respects each person's privacy and autonomy. The Transgender Persons (Protection of Rights) Act, 2019¹⁹, intends to safeguard the rights and well-being of transgender people in India. The Act guarantees the right to self-perceived gender identity, forbids discrimination against transgender people, allows them to live with their family or in any other home of their choice, and requires healthcare facilities. It acknowledges that transgender people have the right to self-identify as male or female, but it makes no reference of the legal implications of transgender marriages. As a result, transgender people must abide by the personal laws that currently govern marriage, which typically depend on binary gender concepts.

4.1.1.1.1 Case Study of Supriyo Chakraborty: A Clear Call for Same-Sex Marriages

The legal cases of the Naz Foundation, NALSA, and Navtej Singh Johar were revolutionary in that they acknowledged the rights of LGBTQ+ people to be in consensual relationships; however, they did not tackle the matter of same-sex marriage or the legal validation of relationships between same-sex couples. With the recent Supriyo Chakraborty case, which occurred in 2023, trends regarding same-sex marriages in India took off.

***Supriyo @ Supriya Chakraborty v. Union of India*²⁰**

Several petitions were submitted by same-sex couples, transgender people, and LGBTQ+ groups. The petitioning parties argued that because laws do not recognize non-heterosexual marriages, there is prejudice toward those who identify as LGBTQ+. They jointly questioned the provisions of the Special Marriage Act of 1954, the Hindu Marriage Act of 1955, and the Foreign Marriage Act of 1969. The union administration had indicated that it would be open to

¹⁸ Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India)

¹⁹ Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019, Acts of Parliament (India)

²⁰ Supriyo Chakraborty v. Union of India, W.P. (C) No. 1011 of 2022 (Supreme Court of India) (India)

set up a committee to investigate if same-sex and LGBTQ+ people may also be granted legal privileges despite having their relationship been recognized by the law as a marriage. This came as a reaction to a court-posed question about whether specific executive orders could be issued to guarantee that same-sex and queer marriages have a right to welfare measures and social security. These instructions included granting permission to open joint bank accounts, designating one spouse as a nominee in insurance coverage, and more—all of which would be necessary to prevent a same-sex couple from being denied marriage registration. As guaranteed by Articles 14, 15, and 21 of the Indian Constitution, the petitioners claimed that the rejection of gay marriages violated their rights to equality, dignity, and personal freedom. As a precedent the petition cited the apex Court's 2018 verdict in *Navtej Singh Johar v. Union of India*²¹, which decriminalized consensual homosexual acts and stressed that LGBTQ+ people had equal liberties as other citizens. The foundation for more extensive talks on LGBTQ+ rights in India was established by this case. The petitioners also drew attention to the fact that many nations across the world are now accepting same-sex unions, and they asserted that India should consider following suit in order to honour its commitment to equality as well as human rights. The Supreme Court of India rendered its first ever one of a kind judgment of the case in *Supriyo Chakraborty*, a case that dealt with same-sex marriage, on 17th of October 2023. In its ruling, the Supreme Court of India declined to give same sex marriages in the country legal status. The court emphasized that the lawmakers should make the final decision on this. However, each judge on the bench concurred that the Union of India should set up a committee to look at the rights and benefits of people in homosexual unions who do not have their relationship recognized by the law as a marriage. In addition, the court ruled unanimously that LGBTQ+ couples are free to cohabitate without fear of violence, compulsion, or outside intervention, but they should not be given instructions to legally recognize their relationship as a legal marriage. The Court also stated that any modifications to the legally binding definition of marriage would have to be determined by legislative action, not by judicial interpretation. This ruling affects the rights of LGBTQ+ people in India since it maintains the status quo that limits marriage to heterosexual couples and excludes same-sex unions from legal recognition. The ruling also indicates possible difficulties in upcoming applications for such acknowledgment.

Society recognizes marriage as an important social institution. Therefore, the ruling that

²¹ Id., at 7

establishes its legal enforceability has some moral significance. There are grave concerns about how this ruling may affect families, police stations, and other institutions. This judgment creates the opportunity for more discrimination since marriage is still associated with social recognition. Given that the supreme court has refused to provide gay couples the right to marry, it would convey the message that they are “unsuitable for marriage”. It puts them in a worse situation and refuses to provide them the rights granted by the same court in the Navtej Singh Johar case. The ability to marry is not a basic right for anybody, but LGBTQ+ couples would be disproportionately affected if it were taken away.

5.1 Conclusion and Recommendations

Numerous nations, notably United States, South Africa, and other European nations, have effectively recognized same-sex marriages. India may use these models as a guide to develop a fair and welcoming legal system. Following a 2015 landmark decision in *Obergefell v. Hodges*²², which held that marriage is a fundamental privilege guaranteed by the U.S. Constitution, same-sex marriage became lawful nationwide. Indian courts may draw precedent for constitutional protections from these decisions. The population of India includes a sizable portion of the LGBTQ+ population. They have waited a long time for people and the government to accept them as equal citizens alongside the heterosexual community, to respect what they are, to safeguard their rights, and to recognize that they exist. Recognition by law for marriages within this population should be the initial move towards establishing same-sex relationships while offering them the dignity and respect that they, as citizens of this nation, deserve, even though it is true that changes in law alone is insufficient to address the systemic oppression that is deeply ingrained.

From a legal and social standpoint, a number of actions and recommendations may be taken to strengthen the legality of same sex marriage in India. These would entail modifications to legislative measures, improvements to judicial interpretations, and change in the societal perception.

- **Judicial Interpretation of Present Laws**

In cases like Navtej Singh Johar where Section 377 of the Indian Penal Code was partially knocked down, abolishing consensual relationships between people of the same sex, it did not

²² *Obergefell v. Hodges*, 576 U.S. 644 (2015).

consider same-sex marriage. Thus, a Comprehensive Interpretation of Article 21 (Personal Liberty and Right to Life) is the need of the hour where under Article 21, the Court may construe the freedom to marry a partner of one's choosing, including couples of the same sex, as a component of that person's right to dignity, autonomy, and privacy.

- **Legislative Amendments**

It is imperative that explicit legislative action be taken. One of the easiest ways to address this issue is to amend the Special Marriage Act of 1954 to specifically permit same-sex marriages. Since the Act applies to civil weddings regardless of faith, this would offer legal status while maintaining the rules governing religious marriage.

To explicitly and directly recognize same-sex marriages, a new, stand-alone Marriage Equality Act may be proposed. This legislation ought to address a number of marital legal issues, such as benefits for spouses, the adoption process, and succession.

Apart from marriage, India might enact extensive laws against discrimination that specifically safeguard the rights of LGBTQ+ people in a number of domains, such as government services, real estate, work, and health services.

- **Public Education and Societal Acceptability**

For legal improvements to have a lasting effect, more significant social changes must accompany them. India's society still adheres to traditional values, and marriage is frequently seen via a religious prism. Campaigns for public education supported by government agencies can increase knowledge of LGBTQ+ problems and emphasize how marriage equality is crucial for upholding individual liberties and equality. Encouraging transparent discussions with religious organizations and local authorities can aid in reducing resistance from conservative groups and advancing diversity. This is especially crucial in a nation where marriage is frequently seen as an act of faith. Attitudes in society are greatly influenced by the mainstream media, including television and motion pictures. Public perception can progressively change if homosexual relationships and marriages are positively portrayed in the media.

- **Equal Rights Other than Marriage**

Adoption Rights: To enable couples to adopt children together, amend legislation that includes

the Hindu Adoptions and Maintenance Act, 1956²³, and the Juvenile Justice (Care and Protection of Children) Act, 2015²⁴.

Legal Rights to Property and Succession: Make sure that those couples are granted the same legal standing and safeguards as their heterosexual counterparts under inheritance and property laws.

Taxes and Spousal Coverage: Same-sex spouses should be granted the same tax credits, medical coverage, and pension benefits as heterosexual couples by updating tax laws and work rules and regulations.

While difficult, same-sex marriage legalization in India is attainable. It necessitates combining many approaches and efforts. The nation may make great headway toward legalizing same-sex unions by presenting the topic as one of human rights and constitutional equality, using both foreign precedents and the country's own constructive rulings on LGBTQ+ rights.

²³ Hindu Adoptions and Maintenance Act, No. 78 of 1956, (India).

²⁴ Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016, (India).