

## DILEMMA OF SAME SEX MARRIAGES IN INDIA

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2

### ABSTRACT

Through the institution of marriage, people are allowed to have families. It is a stable relationship that allows people to cohabit in society without experiencing any negative social effects. Not just the married couple, but the entire society as well as future generations, are impacted by marriage. Same-sex unions are a relatively new phenomenon in society. It wasn't until the twenty-first century that same-sex marriages were conferred legal-recognition in modern culture and society in an increasing number of countries. Even though only a limited number of countries have made same-sex unions legal, their ramifications and repercussions are felt well beyond the borders of those countries and regions. In the coming years, same-sex marriages are expected to continue to be a divisive and important topic in local, national, and worldwide legal, political, and cultural contexts. Many states have upheld their constitutional bans on homosexual marriages in the face of numerous protests from individuals and groups that insist that same-sex unions must be recognized as legal. Additionally, same-sex partnerships are not legally recognized in many nations, including India. As a result, homosexual couples, regardless of their relationship length, are denied many of the legal and financial benefits that come automatically with marriage status. These include employment opportunities, the ability to file joint tax returns, health benefits, and rights resulting from a partner's death, such as international inheritance, etc. They may also be especially pertinent in light of the AIDS epidemic. Patriarchal de facto marriages are backed by all of these benefits in general culture, but LGBTQ+ people cannot take advantage of them. When we look at marriage and family structures from a global perspective, we observe a range of options for governmental recognition of different family structures. This research paper examines the common defenses of same-sex marriages and criticisms of them, as well as possible revisions to laws and policies in countries where it has become a serious political and legal issue whilst make the case that making marriage equality a reality may open up new socio-political and socio-legal avenues.

**KEYWORDS** – Marriage, LGBTQ+, Laws, Homosexual, Lavender marriages, Constitution

### INTRODUCTION

Same-sex marriages is considered to be the practice of marriage between two people of the same sex, the union of either two women or two men, that develops into a long-lasting, stable, and in some jurisdictions as legally-recognized relationships. 'Same-sex' is an informal phrase that refers to any sexual

activity between a man and a man or a woman and a woman. Going by the explications made earlier, in same-sex we refer to people with the same biological make-up which is basically associated with the genitalia and physiology<sup>43</sup>. Religions and civilizations

<sup>43</sup> Team EduBirdie, An overview of same sex marriage, EduBirdie, <https://edubirdie.com/examples/an-overview-of-same-sex-marriage/>



both have the belief that same-sex partnerships are unnatural because they defy laws of the nature. Going even further back in time, the Greeks thought homosexuality to be an abnormal behavior. Some of these experts' observations while attempting to define the natural laws of the cosmos regarding animals served as the foundation for this idea. Greek authors frequently held the view that childbearing remains the only purpose of sex. As of 2023, marriage between same-sex couples is legally-performed and recognized in 34 countries that have a total population of about 1.35 billion people, which accounts for 17% of the world's population, with the most recent being Andorra<sup>44</sup>. India does not recognize same-sex marriage or civil unions; the vast majority of heterosexual marriages are not registered with government and common law marriage based on traditional customs remains the dominant form of marriage<sup>45</sup>. The legalization of same-sex marriage has drawn fierce resistance from the Indian government, which has referred to it as an 'urban elitist concept' that undercuts social and religious norms. For same-sex couples, the social status granted by marriage is equally fundamental as heterosexual couples, anything otherwise shall be considered discriminatory against the homosexuals on the basis of their sexual orientation. A 2021 Ipsos survey found that 58% of Indians believe that same-sex couples should be allowed some sort of legal recognition, and 66% believe that same-sex couples should be able to adopt children. Another Pew survey in 2020 found that 37% of people believed that same-sex marriage should be accepted in the country, up from 15% in 2014<sup>46</sup>. If the lawsuit is upheld, India would become the 35<sup>th</sup> nation in the world and the second in Asia to permit marriage equality, after Taiwan's parliament enacted a similar bill

<sup>44</sup> Team the Encyclopedia of World Problems and Human Potential, Homosexual marriage, The Encyclopedia of World Problems and Human Potential, <http://encyclopedia.uia.org/en/problem/homosexual-marriage>

<sup>45</sup> Team Wikipedia, Recognition of same-sex unions in India, Wikipedia, [https://en.wikipedia.org/wiki/Recognition\\_of\\_same-sex\\_unions\\_in\\_India](https://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_India)

<sup>46</sup> Astha Rajvanshi, Meet the couple leading the push to legalize same-sex marriage in India, Time Magazine, <https://time.com/6272867/india-supreme-court-same-sex-marriage/> (April 19, 2023, 12:37 PM)

in 2019. Nearly five years have passed since the Supreme Court reversed a 2013 decision that had sustained a 157-year-old legislation that dated back to the British colonial era and declared it unconstitutional. Even so, the LGBTQ+ community continues to lack equal rights in areas including adoption, divorce, inheritance, and property ownership. Simple things—like opening a joint bank account, purchasing health insurance, or purchasing a home—cannot be done by same-sex partners because Indian law does not recognize their partnership. For instance, in Indian law, only one member of a same-sex marriage is recognized as a parent, regardless of whether they were the one who gave birth to the child or adopted them as a single parent. Children of LGBTQIA+ couples are denied legal status for both parents since Indian law only recognizes heterosexual marriages.

Denying people, the right to marry based on their sexual orientation is a violation of their fundamental rights and freedoms as has been pronounced in *Shafin Jahan v. Asokan K.M. and others* 2018, and that everyone, regardless of sexual orientation, should have the right to choose who they marry and enjoy the same legal benefit and protections as heterosexual couples. Legalizing same-sex marriages would have a significant impact on other Indian legislation. Homosexuality is not an offense; it is only a way to find love, to seek physical fulfillment or to obtain lust or enjoyment. Non-recognition of same-sex marriage amounted to discrimination that strikes at the root of 'dignity and self-fulfillment' of LGBTQIA+ couples<sup>47</sup>. A marriage may be declared voidable under Section 12 of the Hindu Marriage Act (1955) if one party's impotence prevented the other from consummating the union. But same-sex relationships can also lead to marriage. Consummation can take place in a variety of ways, including anal and oral sex for gay couples and oral sex, fingering,

<sup>47</sup> Sudipta Dutta, Explained | What is India's stand on same-sex marriage?, The Hindu, <https://www.thehindu.com/news/national/explained-what-is-indias-stand-on-same-sex-marriage/article66636166.ece> (March 19, 2023 04:12 AM)



and the use of sex toys for lesbian couples. It is empirically inaccurate to assume that consummation solely refers to penile-vaginal sex. Furthermore, it is a racist and out-of-date idea to need reproduction before marriage. This rule is not often followed in weddings. Furthermore, because to developments in medicine and science, same-sex couples may now conceive and raise children via procedures like surrogacy and IVF. Therefore, it is unjustified to deny same-sex couples the opportunity to wed on the grounds that they would be unable to successfully complete their union or have children.

### RESEARCH METHODOLOGY

The paper is descriptive in nature and the research is based upon thorough study of case laws, recent developments and the relevant provisions of the Constitution of India. The primary sources used in the research are case laws which helped in the development of rights pertaining to the LGBT community as well as journals and articles.

### REVIEW OF LITERATURE

The researcher has made thorough analysis of various provisions of the Constitution of India, such as fundamental rights and powers of Judiciary and Legislature. Apart from that various newspaper articles and editorials has been referred to which has contributed immensely to lay the foundation of the premises and conclusion of the arguments presented. In addition to the above-mentioned references, surveys and fieldworks has also been cited to reflect the view of the public, in general.

### DECriminalISATION OF SECTION 377 OF INDIAN PENAL CODE, 1860

According to Section 377, which deals with 'unnatural offences', anyone who engages in voluntary carnal intercourse with a man, woman, or animal in violation of nature's order shall be punished with either life imprisonment or imprisonment of either description for a

term that may last up to 10 years, as well as being required to pay a fine<sup>48</sup>. In its historic ruling, the 5-judge Constitutional Bench declared Section 377 of the Indian Penal Code illegal insofar as it criminalized sex between consensual adults of the same gender, which included distinguished judges like Chief Justice DipakMishra and Dr. D.Y. Chandrachud. The law to penalize individuals who oppose the 'order of nature' was hurried through in 1860 in light of the Sepoy Mutiny of 1857, Section 377.

During the nineteenth century, the British Colonial Rulers established the Indian Penal Code. The entire code was burdened by the then-current British legal framework and was full of inconvenient provisions, like section 377. The Buggery Act, a piece of legislation from the sixteenth century, surrounded Section 377 Indian Penal Code. The Delhi-based NGO Naaz Foundation and Bhedbhav Virodh Andolan brought up section 377 issue for the first time in court in the year 2001, but their petitions were denied. Since the Delhi High Court ruled that the penal provision was constitutional and dismissed the petition, sex between consenting parties of the same gender has been made a crime for eight years. The High Court's 2009 decision which decriminalized gay sex was overturned by the Supreme Court in its 2013 ruling, which also rejected a review request. When the supreme court ordered the government to recognize transgender people as a third gender and included them in the OBC quota, the eligible community gained some optimism in 2014. The right to privacy was upheld as a fundamental constitutional right by the supreme court on August 24, 2017. The court also called for equality and denounced discrimination, noting that the protection of sexual orientation is at the heart of fundamental rights and that the rights of the LGBTQ community are genuine and based on constitutional principles and doctrines. A petition submitted by five people requesting that the Supreme Court reconsider its ruling on

<sup>48</sup> Indian Penal Code, 1860, Section 377.



Suresh Kumar Koushal v. Naz Foundation was considered in January 2018 by a three-judge Supreme Court bench. A bigger bench was consulted in this matter, and assistance from the center was also sought. Gender equality advocates and activists have claimed that Section 377 allegedly infringes on several Indian Constitutional provisions, including Articles 14 guaranteeing equality before law to all individuals which states, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India<sup>49</sup>. Article 15 ensuring that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them<sup>50</sup>. And Article 21 which ensures that no person shall be deprived of his life or personal liberty except according to procedure established by law<sup>51</sup>.

Finally, in September 2018, by its decision in Navtej Singh Johar & Ors v. Union of India<sup>52</sup>, the Supreme Court overturned Section 377 of the Indian union which made it illegal for same-sex couples to engage in consensual sexual activity. The ruling not only frees the LGBTQ community from the constraints of gender inequality, it also grants them the freedom of individuality, the right to privacy, life and liberty, and the right to make their own decisions, as well as the freedom to express themselves freely. It violates both human dignity and the fundamental right to privacy and to citizens' freedom of choice, no matter how small. The right to privacy includes the right of every person, including LGBT people, to express their choice about sexual orientation. The section fails the tripartite test of Articles 14, 19 and 21. Freedom of choice cannot be limited or abridged under the threat of criminal prosecution and made paraplegic on mercurial stance of majoritarian perception. Thus, the Supreme Court declared this section

<sup>49</sup> Constitution of India, 1949, Article 14.

<sup>50</sup> Constitution of India, 1949, Article 15.

<sup>51</sup> Constitution of India, 1949, Article 21.

<sup>52</sup> Shruti Verma, Case Summary: Navtej Singh Johar v. Union of India, Legal Service India,

<https://www.legalserviceindia.com/legal/article-6402-case-summary-navtej-singh-johar-v-s-union-of-india.html>

as unconstitutional while stating that the community deserves the same rights and respect as every individual, and discrimination based on an individual's sexual orientation profoundly violates a person's human dignity and self-worth. Thus, giving the community a fresh blow while deciding upon the issue of consensual sex.

### LEGISLATURE V. JUDICIARY

India is one of the nations with a mosaic of socio-religious views and practices in the world. Therefore, every issue that could significantly alter our society's basic structure or have an impact on our socio-cultural or socio-religious values must go through the legislative process. The laws passed by the legislature are unquestionably democratic in nature because they are the result of extensive consultation with stakeholders and represent the views of all facets of society. The public holds the legislature liable. Given the sensitivity of the same-sex marriage issue and the wide range of stakeholders from various socio-religious backgrounds, it is advised that the competent legislature deal with this after an extensive consultation process involving relevant social and religious organizations instead of the judiciary, which is hearing the petitions under Article 142 of the constitution.

As the legislative body reflects the collective wisdom and conscience of the country and takes into consideration cultural values, social standards, and other elements that define acceptable human behavior when making decisions about regulating, permitting, or prohibiting human relationships, the legislature is the only body that can decide whether to legalize marriage and how it will be regulated. This decision must be made through a proper legislative process that involves consultation with all relevant stakeholders. The matter needs more thorough consultation and cannot be decided by judicial interpretation. Parliament should be consulted on this matter so that more discussion can take place. The matter required a wide consultative process



and cannot be encompassed within the limited judicial adjudicatory precincts. Therefore, judicial intervention in the matter is not advisable<sup>53</sup>. Reminiscence of public reactions in rulings of the Supreme Court as was in Jallikattu and Sabrimala verdict, among others which were considered to be in stark contrast to the public opinion should not be forgotten.

### **SPECIAL MARRIAGE ACT, 1954**

Couples who are unable to wed under their personal law have a legal form of marriage available to them according to the Special Marriage Act of 1954. It is intended that everyone would be treated equally as citizens and have the same privileges. A declaration of marriage in a vacuum – must be formalized into practical impact of any two people's lives. To execute that greater constitutional power, it is being argued to make the provisions of Special Marriage Act to be gender-neutral. The Act ought to provide same-sex couples with the same level of protection that it does for inter-caste and inter-religious unions. Otherwise, the Act should be deemed to be in violation of the fundamental rights to equality and a life of dignity because it does not provide for the solemnization of marriage between same-sex couple.

It has been contended that Special Marriage Act is Ultra-vires i.e., beyond the powers of the constitution as it discriminates between heterosexual and homosexual couples. The Act, denies same-sex couples both their legal rights and the social acceptance and status that come with marriage. It has been contended that LGBTQ+ persons were not covered by around 15 laws that guaranteed their access to benefits like salary, gratuities, adoption, and surrogacy. The only goal was to gender-neutralize the 1954 Act. It claimed that the usage of gendered language, such as the

terms 'male' and 'female', 'husband' and 'wife', and 'bride' and 'bridegroom', limits accessibility<sup>54</sup>, which needs to be withered away.

### **LEGAL ACCEPTANCE V. SOCIAL ACCEPTANCE**

Couples and their families gain social and financial benefits from marriage. By fostering security and stability, allowing same-sex marriage improves families and communities. The notion that marriage should only be between men and women is shared by numerous religious and cultural organizations. They contend that altering the conventional definition of marriage would be contrary to the core values and beliefs they hold dear. Some people contend that procreation is the main goal of marriage and therefore same-sex couples are not allowed to have biological children. Since same-sex marriage violates the natural order of things, they contend that it should not be permitted. The legal ramifications of same-sex marriage, including issues with inheritance, taxes, and property rights, are a concern. Some claim that changing all the laws and rules to allow same-sex marriage would be too complex. 19% of Indians are accepting of same-sex relationships, according to 2018-19 survey of more than 24,000 respondents across 12 states by CSDS-Lokniti & Azim Premji University<sup>55</sup>. India is a culturally diverse nation with a range of societal and religious norms. The cultural sensitivities of various communities must be taken into account in any legislative or judicial judgement regarding same-sex marriage, while also ensuring that people's fundamental rights are safeguarded. In terms of social acceptance of the LGBTQ+ community, India still has a long way to go. Before considering same-sex marriages, education and awareness initiatives should be created to

<sup>53</sup> PTI, SC must let legislature decide on same sex marriage, says lawyers' body, Times of India, <https://timesofindia.indiatimes.com/india/sc-must-let-legislature-decide-on-same-sex-marriage-says-lawyers-body/articleshow/99735621.cms> (April 24, 2023, 06:32 PM)

<sup>54</sup> Team IAS Parliament, Legalizing Same Sex Marriage, IAS Parliament, <https://www.iasparliament.com/current-affairs/gs-ii/legalising-same-sex-marriage> (November 28, 2022)

<sup>55</sup> Nikhil Rampal, Neither 'urban' nor 'elitist' — what data shows about Indians' views on same-sex relationships, The Print, <https://theprint.in/india/neither-urban-nor-elitist-what-data-shows-about-indians-views-on-same-sex-relationships/1529820/> (April 20, 2023, 06:53 PM)

encourage acceptance and understanding of heterosexuality.

### SUGGESTIONS AND CONCLUSION

The LGBT community needs some face which on earth can be treated well and people do not see them as a bad influence in the society. The society has to change its views regarding the LGBT community and have to treat them with the same respect as they should be treated. At last, we all are humans and all we need is love and to be treated with respect.

- (1) Legislators and other decision-makers should oppose class-based relationship-recognition exclusionary laws that are connected to procreative and child welfare concerns;
- (2) Family policies based on 'the facts of nature' should not be adopted by legislators or other officials;
- (3) There are no easy solutions for encouraging responsible reproduction;
- (4) An emphasis on disparities is insufficient to enhance child wellbeing; and
- (5) Gender should matter less in parenting, not more.

There is no question that same-sex couples planning to get married must be granted the fundamental right to marry a person of their choice once members of the LGBTQ community are entitled to the full range of constitutional rights. More than a dozen nations have made same-sex unions lawful. By simply decriminalizing homosexuality, not enough progress has been made; LGBTQ+ people need equality in all areas of life, including the job, the family, and public spaces. As such, the future of same-sex marriages in India remains uncertain.

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