



# Same-Sex Marriage in India: Its Legal Recognition and Impacts - A Bird's Eye View

This research paper is authored by Ananya Mishra, a scholar with a background in B.Sc and L.L.B. Currently pursuing her L.L.M studies at Maharashtra National Law University, Aurangabad.

## Abstract

In recent years, the world has witnessed significant advancements in LGBTQ+ rights, particularly in the recognition and acceptance of same-sex marriage. While some countries have made remarkable strides in protecting LGBTQ+ rights, the situation in India remains a topic of debate and controversy.

This research paper explores the journey of same-sex marriage in India and its global context. It delves into the evolution of LGBTQ+ rights, from the decriminalization of homosexuality to the current legal developments aimed at recognizing same-sex unions.

The global perspective reveals that many countries have legalized same-sex marriage, with landmark decisions setting important precedents. However, challenges persist, including legal restrictions and hate crimes against LGBTQ+ individuals.

**Keywords-** LGBTQ+ ,Same-Sex marriage.

## 1. INTRODUCTION

Many countries apart from India has widely accepted the concept of same sex marriage in India, however it is pertinent to know that this is also a matter of debate and controversy in most of the countries, India is among those nations. before, I start with my article, it is significant to understand few important terms, the word same sex marriage is not exhaustive and is of inclusive nature, because some of the sexes still remains unknown and anonymous. The word 'LGBTQIA+' comes into picture while we talk about same sex marriage, where l is for lesbian, G is for gay, B is for bisexual, T is for transgender and Q is for queer, I is for intersexual, A is for asexual, at last + has been added recently which makes it more of inclusive nature. There is an evolution in many countries regarding the legal recognition of LGBT such as U.S, Spain. Several measures have been taken for their social acceptance related to their sexual relationship, these recognition and acceptance has lead to the substantial increase in the same-sex couples as they were fear of being exposed earlier due societal oppression and embarrassment.<sup>1</sup>

<sup>1</sup>Salam ZU, "An Emperor with Foibles" *The Hindu* (February 15, 2014)

< <https://www.thehindu.com/books/books-columns/an-emperor-with-foibles/article5692770.ece> > accessed 13th September, 2021

California was the first state to enact a state wide process to recognize same sex couples by creating its domestic partnership registry in 1999. Domestic partnership offered California same sex couples few benefits normally associated with marriage, such as, hospital visitation rights and the ability to be considered next of family when settling the estate of a deceased partner. However same sex marriage has not been legally recognized in India, as the Indian law define marriage as a union between a man and woman. Section-377 of the Indian Penal Code, which was in effect before to the judgement, made homosexuality a crime. This case has signalled a major historical turning point in India's understanding of the rights and liberties of LGBTQIA+ people.<sup>2</sup>

The visibility of the LGBTQIA+ community in India has risen as a result of decriminalization, but this is only the first step towards gaining true equality and legal acceptance. Legalizing same-sex unions is supported by those who feel that

denying people, the right to marry on the basis of their sexual orientation is a violation of their basic freedoms and rights. They offer a number of justifications for the provision. Equal rights and protection for everyone, regardless of sexual orientation, would result from the legalisation of same-sex unions, contributing to the development of a more just society. Opponents of same-sex marriage, on the other hand, contend that marriage is a holy institution that is only recognised as a union between a man and a woman. They contend that same-sex relationships will undermine traditional family values and the institution of marriage by expanding the definition of marriage to include having children and raising them.

#### • **INTERNATIONAL PERSPECTIVE**

The majority of nations have placed limitations on the rights of LGBTQ people at the individual level. The United Nations has not created a special treaty on the matter, but via a number of initiatives and activities, it has succeeded in eradicating the stigma and inherent prejudice towards the group. The United Nations' Free and Equal campaign and activities are a setback for the global LGBTQ community's push for equal rights and just treatment. At the same time, same-sex marriage is discouraged in many countries, where it is prohibited, criminalized, and in certain circumstances carries the possibility of death penalty.<sup>3</sup>

#### • **INDIAN PERSPECTIVE**

India is a secular country that upholds everyone's right to practice, profess, and promote any religion of choice. At its heart, India is a conservative nation that is a steadfast preacher of culture, custom, and tradition, hence anything is a sin which has not been practiced from the beginning of time. This includes elements relating to same-sex relationships as well.

<sup>2</sup> Ojha P, "Same-Sex Marriage Is Not a Fundamental Right: Delhi HC" (*LAW TIMES JOURNAL*, February 25, 2021) <<https://lawtimesjournal.in/same-sex-marriage-is-not-a-fundamental-right-delhi-hc/>> accessed September 13, 2023.

<sup>3</sup> "Delhi High Court asks Centre to respond to plea to recognise same sex marriages under law". *The Economic Times*. Last accessed September 13, 2023

Historical references to same-sex relationships and transgender people in India show that the country was not particularly restrictive.<sup>4</sup>

The temple of Khajurahu is the leading example of tolerance of the community in the past. Ellora caves in Maharashtra and Sun Temple in Konark are the well-known examples, which is carved with illustrations of same-sex relations, including an open depiction of exposed men and women ecstatically embracing each other with sexual fluidity, and also Kama Sutra, which deals with then sexuality, eroticism and emotional fulfillment of life, authored by Vatsyana.

### Indian legislation establishing marital laws

- The 1872 Hindu-Christian Marriage Act, 1954
- Special Marriage Act, 1955
- Hindu Marriage Act of 1937 applying Islamic personal law.

A bill to legalize same-sex marriage under the Special Marriage Act was brought to the Lok Sabha on April 20, 2022, by member of parliament Supriya Sule of the Nationalist Congress Party. In order to give same-sex couples the same legal protections as opposite-sex couples, the proposal would change many provisions of the statute.

A draft of a unified civil code that would have made same-sex marriage lawful was released in 2017. Marriage was described as the "legal union as prescribed under this act of a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or woman" in the proposed code.

However in November 2022, the Supreme Court of India agreed to hear a case that could legalise same-sex unions in India. The case will begin after the Supreme Court of India has heard petitions asking it to transfer nine cases already pending before the Delhi High Court and Kerala High Court that deal with the same issue. The Supreme Court is set to hear the case on January 6, 2023.

### JUDICIAL REVIEW OF LGBTQ IN INDIA

A judicial examination of LGBTQ rights in India shows that, in contrast to the legislative, which has lagged behind on this issue, the court has taken a lead role in recent years. In particular, during the past ten years, the Supreme Court rendered several significant rulings that cleared the path for the acknowledgment of this disadvantaged group's fundamental rights. The inability of the parliamentarians to handle this issue reveals the conservative makeup of the Parliament, which a liberal judiciary had to confront. Some of the most significant

<sup>4</sup> Nair SS, "Life360" (Life360, November 28, 2019) < <https://jomec.co.uk/life360-2019/uncategorised/religion-has-always-been-the-biggest-tool-to-create-taboo-in-india> > accessed September 13, 2023

Supreme Court rulings on the topic are listed below.

## **Union of India v. NALSA**

After the condemned ruling in *Suresh Kumar Koushal v. Union of India*<sup>1</sup>, this case was brought. The Supreme Court reinstated Section 377 criminal penalties in *Suresh Kumar* after decriminalising it in *Naz Foundation*. In order to advance the rights of the transgender population, the National Legal Services Authority took the lead in posing pertinent issues. According to this ruling, transgender people belong to a third gender. The verdict established a thorough set of rules protecting the liberties and rights of the transgender population. Following that, legislative changes were made to provide a clear legislation that would advance their rights. The Transgender Persons (Protection of Rights) Act, 2019, the result of lengthy discussions and several proposed bills, was passed in 2019.<sup>5</sup>

## **Union of India v. Justice (Retd.) K. S. Puttaswamy**

According to this ruling, which recognised the right to privacy as a component of the right to life and liberty guaranteed by Article 21, privacy is an essential aspect of a person's existence and is available to everyone, regardless of gender or sexual orientation. The LGBTQ community should have the right to privacy, including autonomy and independence from government intervention, Justice Chandrachud said in the ruling. A specific observation was made on the freedom and autonomy of sexual activity as well as the right to select the partners of one's choosing. The Court stated, "The protection of sexual orientation and the right to privacy are at the heart of the basic rights provided by Articles 14 (right to equality)

## **Mitra v. Abhijit case**

The issue is whether same-sex marriages are recognised in India under the Hindu Marriage Act and the Special Marriage Act. The petitioner's position is that the state should respond to the cause and comply with the international standards and agreements to which India is a signatory in light of the acknowledgment of same-sex relationships as a result of the decriminalisation. In opposition to this claim, Solicitor General Tushar Mehta asserts that under Hindu law, the term "spouse" may only refer to a man and a woman, and that any judicial intervention would "cause complete havoc with the delicate balance of personal laws." According to the federal government, the decriminalisation of Section 377 did not imply that these relationships were necessarily harmful.<sup>6</sup>

<sup>5</sup> NATIONAL LEGAL SERVICES AUTHORITY (NALSA) VS. UNION OF INDIA (AIR 2014 SC 1863)

<sup>6</sup> Abhijit Iyer Mitra vs Union Of India & Ors on 3 February, 2022

## 2. SAME SEX MARRIAGE: ACROSS THE WORLD

In recent years, an increasing number of nations have legalised same-sex unions.

Northern Ireland was the final UK member state to forbid gay and lesbian marriage until it was recently legalised there by the United Kingdom's Parliament in London. This year also saw the legalisation of same-sex unions in Austria, Taiwan, and Ecuador.

The courts provided the push for legislative reform in a number of nations that recently legalised same-sex unions. For instance, a 2017 ruling by Taiwan's Constitutional Court, which overturned a legislation that defined marriage as a partnership between a man and a woman, sparked a vote on May 17 in the country's unicameral Legislative Yuan. The legalisation of homosexual marriage in Austria is similar.

In a historic decision on June 26, 2015, the U.S. Supreme Court recognised the constitutional right to marriage for same-sex couples. The *Obergefell v. Hodges* ruling, which was 5-4, legalised homosexual marriage across the country, including in the 14 states that had previously prohibited it. The court's reading of the 14th Amendment, which the justices said breaches the amendment's promise of equal treatment under the law, was a factor in the judgement.

Engagement with the LGBTQ community is the next potential remedy, which is urgently needed in the Indian setting. To start, families and communities should have more frank and open discussions about sex and sexuality. It is crucial that the community participate in mainstream activities. Privacy has to be respected and safeguarded. The existence of homosexual or lesbian people has no impact on society. As correctly stated in the Puttaswamy decision, it is a person's sexual choice; as a result, "equality demands that sexual orientation of each individual be protected on an even platform." Programmes for training and sensitization are required to achieve this. With the independent expert on sexual orientation and gender identity playing a crucial role in monitoring and advocating for LGBTQ+ rights through its anti-European discrimination laws, promoting equality in employment, healthcare, and access to goods and services, the United Nations has taken steps to protect LGBTQ+ rights globally.

## 3. CONCLUSION

The world has seen significant advancements in LGBTQ+ rights, but the path to equality is still complex and evolving. While some countries have made outstanding progress in recognising and defending the rights of LGBTQ+ people, others still face difficulties, so it is critical to look at this issue from a global perspective. Despite these obstacles, same-sex marriage has gained widespread acceptability throughout the world, creating

significant precedents for others to follow. This is one of the most prominent developments in LGBTQ+ rights. Despite the advancements, same-sex partnerships are still illegal in many countries, which places LGBTQ+ adolescents at risk. Violence and hate crimes against LGBTQ+ people continue to occur everywhere. Both societal and legal measures must be used to combat these acts of prejudice and hatred. Attitude towards members of the LGBTQ+ community is another.

Positive views, on the other hand, may foster a climate in which LGBTQ+ people feel secure, respected, and welcomed. In terms of LGBTQ+ rights, the world is seeing both progress and enduring difficulties. While progress has been achieved in valuing the worth and humanity of LGBTQ+ people, much work needs to be done. The continual fight for acceptance and equal rights serves as a reminder that the quest for justice is a constant process.

