

SAME-SEX MARRIAGES IN INDIA - A BRIEF ANALYSIS

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INTRODUCTION

A widely entangled, and strained history. India is the world's seventh-largest country by size, the largest populated democracy since its establishment as a nation in the year 1947, and as the latest census of July 2023 shows, has an estimated population size of 1.43 billion citizens.

There have been a huge number of religions, castes, cultures, races, beliefs and languages predominant in the country for centuries. Almost all the laws that are prevalent in the nation are those that owe their origin to pre-Victorian eras, with the Constitution itself being enacted and adopted from a number of European nations from the Victorian era. All this taken into consideration, the fact that according to the laws, a marriage that is between two heterosexuals (a biological man and woman) is only considered legal and is eligible for adoption, inheritance, and legal rights, with same-sex marriage (homosexual marriage) being far from being recognised as legal by the nation, still exposes the LGBTQIA+(Lesbian, Gay, Bisexual, Transsexual, Queer, Intersex, and Asexual) communities to the ever-looming clouds of uncertainty over their rights, recognition of their relationships, social intolerance, and so on.

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India has a huge LGBTQIA+ (or gay community) present, active and vocal in almost all states and major cities of the nation, with pride rallies, conventions, and pride week being celebrated with a rather pomp and enthusiasm by the community. Hindu mythology as a whole dates back thousands of years, and even in those earlier scripts, the images and speculations of a 'man' turning into a 'woman' over time have been unearthed, with holy texts including the mention of third-gender human beings. With this as a fact, same-sex marriages in India were still recognised and marginalised as a crime, with marriage rights only being conferred to the 'heterosexual' marriages, by our colonial rulers, the British, in early 1960.¹

During nearly a vast decade of enjoying extreme, if a not one-sided majority, in most states and the nation as a whole, the BJP-led NDA government has been totally vocal about the

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¹ How same-sex unions are rooted in Indian history <https://www.bbc.com/news/world-asia-india-67131106> accessed 23 October 2023

decisions, policies, and even names given to various institutions, cities by the colonial British, and has shown thorough attempts to erase it, and establish a separate identity of India as a nation. While it opposed stuff like this, the Modi government has been rather possessive and attached to the Victorian laws governing same-sex marriage, and it has been reluctant to let it go since day one.² This was one of the main reasons that led to the Central government filing an affidavit in the Supreme Court opposing the legalising of same-sex marriage and providing any kind of recognition or rights to them as a whole.

There are various nations across the globe that have - ³

Legalised same-sex marriage such as:

North America: Canada, United States of America (as latest as 2015)

South America: Argentina, Ecuador, Colombia.

Europe: United Kingdom, Netherlands, Ireland.

Africa: South Africa is the only nation.

Asia: Taiwan (2019, becoming the first and only nation in Asia) and both Australia and New Zealand.

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Opposed same-sex marriage:

- Most of Asia (with it being illegal in most parts of the continent).
- Russia (also established laws that explicitly ban same-sex marriages).
- Eastern Europe (is even criminalised in most parts)
- North Africa and Gulf Nations.
- Caribbean nations (majority of the nations).

The data representing the number of nations shows that only a total of 34 nations, with an estimated population of 1 billion people have legalised same-sex marriage, with Estonia being the 35th nation to do so on 1st of January, 2024. The renouncement and dejection by 85% of

² India same-sex marriage verdict: Supreme Court declines to announce verdict in favour of LGBTQIA+ community <https://edition.cnn.com/2023/10/17/india/india-same-sex-marriage-verdict-intl-hnk/index.html> accessed 22 October 2023

³ Same sex marriage <https://www.clearias.com/same-sex-marriage/> accessed 22 October 2023

the world population, and over 150+ nations further adds credibility to the fact that not just same-sex marriages but the acceptance expected by the gay community itself has a long and tedious way to go ahead.

STRUGGLES FOR LEGALISING SAME-SEX MARRIAGE IN INDIA

Campaigners, advocates, activists, and members of the gay community have all accepted the fact that the particular law 'criminalizing' same-sex marriage in India not only disentitles the community from their rights as humans, and citizens of the world's largest democracy but also admits that this might lead to more unacceptance and over-closeting of the community by the public. There was apparently a legal battle going on for decades in the apex court that requested for same-sex marriages to be legalised, with their relationships and 'unions' also being accepted.

The Supreme Court then had in a historic decision, ruled that gay sex was no longer a criminal offence, overturning a 2013 judgement that upheld a colonial-era law - known as section 377⁴ - under which gay sex was categorised as an "unnatural offence", and invited imprisonment for a term of 10 years. All the while emphasis was laid on the fact that same-sex marriage still remains a crime, that is not legal, and that the rights conferred through marriage only apply to heterosexual couples only. But accordingly, the acceptability and nod for homosexual couples by society, overall has shown a drastic increase percentage-wise.

A survey conducted by an organisation named Pew, among random members, shows that while the acceptance of homosexual couples by Indian society was 22% in the year 2014, it only drastically increased on the graph, reaching 37% in 2019, and now showing that in June 2023, 53% of the society accepts such couples and has no problem accepting their relationships, nor living among them as a fact.⁵ Despite this major achievement and a better environment that is prevailing and emerging for such couples, there are still a vast number of conservatives and orthodox people who have since initial days only reciprocated anger, resentment, or even dislike towards such a trend. There have also been a wide number of incidents where national-level politicians have been critical of gay communities and their rights, explicitly claiming that a relationship or a union should solely be based on the "basis of procreation, not recreation."

⁴ Indian Penal Code 1860, Section 377

⁵India same-sex marriage verdict: Supreme Court declines to announce verdict in favour of LGBTQIA+ community <https://edition.cnn.com/2023/10/17/india/india-same-sex-marriage-verdict-intl-hnk/index.html> accessed 22 October 2023

The 4th Century Kamasutra,⁶ the world's oldest textbook of erotic love, mentions that "two men friends who are well-wishers of each other and have complete trust in each other may mutually unite". Prof Vanita writes she has found evidence in ancient texts of "parents deciding to accept their children's cross-caste and cross-class marriages on the basis that the young people must have been spouses of the same caste and class in a former lifetime". In the same way, these texts explain that same-sex attachments can last across lifetimes.

Furthermore, various ancient texts, scriptures, and depictions have proven that same-sex unions were a common thing even centuries ago though the way in which love was expressed has never been evident. Even saying so, persecutions for doing so have no mention anywhere too. The ruins of temples of Khajuraho, and Mughal-era sculptures, and monuments all depict scriptures of homosexuality very vividly upon them. This being said, the majority of the people still consider such beliefs and progressions as being more inclined or derived from "Western cultures", or are only advocated to receive "acceptance from the urban-elitist groups", and have no reason to be accepted in a country as religious, and cultural as India and as fact can never fit and blend into the moral fabric of belief, or the ethos that our "great nation" derives its "roots" from.

Thus, the gay communities of India believe that while scraping the colonial-era ban on 'intercourse between the same-sex' was two steps further into the struggle, the disallowing of them to enter into wedlock has proven to "coming down a step", as such a right is only available to heterosexuals, and thus they are the only ones entitled to medical-insurances, medical consent, pensions, adoption of kids, or even simpler and daily life desires, such as joining the membership of clubs meant only for 'couples'. Considering all this, and the fact that a bitter and stringent step needs to take place, a legal battle ensued with a petition being filed in the Supreme Court of India by a gay couple, seeking recognition of same-sex marriage under the Special Marriage Act, following which the court issued notices on the plea.

THE LEGAL BATTLE

The legal battle hence ensued with the filing of the petition seeking recognition of same-sex marriage in India under the Special Marriage Act, 1954,⁷ by a gay couple on November 25th, 2022, creating murmurs and tremors across the Indian political-socio landscape, and a

⁶ How same-sex marriages are deep rooted in Indian history <https://www.bbc.com/news/world-asia-india-67131106> 23 October 2023

⁷ Special Marriage Act, 1954

recognition that was demanded despite the dejections by the society at large.⁸ The petition sought that a legal marriage under the Special Marriage Act be made gender-or-sexuality neutral, thus allowing gay couples to enter into a legal relationship recognised by the Union of India, granting them rights, recognition, and social equality as such.

The Supreme Court Of India issued a notice to all the High Courts of India, stating that all such pending cases and writ petitions regarding the same subject to be transferred under the jurisdiction of the apex court, and that a single, and concluding judgement would be given, in respect to all such matters that were pending. At such time, there were a total of 9 cases pending before the High Courts, 8 before the High Court of Delhi, and one before the High Court of Kerala.

The Supreme Court via a two-judge bench, under CJI DY Chandrachud, further issued a notice that sought a reply from the Central Government of India and the Attorney-General of India. A similar case was filed by a gay couple, that included an Indian citizen, and a US citizen, that sought recognition of their relationship under the Foreign Marriage Act, 1969. The Court stated that the hearing would be under various acts such as the Special Marriage Act, 1954, the Foreign Marriage Act, 1969,⁹ and the Hindu Marriage Act, 1955¹⁰ and that the Central government and Attorney-General needed to give their replies to the notice within February 15, 2023.

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The Central Government was the first to reply with a strong, and rather firm assertion saying that it opposes the legalising of "same-sex marriage" in India, not now, not in the future. The government was represented in the apex court by Solicitor General Adv. Tushar Mehta. The court further granted the petitioners the option to select 3-4 different counsels to present their case, to ensure that their views are brought together under one umbrella, and they have a wider and more relevant representation. The petitioners were represented by widely acclaimed and efficient counsels such as Mukul Rohatgi, Abhishek Manu Singhvi, Raju Ramachandran,

⁸ Same-sex marriage, a chronology of how case reached supreme court constitution bench
<https://www.indiatoday.in/law/story/same-sex-marriage-a-chronology-of-how-case-reached-supreme-court-constitution-bench-2361331-2023-04-18> accessed 23 October 2023

⁹ Foreign Marriage Act, 1969

¹⁰ Hindu Marriage Act, 1955

Anand Grover, Geeta Luthra, KV Viswanathan, Saurabh Kirpal, and Menaka Guruswamy.¹¹ They have strongly emphasised the equality rights of the LGBTQIA+ community.

Their focus is on enabling the legal recognition of "unions" that would enable gay couples to live their lives with the same equality and dignity as that of heterosexual couples. These arguments were solely based on the derivatives of equality, fundamental rights, right to life, right to privacy, personal freedom, social legitimacy, and last but not least, legal recognition at the foremost. A total of 21 petitions were filed in the Supreme Court for a once-and-for-all positive and lasting judgement over the lives and futures of the gay community.

ARGUMENTS PRESENTED

By the petitioners -

The counsels presented a rather descriptive, and demanding list of requirements, and sought to prove them unconditionally via the various Articles of the Constitution of India, and various natural human principles.¹²

1. They contended that there was an inherent and ever-present "right to love" that was present throughout the world and was a requirement needed by every living being, notwithstanding his/her gender, religion, caste, creed, race or cultural differences.
2. Constitutional Rights: They maintained that the prohibition of same-sex marriages constitutes an infringement upon the constitutional rights of the LGBTQ+ community.
3. Not allowing a same-gender couple to enter into a legal relationship deprives and violates them of their equality rights conferred upon them by the Constitution of India.
4. Combatting Social Stigma and Discrimination: They pointed out the social stigma and discrimination experienced by the LGBTQ+ community and how legalizing same-sex marriage would serve to combat these issues.

¹¹ Same-sex marriage, know the petitioners for and against the case before supreme court <https://www.indiatoday.in/law/story/same-sex-marriage-know-the-petitioners-for-and-against-the-case-before-supreme-court-2361328-2023-04-18> accessed 24 October 2023

¹² What did petitioners say in their Supreme Court appeal for same-sex marriage <https://www.oneindia.com/india/what-did-petitioners-say-in-their-supreme-court-appeal-for-same-sex-marriage-3661199.html?story=1> accessed 23 October 2023

5. Adoption rights: The counsels contended how adoption rights were affected as a gay couple could never enter into a legal relationship, thus making them ineligible for the adoption process.

6. Economic rights: The counsels contended how the economic rights of the community had been hindered and how the current laws deny them any economic benefits that they could be eligible or entitled to.

7. Medical insurance claims: How they were not eligible to claim such insurance as they were not falling within the prescribes of already set-up criteria.

8. Right to a Life of Dignity: The petitioners echoed the judgment in the Navtej Johar case, reiterating their rightful claim to a life of dignity.

9. Revisiting Section 377: The explicit need to reconsider Section 377 of the Indian Penal Code was raised, asserting that it stands in contradiction to the fundamental rights outlined in the Constitution.

10. The evolving global trends and the total acceptance of same-sex marriages or unions by 34 nations of the world was an appreciative move directed towards a more equal society, and thus India being the world's biggest democracy also needs to follow in their steps. Better late than never.

11. Finally the argument was raised and that too in a very aggressive yet passionate manner that passing a judgement in favour of the petitioners would further dogmatize the prevalent stereotypes widely present in the society, and would entitle the community to the same legal rights, and equality conferred upon heterosexuals, thus discarding any grounds of future discrimination.

Furthermore, to support the cause, the Delhi Commission for Protection of Child Rights (DCPCR) also filed an intervention pledging its support to the gay community's demand for legalising same-sex marriages and their rights to adoption, similar to those entitled to heterosexual couples.¹³

¹³ Supreme Court to pronounce verdict on same-sex marriage tomorrow
<https://www.livemint.com/news/india/supreme-court-to-pronounce-verdict-on-validity-of-same-sex-marriage-tomorrow-11697461536381.html> accessed 24 October 2023

BY THE GOVERNMENT OF INDIA

1. The Indian government represented¹⁴ by Solicitor General also laid apart a wide number of arguments, among which a majority were based upon the nation's cultural, and religious heritage and beliefs, and that legalising same-sex marriages would prove to be a "bane" in a country like ours.

2. He contended that such a right would totally challenge the moral fabric of our nation where homosexuality as a whole is deemed contrary to the beliefs and teachings of our nation.

3. The government stressed that our nation believes strongly in the principles of legal stability and continuity of the family name, and legalising same-sex marriages would cause a deterrence and hindrance to the process and belief as a whole.

4. It was argued that children who were brought up under homosexual couples have less exposure to the societal, reproductive, and decision-making roles of a man and woman, and there is a great chance that such kids would also grow up in favour of/ or even grow up to be homosexuals themselves.

Such a norm would influence the understanding of children on the marriage institution itself, causing a rapid, and unprecedented change in the behaviours, and hormonal reactions of the future generation.

5. Marriages as an institution serve as a basis for 'procreation', and such would not be possible in the case of homosexual couples.

6. The counsel also actively argued the centre's views that such views were hugely influenced by 'Western cultures' and they were only required by the person for acceptance among the 'elitist' living in urban areas. India still is considered an agricultural nation with wide and differentiating views among the urban and rural communities, and such a view was still widely considered a taboo by the rural folk. A judgement in favour of the petitioners would only distance them further as their views are contradictory, and would also influence their future generations too.

¹⁴ Same-sex marriage, know the petitioners for and against the case before supreme court
<https://www.indiatoday.in/law/story/same-sex-marriage-know-the-petitioners-for-and-against-the-case-before-supreme-court-2361328-2023-04-18> accessed 24 October 2023

7. The government further encouraged patience, suggesting that societal change and acceptance will follow naturally over time.¹⁵

8. The counsel argued that even though few nations have agreed to legalize same-sex marriages, it was only a handful or minority of them (34 nations) while a huge chunk of the world still opposed this view.

9. The state argues that it is the legislative and not the judiciary that should have the right to decide on such a controversial decision.

If it was decided to act positively in the petitioners' view, a law should be passed regarding the community's demands and those powers are only entrusted to the Parliament. The Judiciary only has the power to make sure such a Law is fairly interpreted and prevalent in society.

10. Concern was expressed over the fact that if same-sex marriages were legalised other forms of relationships would be deemed social and legal recognition resulting in a downward graph relating to our nation's roots, setting heavy influence on the generations to come.

11. The counsel presented a fact that the Indian society as a whole was still trying to accept the decriminalizing of homosexuality, with a majority of the consensus still opposed to it.

The Jamia-UI-Hind filed an intervention opposing the several pleas seeking legal recognition of same-sex marriages, claiming that Islam's position on the prohibition of homosexuality is undisputed and established.

The JUIH plea said, "Islam's prohibition of homosexuality has been categorical from the dawn of the religion of Islam itself. The position of Islam with respect to the prohibition on homosexuality is undisputed and established."¹⁶

Including the JIUH, various religious institutions, organisations and seers had opposed such unions.

¹⁵ What the government of India argued before the Supreme Court constitution bench <https://www.indiatoday.in/law/story/same-sex-marriage-what-the-government-of-india-argued-before-the-supreme-court-constitution-bench-2449881-2023-10-17> accessed 23 October 2023

¹⁶ Same-sex marriage: A chronology of how the case reached SC's Constitution Bench <https://www.indiatoday.in/law/story/same-sex-marriage-a-chronology-of-how-case-reached-supreme-court-constitution-bench-2361331-2023-04-18> accessed 22 October 2023

On April 17th the National Commission for Protection Of Child Rights(NCPCR)¹⁷ also approved of the opposition saying that children raised by homosexual couples would have limited exposure to the biological developments and advancements of men and women, further hindering their knowledge of acknowledging gender roles and gender identity, impacting their overall mental growth, and dejection of natural hormones too.

JUDGEMENT

The five-judge-bench gave a verdict in favour of the Central Government, with a 3-2 unanimous vote. The 2-hour ruling that was headed by CJI DY Chandrachud noted that, "queerness is a natural phenomenon present since ages" and that the government should ensure that "the queer community is not discriminated or biased against because of their gender identity or sexual orientation."

Justice S Ravindra Bhat further stated that the right of homosexuals to choose a partner and enter into a romantic, physical relationship was granted in 2018 itself by decriminalizing same-gender intercourse and that they were entitled to live among the society as equals and "celebrate their love and fondness of each other in whichever way they chose within the social realm."

He further added that this however does not allow them "legal entitlement to claim legal recognition of their relationship or union."¹⁸ Bhat called for a "high-powered committee" to be formed to evaluate laws that indirectly discriminate against LGBTQ couples by denying them "compensatory benefits or social welfare entitlements" that usually come with being legally married.

"This court cannot within the judicial framework engage in this complex task, the state has to study the impact of these policies and entitlements," he said.

They concluded by saying that they acknowledged the fact that the power to create or amend any Law or policy lies within the realms of the legislative and that the powers of a court are

¹⁷ Same-sex marriage: A chronology of how the case reached SC's Constitution Bench
<https://www.indiatoday.in/law/story/same-sex-marriage-a-chronology-of-how-case-reached-supreme-court-constitution-bench-2361331-2023-04-18> accessed 22 October 2023

¹⁸ India's top court declines to legalize same-sex marriage in landmark LGBTQ ruling
<https://edition.cnn.com/2023/10/17/india/india-same-sex-marriage-verdict-intl-hnk/index.html>
accessed 24 October 2023

only to "interpret it and effect it", reiterating that it was up to the Parliament to decide whether it could expand marriage laws to include queer unions.

WAY FORWARD

Dozens and dozens of queer community members had gathered around the premises of the Supreme Court, to pay attention to the Supreme Court proceedings, and had mobile phones in their hands that covered the live coverage too. Though the community has expressed widespread disappointment, and discontent with the rejection of their pleas, and their rights, they still express contentment over the fact that the apex court had recognised their relationships and ordered to ensure they were not discriminated against the society, and that this judgement was not a step back for them. Legal rights for LGBTQ+ people in India have been expanding over the past decade, mostly as a result of the Supreme Court's intervention from time to time, with the decriminalizing of Section 377, with one judge even openly stating that it has "paved the way for a better future."

This was the first major legal breakthrough for the community in seeking their rights. Despite the central government, on several occasions, rejecting the various pleas filed by the community in the apex court to seek recognition, they have never felt shy of courage, and determination. The apex court also accepted the central government's offer to set up a special and exclusive panel that will explore upon granting of social and legal rights to the community. The chief justice also rejected the government's assertion that being queer was an "urban" concept, saying it is not just "an English-speaking man" or a "white-collar man" who can claim to be queer, but equally, "a woman working in an agricultural job in a village."¹⁹

CONCLUSION

With all this being said, it is no hidden fact that homosexuality still carries and has long carried a stigma in Indian society for decades. This has changed in recent times with a lot of Bollywood actors, celebrity chefs and influencers openly coming out as queer, and Bollywood also making quite critical documentaries about the problems faced by the community.

According to a census of 2012, India houses a population of an estimated 2.5 million+ LGBTQ citizens, with the gay community and its advocates insisting that the numbers are widely

¹⁹ India's top court refuses to legalize same-sex marriage <https://www.npr.org/2023/10/17/1206483700/india-lgbtq-same-sex-marriage-court> accessed 24 October 2023

inaccurate and that they account for 10% of the nation's overall population, which is a staggering 125 million citizens.²⁰ This is just a rough estimate in the saying, with a wide number of people still "in the closet", or "not open", due to the stringent and orthodox beliefs, cultures, and religious parameters set in the society. Taiwan has become the first and only nation to legally accept and conduct same-sex unions since May 2023. The apex court of Nepal has also ordered a temporary injunction stating that such unions be legalised, though it is not clear when laws related to it are formulated and implemented.

In a nation like ours, where we endorse pride in our values, beliefs, and way of living, acceptance and recognition for the gay communities has been a long and hard-earned victory. But the fact still looms wide and hard about when they will be acknowledged and granted the same civil, and matrimonial rights that heterosexual couples are conferred upon. With the Supreme Court not ordering or prescribing a mandate on the establishment of the Laws relating to legalizing same-sex marriages, it is only a matter of anyone's guess as to when the ever-looming stigma is finally cleared and the community lives life as normal, proud, and equal citizens.

After the judgement of the following case, several judges have raised concerns and requested the central government to ensure that the community members are not discriminated or harassed in a whatsoever way, even if it is a small task such as opening a joint bank account. They called for steps to raise public awareness to take their battle forward, and ensure acknowledgment that "we all are same."

Furthermore, suggestions were also made stating that a public hotline should be set up under a department of the government for the members to raise doubts, queries or report harassment, unanimously if it is preferred.

Lastly, the setting up of safe houses, or community centres for violence-affected members to provide them a stage to voice their journey or troubles, or simply engage in conversations, would also help people shed aside the stigma and "normalize" the fact of talking openly about queerness.

²⁰ India's top court refuses to legalize same-sex marriage <https://www.npr.org/2023/10/17/1206483700/india-lgbtq-same-sex-marriage-court> accessed 24 October 2023