

## LEGALISATION OF SAME-SEX MARRIAGE IN INDIA

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### ABSTRACT

*The LGBTQ+ (Lesbian, Gay, Bisexual, Transgender, and Queer +) community as a whole, or homosexuals specifically, are calling for the legalization of same-sex marriage; however, the majority of Indians are against this, and the government is hesitant to grant them legal recognition due to the sacred nature of marriage in Indian culture. This article traces important legal, social, and cultural changes as it examines the changing legal environment surrounding same-sex marriage in India. Even after homosexuality was decriminalized, there are still obstacles in the way of allowing same-sex unions, such as public perceptions and regulatory requirements. Based on the equality and freedom ideals found in the constitution, evolving public perception, and generational changes, the paper explores the difficult road leading to the legalization of same-sex marriage. It emphasizes how crucial it is to keep pushing for legal reform, to promote the rights of LGBTQ+ people in India.*

**Keywords:** LGBTQ, Same-Sex, Legalization, Rights, Freedom, Marriage, Equality.

### INTRODUCTION

Same-sex marriage has sparked a great deal of debate and discussion worldwide. The legalization of same-sex marriage in India has newly made noteworthy strides. The landmark judgment of the Supreme Court in 2018 in the case of Navtej Singh Johar v. Union of India,<sup>1</sup> when the court decriminalized gay activities under Section 377 of the Indian Penal Code, was one of the most significant turning points in this journey. This landmark ruling was a significant step toward recognizing the fundamental rights of autonomy, intimacy, and identity for LGBTQ+ individuals in India. Protests against the Supreme Court verdict ensued, showing the importance and impact of this ruling. The Supreme Court's ruling in Navtej Singh Johar v Union of India was a turning point in the fight for LGBTQ+ rights in India and laid the foundation for further progress towards legalizing same-sex marriage. In addition to the decriminalization of homosexuality, there have been efforts to promote inclusivity and welfare for the transgender community in India. Kerala, one of India's first states to establish welfare

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<sup>1</sup> Navtej Singh Johar & Ors v Union of India (2018) INSC 790

policies for the transgender community, proposed free gender affirmation surgery.<sup>2</sup> However, despite these positive developments, same-sex marriages are still not legally recognized or performed in India. In India, gays have achieved a significant triumph with the recent success of the LGBTQ+ movement and the decriminalization of Section 377. Legalizing pairings of the same sex will help LGBTQ+ couples by increasing their legal protection and acknowledgment, decreasing discrimination against them, and promoting more public acceptance.<sup>3</sup>

## HISTORICAL CONTEXT OF SAME-SEX MARRIAGE IN INDIA

To understand the current state of same-sex marriage in India, it is important to consider the historical context of LGBTQ+ rights in the country. Same-sex sexual activity was criminalized in India under Section 377 of the Indian Penal Code, which dates back to 1861. Section 377 effectively made homosexual relations illegal, which resulted in widespread prejudice against and persecution of LGBTQ+ people. But in a historic decision in *Navtej Singh Johar v. Union of India*, the Indian Supreme Court ruled on September 6, 2018, that Section 377 was unconstitutional. India's efforts to legalize same-sex marriage have been ongoing, but they are not recognized or performed. One of the first states in India to establish a welfare program for the transgender community and to provide free gender affirmation surgery through government facilities in Kerala.

*Less Than Gay: A Citizens' Paper on the Status of Homosexuality in India*, published in 1991 by the AIDS Bhedbhav Virodhi Andolan (ABVA), was the first public gay rights document in India. Numerous LGBT pride parades have been organized across the country; the first one was conducted in Kolkata in 1999, and it swiftly spread to other parts of the country. *Pink Pages* and *Bombay Dost*, two periodicals for LGBT people, were published in 2009.

In a landmark decision in the historical case of *Naz Foundation v. Government of the NCT of Delhi*<sup>4</sup>, the Delhi High Court ruled that Section 377 of IPC was unlawful as it made homosexual

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<sup>2</sup> 'Social Justice, Kerala' (*Social Justice Departmen*) <[https://sjd.kerala.gov.in/beneficiary-info.php?benef\\_sl=N3NWOHVxUiN2eQ==](https://sjd.kerala.gov.in/beneficiary-info.php?benef_sl=N3NWOHVxUiN2eQ==)> accessed 25 July 2024.

<sup>3</sup> Akshat Anunay, 'Same Sex Marriages in India: A Complete Overview' (*Times of India*, 06 March 2023) <<https://timesofindia.indiatimes.com/readersblog/dopamineffable/same-sex-marriages-in-india-a-complete-overview-53507/>> accessed 25 July 2024.

<sup>4</sup> *Naz Foundation v Government of NCT of Delhi* (2009) 160 Delhi Law Times 277

activities committed with the consent of the partners illegal.<sup>5</sup> But later, in the case of Suresh Kumar Koushal v. Naz Foundation, the Indian Supreme Court overruled this ruling.<sup>6</sup>

### **SAME-SEX MARRIAGE IN THE INDIAN CONSTITUTION**

Human rights and non-discrimination are cited under the Indian Constitution. These ideals are upheld by the acceptance of same-sex marriage, which guarantees that LGBTQ+ people won't face discrimination because of their sexual orientation. To legalize same-sex marriage, human rights standards must be upheld as well as the equality and dignity of every person be protected.

The right to equality is guaranteed by Article 14 of the Indian Constitution<sup>7</sup>, and supporters contend that excluding same-sex couples from getting married amounts to discrimination based on sexual orientation. Advocates of Article 15 contend that it should cover sexual orientation as it forbids discrimination on several grounds, including sex.<sup>8</sup>

Article 19<sup>9</sup>: The primary right that has been infringed upon is the "right to freedom of speech and expression," as stated in Article 19(1)(a). Even if same-sex couples are bonded by love and compassion, marriage is still not recognized, which keeps them from expressing their love and compassion in public and creates a barrier to social acceptance.

It is now acknowledged that a person's right to privacy is a crucial component of their freedom and dignity. In a seminal ruling, the Indian Supreme Court upheld the basic right to privacy guaranteed by the Indian Constitution in the case of Justice K.S. Puttaswamy (Retd.) v. Union of India.<sup>10</sup> This right involves the freedom to decide for oneself what constitutes an intimate and personal connection, including whether or not to get married and start a family.

### **COURT RULINGS CONCERNING SAME-SEX MARRIAGE IN INDIA**

The right to marry whoever one chooses is protected in India by Article 21 of the Constitution, which is why the LGBTQ+ community has long demanded the freedom to marry whoever they want. However, because same-sex marriage is not permitted in India, their demands have not been met. There hasn't been much progress made towards the rights of those who want to marry

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<sup>5</sup> Manu S R, 'LGBTQ Rights in India: Analysing the Supreme Court's Verdict' 5 IJFMR - International Journal For Multidisciplinary Research (IJFMR) <<https://www.ijfmr.com/research-paper.php?id=13961>> accessed 25 July 2024.

<sup>6</sup> *Suresh Kumar Koushal v Naz Foundation* (2013) SLP (C) No.15436 of 2009

<sup>7</sup> Constitution of India 1950, art 14.

<sup>8</sup> Constitution of India 1950, art 15

<sup>9</sup> Constitution of India 1950, art 19

<sup>10</sup> *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1

someone of the same sex; the only ruling they have received is from the case of “Naz Foundation v. Govt. of NCT of Delhi,” wherein it was found that it is a violation of basic rights to criminalize consenting adult gay sexual relations. However, this decision was later overturned. In “Suresh Kumar Koushal and Others v. NAZ Foundation and Others,” This decision was overruled by the Supreme Court, which also legalizes Section 377 of the IPC<sup>11</sup>. However, the Court ruled in “Navtej Singh Johar and Others v. Union of India” that LGBTQ people “are entitled to the full range of constitutional rights, including equal citizenship and equal protection of the laws, as well as the constitutional freedoms guaranteed to them, just like all other citizens.”<sup>12</sup> The Court also struck down the extreme law, declaring Section 377 of the IPC unconstitutional, which had previously made homosexuals’ carnal relations unlawful. In effect, the decision decriminalized homosexuality, and it was a major win for LGBTQ+ rights in India.

But in the newly filed case “Supriya Chakraborty & Abhay Dang v. Union of India,” the Supreme Court dismissed the same-sex marriage appeal.<sup>13</sup> The court's ruling in “Shafin Jahan v. Asokan K.M. and others<sup>14</sup>, 2018” determined that the right to marry is inherent in liberty under the Fundamental Rights. In “Supriya Chakraborty & Abhay Dang v. Union of India,” the Supreme Court also asked the center to form a committee to address the “human concerns” of homosexual couples, in addition to a panel recommended by the government. It stated that professionals with knowledge and experience in addressing the psychological, emotional, and social needs of LGBT people should be on the panel. The parliament was given the task by the court to change the Special Marriage Act of 1954 to permit same-sex unions. The court also declared that the right to marriage is not a fundamental right.<sup>15</sup>

## CHANGING ATTITUDES TOWARDS SAME-SEX MARRIAGE

According to a recent Pew Research Centre survey, 53% of adult Indians support same-sex marriage legalization. Among supporters of this union, 25% “somewhat support” it, while 28%

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<sup>11</sup> Neha Gupta, ‘LGBTQIA+ Community’ (*Legal Service India*)

<<https://www.legalserviceindia.com/legal/article-11395-lgbtqia-community.html>> accessed 25 July 2024.

<sup>12</sup> ‘Same Sex Marriage under the Special Marriage Act 1954 - AspireIAS’ (*Aspire IAS*, 03 December 2022) <<https://www.aspireias.com/daily-news-analysis-current-affairs/Same-sex-Marriage-under-the-Special-Marriage-Act-1954>> accessed 25 July 2024.

<sup>13</sup> *Supriya Chakraborty & Abhay Dang v Union of India* (2023) W.P.(C) No. 1011/2022

<sup>14</sup> *Shafin Jahan v Asokan K.M. and Ors* AIR ONLINE (2018) SC 1136

<sup>15</sup> Shivanshu Shivam, ‘Legalization of the Same-Sex Marriage in India’ (Justice Alive Foundation)

<[https://justicealive.org/legal-aid/legalization-of-the-same-sex-marriage-in-india/#\\_ftn7](https://justicealive.org/legal-aid/legalization-of-the-same-sex-marriage-in-india/#_ftn7)> accessed July 25 2024.

"firmly support" the concept. However, 31% "firmly oppose" it, 12% "somewhat oppose" it, and 43% of Indian adults "firmly oppose" the idea of such unions.<sup>16</sup>

It is the result of changes in cultural norms, representation of LGBTQ+ individuals in media and politics, and generational differences. As younger generations become more politically and socially active, they are more likely to support same-sex marriage and LGBTQ+ rights.

### **IMPACT OF LEGALIZING SAME-SEX MARRIAGE**

The legalization of same-sex marriage in India would necessitate significant modifications to family laws and may encounter opposition from individuals who perceive it as a challenge to customary values. Implementing these changes could provide further difficulties, such as making sure that inheritance laws are changed to accommodate same-sex spouses and that adoption laws do not discriminate against same-sex couples. Nonetheless, there would be significant benefits if same-sex marriage were permitted in India. The same legal protections and rights as heterosexual couples would be extended to same-sex couples, allowing them to adopt children, inherit property, and decide what medical treatment their partner receives.

Legalizing same-sex unions will benefit society overall by encouraging equality and inclusivity. It would convey the idea that everyone is entitled to the same legal protections and privileges, regardless of sexual orientation. This would foster a more welcoming and tolerant society by lessening the marginalization and prejudice experienced by the LGBTQ+ population. In nations such as the United States, United Kingdom, and Canada, where same-sex marriage is now recognized, same-sex partners have the same benefits and protections as heterosexual partners. Legalizing same-sex unions will accomplish the same goals by bringing India up to speed with other progressive nations and encouraging more inclusivity and equality.

### **CHALLENGES IN LEGALIZING SAME-SEX MARRIAGE IN INDIA**

A key obstacle to making same-sex marriage legal in India is the prevailing social views and traditional outlook. Despite the decriminalization of homosexuality in 2018, many people in India still view same-sex relationships as immoral and unnatural. This conservative attitude is particularly prevalent in rural areas and among older generations, making it difficult to shift societal norms and gain widespread support for same-sex marriage.

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<sup>16</sup> The Wire Staff, 'The Wire: The Wire News India, Latest News, News from India, Politics, External Affairs, Science, Economics, Gender and Culture' (*The Wire*, 14 June 2023) <<https://thewire.in/lgbtqia/53-of-adults-in-india-support-legalisation-of-same-sex-marriages-finds-pew-research-center>> accessed 26 July 2024.

Legal and constitutional hurdles also pose significant challenges to legalizing same-sex marriage in India. The current legal framework does not recognize same-sex marriage, and there is no specific law that addresses the issue. In 2018, the Supreme Court decriminalized homosexuality; nevertheless, same-sex marriage remained illegal. Additionally, personal laws in India, which govern marriage and family matters, are based on religion and can vary widely between different communities and regions. This complicates the task of creating a consistent legal structure for same-sex marriage.

The lack of political will and leadership is another significant challenge to legalizing same-sex marriage in India. While there have been some efforts to promote LGBTQ+ rights in India, including the 2018 decriminalization of homosexuality progress has been slow and incremental. The government's opposition to same-sex marriage and the lack of political support for LGBTQ+ rights make it difficult to push for legal reforms and change societal attitudes towards same-sex relationships.

## CONCLUSION

Legalizing same-sex unions in India is a complicated and dynamic matter that needs to take into account several historical, constitutional, social, and cultural aspects. The decriminalization of homosexuality has brought some progress, but same-sex marriage recognition is still very difficult to get. It serves as a reminder that everyone has rights that should be recognized and preserved in a liberal and democratic society, especially those of members of marginalized groups. It is still hoped that as the world changes and Indian culture evolves, it will become more inclusive and recognize the rights of LGBTQ+ people to love and marry who they want.