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## **SAME SEX MARRIAGE: DOGMATIC BELIEF OR A PERSON'S RIGHT**

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### **ABSTRACT**

This article talks about the present status of recognition of same sex marriage in India. Arguments, grounds, motive, reasoning and logic of both the petitioners and respondents which are in favour as well as against it are discussed here. Currents status of supreme court on the legalisation of same sex marriage , whereas arguments made by the learned senior counsels on this matter are also discussed.

Before diving into the concept of same sex marriage first status of same sex relationships are discussed. Whether Supreme Court has the power to include same sex marriage in Special Marriage Act and also Governments stance on the matter also discussing the current position of homosexuality and same sex relationships all around the world. At last concluding the article with the opinion and suggestion on the current scenario.

## INTRODUCTION

"Love doesn't discriminate, and neither should marriage. All couples deserve the same rights and privileges." - Cory Booker.

In spite of the progress that the LGBTQ community has seen in the past two decades in the country of India, there is still a long way for them to go in the fight for equal recognition and equal rights. Despite of rich history and a wide LGBTQ presence in Indian sculptures and texts, there is an unwanted taboo and phobia around the LGBTQ community amongst the common citizens of India which a person who belongs to it faces daily either directly or indirectly. LGBTQ community is no strangers to abuse and discrimination not only in Indian societies but in majority of countries that to this day see homosexuality as a negative thing to their society. Lack of Information and misinformation are the major reasons for this kind of thought process or opinions which are of homophobic or Trans phobic in nature.

Before jumping to the topic of marriage equality or same sex marriage, it is essential to know what the history of the homosexual community is. LGBTQIA+ is an umbrella term which stands for Lesbian, Gay, Bisexual, Transgender, Queer, intersex and asexual. The plus in the end of the abbreviation denotes to the remaining sexualities except the heterosexual that could not be covered in the 7 abbreviation, pansexual, non- binary are some of many examples that come under that plus sign. The LGBTQ term might be the most common term which is used to denote the people who does not follow the heterosexual norms, there are many other inclusive terms such as the LGBTQIAIPS, LGBT Alphabet, LGBTQIDK, LGBTBBQ, LGBTQWERTY or LBTTQQFAGPBDSMNC2SAP, etc. Looking the complexity and difficulty to explain to a lay man LGBTQ works best as an umbrella term.

Gender identity and sexual orientation are two different things that are used as synonyms but holds a different meaning than other, one of life's most essential concepts is gender identity, which refers to a person's innate feeling of being male, female, transgender, or trans-sexual. The sex of a person is typically determined at birth, although a very tiny percentage of people may have bodies that include all or specific parts of both male and female physiology. Genital anatomy issues can occasionally occur in people whose innate perception of themselves is inconsistent with the sex assigned to them at birth. These people may be transgender people both before and after surgery, as well as people who don't want to have surgery or don't have access to it. They may also be people who cannot have a successful operation. An individual's

persistent physical, romantic, and/or emotional attraction to another person is referred to as their sexual orientation. Transgender and gender-variant persons who have a strong sexual orientation—along with homo-sexual, bisexuals, heterosexuals, asexual, etc.—may or may not see a change in their sexual orientation during or after gender transmission. As was already said, gender identity and sexual orientation are two distinct ideas. Each person's self-defined sexual orientation and gender identity are fundamental components of their personality and one of the most fundamental aspects of self-determination, dignity, and freedom.

### **History of LGBTQ community in India**

A complex interaction of cultural, societal, and legal elements has formed the history of the LGBTQ community in India over the course of many centuries. Diverse sexual orientations and gender identities are depicted in ancient Indian literature like the Kama Sutra and sculptures like those found in the temples of Khajuraho, indicating a long heritage of openness and flexibility. The Hijra group, which includes transgender persons, eunuchs, and intersex people, has a long history in conventional Indian culture. They played distinctive roles and were valued for their contributions to culture and spirituality.

However, Victorian moral norms provided by British influence that attempted to enforce a binary concept of gender and sexuality during the colonial era brought about substantial changes to Indian culture. Section 377 of the Indian Penal Code, which made "unnatural offenses," such as consenting gay intercourse, illegal, was put into effect by the British colonial government in 1861. Since this rule was in effect for more than a century, the LGBTQ community has been stigmatized, persecuted, and rendered invisible as a result of its implementation.

It was not until 2001 that the first significant legal step was taken towards recognizing the rights of transgender individuals in India. The Supreme Court, in the case of *National Legal Services Authority v. Union of India*, acknowledged the rights of transgender people and directed the government to take measures to protect their rights, including recognition of their gender identity and access to affirmative action.

In the 2009 case of *Naz Foundation v. Government of NCT of Delhi*<sup>1</sup>, the Delhi High Court decriminalized consensual homosexual conduct between adults, marking a significant legal

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<sup>1</sup> 160 Delhi Law Times 277

advance. The court determined that Section 377 infringed basic rights, such as the right to privacy and equality, and was thus unconstitutional. For the LGBTQ community, this important decision represented a turning point toward more acceptance and understanding.

The Delhi High Court's decision was overturned by the Indian Supreme Court in 2013, restoring Section 377 and making same-sex relationships illegal once more. This choice was welcomed with a great deal of dismay and fury, which sparked a new wave of LGBTQ activism across the nation. Together, the LGBTQ community and its allies organized demonstrations, took part in public awareness initiatives, and diligently fought for their rights.

Their efforts were rewarded in 2018 when the Supreme Court of India rendered a landmark decision in the matter of *Navtej Singh Johar v. Union of India*<sup>2</sup>. The Indian Constitution's guarantees of equality, privacy, and dignity were all deemed to have been breached by Section 377, according to the court. This historic decision invalidated the legislation, decriminalized homosexuality, and upheld the rights and dignity of LGBTQ people. The decision marked a turning point in India's history of LGBTQ rights by giving the group legal status and protection. The LGBTQ community in India has since made advancements in the direction of increased exposure, acceptance, and inclusiveness. Across the nation, LGBTQ support groups, pride parades, and other cultural events have sprouted up, providing forums for discussion, celebration, and activism. The absence of legislative rights for transgender people, societal prejudice, and the demand for thorough education and understanding about LGBTQ issues persist, nevertheless.

The history of the LGBTQ community in India is a testament to the resilience, courage, and determination of individuals and communities who have fought for their rights and the freedom to love and express themselves authentically. It serves as a reminder that progress is possible even in the face of adversity, and that the journey towards equality and inclusivity is an ongoing one.

### **History of Same Sex Marriage in United Kingdom**

LGBTQ communities in the United Kingdom have a long history of fighting and contesting for their rights. However, before LGBTQ communities were granted their rights by the legislature many Legislations and Acts were passed and contended. It all started in the year

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<sup>2</sup> AIR 2018 SC 4321

1533 when several battles were fought and changes were made to the legislation, buggery act of 1533 this act was passed in the parliament by Henry Sixth allowing prosecution for practicing male homosexuality in the UK going to such lengths as awarding convictions that were punishable by death. Offenses against the person act, 1861 this act abolished the death penalty which was awarded for practicing homosexuality instead it was made punishable by 10 years imprisonment. Criminal Law Amendment Act, of 1855 this act made any homosexual act illegal even if a witness was present or not hence going a step back rather stepping further. With no requirement of witness necessary even acts committed by someone in privacy could have been prosecuted, even a letter made by one man to show affection to some other man could have brought the prosecution. This act was also called the Blackmailers Charter. Oscar Wilde also fell victim to this act.

Female Homosexuality was not targeted in any legislation; however, it was brought in the parliament in 1921 to bring the Criminal Law Amendment Bill, 1921 but it failed when both the House of Lords and House of Commons rejected it because of the fear that such type of legislation could encourage women to practice homosexuality. Post World War period saw several transgender identities starting to appear and undergoing surgeries, In May 1952 Roberta Cowell World War 2 spitfire pilot underwent Vaginoplasty surgery and she continued her career as a racing driver. Meanwhile, during that period there were several arrests and prosecutions were made of high-ranking officials within the government and national institutions, such as Alan Turing who was a cryptographer and played a decisive role in World War He helped in breaking the Enigma Code of German War plans and strategies, a movie was also made inspired by his work in 2014 *The Imitation Game*. Wolfenden Report, the committee first met in 1954 and published the report in 1957, this report was focused on the issue that homosexuality could not be regarded as a disease based on evidence and hence aimed to bring a change in current law which prosecuted people scrutinizing their private lives. The government took 10 years to implement this report, it was implemented through the Sexual Offences Act of 1967, Sexual offenses act was backed by the Church of England and the House of Lords hence partially legalizing same-sex acts between men over the age of 21 conducted in private, this act presented a stepping stone. In 1988, this movement took a new phase when Section 28 of the Local Government Act which was passed by the conservative government, banned local authorities from promoting homosexuality, and education being given on homosexuality was banned. This section was later repealed Prime Minister David Cameron even apologized for the legislation.

In 2004 Civil Partnership Act was introduced allowing same-sex couples to enter binding partnerships same as marriage.

### **Marriage (Same Sex Couples) Act 2013,**

This act allowed same-sex couples to marry in England and Wales, followed by a suit in Scotland in 2014. The gender recognition act also came into force giving equal rights to trans people allowing them to acquire a new birth certificate. This movement by communities and groups of LGBTQ people in the United Kingdom took a long period of time however in some countries these communities still continue to fight for their equality and their desired rights.

### **Journey of Same Sex Marriage in United States**

It only took a period of 11 years for the rights of same-sex marriage to spread from one state to all fifty other states including Washington DC in the United States. The concept of marriage equality has been in the US for a long time, it all started with Massachusetts the first state which declared marriage equality through the decision of the Supreme Court on November 18, 2003. Supreme Court legalized same-sex marriage and it forced the public to accept this decision. Hence making the public seriously consider the prospect of marriage between gay and lesbian couples, people also supported this view finally public opinion shifted in their favor. Although before this astonishing move the states through the 1990s and 2000s enacted bans on same-sex marriage through legislation and other amendments, however, Supreme Court of Hawaii contended that these bans violate the constitution then these bans became the focal point of debate among courts. Organizations and communities in favor of same-sex marriage contended that equal treatment given to same-sex couples opens up a number of government benefits and schemes to these people that help the children of same-sex couples. People opposing same-sex marriage contended that allowing only opposite-sex marriage encourages natural procreation and encourages the parents to stay together in the marriage for the proper rearing of the children.

### **Strongest arguments made in favor of same sex marriage**

Same-sex couples argued that denying their right to marry violates the 14th amendment.

The first argument cites the 14th amendment due process clause which states that no person or group shall be denied their fundamental right. Same-sex marriage advocates argue that the state

should not deny gay and lesbian couples their right to marry.

The second argument contended on the 14th amendment equal protection clause which stated that the state must guarantee equal protection under all laws to all groups of people. Same-Sex advocates argued that gay and lesbian couples also deserve their marriage laws and same must be protected by the state.

### **US Supreme Court legalized same sex marriage**

On June 26, 2015, US Supreme Court struck down bans on same-sex marriage made by states finally bringing equality to marriage. "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family,"<sup>[1]</sup> Justice Anthony Kennedy also argued that a federal ban on these marriages violated constitutional protections and discriminated against them by restricting them from accessing laws pertaining to social security, housing sanctions, criminal sanctions, copyright, taxes, etc. There was always a possibility that the Supreme Court might not rule in favor of petitioners, and same-sex marriage bans of various states could have been upheld hence reinstating the ban in different states, hence completely revoking the marriage of different couples which married between the time lower courts allowed their unions and the Supreme Court decision.

### **Same-Sex Relationships**

However, before talking about the status of same sex marriage in India we shall first talk about the legalisation of same sex relationships aka (Homosexuality).

Before 2018 same sex relationships were used to be considered an offence under section 377 of Indian Penal Code (Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine )<sup>3</sup>.

In 2018 after decades of activism that occurred in grassroots decriminalized homosexuality, the application of Section 377 of Indian Penal code to private consensual sex between men or

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<sup>3</sup> <https://indiankanoon.org/doc/1836974/#:~:text=Whoever%20voluntarily%20has,in%20this%20section.>

women was ruled unconstitutional by India's supreme court in case Navtej Singh Johar & Ors. versus Union of India.

Arguments that were made in this case *“With the passage of time and evolution of the society, procreation is not the only reason for which people choose to come together, have live-in relationships, perform coitus or even marry – they do so for a whole lot of reason including emotional companionship and many more”*<sup>4</sup>

The constitution-makers made the constitution flexible instead of rigid with the intention to add laws that benefit the public and struck down laws that society doesn't need any more it turned the constitution of India into a living organism that has evolved over time there have been many changes in the society and the constitution because of its flexible nature have been able to keep up with the society's needs.

### **Current Status of Same Sex Marriage in India**

A 5-judge Constitution Bench, consisting of Chief Justice of India D.Y. Chandrachud, Justice S.K. Kaul, Justice Ravindra Bhat, Justice Hima Kohli and Justice P.S. Narasimha, heard 20 connected cases brought by 52 petitioners. Many petitions were filed by people of different groups including Transgenders, Same sex couples and LGBTQIA activists challenging the provisions of Special Marriage Act 1954, Hindu Marriage Act 1955 and Foreign Marriage Act 1969 claiming that all these legislations that were passed do not recognise homosexual marriages.

Arguments raised by Respondent Senior Advocate Kapil Sibal *“ Marriage was a social phenomenon which only deals with heterosexuals , any law that impacts a society so deeply needs involvement of the parliament, family and society as well”*

*“Anyone can claim their marriage but the moment anyone ask for recognition this is where the problem arises”*

*“Homosexual Marriage can't be equated with the marriage that had the grant of society for more than 100 of years”*

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<sup>4</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

Justice D Y Chandrachud in response to this “ *Court in the past has issued declarations like right to environment and right to education. Hence now right to education is now read under right to education act.*

### **Not in the Domain of the Courts to pass any such Declaration**

Doctrine of separation of powers which is an inherent part of the basic structure of the constitution of India clearly states that there should be separation of powers between various organs of the state. Hence, the law-making power should rest with the legislature and judiciary focus on the interpretation of the laws.

Art. 140<sup>5</sup> of the Constitution confers ancillary powers to the Supreme Court by the parliament, but in the present case no such power has been delegated to the Hon’ble Court and If the court passes any declaration, it will be contrary to Art. 140 of the Constitution.

This is a matter of policy that should be decided by the elected representatives hence kind of direction should be issued by the court.

### **Assertions Made by Same Sex Couples**

Article 14<sup>6</sup> ensures equal rights and protection to the citizens and hence imposes a positive obligation on the state as well as the Supreme Court to bringing necessary social and economic changes so that equal protection of laws can be ensured. Article 14 does not restrict the word ‘person’ and its application only to male or female. All the same sex couples and comes under the ambit of article 14.

The Special Marriage Act, 1954 violates the fundamental rights of non-heterosexual groups by not allowing right to marry. They are not able to marry the person of their own choice and sometimes are forced into Lavender Marriages (gay men or women marrying a heterosexual men or women). Due to which LGBTQIA++ community are looked upon by society.

The couples are not able to get a Get a joint bank account, Provident fund, Pension, Purchase house together, Take medical decisions for each other, Surrogacy, adoption, Inheritance,

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<sup>5</sup> The Constitution of India 1950, Art 140

<sup>6</sup> Indian Constitution, Art.14

succession and Maintenance.

Article 21 of the constitution of India states that “*No person shall be deprived of his life or personal liberty except according to procedure established by law*”. This article guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable.

The Special Marriage Act, 1954 is an Act of the Parliament of India with provision for civil marriage for people of India and all Indian nationals in foreign countries, irrespective of religion or faith followed by either party. The purpose of special marriage act 1954 was to include those marriages which were not in convention with the traditional marriage concept. The core of the Special Marriage Act, 1954 was to give freedom of choice.

Marriage is a bouquet of rights. The benefits which are given to married couple are gratuity, provident fund, joint bank, account, to make medical decisions, adoptions, surrogacy, pensions etc. are all premised on one thing which is spousal relationship created by marriage. Same sex couples are excluded from all of that. Marriage is a matter of conscience under article 25<sup>7</sup> of constitution of India.

Same sex couples want to insert their marriage in Special Marriage Act ,1954 however the Central Government is against such contention.

### **Current Status of Same Sex Marriage Around the World**

Currently there are 34 countries in total where same sex marriage is considered legal Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Finland, France, Germany, 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.

### **The legalisation of same sex marriage:**

There are total of 23 countries which have legalised same sex marriage through legislation.

10 countries went with court decisions to legalise same sex marriage. Australia, Brazil, Costa

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<sup>7</sup> Article 25, Const of India

Rica etc.

South Africa and Taiwan are the only 2 countries to legalise same sex marriage after the court mandated them to do so.

Netherlands became the first country to legalise same sex marriage in year 2000 and Costa Rica was the first central American country to legalise same sex marriage.

With the current ongoing circumstances it may seem that India will might become the third country to legalise same sex marriage after court-mandated them to do so after Taiwan and South Africa. Reason being, Article 377 (Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine)<sup>8</sup> was made unconstitutional by Supreme Court in the case Navtej Singh Johar v Union of India<sup>9</sup> after no action was taken by the Government.

However, there are still various countries which ceases same sex marriages even relationships.

Recently Ugandan Parliament passed a new strict version of Anti LGBTQ bill imposing death penalties on the cases of aggravated Homosexuality on March 21 2023 by Ugandan President Yoweri Museveni.

Uganda being not the only country in Africa there are other 54 countries in Africa which gives harsh punishments on practising homosexuality

Gay relationships are still considered a criminal offence in 7 countries, eight countries in which it can result to death sentence.

Iran, Sudan, Saudi Arabia, Yemen, Somalia, Syria and Iraq are countries in which death penalty is carried out.

### **Subsequent Future for Same-Sex Marriage in India**

It might appear to everyone that Supreme Court by some means will include Same sex marriage in Special Marriage act 1954 but however Supreme court does not have any jurisdiction or

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<sup>8</sup> Article 377 Unnatural offences, Const of India

<sup>9</sup> Navtej Singh Johar v Union of India

power to enact laws. At the end of the day Supreme court can only issue guidelines and can only give directions to the Government for passing up a bill which would later become an Act recognising Same sex marriage under Special Marriage Act of 1954.

### **Doctrine of Separation of Power**

The power to legislate vests with the parliament and not the Supreme Court following the doctrine of Separation of Powers which is an inherent part of the basic structure of the constitution of India clearly states that there should be separation of powers between various organs of the state. It might seem that legalisation of same sex marriage in India would still take number of years as happened in the case of decriminalisation of Homosexuality. Change is bound to occur in every society difference being someplace it takes not much time whereas someplace it takes a lengthy amount of time.

### **Reasons for Demanding of Recognition of Same Sex Marriage**

Marriage is a bouquet of rights. The benefits which are given to married couple are gratuity, provident fund, joint bank, account, to make medical decisions, adoptions, surrogacy, pensions etc. are all premised on one thing which is spousal relationship created by marriage. Same sex couples are excluded from all of that. Marriage is a matter of conscience under article 25 of constitution of India.

### **Conclusion and Suggestions**

After observing the current status as well as proceedings for same sex marriage in India, this writer holds the view that same sex marriage should be legalised reason being every citizen of our country have the same sets of legal rights and un recognition of same sex marriage violates their Fundamental Rights violating Article 14, 15, 19 and 21 of same sex couple as it discriminates individuals on the basis of sexual orientation.

The institution of marriage has evolved from marriage being defined as a 'civil union of one man and one woman united in law for life for discharge of duties to each other and the community' to 'a legalized union between two people called spouses and establishes rights, obligation between them and their children'. The people belonging from LGBTQIA communities cherish the same right as given to heterosexual couples. They want to live a dignified life as given to others and not always be looked upon.

As contended in the arguments of Saurabh Kirpal case 2020 “Man is a social being and has autonomy and is a social being. Covid 19 times have shown that how difficult is to live alone. Marriage is an expansion and is an inclusive concept. At one time in USA interracial marriage and in India intercaste marriage, widow remarriage was illegal. So, marriage has been an evolving institution and not a static concept. If dignity and autonomy are the pillars of the constitution, there is no possibly no greater manifestation of that autonomy than the right to choose a sexual partner. And nothing is a greater expression of that choice than marriage. It seems apparent that both the right to choose a partner and the right to marry are intensely personal choices over which the State and the community really ought to have no control”<sup>10</sup>

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<sup>10</sup> Saurabh Kirpal, *Sex and the Supreme Court* (2020 Hachette India) 116.