

**THE LAWWAY WITH LAWYERS JOURNAL**  
**VOLUME:-19 ISSUE NO:- 19 , FEBUARY 3, 2025**  
**ISSN (ONLINE):- 2584-1106**  
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**SAME-SEX MARRIAGE IN INDIA: THE CONTADICTORY OUTCOMES AND THE LEGAL STRUGGLES**

**ABSTRACT**

Marriage is a formal relationship between two people that is recognised by the law which substantially establishes rights and obligations towards each other. Civil union is similar to a marriage which provides recognition under law for the same sex couples. Legalizing civil union grants LGBTQ+ individual's equal rights and recognition under the law, legal benefits and protections, promoting social equality, reducing discrimination, and positive impact on their mental health and well-being. On the other hand, marriage is considered to be sacrament rather than a contract where its elemental purpose is procreation which is not possible in the same sex marriage. legalising civil union will trigger societal instability and is contrary to Indian ideals and cultural norms. Based on the facts outlined above the paper shall be analysis of the contradictory outcomes whether there is necessary of legalising same sex marriage in India. The paper shall also deal with the recent developments of the same sex marriage via the case decided by the supreme court of India.

**Key words:**

Marriage, civil union, LGBTQ+, legalising, same sex marriage, homosexual couples

**Introduction**

Same sex marriage refers to the marriage between two individuals of the same sex. This generally takes place in the LGBTQ community. The term LGBTQ evolved to represent the inclusive society. In the early 1990s activists began to use the term LGBT. Later in 2010s LGBTQ was adopted to recognise the diversity of sexual and gender identities. "LGBTQ" is a contraction for lesbian, gay, bisexual, transgender, and queer. there is no decisive definition for the term hence it is used with the acronym LGBTQ. the + in the "LGBTQIA+" stands for all the other identities that are not included in the acronym. The LGBTQ+ community is internationally represented via symbols of "the pink triangle" and "the rainbow flag".

The LGBTQ community has come across a long way against the discrimination, legal restrictions, identification, equal rights etc. the British Indian government enacted IPC (Indian penal code) to address the chaos and confusion in the criminal justice system of India in 1860. Section 377 of IPC criminalised "unnatural sex" which states whoever voluntarily has carnal intercourse against the order of nature with any man, women or animal shall be punished with life imprisonment or for a term extended to ten years. IPC, in its present form,

Later in 2018 via landmark case “Navtej Johar vs. Union of India” Supreme Court of India without opposition ruled that Section 377 which was criminalised homosexual acts between adults was unconstitutional. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution. Supreme Court of India effectively decriminalized same-sex relationships by upholding the rights to privacy, equality, and dignity under the Constitution.

#### **Why same sex marriage has become a topic of debate?**

Same sex marriage is a subject of heated argument across the world. India is a land of cultural diversity. Legalising same sex marriage in a country where the traditions and religious beliefs, customs and culture is respected is strenuous. The lawmakers must take into consideration of religious and cultural belief if not it will surely trigger the societal instability, which has increased the pressure of law makers and the courts as well. Though there are precedents and advancement regarding same sex marriage the issue keeps on evolving which is definitely a pressure for the lawmakers and court to decide the cases.

#### **Legal status in India**

India currently does not recognise the same sex marriage. Yet there are developments where the court decriminalised Section 377 and recognised the rights of queer couples which is a significant victory to the LGBTQ community. But it is important to note that still there are no laws governing and protecting the rights of homosexual couples. The legal recognition of homosexual couples marriage remain absent.

#### **Same sex marriage in ancient period**

Hinduism and religion were not against transgender. In Vedic society third gender citizens were neither persecuted nor denied their basic right like modern Indian society. It is important to note that a temple in Madhya Pradesh “Khajuraho temple” depict explicit sexual act between both men and women which is an evidence of acceptance of homosexuality in that period.

In Ramayana, it is said that after visiting Sita in Lanka, Hanuman sees Rakshasa women kissing and embracing each other.

The Kamasutra is an ancient Sanskrit text that describes homosexual practises, but it does not advocate homosexuality.

On the other hand, it is important to note the interpretations of ancient society and mythology as well. It is said that in “Mathsya Purana” during the churning milky ocean or “Samudhra Manthana” Lord Vishnu took Mohini Avatar (a delusion of Lord Vishnu) Lord Shiva was attracted by the Mohini’s beauty and resulted in birth to Lord Ayyappa. Here it is important to note that Shiva was attracted to Mohini the female form of Vishnu and it cannot be considered as same sex union.

Manusmriti or Manava Dharmashashtra does not support civil union. It predominantly focuses on traditional marriage as a means of procreation. It prescribes social and sexual relations under the umbrella of heterosexual monogamous union.

In mythology, depicts two characters under third gender Shikandi and Arjuna. Shikandi undergoes a gender change, born as a female named Amba, but later transforming into a male warrior named Shikandi through a boon from Yaksha allowing her to fight and ultimately defeat Bhishma in battle exploiting his vow not to fight a woman. Arjuna was cursed by an Apsara named Urvashi after he rejected her advances causing him to live as women for an exile period. Later upon Indra's request the curse was modified to only last for one year where Arjuna lives as Brihannala (a eunuch). This is demonstrating a concept of gender fluidity with in the epic.

The Arthashastra of Kautilya, an ancient Indian treatise and statecraft, mentions variety of sexual practices which, whether performed with a man or woman were sought to be punished with the lowest grade of fine.

Ancient Indian texts, inscriptions and paintings on temple walls, clearly don't approve of homosexuality. Ancient laws and texts generally disapproved of same sex marriage. But the repeated references do acknowledge its existence. For the record there are instances in ancient Indian history that provide evidence and acceptance of homosexuality but there are no documents to prove the legalisation of same sex marriage in ancient India.

### **Same sex marriage in modern India**

In India the currently same sex marriage is not recognised and it does not have any legal status yet. In 2018 the supreme court case *Johar Navtej v Union of India*, it was held that section 377 criminalises certain sexual act not any class of people. hence it decriminalised same sex relationship between adults and allowed live-in relationship between same sex couples. The court predominantly legalizes homosexuality in India which removed unnatural offences that were punishable under section 377.

Later in 2022 two same sexed couple Supriyo Chakraborty and Abhay Dang, Parth Mehrotra and Uday Raj Anand filed a writ petition challenging the section 4(c) of special marriage act 1954. the petitioners argue that the section is limited for heterosexual relationships which is violating their fundamental right, equality, freedom of expression and discrimination against the same sex couples.

The supreme court overruled same sex marriage. But, it also recognised the rights of queer couples and allowed them to cohabit or live together without any violence or threat.

Further in 2023 again in *Supriyo vs Union of India* challenged the court decision that refuse to provide the legal status to same sex marriage in India. The petitioners also brought to the court notice to provide the right to form civil union and adopt for same sex couples.

The court ruled that marriage is neither fundamental right nor constitutional right rather it is a statutory right. The 5 bench judge agreed that the court can neither strike down or read words into the Special Marriage Act 1954 to include same sex members within the ambit of the Special Marriage Act 1954. The top court said it is for Parliament and state legislature to formulate laws on it. A five-judge Bench of the Supreme Court, headed by Justice B.R. Gavai, rejected petitions seeking a review of an October 2023 judgment which refused to legalise same-sex marriage.

### **Why there are petitions filed to legalise the same sex marriage?**

In India recently there were 21 petitions filed in the supreme court of India for the legal status of the homosexual couples. A bench of five judge heard all of them and without any opposition rejected all of them. Nevertheless, there are petitions filed to review the rejection of the petition which the court denied on January 2025. the petitioners have stated certain points during the argument why legalising same sex marriage is important.

- **Human rights and equality:** the petitioners have argued that it is a fundamental issue and it is violating their fundamental and constitutional rights which is causing discrimination. It is to be noted that apart from sexual orientation every individual should have the right to marry the person they love and it should be recognised by the law and order. The petitioners also pointed out that article 14 and article 21 which say right to equality and right to live in dignity respectively should be made available to the same sex couple as well.
- **Social acceptance:** social acceptance and legal recognition of same sex couples would be the powerful move of inclusivity which will further help to reduce the discrimination faced by the LGBTQ individuals in the society. legal recognition of same sex marriage as of now is a complex one but over the time it would help to greater social acceptance and achieve greater social cohesion.
- **Legal protection and aids:** there are no laws or acts which governs or protect the homosexual couples as mentioned earlier legal recognition of same sex marriage remains absent. Fundamentally marriage provides various legal benefits including succession, inheritance, health care, adoption etc. which the same sex couples are denied to all the benefits without the legal recognition.
- **Global progress and recognition:** same sex marriage now is no longer a minor problem it has gained attention all over the world many countries like United states, Australia, Argentina, United Kingdom, Belgium have recognised same sex marriage which is a positive sign of achievement of human rights and equality. India is a global leader taking a step further can be a major step towards the inclusivity and achievement of human rights and equality.

### **The case against legalising same sex marriage in India: legal, social, ethical considerations.**

Legalising same sex marriage is a complex and is a pressure to law makers and the courts. There are strong arguments in favourable to the legal status of same sex marriage nevertheless, there are concerns and considerations which the lawmakers must look into.

- **Cultural and religious belief:** marriage in India is considered as sacrament than a contract which basic purpose is procreation which cannot be possible in civil union. They believe that marriage should be done only between men and women.
- **Ethical considerations:** ethical considerations are discussed in a broader context of balancing individual rights, societal values, and cultural norms.

- **Traditional family structure:** in many cultures, marriage is not just a romantic relationship but it's a bedrock for family life which involves procreation and raising of children same sex marriage challenge these standards. It is very important to note the mental status of the children that are brought up by the same sex couples.
- **Legal precedents and social change:** marriage is a social institution it should not be forced by the law rather it should be slowly accepted by the society. The lawmakers feel that changing the definition of marriage might open doors for polygamy and other relationships which is a matter of concern.
- **Political and legal concerns:** it is believed that legalising same sex marriage would not receive a lot of support from the political parties the politicians may not support this thinking that might affect their number of votes during the elections. And also as of now the supreme court has ruled that it is up to the parliament and state legislature it might arise a conflict between the national laws and state legislature as well.
- **Public opinion:** the very important aspect taken in consideration is public opinion. A lot of people majorly oppose the legalisation of same sex marriage thinking that it is breaking the traditions, cultural and religious beliefs.

### **Whether there is a necessity of legalising same sex marriage in India?**

The question whether India should legalise same sex marriage or not is a subject of discussion. There are strong arguments in favour of legalising same sex marriage but it is also facing a large amount of backlash though courts have made noticeable developments there is no recognition for same sex marriage in India till date. All the precedents denied to provide the legal status to the homosexual couples for marriage and adoption as well. The court has ruled that marriage is not a fundamental right rather a statutory right this it is the parliament or the state legislature to formulate the laws regarding same sex marriage.

#### **Case laws:**

##### **Navtej Johar v. Union of India**

A landmark case which decriminalised section 377 which criminalised "unnatural sex" which states whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with life imprisonment or for a term extended to ten years. Recognition of marriage was denied by the court.

##### **Supriyo v. Union of India (2022)**

Here the court recognised the relationship between queer couples and live together without any threat or violence. But the legal status of the marriage remains absent.

##### **Supriyo v. Union of India (2023)**

The court ruled that marriage is not a fundamental right it is a statutory right it is parliament or the state legislature that should formulate laws on legalising same sex marriage. There is no legalisation of same sex marriage it was again denied by the supreme court of India.

#### **Conclusion:**

The debate on same sex marriage is ongoing and the issues keep on evolving along with the time it is like a coin which has two sides. Legalising same sex marriage will provide rights and equality legal

recognition, and legal benefits and protection to the same sex marriage couples, conversely it would hurt the traditional and religious beliefs and cause social imbalance which might also lead to the social division. From the beginning this has given a contradictory outcome. to decide whether it is necessary or not is truly a burden for law makers ultimately it requires careful balance between the traditional values and the law.

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