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## SAME- SEX MARRIAGE: “A SOCIO- LEGAL DEBATE IN CONTEMPORARY WORLD”

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### Abstract

Same- sex marriage is against the Indian culture, said the Indian Government. According to a Member of Indian Parliament Sushil Kumar Modi, same sex marriage is neither accepted in any uncodified personal law. On 6th January, 2023, the Supreme Court decided to address various petitions pending in different High Courts. These petitions were regarding same- sex marriages, asking whether they should be legalized in India or not. The supporters of the petitions said that India decriminalized homosexual relationships in 2018, i.e., one can legally have a relationship with a homosexual partner. They argue that as India decriminalized homosexual relationships in 2018, why should it not legalize same- sex marriage in 2023? They believe that as homosexual relationships are legal, so should same-sex marriages. They say that not recognizing same- sex marriages violate the right to equality enshrined in Article 14 guaranteed in the Constitution, while government holds an opposite view.

Our society is divided on this matter as well. Some argue that people have a right to marry, if they desire, whomever they like. Take the case of Supriyo Chakraborty and Abhay Dang from West Bengal. They have been together for around 10 years, their families have accepted them, and they have even held a ring ceremony. They want to get married but can't because Indian law does not recognize same- sex marriage. On the other hand, some argue that same- sex marriages go against Indian society. This is because the family is the basic unit of Indian society, and as same- sex couples can't procreate, they can't constitute a family. So, should India legalize same-sex marriage or not?

Reportedly, 7-8% of the Indian population falls under the LGBTQ+ community. There has been a significant progress in the rights of LGBTQ community but lately the Apex Court has handed over the batten of recognizing the same- sex marriage to the Parliament of India. Thus, this research paper deals with the arguments for and against legalizing of same- sex marriage in India.?

**Keywords:** *Homosexual, same- sex marriage, legal recognition, decriminalize*

## A. INTRODUCTION

Same- sex marriage is basically a legal union of two same sex individuals. In its present form, marriages in India are only between recognized between heterosexuals and not per se homosexuals. There are certain doctrines for the interpretation of the Constitution including ‘silences of the Constitution’, ‘basic structure’ and ‘constitutional morality.’ These doctrines have far- reaching effects as they not only read the text but go beyond to interpret the soul of the grund-norm. Right to equality, liberty and privacy have been well recognized as fundamental to the very being of every person, and thus cannot be evaded in a superficial manner. Thus, the question of whether same- sex marriages take a firm stand. This topic is of significance because it pertains to human rights of a LGBTQ community. The community, the advocates and LGBTQ rights activities have been fighting for the cause for a significant number of years. Thus, the issue must come to light and a serious debate be stimulated around the topic. As far as this topic is concerned, society can be divided into three groups. The first being, that supports the legalization of homosexuality and same- sex marriages, second, that support the legalization of homosexuality but not marriages and third, who oppose the legalization of both. This research paper precisely focuses on the first two groups and their arguments, as the last group and their arguments was already tackled with and countered on 6<sup>th</sup> September, 2018, when Hon’ble Supreme Court read down consensual- homosexual behavior under Section 377 of the Indian Penal Code.<sup>1</sup>

This penal provision criminalized homosexual relationships. Section 377 was the first codified legislation on homosexuality in India, and came into effect when India was under British rule. It was drafted by Lord Macaulay in 1838. This law prohibited any “unnatural sex against the order of nature.”

Thus, according to this law, homosexuality was deemed “unnatural.” Thus, being homosexual could land a person in jail. Before, independence, being outspoken about this law had harsh consequences. A movie named “Fire” was inspired by the novel “Lihaaf,” by Ismat Chughtai, published in 1942.

Lihaaf is a story about a neglected wife who explores lesbian sex.<sup>2</sup> In the year 1946, the author of the book faced charges of obscenity.<sup>3</sup>

Even after India got independence, things continued to remain the same. In 1987, two female police officers from Bhopal ‘Lila and Urmila’ were sacked from their jobs after getting married and coming out as a lesbian couple. Similarly, author Payal Dhar, who identifies herself as a part of LGBTQ+ community, states that in 80s and 90s, she had no terminology to describe how she viewed herself.

Even after independence, the people of this community continued to face discrimination and section 377 remained in effect. However, things began to take a turn in the 1990s. In 1991, India liberalized its economy, and LGBTQ+ activists gained inspiration from the idea of equality predominant in foreign countries. During this time, India’s first LGBT magazine, Bombay Dost,<sup>4</sup> also started its publication. It is to be noted that society and the law were still against the LGBTQ+ community, but support emerged gradually.

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It was in 2001, when an NGO called Naz Foundation filed a petition challenging Section 377 in the Delhi

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

<sup>2</sup> The Beacon Webzine, “‘Lihaaf’ [The Quilt]. Short Fiction by Ismat Chughtai” (2021), <https://www.thebeacon.in/2021/03/20/lihaaf-the-quilt-short-fiction-by-ismat-chughtai/> (last visited June 01, 2025).

<sup>3</sup> Mrinalini Raj, “Why Ismat Chughtai Faced Trial: An Intersectional Reading of the Reception of ‘Lihaaf’ in Colonial India,” Bridgewater State University Virtual Commons (2025),

[https://vc.bridgew.edu/cgi/viewcontent.cgi?params=/context/jiws/article/3122/&path\\_info=9](https://vc.bridgew.edu/cgi/viewcontent.cgi?params=/context/jiws/article/3122/&path_info=9). Revised\_Why\_Chughtai\_Faced\_Trial\_The\_Reception\_of\_Lihaaf\_in\_Colonial\_India\_1.pdf (last visited June 01, 2025).

<sup>4</sup> Shruti Das, “How LGBTQ Magazines Are Helping Individuals Come Out,” Newslandry (2025), <https://homegrown.co.in/homegrown-voices/the-radical-history-evolution-of-indias-first-gay-magazine> (last visited June 01, 2025)

High Court. The petition was stalled for nearly eight years and later dismissed. It was after the Apex Court ordered reconsideration of the petition, the Delhi High Court judged in 2009 and decriminalized homosexuality.<sup>5</sup> The matter was then taken to the Supreme Court, and in 2012, the Apex Court overturned the Delhi High Court's decision and held that in over 150 years less than 200 people were prosecuted under this section. Therefore, neither from the legislative side nor from the judicial side was there any hope for the homosexuals.

In the year 2015, Mr. Shashi Tharoor introduced a private member's Bill<sup>6</sup> to decriminalize homosexuality, but the Bill was voted against in the House of People. Finally, it was in the year 2018, that a Constitutional bench of five-judge Bench of the Apex Court partially struck down Section 377 and decriminalized same-sex relations between adults of consenting age.<sup>7</sup>

Therefore, the question that persists is, if homosexuality is legal and same-sex couples can even live together legally, what objective be achieved by the recognition of the same through marriage?

According to Indian law, child of any age can be adopted by a single woman while only male child can be adopted by a single man. Thus, an LGBTQ+ couple can apply for adoption as a single parent, while the other partner having no legal right over the child. In India we have many different 'family laws' regulating the matters of adoption, surrogacy, inheritance, etc, and 'marriage' plays a crucial part in all these laws. Thus, as LGBTQ+ couples cannot marry legally, they're deprived of rights afforded by these laws.

The classic case of Mr. Sameer Samudra<sup>8</sup> who married his partner Mr. Amit Gokhale in the United States clearly showcases the struggle. The couple moved to India some years ago, and since then are going through financial struggles because of the law. According to Mr. Sameer, he couldn't get life insurance for his partner. He also can't apply for joint house loan as their marriage has no legal recognition. Moreover, same-sex couples lack security and protection from the government and society. For instance, the lack of bigamy is applicable to legally wedded couples alone

and a gay or a lesbian couple cannot claim the protection under the law.

Also, by any stretch of imagination a gay or lesbian couple cannot move to the court for restitution of conjugal rights in case their partner withdraws from their society without a just cause. As per the law of inheritance in India, if a legally wedded spouse dies without a 'will', the other spouse inherits the property accordingly. This is not the case with homosexual couples, as the property can be inherited by the partner of family.

## B. ARGUMENTS IN FAVOUR OF SAME-SEX MARRIAGE

### 1. Rights constitutionally protected

The Constitution of India guarantees every individual the rights to liberty, equality, and privacy. In the landmark *Maneka Gandhi*<sup>9</sup> case, the Supreme Court interpreted Article 21 to mean that the right to life and personal liberty extends beyond mere survival and includes the right to live with dignity. Dignity implies that all individuals have an inherent right to a life free from discrimination. Therefore, the law must uphold equality and avoid any form of bias. However, Section 4(c) of the Special Marriage Act, 1954, explicitly recognizes marriage only between a 'male' and a 'female', thereby excluding same-sex couples and denying them crucial matrimonial rights such as adoption, surrogacy, and employment or retirement benefits. While a five-judge Bench of the Supreme Court has clarified that the right to marry is not, in itself, a fundamental right,<sup>10</sup> it has affirmed that the right to choose one's partner is an essential aspect of personal liberty.<sup>11</sup>

Article 21 of the Indian Constitution ensures the right to marry a person of one's choice. In the landmark case of *Lata Singh v. State of Uttar Pradesh*,<sup>12</sup> the Supreme Court affirmed that an adult woman has the autonomy to marry anyone she chooses, and no law can prohibit inter-caste marriages. The Court further emphasized that societal expectations should not interfere with an individual's personal decisions. While parents may choose to sever ties, they cannot resort to threats or incite violence. Although the right to privacy is not

<sup>5</sup> *NAZ Foundation v. Government of NCT of Delhi and Ors*, (2009) DLT 27 (India).

<sup>6</sup> The Indian Express, "Shashi Tharoor's Bill to Decriminalise Homosexuality Defeated in Lok Sabha" (2015), <https://indianexpress.com/article/india/india-news-india/shashi-tharoors-bill-to-decriminalise-homosexuality-defeated-in-ls/> (last visited June 01, 2025).

<sup>7</sup> *Supra* note 1.

<sup>8</sup> Mint, "Same-Sex Couples in India Lack Basic Financial Rights" (2019),

<https://www.livemint.com/money/personal-finance/same-sex-couples-in-india-lack-basic-financial-rights-1561396839301.html> (last visited June 01, 2025).

<sup>9</sup> *Maneka Gandhi v. Union of India*, 1978 2 S.C.R. 621 (India).

<sup>10</sup> *Supra* note 5.

<sup>11</sup> *Shafin Jahan v. Ashokan K.M.*, (2018) 16 SCC 368 (India).

<sup>12</sup> *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475 (India).

explicitly stated in the Constitution, the Supreme Court has interpreted it as an essential part of the right to life and personal liberty under Article 21. The Personal Data Protection law also acknowledges privacy as a fundamental right, and some legal experts argue that this recognition could form the basis for advocating the legalization of same-sex marriages, as it supports individuals' autonomy over personal choices. Many legal scholars contend that legalizing same-sex marriage does not require a constitutional amendment, but rather a simple revision of the Special Marriage Act (SMA) to make its language gender-neutral.<sup>13</sup>

## 2. Queer Indian history

Third argument in favour of same-sex marriage is 'queer Indian history.' Same-sex relationships in India date back to the past. According to historian Harbans Mukhia, the British criminalized homosexuality in India in the 19<sup>th</sup> century.<sup>14</sup> According to the historian, this ban was more to do with their Christian belief systems, but in both Hindu and Muslim history there are multiple mentions of homosexual relationships.

According to Valmiki's Ramayana, when Lord Hanuman returned from Lanka after visiting Goddess Sita, he recounts to others about sighting two rakshasa women kissing.<sup>15</sup> Also in Rig Veda, Mitra and Varun, both male Gods are said to have a child. The epic Mahabharat has the story of Shikhandi, who was responsible for the death of Bhishma, was born as a girl but raised as a man.

In Muslim history, The Sufi poet, Shah Hussain is believed to have fallen in love with a Hindu boy, Madho Lal.<sup>16</sup> Also, in Baburnama, Babur enunciates his attraction towards a boy named Baburi in Kabul.<sup>17</sup> But the counter argument is that, in Indian history there

were instances of homosexual relationships and not same-sex marriages.

## 3. Brain Drain

The final argument favouring same-sex marriages in the theory of 'brain drain.' Many progressive countries have in recent past have recognized same-sex marriages. The argument is that talented LGBTQ+ people would leave India, if it doesn't accord suitable rights.

## C. ARGUMENTS AGAINST SAME-SEX MARRIAGES

### 1. Challenging family, marriage

The first argument against of same-sex marriage is that it violates the fundamental unit of our society i.e., 'challenging family.' It's also argued that legalizing same-sex marriages is copying western culture and violates Indian values. The case is not made out in favour of same-sex marriage, as some believe that the purpose of marriage is procreation, which can only be achieved by heterosexual union. The counter argument is that Indian culture as already stated had various instances of homosexuality and is not a product of west. Also, the purpose of marriage is not just procreation. There are various hetero-couples who do not have children, still their marriage is recognized as legally valid. This, in turn, is countered by the fact that heterosexual couples without children are exceptions. According to a study published in 2010 showed that nearly 2.5% of Indian couples do not have kids.<sup>18</sup> Thus, law shouldn't be based on exceptions.

### 2. India not ready

<sup>13</sup> Times of India, "Same-Sex Marriages in India: A Complete Overview" (2025), <https://timesofindia.indiatimes.com/readersblog/dopamineffable/same-sex-marriages-in-india-a-complete-overview-53507/> (last visited June 01, 2025).

<sup>14</sup> Aishwarya Sinha and Manasi Prabhakaran, "Comparative Study of the Progression of Queer Rights in India and the UK, with Special Emphasis on Intersex People," IJPSL (2021), [https://ijpsl.in/wp-content/uploads/2021/09/Comparative-Study-of-the-Progression-of-Queer-Rights-in-India-and-the-UK-with-Special-Emphasis-on-Intersex-People\\_Aishwarya-Sinha-Manasi-Prabhakaran.pdf](https://ijpsl.in/wp-content/uploads/2021/09/Comparative-Study-of-the-Progression-of-Queer-Rights-in-India-and-the-UK-with-Special-Emphasis-on-Intersex-People_Aishwarya-Sinha-Manasi-Prabhakaran.pdf) (last visited June 01, 2025).

<sup>15</sup> Mukti Lahki Mangharam, "Rama, Must I Remind You of Your Divinity?" Locating a Sexualized, Feminist, and Queer Dharma in the Ramayana," Vol. 39, No. 1 (Spring 2009), Rutgers University, <https://english.rutgers.edu/images/documents/faculty/mangharam-rama-2011.pdf> (last visited June 01, 2025).

<sup>16</sup> Scroll.in, "From Bulleh Shah and Shah Hussain to Amir Khusro, Same-Sex References Abound in Islamic Poetry" (2016), <https://scroll.in/article/810007/from-bulleh-shah-and-shah-hussain-to-amir-khusro-same-sex-references-abound-in-islamic-sufi-poetry> (last visited June 01, 2025).

<sup>17</sup> The Print, "Babur Fell Hopelessly in Love with a Boy Called Baburi. Roamed Love-Sick Like a Madman" (2019), <https://theprint.in/pageturner/excerpt/babur-fell-hopelessly-in-love-with-a-boy-called-baburi-roamed-love-sick-like-a-madman/1976258/> (last visited June 01, 2025).

<sup>18</sup> National Health Mission, Material for Annual Report 2010-11 – Family Planning (2011), <https://nhm.gov.in/images/pdf/programmes/family-planing/annual-report/annual-report-fp-division-2010-11.pdf> (last visited June 01, 2025).

The second argument is actually a counter to LGBTQ+ supporters. According to the supporters there are many progressive nations in the world which have recognized same- sex marriages. But, when it comes to Asian countries recognizing the union, there is only Taiwan which legalizes the same. Thus, the opponents believe that India isn't prepared for the legitimization for same- sex marriages.

Several studies have shown that economically developed countries are more likely to approve of homosexuality.<sup>19</sup> To counter this argument, the supporters argue, no country is cent percent ready for same- sex marriages, thus a law supporting such marriages can bring a change in society. But the grass is always greener on the other side. There are various interviews and instances to showcase that not much has changed after section 377 has been turned down. Thus, the argument opposing the marriage still holds water.

### 3. Childhood psychological impact

The third argument against same- sex marriages is that such marriages can be harmful to children. According to an esteemed Sociologist, to design a system where a child's needs were met adequately, we would come up with something quite similar to two- parent ideal. Studies have shown that both father and mother have a unique role in a child's development. But the supporters counter it with recent research published in 2023,<sup>20</sup> which states that the children of same- sex couples fare just as well, if not better, than those of heterosexual couples.

### 4. Religion

Finally, it's widely argued that same- sex marriages go against religion. Many religions condemn homosexuality. For instance, All- India Muslim Personal Law Board (AIMPLB) opposes homosexuality. In case of Hinduism there is no all-encompassing religious body that could condemn or support same- sex marriages. According to Mythologist Devdutt Patnaik, the lack of an essential rule- book, leaves the abstract moral principles catalogued in Hindu texts open to interpretation. Most Indians are of the view that religion plays a crucial rule

in their life. As the religion didn't allow such unions, it would be going against their tenets.

### D. THE DEBATE

The debate about same- sex marriage must be viewed from various dimensions. Legal/ Constitutional scholars are basically pro-recognition. They view marriage as a constitutional right, falling under Articles 14, 19 and 21 of the Constitution. They vest their argument on the Supreme Court's decision of decriminalization of Section 377 of the Penal Code, thus recognizing dignity and autonomy for LGBTQ+ people.

The Civil Rights Activists and LGBTQ+ Advocacy Groups also hold a pro-recognition stand. They firmly agree that union through marriage is not just a piece of paper; it's about validation, dignity, and equal citizenship. Marriage is therefore argued as a form of "social recognition" and "institutional dignity" that the state must provide to all, regardless of gender or sexual orientation.

Thus, from a bird's eye view same- sex marriage would hold equal rights to citizens. It would further the social validation and boost emotional security. This step would align India's legal framework with progressive democracies, strengthening its reputation for upholding human rights.

On the other hand, religious leaders and conservative groups mostly hold an anti-recognition stand. Many religious organizations view marriage as a sacrament defined by religion and tradition — exclusively a union between a man and a woman. They express concern that legalizing marriage for same-sex couples would undermine marriage's "foundations" and affect societal norms. Thus, marriage is a culturally and spiritually defined institution; a change would require a deep societal consensus, not a court ruling.

Sociologists and Anthropologists advocate 'Social Impact View.' They focus on marriage's role in forming kinship, validating relationships, and structuring society. Some say extending marriage would reflect the changing nature of marriage itself, noting marriage has historically evolved (such as legalizing interracial marriage or removing bans on

<sup>19</sup> M.V. Lee Badgett, Sheila Nezhad, Kees Waaldijk, and Yana van der Meulen Rodgers, "The Relationship Between LGBT Inclusion and Economic Development: Emerging Economies," Williams Institute (2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-inclusion-economic-dev/#:~:text=The%20post%2Dmaterialist%20demand%20for,individual%20autonomy%20and%20minority%20rights> (last visited June 01, 2025).

<sup>20</sup> Wendy D. Manning, Marshal Neal Fetto, and Esther Lamidi, "Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief," National Institute of Health (NIH) (2014), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4091994/#:~:text=These%20studies%20reveal%20that%20childr en,early%20sexual%20activity%2C%20and%20subst ance> (last visited June 01, 2025).



divorce. They view marriage's expansion as a part of social progress and adaptation to a more inclusive understanding of relationships.

Thus, from a conservationist's view, same-sex marriages are against the traditional definition of marriage. Also, there may be possible backlash from segments of society that strongly oppose marriage reform. Finally, there may be legal complications in existing marriage, divorce, succession and adoption laws, which were designed with a male-female marriage in mind. The pros predominantly center on human dignity, equal rights, and social justice, while the cons mainly reflect resistance stemming from tradition, religion, and legal complexities. It's a delicate balance between honoring traditions and extending fairness and dignity to all citizens

## E. CONCLUSION

The present government in the Centre claims that the institution of marriage is crucial for Indian society, and same-sex marriages can't be part of society yet. It is to be observed that in India there is no one uniform marriage law as of now. There exists Hindu Marriage Law, Christian Marriage Law, Muslim Marriage Law and Special Marriage Law. In the recent ruling, although the Supreme Court declined to legalize same-sex marriages, leaving it to Parliament to legislate on the subject, still many believe that judiciary must play an active role in order to legitimize homosexual unions.

Thus, the future of homosexuals and their rights although seems unpredictable but is certainly not so. One measure is the creation of separate "civil union." A civil union is a marriage-like partnership of two individuals who can enjoy legal benefits such as inheritance and tax benefits. The key difference between marriage and a civil-union is that the religion doesn't validate a civil union. As India lacks a Uniform Civil Code, these marriages would under SMA.

Another measure is to recognize same-sex marriages under the existing laws. For instance, under the Hindu Marriage Act, a marriage can be solemnized between any two Hindus. Thus, a liberal interpretation of the same would allow same-sex marriages. Also, under the SMA the term used is "each party" which can be interpreted to be gender neutral. Thus, there is no requirement of amendment.

A 2022 poll by the Pew Research Center found that 55% of Indians support same-sex marriage. This is up from 37% in 2018. The poll also found that support for same-sex marriage is highest among younger Indians, with 51% of Indians aged 18-29 supporting same-sex unions. According to a famous psychologist Jonathan Haidt, every human subscribes to five basic moral foundations. These are, 'care/harm', i.e. we tend to

ensure that nobody is hurt. The second being, 'fairness/reciprocity', i.e. giving everyone an equal chance. The third being, 'group/loyalty', i.e. one's loyalty to the group they identify with. The fourth being, 'authority/respect', i.e. a feeling of reverence for a leader. The last being, 'purity/sanctity', i.e. an idea that attaches the value of purity and impurity to an entity. People give varying degrees of importance to these five foundations. Basically, those who support same-sex marriages value the foundation of 'care and fairness.' While those opposing value 'group/loyalty and purity/sanctity.' They argue that that same-sex marriages are not legal in India and don't want such people to be part of society. The opposing one's also consider 'purity' as a prime factor, as such unions are condemned by religion.

So, what does "equality" truly mean? People are inherently different—some are wealthy, others poor; some prefer one lifestyle over another. Each individual has the right to make their own choices. Lofty ideals and phrases cannot change these basic realities. Therefore, applying rigid or abstract notions of equality is not always practical.

The Constitution is not a set of fixed mathematical equations based solely on form. It serves as the foundational structure of governance, crafted for people with diverse opinions, and designed to remain relevant not only in the present but also in the future. It is not a mere academic document—it is a guiding force for shaping the life of an evolving and forward-looking society.

As a living document, the Constitution grows and adapts. The principles of liberty, freedom, and protection under its framework will gradually take clearer shape as judicial decisions accumulate over time. These rights cannot be defined by static rules or rigid tests. They are not cold, lifeless words preserved in some ancient manuscript, but rather living, breathing ideals—dynamic forces meant to inspire and shape the nation's future while guiding its present. It matters little whether logic is on side or whether its particular brand of culture is worthwhile on not the mere fact of losing it, makes it dear. The LGBTQ community is a sexual minority. They have travelled a long road to freedom. Thus, interpreting the silences of the constitution and upholding the equality rights of every citizen, same-sex marriage needs to be recognized.

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