

Same Sex Marriage in India- A Constitutional and Socio Legal Analysis

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Abstract

We are moving to the era of AI and encompassing modern technology into every aspect of our life but we haven't upgraded our judicial and legal system to welcome the marriages in the LGBTQAI+ community. This is not just about legal recognition of same sex marriages it is more about social norms, legal framework, constitutional rights and evolving human rights. While consensual same-sex relationships have been decriminalized, the absence of legal recognition of same-sex marriage continues to create a gap between individual liberty and institutional acceptance. In this paper we will try to examine the constitutional validity of denying marriage rights to LGBTQAI+ community by analysing key provisions such as Articles 14, 15, and 21 of the Constitution of India.

Something that also has been a part of our history we will try to look at historical background of same sex relationships, we will move forward by highlighting references from ancient texts such as the Ramayana and the Mahabharata, and contrasts them with the impact of colonial laws like Section 377 of the Indian Penal Code. Next we will evaluate the role of the judiciary through landmark decisions, particularly Navtej Singh Johar v. Union of India (2018) and Supriyo v. Union of India (2023), to understand the progress and limitations in judicial recognition of LGBTQ+ rights.

We will also ponder over key challenges in the legal recognition of same-sex marriage, including personal laws, social stigma, legislative inaction, and religious concerns. It argues that while the judiciary has played a transformative role in affirming dignity and equality, the realization of full marital rights requires legislative intervention.

Keywords: Same Sex Marriage , Indian Constitution, LGBTQ+ rights.

1. Introduction

One can argue that India as a nation is not ready for marriages between individuals of same sex. We should know few basic terms before we delve deep into the topic. Same-sex marriage is the legal union between two people of the same gender¹. Next important to be understood is the LGBTQIA+, this is a community of people recognized by some sections of the world where each word stands for a

¹ Same Sex Marriage - Definition, Examples, Cases

meaningful section of people in general. L stands for Lesbian, G stands for Gay, B stands for Bisexual, T stands for Transgender, Q stands for Queer, I stands for Intersex and A stands for Asexual. Also some sections are not mentioned in the acronym separately but are a part of the community therefore they are represented by the plus sign. The plus sign includes Two spirit, Non binary, Pansexual, Demisexual, Aromantic, Genderfluid, Agender and others². Marriages are not just a union between 2 individuals they are also a part of legal recognition to a private relationship between two individuals. In India the constitution has provided us the right to choose our partners³ but this choice is not available to the above mentioned community as of now. The good part is that same sex relationships are not criminalized but marriages of this community have still not gained the legal recognition needed.

HISTORICAL BACKGROUND

One might think that this concept is western and has influenced our country but the truth is many religious texts suggest the existence of such relationships in the history of India. Ancient Indian literature, epics and mythological narratives, contain references that indicate the existence and acceptance of gender diversity and non-heteronormative relationships. We can look into the example of Ramayana, in some texts it is popularly interpreted that Lord Rama before leaving for exile asked the men and women of Ayodhya to return to their homes but there was a section of people who did not identify as men or women so they patiently waited for his return and stayed there. Lord Rama was pleased by their devotion and he blessed them⁴. One more example comes from the famous Mahabharata where some sacred texts suggest Shikhandi is believed to be the rebirth of Amba, a princess who sought revenge against Bhishma after being wronged by him. In her next birth as Shikhandi, she was born biologically female but raised as a male, reflecting a distinction between biological sex and gender identity. Shikhandi later undergoes a transformation and acquires a male identity through supernatural means. During the Kurukshetra war, Shikhandi plays a crucial role in Bhishma's defeat. Bhishma, bound by his principles, refuses to fight someone who was born female, allowing Arjuna to use Shikhandi as a shield to bring him down⁵. The criminalization of same-sex relationships in India can largely be traced to colonial influence, particularly the introduction of Section 377 of the Indian Penal Code in 1860. This marked a significant shift from earlier cultural attitudes and imposed Victorian moral standards on Indian society

Section 377 of the Indian Penal Code criminalized “unnatural offences⁶,” effectively targeting same-sex relationships. This provision was partially read down in 2009, reinstated in 2013⁷, and finally decriminalized in 2018⁸.

² LGBTQIA+ Meaning of Each Letter & Acronym Breakdown | SFGMC

³ Constitution of India 1950, Article 21

⁴ Valmiki Ramayana, Ayodhya Kanda

⁵ Mahabharata, Udyoga Parva and Bhishma Parva, <https://www.sacred-texts.com/hin/maha/index.html>

⁶ Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277 (Del HC)

⁷ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1

⁸ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

The shift we are witnessing

Marriage has historically been perceived as a heterosexual union, primarily aimed at companionship, procreation, and the continuation of family lineage. However, with the evolution of constitutional values such as equality, dignity, and personal liberty, this conventional understanding of marriage is increasingly being questioned.

CONSTITUTIONAL FRAMEWORK

At its core, the debate around same-sex marriage in India is not merely about legal recognition of a relationship, but about how the Constitution understands personhood, dignity, and equality. The Indian Constitution is a living document, designed not only to preserve tradition but also to respond to the evolving realities of society. In this context, the question arises: can the promise of constitutional rights truly be fulfilled if certain individuals are denied the right to marry solely on the basis of their sexual orientation?

Article 14 of the Constitution guarantees equality before the law and equal protection of laws. This provision does not merely prohibit arbitrary discrimination but also requires that any classification must be reasonable and based on intelligible differentia. Excluding same-sex couples from the institution of marriage creates a classification that lacks a rational nexus with any legitimate state objective, thereby raising serious constitutional concerns⁹

Further, Article 15 prohibits discrimination on grounds of sex. The Supreme Court has progressively interpreted the term “sex” to include sexual orientation, thereby expanding the scope of protection available to LGBTQ+ individuals. This interpretation reflects a deeper constitutional commitment to substantive equality rather than mere formal equality.

Article 21, which guarantees the right to life and personal liberty, has been interpreted in the broadest possible sense to include the right to live with dignity, the right to privacy, and the right to choose one’s partner. The recognition of intimate personal choices as part of individual autonomy marks a significant shift in constitutional jurisprudence. Denying same-sex couples the right to marry, therefore, not only restricts their personal liberty but also undermines their dignity as equal citizens¹⁰

The transformative nature of the Constitution becomes particularly relevant in this context. Indian constitutional law has moved beyond a static interpretation of rights and embraces the idea that the Constitution must guide society towards greater inclusivity and justice. As observed by the Supreme Court, constitutional morality must prevail over social morality when the two are in conflict¹¹

When we look at it collectively, Articles 14, 15, and 21 create a powerful framework that supports the recognition of same-sex relationships. This issue is not simply a matter of legislative policy but one that goes to the heart of constitutional identity, whether the Constitution truly guarantees equal dignity and freedom to all individuals, irrespective of who they choose to love.

⁹ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75

¹⁰ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

¹¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

JUDICIAL ROLE

We can look at 2 case laws to understand how judiciary has contributed to the journey. There are certain areas where we do not find statutory recognition and in such situation courts have often become the primary space where questions of identity, dignity, and equality are articulated and contested. Judiciary has a unique role here it is not merely an interpreter of law, but a mediator between constitutional ideals and social realities.

As we have seen earlier in the case of *Navtej Singh Johar v. Union of India* (2018), it became a turning point in the journey where the Supreme Court decriminalized consensual same-sex relationships by reading down Section 377 of the Indian Penal Code. In doing so, the Court went beyond a technical reading of the law and affirmed that constitutional rights are not contingent upon societal approval. It recognized sexual orientation as an essential attribute of identity and emphasized that dignity, autonomy, and privacy are integral to the right to life under Article 21¹²

But if we look at another case law when it comes to the issue of same-sex marriage, the approach of the judiciary has been more limited. In *Supriyo v. Union of India* (2023), the Supreme Court acknowledged the rights of same-sex couples but refused to grant legal recognition to same-sex marriages.¹³ The Court stated that this is a matter for the legislature to decide.

This dual approach reflects both the strength and limitations of judicial intervention. On one hand, the judiciary has played a transformative role in recognizing fundamental rights and reshaping constitutional discourse. On the other hand, it has shown institutional restraint in matters that require structural changes to existing legal frameworks.

Legitimizing sexual or non-sexual relation between individuals with same sex in the form of marriage

We have come so far with the modernization and advancement in the technology as well as the thinking mindset of people. But giving legal recognition to marriage of the people from the LGBTQIA+ community is still a challenge.

Personal Laws and Existing Legal Framework

Indian marriage laws are largely based on religion, such as Hindu, Muslim, Christian, and Parsi personal laws. These laws traditionally recognize marriage only as a union between a man and a woman. Terms like “husband” and “wife” are used throughout these statutes, leaving no scope for same-sex couples. Changing these laws would require extensive amendments, which makes the process difficult and sensitive¹⁴.

Social Stigma and Cultural Attitudes

Indian society is still largely conservative when it comes to issues of sexuality and marriage. Same-sex relationships are often viewed as socially unacceptable. This social stigma creates pressure on

¹² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

¹³ *Supriyo v. Union of India*, (2023) SCC OnLine SC 1348

¹⁴ <https://pmc.ncbi.nlm.nih.gov>

lawmakers and also discourages individuals from openly asserting their rights. The gap between constitutional values and social acceptance remains a major obstacle¹⁵.

Legislative Inaction

Despite judicial recognition of LGBTQ+ rights, there has been limited action from the legislature to provide legal recognition to same-sex marriages. The Supreme Court in recent cases has also indicated that such changes require legislative intervention. The lack of political consensus further delays the process of reform.

Religious and Moral Concerns

Marriage in India is not only a legal institution but also a religious and cultural one. Many religious groups oppose the idea of same-sex marriage on moral or doctrinal grounds. This creates resistance to legal reform and makes it a sensitive issue for policymakers¹⁶.

Lack of Awareness and Legal Clarity

There is still limited awareness among the general public regarding LGBTQ+ rights. In addition, the absence of clear legal provisions creates confusion about the rights and protections available to same-sex couples. This lack of clarity further complicates their legal and social position¹⁷.

Conclusion

After looking at the historical background, the judicial role, the religious and moral concerns and the legal challenges faced we can conclude that the recognition of same-sex marriage in India remains an unresolved issue at the intersection of law, society, and morality. While significant progress has been made through judicial decisions, the absence of legal recognition continues to deny the LGBTQ+ community full equality.

A progressive legal framework that acknowledges the rights of all individuals, irrespective of sexual orientation, is essential. The realization of constitutional values requires not only judicial interpretation but also legislative action. Same-sex marriage is not merely a legal question but a matter of human dignity and equal citizenship.

¹⁵ <https://lawfullegal.in/the-legal-status-of-same-sex-marriage-in-india-navigating-equality-rights-and-judicial-constraints>

¹⁶ <https://lawfullegal.in/the-legal-status-of-same-sex-marriage-in-india-navigating-equality-rights-and-judicial-constraints>

¹⁷ <https://papers.ssrn.com>