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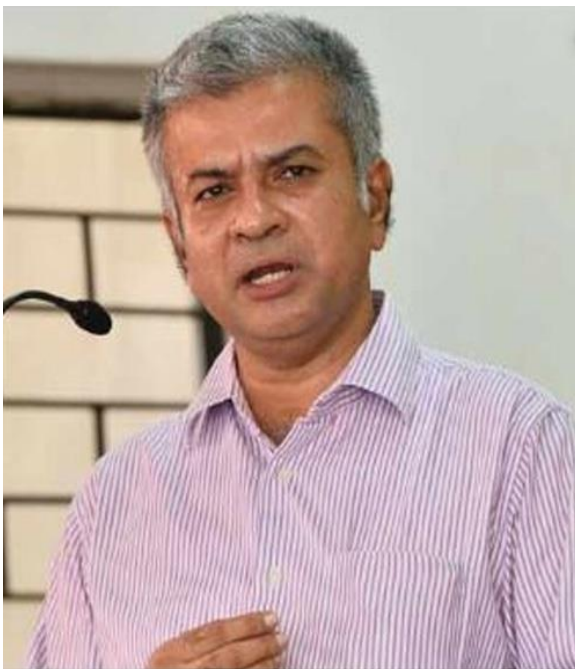
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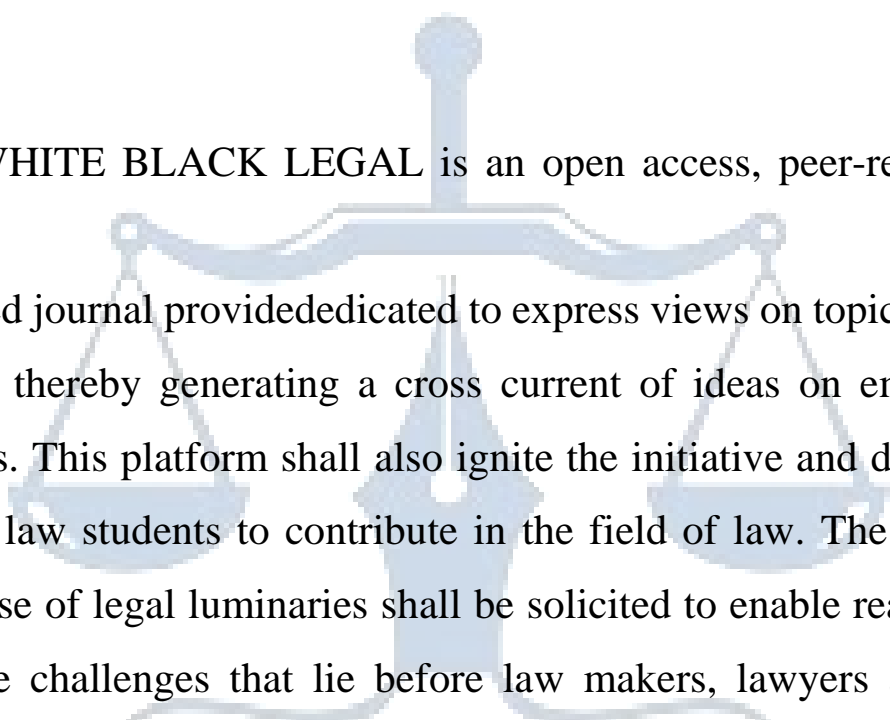


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **SAME SEX MARRIAGES IN INDIA: WAY AHEAD**

AUTHORED BY - DIVYA SHUKLA

## **ABSTRACT**

Matrimony has traditionally been regarded as a holy union of two "individuals." In most industrialized countries, partnerships between two persons of any gender are gradually replacing marriage as a union between a man and a woman. Accepting homosexuality on a social and legal level may be challenging because it is generally seen as a Western phenomena. Legalizing same-sex unions seems to be the logical course of action following the magnanimous decision to decriminalize homosexuality.

The criminal penalties for same-sex unions were established by the British authors of the Indian Penal Code. Section 377 made these exchanges unlawful and enforced penalties and jail terms, creating a hostile climate for all parties. The Indian social structure did not make life any easier for this vulnerable segment. With the advent of the 21st century, India saw a similar uprising propelled by global movements against oppression and discriminatory behaviors.

In India, Section 377 was partially decriminalized by the Supreme Court's ruling in the Navtej Singh Johar v. Union of India (2018) case, allowing for the lawful homosexuality of two consenting adults. Nevertheless, India does not have any laws addressing the issue of same-sex partnerships being allowed or not.

The judicial perspective and the Supreme Court's role in examining the situation and providing a liberal interpretation to protect the rights of this oppressed minority will be the main points of focus. Current developments will also be a focal point of the study.

**KEYWORDS:** Same sex unions, Homosexuality, legalize

## **INTRODUCTION**

In the latter part of the 1800s, the German psychologist Karloly Maria Benkert is credited with creating the word "homosexuality". Up until the 1970s, homosexuality was thought to be a mental disease. However, a number of clinical research have found that homosexuality is a

common aspect of human sexuality. It was not a crime to be gay in ancient India. Sutra 36 of the Kama Sutra describes sexual practices between individuals of the same sex as "sadharana<sup>1</sup>," implying that these acts are customary. Khajuraho's<sup>2</sup> temples depict women in sensual embraces. It may be argued that this is an acknowledgement of homosexual conduct. The Mahabharata contains a story about Shikhandini, a warrior and the daughter of King Drupada. She was named Shikhandini after growing up as a prince and getting betrothed to a woman. When her wife found out, she revolted. Thanks to supernatural intervention, she was made into a man and lived a hermaphrodite<sup>3</sup> life.

A person who intentionally engages in carnal intercourse against the natural order with any man, woman, or animal faces life in jail or a maximum of ten years in prison of any sort, in addition to a fine, as stated in Section 377 of The Indian Penal Code, 1860.

As medical research has progressed, it has been found that homosexuality—the innate inclination for an individual to be drawn to other individuals of the same gender—is a common characteristic among humans. It's not forbidden or immoral. The LGBTQI community has learned from human rights consciousness and modern thought that essential rights include privacy, dignity, and a satisfying personal existence. They started speaking up for their rights as a result. Many individuals and groups, such as the Naz Foundation, the National Aids Control Organization, the Law Commission of India, Navjit Singh Johar, and others, have helped the LGBTQI community in its pursuit of equal rights.

### **INTERNATIONAL VIEWPOINT**

LGBTQ rights around the world have generally been restricted at the national level rather than the international level. The United Nations has not produced any clear conventions pertaining to the subject. However, it has spurred a discussion about eradicating the stigma and inherent bias toward the minority through advertisements and activities. The United Nations Free & Equal campaign is one instance of advocating for the equitable treatment and rights of the LGBTQ population worldwide.

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<sup>1</sup> SAURABH KIRPAL, SEX AND THE SUPREME COURT 27 (Hachette India, 2020).

<sup>2</sup> In the Indian state of Madhya Pradesh, the Khajuraho Group of Monuments is situated in the Chhatarpur district.

<sup>3</sup> Kirti Pandey, The back story of Shikhandi in Mahabharat and Why Bhishma Vow of Celibacy Cost Him His Life, MIND AND SOUL (Mar. 3, 2022, 5:15 pm)



Many nations forbid same-sex partnerships and penalize those who engage in them with life sentences or even the death penalty. In 2006, an attempt was made to address community concerns, specifically with the assembly held in Yogyakarta.

This document outlined principles connected to human rights that deal with sexual orientation, gender identity, gender expression, and sex characteristics. These Principles not only bestow many rights upon the community, but they also impose obligations on the state to uphold those rights. In 2017, this was updated, and Yogyakarta Plus 10—a new document—was created and adopted. In order to ensure that the community might be freed from discriminatory practices and treated equitably, with basic decency and respect, it granted the states additional rights and obligations.

Many nations have legalized same-sex unions, including Taiwan, which was the first in Asia to do so.

On June 26, 2015, the US Supreme Court rendered a landmark ruling in *Obergefell v. Hodges*, granting same-sex couples the constitutional "right to marry." Among the European nations that allow same-sex unions are the Netherlands, Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, United Kingdom, Ireland, Finland, Germany, and Austria.

Italy is the largest country in Western Europe where same-sex marriage is prohibited; nonetheless, the country's parliament approved same-sex civil partnerships in 2016.

In 2005, Canada was the first country in the Western Hemisphere to legalize same-sex unions. Same-sex marriage is now permitted in Australia and New Zealand as well. A number of countries in South and Central Asia, including Yemen, Bangladesh, Pakistan, Iran, and Saudi Arabia, outlaw same-sex partnerships. Same-sex unions are now legal in South Africa.

New, modern families have replaced traditional heterosexual marriages, and many countries now permit homosexual marriages and relationships.

The definition of "marriage" is an unbreakable tie that unites two individuals through joy and grief. The institution is what acknowledges a couple's sexual relationship with elder and divine approval. The marriage establishes the parties' legal rights and responsibilities. Considering that

the Supreme Court has acted to permit a mutually beneficial same-sex relationship. Laws allowing same-sex relationships should be drafted to address adoption, inheritance, gay marriage, and other issues.

### **INDIAN PERSPECTIVE**

Marriage in India is governed by personal laws. The parties' respective religious affiliations determine how personal laws are applied.

1. Hindus: Hindu Matrimony Act of 1955
2. The 1937 Muslim Application of Personal Law (Shariat) Act For Christians, the Indian Christian Marriage Act of 1872 is applicable.
3. Parsi Marriage and Divorce Act of 1936

It is clear from the act's wording that it only covers heterosexual marriages. The provisions are made with consideration for the gender characteristics of both men and women.

Thus, present personal law cannot regulate homosexual marriages. Furthermore, adopting a child is not permitted for same-sex couples. Additionally, they are unable to seek surrogacy within the current legal framework. Thus, in order to grant the LGBTQ people its rights regarding marriage and adoption, legislation must be changed.

In the Arunkumar v. Madras High Court<sup>4</sup> case, the LGBTQI community's marriage rights have already advanced. A transwoman and a man have the legal right to register their marriage according to the Hindu Marriage Act of 1955. The Inspector General of Registration states that on April 22, 2019, the Madras High Court upheld this privilege.

The Hindu Marriage Act of 1955 defines a "bride" as both a transwoman and a person who was born as a woman. The Hindu Marriage Act states that the word "bride" cannot have a set meaning.

### **JUDICIAL HISTORY OF SAME SEX MARRIAGES IN INDIA**

A judicial review of the matter revealed that the court has been leading the charge on this subject recently, despite the legislative branch's reluctance to confront LGBTQ rights in India.

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<sup>4</sup> Writ Petition no: 4125 of 2019 and 3220 of 2019, Judgment dated, April 22, 2019.

Specifically, over the last ten years, the Supreme Court has issued a number of noteworthy decisions that have paved the way for the recognition of the fundamental rights of this oppressed community. The MPs' failure in this area is a reflection of the Parliament's conservative tendency, which a liberal court was needed to correct. These are some of the most well-known decisions the Supreme Court has made in this regard.

➤ **NCT Delhi Govt. v. Naz Foundation<sup>5</sup>.**

In this landmark decision, the Delhi High Court declared that Section 377 of the Indian Penal Code was unconstitutional. Based on a Public Interest Litigation that the NGO brought, the verdict allowed for the legal analysis of the British statute. The Indian Constitution's equality-centered Articles 14, 15, and 16 were found to have been violated by the court.

➤ **NALSA VS UNION OF INDIA<sup>6</sup>**

This lawsuit was initiated after the highly criticized decision in Suresh Kumar Koushal v. Union of India<sup>7</sup>. In the Naz Foundation case, the Supreme Court decriminalized Section 377, but in the Suresh Kumar case, it reinstated it. Important questions in favor of the transgender community were raised, spearheaded by the National Legal Services Authority. Transgender persons are the third gender, per this rule. The decision created a comprehensive set of guidelines that protect the rights and liberties of the transgender community.

A detailed statute that will promote their rights was created as a result of subsequent legislative changes. The outcome of extensive deliberations and multiple proposed legislation is the Transgender Persons (Protection of Rights) Act, 2019. Despite being necessary and having some positive aspects, the law has a major issue with administrative involvement. Every person must be acknowledged as "transgender" in accordance with an identity document that a district magistrate issues. This is a big issue considering how delicate the subject is.

➤ **Justice (Retd.) K. S. Puttaswamy v. Union of India<sup>8</sup>**

This decision acknowledged the right to privacy as a part of the right to life and liberty

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<sup>5</sup> 160 Delhi Law Times 277. (India)

<sup>6</sup> 0 AIR 2014 SC 1863. (India)

<sup>7</sup> 1 Civil Appeal 10972 of 2013. (India)

<sup>8</sup> AIR 2017 SC 4161. (India)

guaranteed by Article 21. It came to the conclusion that everyone has the right to privacy because it is a fundamental component of human life, regardless of gender or sexual orientation.<sup>12</sup> The LGBTQ community should have a right to privacy, particularly autonomy and freedom from government interference, as Judge Chandrachud stated in her decision. The freedoms of sexual orientation, self-determination, and partner choice received special attention.

The Supreme Court stated that "the fundamental rights guaranteed by Articles 14 (right to equality), 15 (discrimination on grounds of sex), and 21 (right to life and personal liberty) of the Constitution lie at the core of the right to privacy and the protection of sexual orientation." This decision served as the primary impetus for the landmark Navtej Johar case.

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

The infamous Section 377 was overturned by this decision, decriminalizing homosexuality in India. The section was declared unlawful because it violated Articles 14, 15, 16, and 19(1)(a) of the Constitution and criminalized consensual sexual contact between two consenting adults. The recognition of the rights to a dignified existence and the freedom to exercise personal autonomy and choice was spurred by the Puttaswamy verdict.

➤ **Abhijit Iyer v. Union of India and others<sup>10</sup>**

Mr. Abhijit Iyer said same-sex marriage was not specifically forbidden and that the language of the Act was gender-neutral in his appeal for the registration of a same-sex marriage under the HMA, 1955. The Indian Constitution's Articles 14 and 19 as well as the denial of the freedom to marry the person of one's choosing are blatant violations of fundamental rights. The division kept between heterosexuals and homosexuals with regard to marital privileges leads to the marginalization of homosexual couples in society.

The Central Government argued and advised the Delhi High Court that marriages in India are only permitted between heterosexuals, or biological men and women, despite the decriminalization of homosexuality.

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<sup>9</sup> AIR 2018 SC 4321. (India)

<sup>10</sup> W.P.(C) 6371/2020

## **NEED FOR NEW SAME SEX MARRIAGE LAWS IN INDIA**

It's time to fundamentally change marriage. It is false to claim that marriage exists only to produce children in light of the progress of women's rights. Women have the sexual right to choose whether or not to become mothers. International law recognizes forced pregnancy as a crime against humanity<sup>11</sup>.

The Supreme Court declared in *Suchita Shrivastava and others v. Chandigarh Administration*<sup>12</sup> that a woman's freedom to make reproductive decisions is protected by her right to life under Article 21 of the Indian Constitution. In view of the aforementioned remark, it is safe to say that childbirth is not, or rather should not, a requirement of marriage in the current period. Given this, same-sex unions might be allowed.

If same-sex marriage is not legalized, fundamental rights will be violated, including the right to privacy (Article 21), the right to live in dignity (Article 21), the right to equality (Article 14), the right to freedom of speech and expression (Article 19(1)(a)), and the right to life (Article 21). According to Article 15 of the Indian Constitution, the State cannot discriminate against people based alone on their place of birth, gender, race, religion, caste, or any combination of these.

Legalizing same-sex partnerships could be beneficial in two respects. The main way that same-sex marriages would promote environmental sustainability is through population control, as several nations, including India, have put laws and regulations in place to that effect.

Second, among other things, adoption and maintenance laws would need to be passed if same-sex partnerships were made legal. Thirty million children are orphaned and left behind in India<sup>13</sup>.

These children are denied a happy family life due to overly stringent adoption laws and the lack of adoption rights for same-sex couples. The Delhi High Court held in *Lakshmi Bhayva*

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<sup>11</sup> Rome Statute of the International Criminal Court, § 7, 1998

<sup>12</sup> (2009) 14 SCR 989, (2009) 9 SCC 1

<sup>13</sup> INTERNATIONAL LEARNING MOVEMENT, <https://www.ilmuk.org/news/the-state-of-india-s-orphaned-children-crisis/#:~:text=India%20Orphan%20Crisis%20in%20Numbers,true%20figures%20are%20still%20unknown.> (last visited March 10, 2022)

Taneeru v. Union of India<sup>14</sup> and others that the right to a happy family life is a fundamental aspect of the right to life.

It is almost impossible to enshrine all of these rights under personal laws without also establishing a myriad of marital perks. Therefore, it is necessary to develop new legislation that expressly states the need for the new law as well as the parties' competence. When the regulations governing divorce, maintenance, adoption, succession, and inheritance are satisfied, matrimonial rights are only partially realized. The Parliament must therefore expressly state who will be the adopted child's primary legal guardian, how same-sex spouses will inherit from one another, and who is primarily entitled to support.

### **ARGUMENTS IN FAVOUR**

Protection and Equitable Rights Law: Regardless of sexual orientation, everyone has the right to be married and raise a family.

Same-sex couples should have the same legal rights and protections as opposite-sex couples. It was discrimination against LGBTQIA+ couples, which severely compromised their dignity, when same-sex marriage was rejected.

Creating Stronger Families and Communities: In both social and financial aspects, marriage benefits same-sex individuals, couples, and their families.

Cohabitation as a Fundamental Right: The Chief Justice of India (CJI) acknowledged that cohabiting is a fundamental right and that the social ramifications of these kinds of partnerships need to be legally addressed by the government. According to a ruling by the Indian Supreme Court, a person's gender is more complex than their genitalia and that biological gender is not "absolute." A man or a woman is not a fixed concept.

Worldwide Recognition: It is against the core ideals of the world to deny people in democratic societies the freedom to marry a member of their own sex. Many countries permit same-sex unions.

In thirty-two countries, same-sex unions are legal.

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<sup>14</sup> W.P.(C) 5533/2021

## **ARGUMENTS AGAINST**

**Religious and Cultural Beliefs:** Many religious and cultural groups maintain that a marriage should only include a man and a woman as partners.

They argue that changing the accepted definition of marriage would go against their basic principles and beliefs.

**Procreation:** According to some, the primary reason for marriage is that same-sex couples cannot have biological children.

They believe same-sex marriage ought to be prohibited since it goes against the laws of nature.

**Legal issues:** There are fears that allowing same-sex relationships may result in issues with inheritance, taxation, and property rights.

Many argue that it would be very difficult to change all laws and regulations to permit same-sex marriage.

**Adoption Issues:** Adopting children by queer couples may lead to stigma, discrimination, and negative impacts on the mental and emotional well-being of the kid. This is especially true in Indian culture, where there isn't always acceptance of the LGBTQIA+ community.

## **WAY FORWARD**

**Increase public awareness:** One of the objectives of awareness campaigns, which also encourage equality and acceptance of all sexual orientations, is to increase public knowledge of the LGBTQIA+ population.

**Reforms in the Law:** In order to allow same-sex marriages and give them the same rights and privileges as opposite-sex unions, the Special Marriage Act of 1954 was modified. Create a contract-like agreement giving gays and lesbians the same rights in the interim.

**Talk and Involvement:** Talking with religious leaders and organizations can help close the gap between traditional beliefs and modern viewpoints toward same-sex relationships.

Legal Challenges: In India, the LGBTQIA+ community is entitled to bring a constitutional challenge against the laws that now prohibit same-sex unions. Such judicial battles may establish a precedent that will help same-sex partnerships become legally acceptable.

Cooperation: To legalize same-sex marriage, all relevant parties—including the LGBTQIA+ community, the government, civil society, and religious leaders—must cooperate. By working together, we can create a more tolerant society where everyone is allowed to love and marry anyone they choose, regardless of gender.

## **CONCLUSION**

The relevance of same-sex marriage worldwide is rising, and India might take a cue from the countries that have accepted and legalized it. The LGBTQ+ community now has equal rights and protections because of inclusive laws that have been approved in the US, Canada, and several European nations. By learning from its mistakes, India can approach same-sex partnerships in a similar way. This could entail learning about public opinion, legislative frameworks, and cultural tolerance to figure out how to advance a more inclusive and progressive society.

There is still hope that the government will give same-sex couples more rights and fulfill its commitment to form a committee to investigate the challenges they encounter in acquiring ration cards and pension benefits, among other things, even though the decision greatly insulted many. In conclusion, same-sex marriage is still a sensitive and divisive topic in India. Although same-sex marriage is still prohibited, homosexuality was decriminalized in 2018. While the Supreme Court's decision in *Navtej Singh Johar v. Union of India*<sup>15</sup> was a positive start, more legal changes are still required before same-sex couples can benefit from equal rights and privileges. Unfortunately, prejudices and cultural standards still make it difficult for same-sex marriage to be accepted in India.

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