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# **FROM ANCIENT ACCEPTANCE TO MODERN STRUGGLES: THE EVOLUTION OF SAME-SEX MARRIAGE**

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## **ABSTRACT**

*Every person is entitled to equality, which includes the freedom to marry a partner of their choice. If this freedom is restricted purely because of whom they love, can we genuinely assert that the principle of equality is being upheld? Around the world, countless individuals deny marrying same-sex partners under the argument that it can undermine societal norms. Same-sex become the important issue of contemporary times. It can raise some critical questions: Does denying LGBTQ+ rights uphold the tradition? Can we protect the rights of LGBTQ+ without undermining religious beliefs?*

*This Article Defines the concept of same-sex marriage. In the introduction, this Article is exploring the nuances of the definition related to same-sex marriage and the acceptance of same-sex marriage in India and in world. The Article also includes the debate on same-sex marriage worldwide. The evolution of Same-sex marriage in India and the world is discussed in this article from ancient to modern world. This article mentioned the current situation of Same-sex relationships in India and the world. Then, this Article, compared the conditions of same-sex laws in different countries, and discussed future implications of the legalization of same-sex marriage is discussed in which it was discussed that what all thing improve if the same-sex marriage is legalized in India and other countries. This Article also discuss global disparity of Same-sex marriage and ongoing struggle of same-sex Marriage around the world and in the India. In last this Article discuss about the future aspect of same marriage in world and in the India.*

## **Keywords**

*Right to equality, Freedom to marry, Same-sex Marriage, LGBTQ+ rights*

## INTRODUCTION

Homosexuality, defined as romantic or sexual relationships between individuals of the same gender, has deep historical and cultural roots in India. Contrary to the belief that it is a modern or Western concept, evidence from ancient Indian texts and artifacts reveals its existence and acknowledgment. Hindu traditions and scriptures, including the Kamasutra, Ramayana, and Mahabharata, offer references that point to the recognition of same-sex relationships<sup>1</sup>. In Khajuraho and Konark temples, depictions of Lesbian relationships are seen, and Ardhnarishwar is a depiction of lord Shiva in which the composition of both males and females is seen.<sup>2</sup> In contemporary India, however, the subject of homosexuality, particularly same-sex marriage, remains a contentious issue. Discussions around LGBTQ+ rights and their place in society are ongoing, reflecting a blend of progress and resistance. Globally, the legal recognition of same-sex marriages has been a significant milestone for LGBTQ+ rights. Over the last two decades, many countries, including Australia, Brazil, Canada, New Zealand, and the United Kingdom, have embraced and legalized same-sex marriage. These nations have taken significant steps toward equality by acknowledging the fundamental right of individuals to marry whom they love, irrespective of gender<sup>3</sup>. In contrast, it is still illegal and punishable in countries like Iran and Afghanistan<sup>4</sup>. While India has a different story; Same-sex Marriage is still not legally recognized, but it was decriminalized in India in 2018.

## HISTORICAL EVOLUTION OF SAME-SEX MARRIAGE IN THE WORLD

In ancient times, same-sex Marriage was accepted in different parts of the world. Same-sex relationships in ancient Greece and Mesopotamia are accepted and recognized by society. Same-sex relationship was accepted in ancient Greece and Rome but not always accepted as a formal marriage<sup>5</sup>. Despite this, Rome can legalize some same-sex relationships. During ancient times, same-sex Marriage was also accepted in Asian countries. Same-sex relationships in China are especially between male lovers of the emperor and the emperor, but same-sex relationships are kept distinct from heterosexual relations, whose primary objective is to

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<sup>1</sup>Sherry Joseph, Gay and Lesbian Movement in India, 31 Econ. & Pol. Wkly. 2228, 2228 (1996).

<sup>2</sup> Hena Khatun, LGBT Movement in India, 5 LGBT. Mov. in. Ind. 218, 218 (2018).

<sup>3</sup>Josephine Rozzelle, 'Same-Sex Marriage Legalization by Country', U.S. News & World Report (Feb 15 2024)

<sup>4</sup>Nimisha S Pradeep, Fight for equality to continue: Only 35 countries in the world have legalised same-sex marriage, The Hindu Businessline (India, October 21 2023).

<sup>5</sup>Joshua J. Mark, 'LGBTQ+ in the Ancient World', World History Encyclopedia <[LGBTQ+ in the Ancient World - World History Encyclopedia](#)> (25June, 2021)

produce heirs. In Japan, same-sex relationships can be seen between older men and younger boys, and the samurai class commonly participate in it.

Over time, acceptance of same-sex relationships started deteriorating in different parts of the world. Over time, in the Roman Empire, acceptance of same-sex relationships diminished compared to an earlier period. In 342 A.D., a law was introduced that criminalized people who were in same-sex relationships, and due to the fall of the Roman empire in 533 A.D., same-sex relationships were banned entirely in Rome. 16th-century Europe saw same-sex relationships as a threat to European society. By 19<sup>th</sup> century, it was considered a medical issue in some countries. In the 20<sup>th</sup> century, same-sex relationships were often seen as an act that undermined traditional values.<sup>6</sup>

## **HISTORICAL EVOLUTION OF SAME-SEX MARRIAGE IN INDIA**

In ancient India, same-sex relationships and unions were not only acknowledged but often accepted within various cultural and religious frameworks. Several ancient Hindu texts, such as the *Kamasutra* and other scriptures, make references to same-sex relations, showcasing an understanding and acceptance of diverse sexual orientations. These references highlight that homosexuality was neither considered unnatural nor sinful in the ancient Indian societal fabric. However, with the arrival of the medieval period, the scenario began to shift drastically, primarily due to external influences.

The colonial era, marked by British rule in India, introduced laws and moral frameworks that were heavily influenced by Victorian ideals and Christian morality, which stigmatized homosexuality. This led to the enactment of the Indian Penal Code (IPC) in 1860, which included Section 377. This section criminalized "carnal intercourse against the order of nature," effectively targeting and criminalizing homosexual relationships. However, it is important to note that Section 377 did not explicitly criminalize same-sex marriage; its focus was primarily on the act of sexual intercourse deemed unnatural according to the colonial mindset. This law significantly altered the societal perception of same-sex relationships in India, introducing a stigma that lingered for decades.

In 1860, the Indian penal code was enacted, which led to the criminalization of same-sex

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<sup>6</sup>William N Eskridge Jr, 'A History of Same-Sex Marriage' (1993) 79 Virginia Law Review 1419 (October 1993).

relationships. Section 377<sup>7</sup> of the IPC talks about same-sex Marriage, but this section can not directly criminalize same-sex Marriage. In modern times, people have started protesting against unjust laws like Section 377<sup>8</sup> of the IPC, and societal acceptance has also increased. In the case of "National Legal Services Authority v. Union of India & Ors," the honorable Supreme Court of India court held that same-sex couples have fundamental rights that can be enjoyed by every person regardless of their gender and recognize the gender of LGBTQ. This case is the case that recognizes the fundamental rights of same-sex couples.<sup>9</sup>

## **CURRENT SCENARIO OF SAME-SEX MARRIAGE IN INDIA AND IN THE WORLD**

Same-sex marriage has gained recognition and acceptance in several parts of the world, with 36 countries legalizing it to date. This progressive move towards equality and inclusivity began with the Netherlands, which became the first country to legalize same-sex marriage in 2001. Over the years, other nations followed suit, reflecting the growing awareness and acknowledgment of LGBTQIA+ rights. The most recent addition to this list is Greece, which legalized same-sex marriage in February 2024<sup>10</sup>. This milestone is particularly significant as Greece is the first Orthodox Christian-majority country to grant legal recognition to same-sex marriages, setting an example for other nations with strong religious influences.

Despite these advancements, the majority of countries worldwide still criminalize same-sex relationships. In many of these countries, same-sex unions are punishable by law, reflecting deeply entrenched societal prejudices and discriminatory legal frameworks. This highlights the stark contrast between progressive and conservative regions, underscoring the need for global advocacy to protect and promote LGBTQIA+ rights.

In India, the legal status of same-sex relationships has been a subject of intense debate and judicial scrutiny. While homosexuality was decriminalized in 2018 through the landmark judgment in *Navtej Singh Johar v. Union of India*, same-sex marriages remain unrecognized. The Supreme Court, in its judgment in *Supriyo @ Supriya Chakraborty & Anr. v. Union of*

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<sup>7</sup>Indian Penal Code s 377 (1860).

<sup>8</sup>Indian Penal Code s 377 (1860).

<sup>9</sup>Ayush Kumar, 'Same-Sex Marriage in India' (The Society for Constitutional Law and Discourse Blog, 7 October 2024) <https://www.tsclcd.com/india-same-sex-marriage-equality>.

<sup>10</sup>Josephine Rozzelle, 'Same-Sex Marriage Legalization by Country', U.S. News & World Report (Feb 15 2024).

*India*<sup>11</sup> delivered in October 2023, ruled that members of the LGBTQIA+ community do not have a fundamental right to marry under the Indian Constitution. The Court declined to interpret the provisions of the Special Marriage Act, 1954, to include same-sex couples, emphasizing that such recognition requires legislative action rather than judicial intervention.

The judgment has left many LGBTQIA+ activists and allies disappointed, as it underscores the gap between legal acknowledgment of individual identity and the denial of relational rights. While same-sex relationships are no longer criminal in India, the lack of legal recognition for same-sex marriages perpetuates societal discrimination and limits the community's access to rights and benefits associated with marriage, such as inheritance, adoption, and medical decision-making.

## DEBATES ON SAME-SEX MARRIAGE

### Opponents' argument for same-sex Marriage.

The opponents of same-sex relationships argue that Marriage is a traditional union between a man and a woman..They also argue that if Marriage is allowed between people of same-sex then the demand for considering the marriage between two or more people can also arise in the society and demand for considering the Marriage between different species also arose. According to critics of legalizing Same-sex Marriage if these type of Marriage if accepted then the society has a negative impact and also the traditional definition of marriage is infringed.<sup>12</sup>Marriage is considered a Heterosexual institution whose primary goal is to raise children and form a nuclear family, something that same-sex couples cannot achieve. Every child deserves both a father and a mother in their life<sup>13</sup>, but in the case of a same-sex couple, the traditional concept of father and mother is absent in the child's life. They also claim it is tough to define who can take responsibility as a father or mother of a child for the child's upbringing.

### Supporters argument for same-sex Marriage.

1. Same-sex couples have the right to equality<sup>14</sup>. Article 14<sup>15</sup> of the Indian Constitution guarantees equality before the law and equal protection of law to every person. In

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<sup>11</sup>Supriyo @ Supriya Chakraborty & Anr v Union of India [2023] INSC 920.

<sup>12</sup> John G. Culhane, 'Uprooting the Arguments against Same-Sex Marriage' (1999) 20 Cardozo L Rev 1119

<sup>13</sup>Adam Jowett, "But if you legalise same-sex marriage..." Arguments Against Marriage Equality in the British Press' (2013) 24(1) SAGE <<https://doi.org/10.1177/0959353513510655>> accessed on 24 October, 2024.

<sup>14</sup>Susmita Barman, 'Analysis of Same-Sex Marriage with Judgements' (2023) 5 Indian Journal of Law and Legal Research 1, 5 <[Analysis Of Same-Sex Marriage With Judgements](#)>accessed on 24 October, 2024).

<sup>15</sup>Constitution of India, 1950, Art. 14

*Navtej Singh Johar v. Union of India*,<sup>16</sup> the Court held that the only purpose of retaining section 377<sup>17</sup> of IPC is to protect women and children from non-consensual carnal intercourse. However, the Court argues that consensual carnality does not harm the women and children. Since Non-consensual intercourse is already punishable by section 375<sup>18</sup> of the IPC, then section 377<sup>19</sup> was held unconstitutional because specific societies were targeted, which violates article 14<sup>20</sup> of the Indian constitution.

2. Same-sex couples have the right to marry according to their wish<sup>21</sup>. In 2014, the U.N. recognized same-sex Marriage and argued that we respect same-sex Marriage in countries where same-sex Marriage is already declared legal by the State.<sup>22</sup>
3. Same-sex couples have the right to enjoy economic and financial benefits<sup>23</sup>. Article 22<sup>24</sup> of the Universal Declaration of Human Rights (UDHR) argues that everyone has economic, social, and cultural rights indispensable for his dignity and the free development of his personality. Article 23(3)<sup>25</sup> of UDHR argues that Everyone who works has the right favorable remuneration, ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.
4. Same-sex couples have the right to social security<sup>26</sup>. Article 22<sup>27</sup> of UDHR argues that Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and by the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

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<sup>16</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>17</sup> Indian Penal Code s 377 (1860).

<sup>18</sup> Indian Penal Code s 375 (1860).

<sup>19</sup> Indian Penal Code s 377 (1860).

<sup>20</sup> Constitution of India, 1950, Art. 14

<sup>21</sup> Susmita Barman, 'Analysis of Same-Sex Marriage with Judgements' (2023) 5 Indian Journal of Law and Legal Research 1, 5 <[Analysis Of Same-Sex Marriage With Judgements](#)> accessed on 24 October, 2024.

<sup>22</sup> UN News, 'Rights of LGBT People Must Be Respected, UN Officials Stress' (UN News, 9 October 2024) <https://news.un.org/en/story/2014/07/472572> accessed 9 October 2024.

<sup>23</sup> Susmita Barman, 'Analysis of Same-Sex Marriage with Judgements' (2023) 5 Indian Journal of Law and Legal Research 1, 5 <[Analysis Of Same-Sex Marriage With Judgements](#)> accessed on 24 October, 2024.

<sup>24</sup> Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810, Art 22 (1948).

<sup>25</sup> Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810, art 23(3) (1948).

<sup>26</sup> Susmita Barman, 'Analysis of Same-Sex Marriage with Judgements' (2023) 5 Indian Journal of Law and Legal Research 1, 5 <[Analysis Of Same-Sex Marriage With Judgements](#)> accessed on 24 October, 2024.

<sup>27</sup> Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810, art 22 (1948).

## COMPARISON OF SAME-SEX MARRIAGE AROUND THE WORLD

Same-sex is legal in 36 countries, and it is still illegal in approximately 130 countries of the world.<sup>28</sup> In countries where same-sex Marriage is legal, such as the United States of America(USA) and the Netherlands, same-sex couples have the right to marry. In the USA, if any spouse is coming to the USA for any purpose like study, work, international exchange, or legal immigration, they are eligible for a Derivative Visa. If any stepchildren are with them, they are also eligible for a Derivative Visa and all the benefits a Same-sex spouse enjoys. In the USA, Same-sex couple and their children (stepchildren of the primary applicant who do not turn 18 before the marriage takes place) are eligible for a Non-migration Derivative Visa if they are allowed by the law. If one of the spouses is from a foreign nation and that spouse has children, then those children are considered citizens of the USA, but those children are not turning 18 before the marriage took place.

Article 1 of the Netherlands states that all the people in the Netherlands are equal and forbids discrimination on any grounds<sup>29</sup>. The Equal Treatment Act of 1994 of the Netherlands can prohibit discrimination in employment opportunities, access to goods and services, professional occupation, membership of trade union or professional union, etc., “irrespective of their religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.” In the Netherlands, Same-sex couples are allowed to adopt children whether they are married or not, but to adopt children, they have to live together for at least three years. Most of the people of the Netherlands accept Same-sex marriage<sup>30</sup>.

In countries where same-sex Marriage is still not legal, same-sex couples have no right to marry. The death penalty was imposed in 10 countries of the world for same-sex relationships. Article 233-239 of the Iranian Penal Code can punish men who engage in same-sex relationships with another man with the death penalty. Still, if women engage in same-sex relationships, then they get corporal punishment. In 2017, Iran executed a 17-year-old boy because he came into a same-sex relationship with another minor boy. In many countries, same-sex relationships are not legal, but there is no capital punishment for same-sex Marriage. In earlier times in Saudi Arabia, the death penalty was given for same-sex Marriage, but now,

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<sup>28</sup>The Hindu, <https://www.thehindu.com/data/data-in-133-countries-homosexuality-decriminalised-but-only-in-32-of-them-same-sex-marriage-is-legal/article66374632.ece> (last visited on oct. 9).

<sup>29</sup>Constitution of the Kingdom of the Netherlands, art 1.

<sup>30</sup>Equal Treatment Act 1994 (Netherlands).

same-sex couples in Saudi Arabia are not punished by the death penalty<sup>31</sup>. In some countries, same-sex is not legal, but same-sex relationships are not punishable by law. In India, Same-sex marriage is not legal, but same-sex couples are not punished.

## **FUTURE ASPECT OF LEGALIZING SAME-SEX MARRIAGE**

Same-sex couples are exploited in countries where same-sex is not legal. When same-sex Marriage is legalized, then same-sex couples are treated equally like heterosexual couples, and they are allowed to marry according to their personal choice. Several Same-sex individuals fear disclosing their gender identity due to fear that society can reject them and, in extreme cases, kill them.

For example- Manoj Kumar Singh, a transgender person from Bihar, realized that he was attracted to men more than women. But he hides all the facts due to fear of rejection from society. When Manoj revealed his identity, his parents could not accept him, and people started gossiping about him, so he shifted to a Mumbai-based firm so that no one could gossip about him.<sup>32</sup>

When same-sex Marriage becomes legal, people like Manoj feel protected in society, and society will also accept people like Manoj over time. The exploitation against same-sex couples decreases over time. When same-sex become legal, then same-sex couples also live lives with dignity, which is defined under Article 21<sup>33</sup> of the Indian constitution. Same-sex couples gain family rights, and their children receive equal rights similar to those of children in heterosexual families.<sup>34</sup>

In some countries, same-sex relationships are illegal, like Iran, Saudi Arabia, etc., and in these countries, most people are against same-sex marriage, and they do not accept same-sex couples in countries where same-sex relationships are legal, like the Netherlands and the USA most of the people accept same-sex marriage. If same-sex marriage is legal in countries like Iran, Saudi

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<sup>31</sup>US Commission on International Religious Freedom, 'Sharia and LGBTI' (USCIRF, March 2021) <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf> accessed 10 October 2024

<sup>32</sup>Times of India, <https://timesofindia.indiatimes.com/city/patna/lgbt-community-netas-hail-apex-court-decision/articleshow/65710657.cms> (last visited on oct. 12).

<sup>33</sup>Constitution of India, 1950, Art. 21.

<sup>34</sup>Hena Khatun, 'LGBT Movement in India' (2018) 5 LGBT Movement in India 218, 218.

Arabia, etc., then in these countries Same-sex couples will be accepted by people of these countries. Also, if Same-sex marriage is allowed, then the exploitation against same-sex couples is diminished in these countries and same-sex couple feel more secure in these countries.

## CONCLUSION

Debate on same-sex Marriage is not only for the legalization of same-sex Marriage, but it also provides some rights like the right to marry, the right to have a family, the right to property, and the right to marry according to their choice. The journey of legalization of same-sex Marriage has many ups and downs. It started in ancient civilizations, where some civilizations, like Greece, recognized same-sex Marriage, but by the medieval period, the attitude toward recognition changed due to colonial influence. Today, in the 21st century, the same-sex marriage issue is one of the most significant issues in the world.

A total of 36 countries of the world declared same-sex Marriage legal in their country; the first country that legalized same-sex Marriage was the Netherlands in 2001 and the latest country that legalized same-sex Marriage was Greece in February 2024; this clearly shows the changing attitude of society and the state toward same-sex Marriage. The United States of America (USA) and Canada not only legalize same-sex but also treat same-sex couples as heterosexual couples. In contrast, in many countries, same-sex Marriage is still illegal. In some countries like Iran and Afghanistan, same-sex Marriage is punishable by death by the death penalty. Recognition of same-sex Marriage in some countries, but same-sex Marriage is still not recognized by state countries, and the criminalization of same-sex couples by the death penalty in some states shows the vast disparity in the world toward same-sex couples' rights.

In India, the struggle to legalize same-sex Marriage continues. In 2018, in the case of *Navtej Singh Johar v. Union of India*<sup>35</sup>, the apex court decriminalized same-sex Marriage and struck section 377 of the IPC. But in the recent case of *Supriyo @ Supriya Chakraborty and others v. Union of India*<sup>36</sup> in October 2023, the Court held that same-sex couples have no fundamental right to marry under the Special Marriage Act.

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<sup>35</sup>Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>36</sup>Supriyo @ Supriya Chakraborty & Anr. v Union of India 2023 INSC 920.

Legalizing same-sex Marriage is not only about ensuring the rights of same-sex couples but also about giving them access to economic, social, and family rights. They also have access to property rights, family rights, and many more. The struggle is also about same-sex couples living in society without fear. The legalization of same-sex Marriage in the whole world is challenging, but protesting same-sex couples' rights is a positive sign that same-sex couples have equality all over the world in the future.

