

# LEGALFOXES LAW TIMES

## LEGALIZING HOMOSEXUAL MARRIAGES: A WAY TO GENDER EQUALITY

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### ABSTRACT

In modern India, the word homosexuality has brought many challenges. Homosexuality is a word used for the community of people who are attracted to same-sex. At a different time and in different cultures, the word had drawn lots of negativity, approval, and even ban. According to Section 377 of The Indian Penal Code, 1890 states that anyone voluntarily having sexual intercourse with a man or woman against nature will be liable for life imprisonment, imprisonment for ten years or fine. The fight against the section was long-lasting. People came together to fight against the discriminating law. However, in 2018, Homosexuals, after a long fight, have got half supremacy. The reason behind calling Half- supremacy is that the section only recognizes it but has not recognized homosexual marriages.

Traditionally and legally, the theory of marriage extends only to male-female relationships. However, it is high time that the theory should be changed to all sexualities. Many countries have accepted homosexual marriages, whereas some still oppose it. The reason for opposition is that people claim it to be unnatural, against religion, and immoral.

Acceptance of homosexual marriages is the demand of our society. For a country like India, legalizing homosexual marriages would be a stepping stone towards a gender-equal society. In this article, I will address the arguments supporting legalizing homosexual marriages through some ancient times reference and real-time cases.

### INTRODUCTION

The word Homosexuals denotes people attracted towards people of the same sexual orientation. Homosexuality is a sexual orientation identified by sexual attraction or romantic desire solely for

people who have the same sex. Homosexual males are identified as "gay," whereas females are identified as "lesbians." Homosexual marriage is commonly understood as gay marriage, which symbolizes marriage between people of same-sex.

Society now recognizes homosexual Couples, but acceptance of such marriages still a question. Many famous people claim that love and happiness have no boundaries, then why we are not accepting homosexual marriages. There is nothing wrong with such a marriage. These couples are just like any other couple and have the right to live happily with head held high. Society demands that legal interprets and framers should consider legalizing such marriages.

## **HISTORY**

Some earliest western document claims that in Early Greece, the homosexual's relationship was a social norm. Some researchers even claimed that homosexual marriages were commonly witnessed in Christian and non-Christian communities. In preindustrial societies, homosexuality was observed by the lower sections of the society. At the same time, some upper sections viewed it as wrong. However, due to urbanization and the nuclear family, homosexuality became much less tolerated and even banned in some cases<sup>1</sup>.

Even in Hindu Mythology, there are traces of homosexuality. It also shows homosexual love in several modes. Classical manuscripts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads, and Puranas mention homosexuality. Furthermore, some records show that homosexual activities were popular amongst sannyasins who cannot marry. Therefore occurrences of homosexuality are available in traditional and mythological texts, and India is not an exemption. In Gujarat, a small community called Angaar, where the Kutchi community performs a ceremonial transgender marriage during Holi. For the past 150 years, the wedding is celebrated where Ishaak, the bridegroom, and Ishakali are both men.

Thus the records are encumbered with shreds of evidence showing the presence of homosexuality in history.

## **WHY SAME-SEX MARRIAGE IS IMPORTANT?**

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<sup>1</sup><http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>

In my view, the law should recognize Homosexual marriages as marriage is a bond of love. Therefore, it should be permitted to couples despite their gender. Following are some reasons behind why marriage should be permitted to homosexual couples<sup>2</sup>.

- **Reduction in discrimination:**

Homosexuals allege that they had not been given the equal powers and honor that a married couple would get. They are recognized as "others." this is why they feel isolated and dejected from society just because of their sexual orientation. Many Employers stop providing jobs to them, and even people stop talking to them. The acceptance of homosexual marriage would not wholly eradicate this discrimination against homosexual couples. However, it would eliminate the problem of ignorance and the grounds for prejudice.

Moreover, It would stop bullying and hate crimes against them. It would even overcome these forms of discrimination against LGBT people because it would remove the established "otherness" position of homosexuals. By reducing prejudice, the acceptance of homosexual marriage will improve the protection, self-confidence, strength, and wellbeing of homosexual couples.

- **Broader effects of same-sex marriage:**

The demand for homosexual marriages is high, and it will increase in the upcoming years. Acceptance of homosexual marriage would not only strengthen the marriage foundation but it will even strengthen the Indian society.

- **Reduction in Divorce rate:**

In comparison to heterosexual marriages, homosexual marriages have a low divorce rate. The acceptance of homosexual marriages will reduce the divorce rate in India.

In Indian society, due to parents and societal pressure, people do get married. However, when they know about the other person's sexuality, they either rape them or divorce them.

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<sup>2</sup><https://www.equality-network.org/wp-content/uploads/2013/07/Why-is-same-sex-marriage-important.pdf>

However, If people get married according to their preferences, the divorce rate will probably reduce.

- **Live with dignity:**

Acceptance of homosexual marriage would make homosexual couples live with dignity. They will be able to come out in the open with their sexual preferences. The harassment faced by them by police will stop.

### **ANCIENT INDIA RECOGNIZES HOMOSEXUAL MARRIAGES.**

"Tritiya-Prakriti: People of the Third Sex" a work by Amara Das Wilhelm, reveals that according to Sanskrit writings' research. Medieval and ancient India shows that homosexuals and the "third gender" existed in Indian society and were broadly accepted.

According to a second century, in ancient Hindu text "kama sutra," lesbians were addressed as "swarinis."<sup>3</sup>They use to marry other women t raise their children. The book also mentions gay as "klibas" referred as impotent men who tend to marry each other.

In Madhya Pradesh, the statues in the Khajuraho temple are famous for their explicit homosexual representation. The sculptures rooted in the Khajuraho temple describe sexual intimacy among man and man and woman and woman. They also show acceptance of sexual relationships between male and female entities. Sculptures are renowned for showcasing the presence of intimacy between members of the same sex.

Now, let talk about Bhagirathi, who bought Ganga to the earth. According to KritivasiRamayan, the King of Ayodhya was desperate to preserve his ancestry after losing most of his sons to the war. When the king died, then the two widows queens drank the potion and made love to each other; one of the widows got pregnant and gave birth to Bhagirathi.

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<sup>3</sup><https://devdutt.com/articles/did-homosexuality-exist-in-ancient-india/>

According to rig Veda, Varuna and Mitra were homosexual couples and even had children together. Even in Valmiki's Ramayana, Hanuman observes Rakshasa women kissing and embracing those who had been kissed and embraced by Ravana<sup>4</sup>.

Therefore, ancient texts acknowledge homosexual intimacy in Indian history and culture. There lies no objection or argument to not legalizing homosexual marriages.

### **HINDU MARRIAGE ACT 1955 AND HOMOSEXUAL MARRIAGE**

In Navtej Singh Johar v. Union of India<sup>5</sup>, the Hon'ble Supreme Court of India decriminalized homosexuality. However, some questions remained unanswered by the Court and the Government on the recognition of homosexual marriages. Lately, a Public Interest Litigation ("PIL") was registered in the Delhi high court asking for declaration of the gay community's marriage rights under the Hindu Marriage Act, 1955. The petitioner said that the Law recognizes marriages between two couples irrespective of discrimination among heterosexual and homosexual couples. The Act does not lay any condition that marriage must be solemnized between a man and a woman. Nevertheless yet, homosexual couples cannot get wedded and register the same under the Act. The present judgment only recognizes homosexuals as 'individuals' but not as 'couples.'

Marriage is a sacred custom in India. Denying homosexual couples the power to get married based on sexual orientation and gender identity is evil. Countries worldwide have legalized same-sex marriages, but India's Government does not look in the state for dropping the bounds of belief and traditionalism. The lawmakers still state that homosexual marriages are not part of the Indian legal system<sup>6</sup>.

The firm devotion to obsolete conditions and beliefs denies the sacred power to get married violate Article 21 of the Constitution. It has become essential for India to accept that homosexual marriage is not something new to our society. There had been many traces of such marriages in

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<sup>4</sup><https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377>

<sup>5</sup>WRIT PETITION (CRIMINAL) NO. 76 OF 2016

<sup>6</sup>[www.jurist.org/commentary/2020/10/paras-sharma-india-same-sex-marriage/](http://www.jurist.org/commentary/2020/10/paras-sharma-india-same-sex-marriage/)

ancient times. Hindu documents describe marriage as the wedlock of two souls which has no gender. The issue of homosexual marriages is more of morality than on law. Even the Human Rights Charter Article 16<sup>7</sup> recognizes the power to marry' as a human right' and extends to homosexual couples. Not recognizing such marriages is like saying to someone on their face that you are not meant for marriage.

It is time when lawmakers should stop believing in some old traditions and values which are not gender-neutral and taking away someone's right to marry. India's Constitution is ready for legalizing homosexual marriages. However, there is a strong need to make society forget the so-called 'values and culture' and accept this change.

### **HOMOSEXUAL MARRIAGE AND GENDER EQUALITY**

When we talk about gender equality, we mean that no one should face discrimination based on gender. Everyone, including transgender, lesbians, queer and gay, should have equal rights, responsibilities, and opportunities.

Why we connect gender equality and homosexual marriages? The reason behind this is that though, after the 2018 judgment, homosexuality has gotten a place in Indian culture. However still, homosexual marriages are neither accepted nor legalized.

Legalizing homosexual marriages will provide equal rights and responsibilities to the LGBTIQ community. Marriage is a concept above gender and depriving someone of getting married because of their gender or sexual orientation is a crime. Indian, in some of the other ways, faces criticism over gender inequality. Legalizing homosexual marriages could prove a stepping stone towards gender equality.

### **INDIAN CONSTITUTION IS READY**

Marriage in India continues to maintain its moral and cultural origins by not accepting homosexual marriages. After the 2018 judgment court has offered them the best solution of "live-in." this has narrowed down the meaning of the concept for homosexuals. Marriage is a concept having legal recognition but no definition. Even the personal laws define requisites for a valid marriage, not marriage itself.

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<sup>7</sup>[www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/)

India is a sovereign and democratic country where a person can marry whosoever he/she likes. As per the Indian constitution, Every individual has an absolute right to choose a life partner. The capacity to make choices is an inviolable aspect of the human personality. It involves decisions on vital matters like marriage and sexual orientation. Justice Nariman's words in Puttaswamy paraphrase privacy in India have evolved across judicial precedents to recognize more extensive privacy interests, including individuals' choices of abortion, right of same-sex couples including their right to marriage, procreation.

Denying homosexual marriage is a legal blackhole<sup>8</sup>. Non-acceptance on the ground of traditions is a clear evidence of discrimination based on gender, which is prohibited under article 15 of the constitution. According to section 5 of the Hindu Marriage Act 1955, no condition declares that marriage should be between a man and a woman. Hence, non-acceptance of the right of same-sex couples to marry would be incorrect.

Therefore, there are ready to accept such marriages, but our society is not.

## CONCLUSION

I want to conclude that non-acceptance of homosexual marriage would violate our Indian constitution as it stops one from marrying a person of their own choice. Also, it discriminates against homosexuals based on their sexual orientation. There had been many instances that proved that homosexuality and marriage are not a new concept. Its traces are very well present in ancient India. It is time when we all should try to change societal norms and tradition before its too late. Legalizing homosexual marriage would also be a stepping stone towards gender equality in India. We all have seen Mahabharath, where king Dhritarashtra stuck to the values, rules, and traditions, which led to a war and lost everything. Similarly, India should legalize homosexual marriage before there wrath of the people to make it legal.

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<sup>8</sup> <https://www.thequint.com/neon/gender/opinion-same-sex-marriage-are-courts-and-society-ready#read-more>