

**DE JURE NEXUS LAW JOURNAL**

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**SAME SEX MARRIAGES AND GLOBAL COMPARISON**

**INTRODUCTION**

When it comes to human and civil rights, many advanced countries have recognized same-sex marriage. The legal protection of same-sex relationships on an equitable basis with straight people has now become a requirement. The right to marry is often seen as a human right. Marriage is seen as one of the most important aspects of a person's identity in political, legal, and socioeconomic terms. It is a legal institution recognised by various personal laws for acknowledging the relationship between two individuals. It is of tremendous public importance since it has a great deal of relevance in terms of rights and duties such as property, inheritance, and other associated rights. These rights are the result of a marriage.

Thirty-one nations, such as the United States, have allowed same-sex marriage, whereas many Western democracies recognise civil unions in the absence of marriage equality. However, same-sex marriage is still illegal in most countries, and the global expansion of LGBTQ+ rights seem to have been sluggish. International institutions, including the United Nations, have made resolutions in favour of LGBTQIA+ rights, but human rights organisations claim that these bodies lack the authority to implement them.

## **UNITED STATES OF AMERICA**

On June 26, 2015, the United States Supreme Court declared that the Constitution guarantees same-sex couples the freedom to marry, essentially legalising same-sex marital relationship in the 13 states where it had formerly been prohibited. The five-to-four decision, which applies to US territory, occurred in the midst of major upheavals in public opinion. By 2020, 70% of Americans polled supported same-sex marriage, rising from 27% in 1996.

This decision was passed almost 20 years after President Bill Clinton signed the Defence of Marriage Act in 1996 which restricted the definition of a marriage to a union between a man and a woman, which resulted in same-sex couples being denied the federal benefits that heterosexual couples receive such as health care, social security, and tax breaks, as well as green cards for immigrant spouses of U.S. citizens.

Notwithstanding these Supreme Court decisions, there is still a controversy in the United States between proponents of legal equality and those who object to marriage equality based on religious beliefs. The Supreme Court ruled in June 2018 in favour of a Colorado baker who denied to produce a wedding cake for a same-sex marriage due to his religious views, despite the state's civil rights law. The court, however, declined to make a more general decision on whether businesses had the right to refuse products or services to LGBTQ+ individuals on religious grounds.

The court declared in June 2020 that a 1964 civil rights law barring employment sex discrimination also covers discrimination based on sexuality or gender identity. This verdict protected employees belonging to the LGBTQ+ community from being fired by providing a legal safeguard in states where no such safeguards existed prior to this ruling.

## **EUROPE**

Western Europe is home to the majority of the nations that have legalised marriage equality. The Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), the United Kingdom (2013), Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017), and Austria have all legalised same-sex marriage (2019). Although Italy is the biggest European nation that still hasn't legalised same-sex marriage, it did allow for civil unions of

same-sex couples in 2016. Switzerland legalised same-sex marriage on 16<sup>th</sup> December, 2020 when the Swiss Parliament passed the legislation.

Eastern Europe has a lower level of support. According to a 2017 Pew Research Center poll, 16 percent of Belarusians and 9 percent of Ukrainians support legalising same-sex marriage. Poland and Hungary, both of which have constitutional restrictions on same-sex marriage, have 32% and 27% support, respectively. At least 10 additional Central and Eastern European countries have similar laws. Although civil unions are permitted in Estonia, public support for marriage equality in the Baltic republics is limited. Same-sex relationships are legal in the Czech Republic and Hungary. A Budapest court ruled in 2018 that same-sex marriages done outside of the country must be regarded as partnerships.

## **PACIFIC RIM**

Only Australia and New Zealand are Pacific Rim countries that allow same-sex marriage. After over eight million Australians endorsed the proposal in a national referendum that fall, Australia's parliament voted in December 2017 to amend the law on marriage. In May 2019, Taiwan's legislature enacted a judgement made by the country's top court two years prior, making same-sex marriage lawful.

In 2015, a Tokyo district began recognising same-sex unions, despite rapidly altering popular sentiment in Japan. A court in Sapporo ruled in 2020 that the Japanese government's refusal to recognise same-sex marriages is a violation of the constitution. In a 2018 poll, nearly 80% of persons aged sixty and under supported same-sex marriage. Bills to allow same-sex marriage or civil unions have been introduced in Thailand and Vietnam.

According to the ILGA, only 31% of Chinese, 30% of Malaysians, and 14% of Indonesians supported legalising same-sex marriage in 2016. In portions of Indonesia, Malaysia, Myanmar, and Singapore, same-sex relationships between men are prohibited. They are sentenced to death by stoning in Brunei, but the government has stated that it will not apply the punishment due to international pressure.

Since 2016, human rights organisations have reported an upsurge in violence and intimidation against LGBTQ+ individuals in Indonesia, including discriminatory comments made by a number of public leaders. The Philippine President has expressed support for

recognising same-sex partnerships but not same-sex marriages, while a study conducted in 2019 found that 73 percent of Filipinos believe homosexuality should be tolerated.

## **SOUTH AND CENTRAL ASIA**

Throughout most of South and Central Asia, notably Bangladesh and Pakistan, same-sex relationships are banned. In 2018, India removed a colonial-era ban on homosexual sexual relations, and Bhutan followed suit in 2020. Nepal has adopted various anti-discrimination laws based on sexual orientation, and a government-appointed body recommended that same-sex marriage be legalised in 2015. Official documents in Bangladesh, India, Nepal, and Pakistan enable people to register as a transgender person.

In South and Central Asia, there is scant data on public attitudes regarding homosexuality. In 2016, the ILGA found that 35% of Indians and 30% of Pakistanis think same-sex marriage should be allowed. Kazakhstan had a 12 percent approval rating.

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## **MIDDLE EAST AND NORTH AFRICA**

In much of the region, same-sex relationships are outlawed, and in Iran, Saudi Arabia, and Yemen, they are punished by death. Algeria, Morocco, Oman, Syria, Tunisia, and Gaza all have laws against same-sex activity. Lebanese courts set a possible precedent for decriminalisation in 2018. Israel accepts same-sex marriages conducted in other jurisdictions, but in a 2018 vote, the Knesset, Israel's legislative body, rejected a bill which would have authorised same-sex marriages. Civil advantages are available to same-sex couples, such as residency permits for the companions of Israeli citizens.

In terms of public opinions toward same-sex couples, Israel stands out from its neighbours: according to the ILGA survey, 49 percent of Israelis believe same-sex marriage should be allowed, compared to 19 percent in the UAE, 16 percent in Egypt, and 14 percent in both Jordan and Morocco.

## **SUB SAHARAN AFRICA**

South Africa is still the only country in Sub-Saharan Africa that allows gay and lesbian couples to marry. In 2006, the parliament allowed same-sex marriage, just under a decade after the court overturned restrictions prohibiting men from having sex with women. The post-apartheid constitution was the first in the world to protect people based on their sexual orientation, though a 2016 ILGA poll found only 40% of South Africans support same-sex marriage, and human rights monitors have identified security forces failing to protect lesbians and transgender men's rights.

Same-sex relationships are outlawed in much of Africa, and in Mauritania and Sudan, as well as sections of Nigeria and Somalia, they are punished by death. Afrobarometer polling conducted between 2016 and 2018 indicated that 78 percent of Africans in thirty-four countries were homophobic.

Despite the fact that the African Union's human rights commission passed a resolution denouncing violence against LGBTQ+ individuals in 2014, a handful of African countries attempted to block the appointment of a UN expert to investigate anti-LGBTQ+ prejudice in 2016.

However, there have also been recent advances: Afrobarometer discovered that, in addition to South Africa, majorities in three other countries—Cape Verde, Mauritius, and Namibia—are accepting of homosexuality. Mozambique decriminalised same-sex relationships in 2015, with the Seychelles doing so in 2016, Angola and Botswana doing so in 2019, and Gabon doing so in 2020. In addition, courts in Kenya, Uganda, and Zambia have ruled in favour of LGBTQ+ advocacy groups in recent years.

## **SITUATION IN INDIA**

In India, homosexuality has a long history. Ancient literature, such as the Rig-Veda, which dates back approximately 1500 BC, as well as sculptures and relics, depict sexual encounters between women as disclosures of a feminine universe in which sexuality was predicated on pleasure and fertility. Some historical evidences of same-sex relationships include the depiction of homosexual activities in the Kamasutra, the Harems of young boys held by Muslim Nawabs and Hindu Aristocrats, male homosexuality in Medieval Muslim history, and evidences of sodomy in Tantric rites.

With the arrival of Vedic Brahmanism and, subsequently, British Colonialism, these experiences began to lose their relevance. According to Giti, the Aryan invasion, which began around 1500 B.C., began to suppress homosexuality by establishing patriarchy's control. There are references in the Manusmriti to punishments such as caste loss, severe monetary fines, and whippings for gay and lesbian conduct. In the case of married ladies, 'luring of maids' is punishable by shaving the woman's head, cutting off two fingers, and afterwards parading her on a donkey. Manu's more harsh sanctions for married women could indicate either a high incidence of such partnerships among married women or a higher acceptability of these activities amongst unmarried women.

The presentation of explicit sexual imagery was considered 'pornographic and wicked' by homophobic and Victorian traditionalist ideals. Ever since era of colonial expansion, the Western concept of sexuality has been heavily affected by reproductive assumptions. Puritanical beliefs and attitudes were imprinted onto colonial people's view of sexual activity, as seen by their reactions to all types of 'unnatural' sexual behaviours. The Indian mentality embraced the Western 'moral and psychological' notion that sexuality is 'pathological,' instead of the natural expression of desire that was originally part of Indian culture.

The way people think about homosexuality has changed dramatically during the last century. Since 1974, homosexuality has no longer been classified as an aberrant behaviour and is no longer classified as a mental disease. In other nations, it has also been decriminalised. Since then, anti-discrimination or egalitarian laws and policies have been adopted in numerous states around the world to safeguard homosexual and lesbian rights. In 1994, South Africa became the first country in the world to enshrine lesbian and homosexual rights in its constitution. Similar regulations exist in Canada, France, Luxembourg, Holland, Slovenia, Spain, Norway, Denmark, Sweden, and New Zealand. The Supreme Court of the United States ruled in 1996 that no state could enact bills discriminating against the LGBTQ+ community. In India, no such progressive reforms have occurred, and homosexuals continue to be victims of various forms of abuse condoned by the government and society.

The much-debated section 377<sup>1</sup> of the Indian Penal Code, 1860, was declared partially unconstitutional in *Navtej Singh Johar & Ors. vs. Union of India*<sup>2</sup>. The court stated that regardless of how minor the LGBT portion is, they have the right to privacy, which incorporates intercourse. Their choice of mate may be unconventional as per the Indian

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<sup>1</sup> Indian Penal Code, 1860, §377

<sup>2</sup> AIR 2018 SC 4321

culture, but that does not imply they will face legal consequences. Section-377 infringes on their human decency and freedom of choice, infringing on their right to privacy, which is protected under Article 21<sup>3</sup>.

The fundamental goal of preserving section-377 is to protect women and children from ever being mistreated and harassed as a result of carnal intercourse, yet consensual carnal intercourse done by members of the LGBTQ+ community cannot in any case be harmful to women or children. Furthermore, non-consensual activities have previously been defined as a crime under section 375<sup>4</sup> of the IPC, implying that section-377 is redundant and discriminatory against a particular group of people, and hence unlawful under Article 14<sup>5</sup> of the Indian Constitution.

The right to choose is not an absolute right due to the liberal nature of our Constitution. As a result, the concept of choice has been subjected to some limitations. The right to choose a partner for sexual interactions, on the other hand, is a wholly personal choice that cannot be regulated. Section-377 of the IPC, on the other hand, inhibits the right of the LGBT community to choose a sexual partner and is thus unreasonable and arbitrary.

The reasons for imposing justifiable restrictions on the basic right of expression include public order, decency, and morality. Any act of affection performed in public by members of the LGBT community does not disrupt public order or moral standards unless it is appropriate and not obscene. Section-377, on the other hand, is unlawful because it fails to meet the proportionality standards and violates the LGBT community's fundamental right to free expression.

The Supreme Court decided that section-377 is unconstitutional because it breaches Articles 14, 15<sup>6</sup>, 19<sup>7</sup>, and 21 of the Indian Constitution, overturning the decision in **Suresh Koushal and Ors vs. Naz Foundation and Ors.**<sup>8</sup> It further stated that section-377 will only apply to non-consensual sexual activities perpetrated against adults and minors.

Petitioners filed petitions in the Delhi High Court in 2020, requesting that the court grant legal legitimacy to same-sex marriages based on the Navtej Singh Johar v. UOI verdict. Four

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<sup>3</sup> India Const. Art. 21

<sup>4</sup> Indian Penal Code, 1860, §375

<sup>5</sup> India Const. Art. 14

<sup>6</sup> India Const. Art. 15

<sup>7</sup> India Const. Art. 19

<sup>8</sup> Civil Appeal No. 10972 OF 2013

suits were filed under various statutes, including the Special Marriage Act of 1954, the Foreign Marriage Act of 1969, and the Hindu Marriage Act of 1954. *Abhijit Iyer Mitra & ors. vs. UOI, Dr. Kavita Arora & ors. vs. UOI, Vaibhav Jain & Ors. vs. UOI, Udit Sood and Ors. v. Union of India and Ors.* are the petitions that were filed in the Delhi HC.

All of these petitions were bundled together, and the Delhi High Court requested a response from the Indian government. The government requested dismissal of petitions seeking recognition of same-sex marriages under current legislation, and told the Delhi High Court that an union in India is inextricably linked to "age-old customs, rituals, practises, cultural ethos, and societal values," and that the Supreme Court had only decriminalised "a particular human behaviour" by reading down Section 377 of the IPC, which covers homosexuality.

The government also stated in its response to three petitions seeking to legalise same-sex marriages that there is a "legitimate State interest" in limiting marriage recognition to those of opposite sex. According to a response from the Ministry of Law and Justice, "societal morality" is relevant in determining the legitimacy of a law, and it is up to the Legislature to impose such societal morality and public acceptability based on Indian ethos.

The government claims that residing together as lovers or being in a relation with a same-sex person is "not equivalent" to the "Indian family unit concept" of a husband, wife, and children, arguing that marriage has "sanctity." Despite the fact that marriage between a biological man and a biological woman is legally recognised in our country, marriage must rely on age-old customs and social norms.

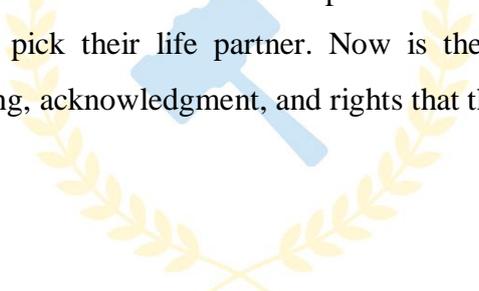
Marriage, while taking place between two private persons, "cannot be consigned" to merely a notion within an individual's zone of privacy, according to the government. Marriage, on the other hand, is recognised as a public recognition of a partnership, with various statutory rights and responsibilities attached, according to the Delhi High Court. The ruling in the Navej Singh Johar case, it added, "does not expand the right to privacy to encompass a basic right in the type of a right to get married by two parties of the same gender."

## **CONCLUSION**

The primary problem with legalising same-sex marriages is that many begin to oppose it based on religious and cultural considerations. Tushar Mehta, the solicitor-general, argued in front of the Delhi HC that same-sex marriages violate "our law, legal system, society, and

values." It is unfortunate that a young democracy has become so restrictive because of values and society that it took nearly 24 years (the petition was filed in 1994) to decriminalise homosexuality and authorise people to openly love each other, and now it's become so strict due to virtues and society that a group of sexual minorities is not allowed to marry someone of their own choosing.

The argument is that because the queer community is not confined to any one faith or organisation, no one will object to a marriage being recognised on the basis of values and culture if it is recorded under the Special Marriage Act. Simply amending the law will not be enough to recognise marriage; societal approval is also required. The only way to do this is for people to be made aware of and educated to the point where they comprehend that each individual has the right to pick their life partner. Now is the time to give the LGBTQ community the equal standing, acknowledgment, and rights that they have been striving for.



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