

Explainer: Recognition of same-sex marriages

On March 13, 2023, Indian apex court transferred a plea for recognition of same-sex marriages to the constitutional bench. Justice DY Chandrachud, PS Narasimha and JB Pardiwala listed the hearing from April 18, 2023.

In an affidavit, Indian government has opposed the plea seeking legal recognition of same-sex marriages. Indian government said that marriage is accepted 'statutorily, religiously and socially' only between a biological man and a woman. The affidavit argued that any deviation from this accepted form could only be voted by lawmakers and not ruled by courts.

As per Indian government, formalising marriage also impacts related issues like adoption and inheritance rights, thus it is important for the legislature to discuss the matter while taking into account all viewpoints that might have an effect on society.

Marriage is an institution as per Indian ethos and Hindu practice. Unlike in many Western countries, marriage is not a 'contract' for physical union alone.

Instead, it's a socio-economic institution having huge implication for the 'families', 'society' and India as a 'nation'.

Same-sex marriages around the world

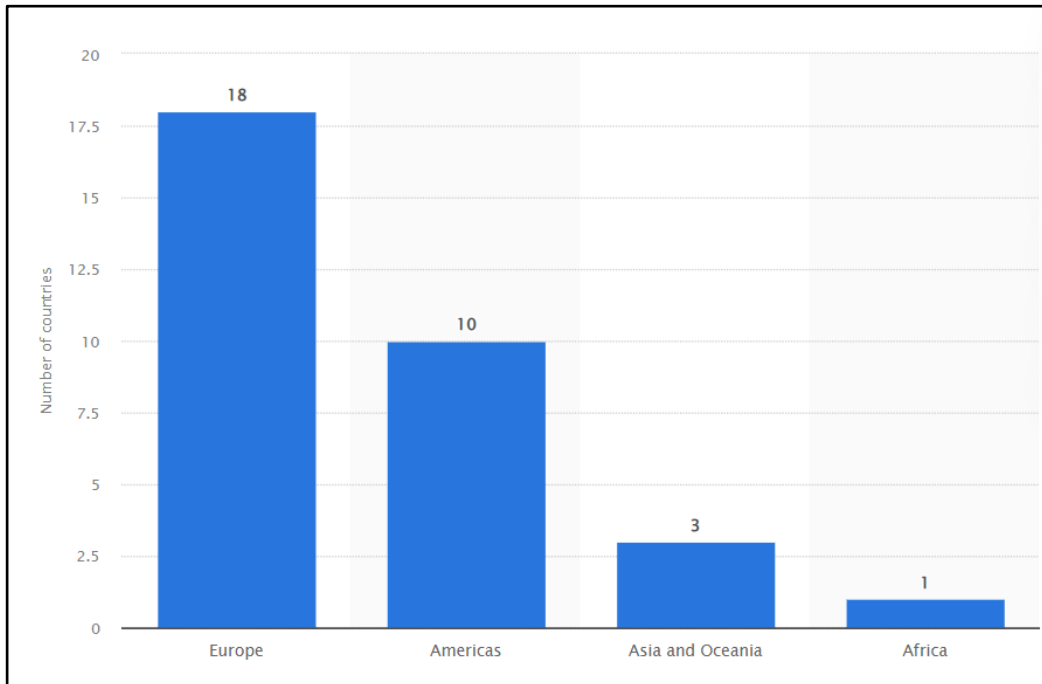
Currently, 32 countries recognize same-sex marriages as legal: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America and Uruguay.

About 22 countries have legalized same-sex marriages nationally through legislation. Among these, Australia, Ireland and Switzerland legalized same-sex marriages through legislation only after nation-wide votes.

10 countries have legalized same-sex marriages through court decisions — Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Slovenia (followed by national legislation), South Africa, Taiwan and the United States of America.

Two countries, South Africa and Taiwan, enacted legislation legalizing same-sex marriages after courts mandated them to do so.

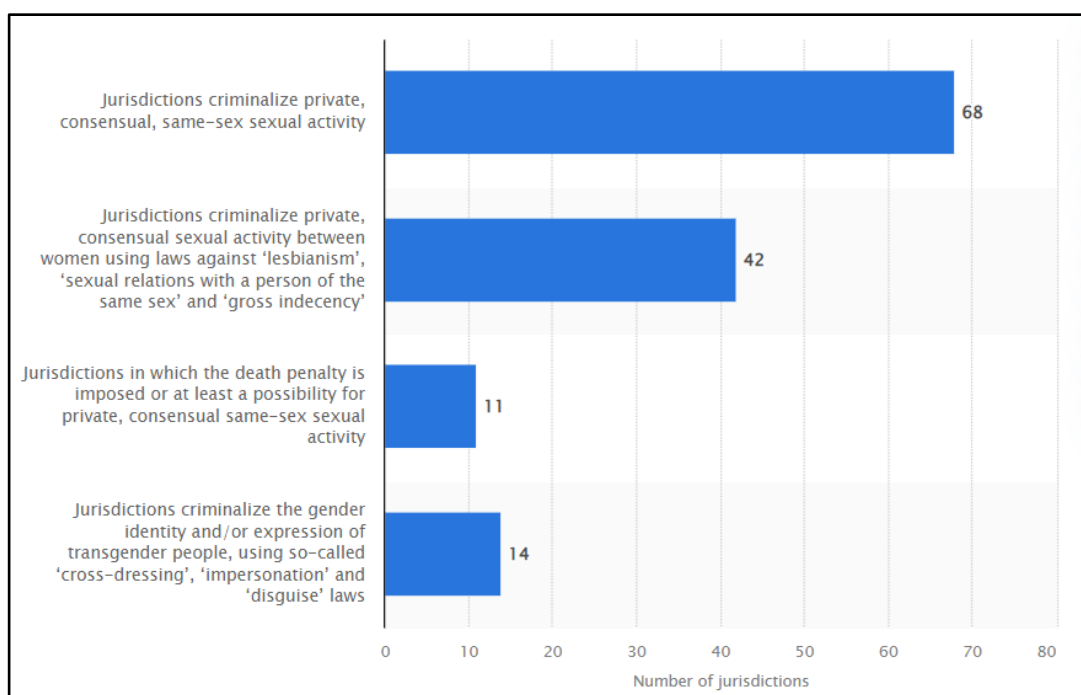
Number of countries that have legalized same-sex marriage as of 2022, by continentⁱ



Worldwide, **68 countries criminalize homosexuality as of 2022**. Most of them are located in the Middle East, Africa, and Asia. In 11 countries, death penalty is imposed or at least a possibility for private, consensual same-sex sexual activity.

These countries are Iran, Northern Nigeria, Saudi Arabia, Somalia, Yemen, Afghanistan, Brunei, Mauritania, Pakistan, Qatar and the United Arab Emirates.

“Countries that criminalize homosexuality as of 2022”ⁱⁱ



Affidavit by Indian Government

6. It is submitted that codified and uncodified personal laws take care of all branches of every religion like Mitakshara, Dayabhaga etc. in Hindus

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and similar differences in other religions. Depending upon the personal laws applicable, the nature of marriage as an institution is different. Amongst Hindus, it is a sacrament, a holy union for performance of reciprocal duties between a man and a woman. In Muslims, it is a contract but again is envisaged only between a biological man and a biological woman. It will, therefore, not be permissible to pray for a writ of this Hon'ble Court to change the entire legislative policy of the country deeply embedded in religious and societal norms.

7. It is submitted that despite the decriminalization of Section 377 of the Indian Penal Code [hereinafter referred to as "IPC"], the Petitioners cannot claim a fundamental right for same-sex marriage to be recognized under the laws of the country. It is submitted that the same has been adequately clarified by the Hon'ble Supreme Court in *Navtej Singh Johar v. Union of India, (2018) 10 SCC 1* [hereinafter referred to as "*Navtej Singh Johar*"], wherein the Hon'ble Supreme Court held as under :

"167. The above authorities capture the essence of the right to privacy. There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others."

DENIAL OF LEGAL RECOGNITION DOES NOT BREACH OF PART III OF THE CONSTITUTION

35. It is submitted that this means that in terms of Article 14, same sex relationships and heterosexual relationships are clearly distinct classes which cannot be treated identically. Hence, there is an intelligible differentia (normative basis) which distinguishes those within the classification (heterosexual couples) from those left out (same sex couples). This classification has a rational relation with the object sought to be achieved (ensuring social stability via recognition of marriages). It is submitted that in light of the above all the impugned laws pass the Article 14 test and must be declared constitutionally sound

36. It is submitted that this special status, which is granted to Heterosexual Marriage cannot be construed as a discrimination against same sex couples under Article 15(1) or as a privileging of Heterosexuality. This is because no other form of cohabitation enjoys the same status as heterosexual marriage including Heterosexual live-in relationships. Indeed, in live-in relationships even the presumption of marriage is rebuttable as held in *Badri Prasad vs Director of Consolidation (1978) 3 SCC 527*. Thus, it can be clearly seen that not every heterosexual union has a status at par with marriage. To fall foul of Article 15(1), there should be discrimination *only* on the basis of sex. It is evident that this condition precedent is not at all satisfied in the present case. Article 15 is therefore inapplicable and cannot be used to assail the concerned statutory provisions.

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37. It is submitted that there can be no fundamental right for recognition of a particular form of social relationship. While it is certainly true that all citizens have a right to association under Article 19, there is no concomitant right that such associations must necessarily be granted legal recognition by the State. Nor can the right to life and liberty under Article 21 be read to include within it any implicit approval of same sex marriage. After the decision in *Navtej Singh Johar (supra)* the only change is that persons of the same sex can engage in consensual sexual intercourse without being held criminally liable under Section 377 of the Indian Penal Code. This, and no more than this, is what has been held in that case. While the aforesaid conduct has been decriminalised, it has by no means been

33. It is submitted statutory recognition of marriage limited to marriage/union/relation as being heterosexual in nature, is the norm throughout history and are foundational to both the existence and continuance of the State. Hence, considering its social value the State has a compelling interest in granting recognition to Heterosexual Marriage only to the exclusion of other forms of marriage/unions. It is submitted that at this stage it is necessary to recognise that while there may be various other forms of marriages or unions or personal understandings of relationships between individuals in a society, the State limits the recognition to the heterosexual form. The State does not recognise these other forms of marriages or unions or personal understandings of relationships between individuals in a society but the same are not unlawful.

34. It is submitted that on a normative level, the society consists of smaller units of family, which in turn are predominantly organised in a heterogenous fashion. This organisation of the building block of society is premised on further continuance of the building blocks i.e. the family unit. While other forms of unions may exist in the society which would not be unlawful, it is open for a society to give legal recognition of the form of union which a society considers to be quintessential building block for its existence!

19. It is submitted that marriage between a biological man and a biological woman takes place either under the personal laws or codified laws namely, the Hindu Marriage Act, 1955, the Christian Marriage Act, 1872, the Parsi Marriage and Divorce Act, 1936 or the Special Marriage Act, 1954 or the Foreign Marriage Act, 1969. The parties entering into marriage creates an institution having its own public significance as it is a social institution from which several rights and liabilities flow. Seeking declaration for solemnisation/registration of marriage has more ramifications than simple legal recognition. Family issues are far beyond mere recognition and registration of marriage between persons belonging to the same gender. Living together as partners and having sexual relationship by same sex individuals [which is decriminalised now] is not

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comparable with the Indian family unit concept of a husband, a wife and children which necessarily presuppose a biological man as a 'husband', a biological woman as a 'wife' and the children born out of the union between the two – who are reared by the biological man as father and the biological woman as mother.

India decriminalized same sexuality in 2018

A five judge constitution bench led by Chief Justice Dipak Misra, Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra unanimously decriminalised 158-year-old colonial-era provisions of section 377 of the Indian Penal Code (IPC) which criminalises consensual unnatural sex.

Then Chief justice of India Dipak Misra said Section 377 is irrational, indefensible and manifestly arbitrary. He added, The LGBTQ+ community needs rainbow of hope for the sake of the humanity. They should be allowed to live with dignity and without pretence. This is their journey to dignity, equality and liberty.

Concluding Observations:

In India, every citizen irrespective of sex, caste, creed, race, religion, or region has rights mentioned in the constitution. India accepts and respects everybody.

In 2018, the apex court decriminalised section 377. Issues pertaining to same-sex marriages are a matter of scrutiny by Legislators, social leaders, communities, dharmic leadership and others.

However, there are several countries globally which penalise Homosexuality. Self-claimed intellectuals and scholars mastering people on India's viewpoint on same-sex marriages should also be vocal against the same homosexual community living in fear in these countries.

In Indian context, a national, open debate must precede legalizing same sex marriages. Wide ranging consultations must happen before a call is taken. Legalizing same sex marriages or otherwise should not be left to either policymakers or courts. It's the society at large based on Hindu / Indian ethos that a decision on same sex marriages be taken.

Individuals with different sexual preferences can live the way they want to without inhibition, restrictions or social boycott. But, the institution of marriages which is sacrament in Hindu philosophy , family and societal values cannot be infringed upon.

Larger socio-economic implications will have to be evaluated through a deeper study on allowing same sex marriages in other countries and places where it has been prohibited.

ⁱ Published by Statista Research Department and 12, D. (2022) *Gay marriage worldwide by Continent*, Statista. Available at: <https://www.statista.com/statistics/1229293/number-of-countries-that-permit-same-sex-marriage-by-continent/> (Accessed: March 14, 2023).

ii Published by Statista Research Department and 12, D. (2022) *Countries that criminalize homosexuality 2022*, Statista. Available at: <https://www.statista.com/statistics/1227390/number-of-countries-that-criminalize-homosexuality/> (Accessed: March 14, 2023).