

LAWFOYER INTERNATIONAL
JOURNAL OF DOCTRINAL LEGAL
RESEARCH
(ISSN: 2583-7753)

Volume 1 | Issue 2

2023

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EQUALITY AND INCLUSIVITY: THE PUSH FOR LEGALIZING SAME-SEX MARRIAGES IN INDIA

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I. ABSTRACT

“Marriage is a more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring.”² Traditionally marriage is perceived to be the union of persons of opposite sexes, this is observed as a by-product of the law of nature. Marriage is a cornerstone of human civilization. It is unreasonable to withhold these rights and protections based on a person's sexual orientation when so many rights are connected to marriage. Scientifically, being part of a diversity of species, it is "natural" to be a homosexual. These instincts are not self-made or self-engineered. They are rooted in a person's inherent sexuality. Being homosexual does not imply being queer or abnormal. It is all a matter of mindset, not the law. Therefore, 'Gay marriage' or 'Lesbian marriage' ought to be allowed.

The freedom to marry is not officially recognized as a basic constitutional right in the Indian Constitution. However, the freedom of choice in marriage has been recognized as an essential component of *Article 21*³ of the constitution through judicial interpretation by the Apex Court of the country. Marriage as an institution is founded on exclusion. Same-sex marriages are still not accepted in Indian society despite other dynamic changes. It is important to understand that without social support, laws alone cannot bring about social change and development.

II. KEYWORDS

Same-sex marriage, Homosexuals, LGBT Rights, Section 377, Legalization, Sexual Orientation.

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² CV Varshani, A Qualitative Approach to Understand What Sustains Marriage, Vol. 6, IJIP, Pg. 1, (2018), <https://ijip.in/articles/a-qualitative-approach-to-understand-what-sustains-marriage/>.

³ India Const. art. 21.

III. INTRODUCTION

It was a very grand and welcomed move of the Supreme Court of India when it adjudged to decriminalize 'homosexuality' and 'homosexual relations' in India through the landmark case of *Navtej Singh Johar Vs. Union of India* on 6th September 2018.⁴

It was a turning point in Indian history, paving the way for the government authorities to recognize LGBTQ rights. A group of individuals filed a lawsuit to challenge the validity of *Section 377* of the Indian Penal Code⁵, which criminalized consensual sexual intercourse between adults of the same gender. In the landmark ruling, the Supreme Court deemed *Section 377* unconstitutional in so far as it criminalized consensual sexual activities between adults of the same gender. The Court ruled that the LGBT community has the same rights as any other citizen and that discrimination based on sexual orientation violates the Indian Constitution's guarantee of equality to all its citizens. The ruling was hailed as a significant success for India's LGBT community and was considered a step towards putting an end to discrimination against them. People in India and throughout the world welcomed the decision, which was viewed as an important achievement in the struggle for LGBTQ rights. The unanswered question that remains is 'whether the Indian legal system and society are ready to accommodate such change in the system.'

In Ancient Indian Sanskrit texts of *Kamasutra*, homosexuals are shown as a normal unit of the society. The homosexual lifestyle was not overtly condemned. In fact, it is interesting to notice that nouns and pronouns in the Sanskrit language can be either masculine, feminine, or neuter. This holds true for both inert items and living creatures. Therefore, a person whose morals are rooted in Sanskrit literature is easily amenable to a third gender.⁶

⁴ Navtej Singh Johar & Ors. vs. Union of India, AIR 2018 SC 4321.

⁵ Unnatural offences.

⁶ Virtual Vinodh, <http://www.virtualvinodh.com/writings/assorted/homosexuality-kamasutra> (2020) .

Homosexuality is an attraction of a person towards the same gender, so can this be said to be 'natural'? The dictionary meaning of the Natural is, "Existing in or caused by nature; not made or caused by humankind." This description, thus, classifies it as natural. However, what is natural may not be accepted as normal in society.

IV. THE COMMUNITY

Understanding the LGBT as a community of people is equally important before exploring the issue of their marriage rights. Homosexuals as abbreviated as LGBT - Lesbian, Gay, Bisexual, and Transgender, have been interpreted in *Section 377* of the Indian Penal Code.

It is used as an umbrella term to describe the diverse group of people who identify as sexual or gender minorities, sharing a common goal of advocating for their rights and promoting acceptance and equality with other people. They have historically faced discrimination and marginalization, and many individuals within this community continue to experience discrimination even today.

- 'Lesbian' is a woman who is attracted, emotionally and/or physically, to other women.
- 'Gay' is a man who is attracted, emotionally and/or physically, to some other male.
- 'Bisexual' is a person who is attracted to both men and women.
- 'Transgender' is a person whose gender identity and/or gender expression does not match their assigned sex at birth; They may be a female sex at birth but identifies as male or a male sex at birth but identifies as female.⁷

The British administration strenuously criminalized the transgender or 'Hijra' community under *Section 377 of IPC, 1860*, making it a non-bailable offense, revulsed by the fact that they were given high regard by the royal courts and other institutions. This amounts to an unreasonable restriction on the right to freedom of Transgenders.

⁷ Abhishek Sarta, An Analytical Study of the Challenges Faced by the LGBTQ Community in the Contemporary Indian Society, Vol. 11, AJMR, Pg. 4, (2022), <https://www.indianjournals.com/ijor.aspx?target=ijor:ajmr&volume=11&issue=8&article=001> .

The homosexual community has been demanding to be given the freedom to get recognized as 'lawfully wedded partners' by Indian laws. "Their right to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity, and equality, along with the other fundamental rights guaranteed under Part III of the Constitution"⁸, are still being infringed, even after the nullification of part of *Section 377, IPC*.

V. 'MARRIAGE': EXPLORING SAME-SEX MARRIAGE

Marriage is a union of two people known to be a Couple. The dictionary meaning of marriage is "interpersonal union established in various parts of the world to form a familial bond that is recognized legally, religiously, or socially, granting the participating partners mutual conjugal rights and responsibilities".⁹ Matrimony or marriage, often known as wedlock, is a culturally and usually legally recognized union in a voluntary and contractual alliance. Even though the idea of marriage is universal, there are many different ways to solemnize it. Marriage, according to society, has an ultimate purpose attached to it, that is, Procreation. It is a notion assigned to marriage in the legal society for the continuation of generations or bloodlines. However, it is a fact that marriage is also intended for companionship, maintenance, redemption, stability, and other equally vital purposes, which cannot be disagreed with. Supreme Court in its judgement of 2006¹⁰ provides that the 'right to marry' is a Fundamental right of Life and Liberty. Further, in its recent landmark judgements in two cases of 2018¹¹, the apex court set aside the decision of the Kerala High Court and held that the 'right to choose a partner' of one's own choice is a matter of dignity under *Articles 19 and 21* of the Constitution.

Indian citizens can choose to get married under one of their many personal laws or under the common law of civil union. Marriage laws are incorporated into the personal laws of Hindus, Christians, and Muslims as well as the secular *Special Marriage Act, of 1955*. Although none of the Acts explicitly specify marriage only between a "man" and a "woman", it has been interpreted and accepted to mean that

⁸ Navtej Singh Johar & Ors. Vs. UOI, AIR 2018 SC 4321.

⁹ Dictionary.com, <https://www.dictionary.com/browse/marriage>.

¹⁰ Lata Singh Vs State of U.P. & Another, AIR 2006 SC 2522.

¹¹ Safin Jahan vs. Ashoka KM & Ors., AIR 2018 SC 357 ; Shakti Vahini vs. UOI & Ors., (2018) 7 SCC 192.

marriage is always a union between a man and a woman. Words like "bride and bridegroom" and "husband and wife" imply that the laws exclusively apply to heterosexual couples.

'Same sex' individuals, popularly called 'Homosexuals', are persons sexually attracted to persons of the same sex, meaning "men attracted towards men and women attracted towards women". This term is inclusive of the acronym LGBT ("Lesbian, Gay, Bisexual, and Transgender"). Same-sex marriage, also referred to as gay marriage, is the act of being married to someone who shares your sexual orientation or gender identity.

VI. CONSTITUTIONAL MANDATES

The Constitution of India provides Fundamental Rights to all its citizens, enshrined in Part III, from the Right to Equality to Writs for their enforcement. Fundamental Rights are considered essential for the development and protection of the individual. Transgender people have equal access to these fundamental rights. Though even if they are unable to exercise or profess it rightfully.

Seeing through the constitutional gateway, several essential rights given to the LGBTQ community are:

- Right to Equality, under *Article 14*¹² of the Indian Constitution guarantees the right to equality before the law and equal protection under the law, without considering sex, gender, sexual orientation, or any other factor.
- *Article 15*¹³ of the Indian Constitution prohibits discrimination based on race, religion, caste, sex, or place of birth. However, homosexuals are not permitted to marry of their own accord, thus in a sense they are subjected to discrimination for not being allowed to choose their spouse and live a marital lifestyle of their choice.

¹² India Const. art. 14.

¹³ India Const. art. 15, cl. 1 & 2.

- The right to freedom of speech and expression, which includes the ability to express one's sexual orientation and gender identity, is guaranteed by *Article 19*¹⁴ of the Indian Constitution.
- The right to life and personal liberty, which includes rights to sexuality, sexual autonomy, choice of sexual partner, privacy, dignity, the freedom to choose one's sexual orientation and gender identity, is guaranteed by *Article 21*¹⁵ of the Indian Constitution. It also includes the right to marry anyone, of one's choice and whenever s/he wants.

Additionally, the right to privacy was recognized as a basic and essential right under the Indian Constitution by the Supreme Court of India in its landmark judgement *Justice K.S. Puttaswamy vs. Union of India*¹⁶. This involves the right to sexual privacy as well as the freedom to make intimate personal decisions without intervention from the state.

VII. GOVERNMENT'S STANCE

In 2019, the government introduced the *Transgender Persons (Protection of Rights) Bill*¹⁷, which aimed to provide greater rights and protections for transgender individuals in India. However, the bill faced criticism from LGBTQ advocates who argued that it did not go far enough in protecting the rights of transgender individuals and that it did not address the issue of same-sex marriage.

The argument of the government has always been that there is a biological man, a biological woman and their union makes an Indian family unit¹⁸ and leads to procreation, that is the order of nature. The inability of same-sex couples to procreate cannot be a reason to deny their marriage rights. The position taken by the government has been clear concerning the right of LGBTQ people to have their socio-legal partnerships recognised by the parliament through enacting legislation for it

¹⁴ India Const. art. 19, cl.(a).

¹⁵ India Const. art. 21.

¹⁶ *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.*, (2017) 10 SCC 1, AIR 2017 SC 4161.

¹⁷ *Transgender Persons (Protection of Rights) Act, 2019*, No. 40, Acts of Parliament, 2019 (India).

¹⁸ Mythreyee Ramesh, 'Only Man & Woman Make a Family': Centre Opposes Same-Sex Marriage, *The Quint* (25 Feb 2021, 7:18 PM IST), <https://www.thequint.com/gender/same-sex-marriage-centre-response-to-pleas-delhi-high-court>

rather than, by a judicial order. The Centre has been urging the court to leave the issue to the parliament.

Solicitor General of India, Tushar Mehta on behalf of the government in the recent constitutional bench, hearing pleas of 20 petitioners seeking Legalization of same-sex marriage, regarded it as "Urban elitist view". However, no data has been presented by the government in this regard to back its contention.

VIII. CHALLENGES

In India, institutions as well as individuals frequently harass and discriminate against LGBTQ+ people. These preconceptions and stereotypes are frequently the foundation of this discrimination, which can have detrimental effects on the mental health and general well-being of LGBTQ+ people. This discrimination can be particularly severe for same-sex couples because they frequently experience harassment and violence when they try to exercise their rights or ask for official recognition of their relationships. The lack of exposure to LGBTQ+ people and same-sex couples in popular culture and society is one of the biggest social obstacles to same-sex marriages in India. People who identify as LGBTQ+ are frequently stigmatized and seen as sexually promiscuous or deviant, showing their prejudices and stereotypes towards them.

The institution of marriage and its conventional norms of the family is rooted in deep orthodox and patriarchal ideas. People in India are culturally and traditionally attached to their Customs because of which they regard same-sex marriage as a Westernized concept and against the traditional values of ancient India, which their ancestors passed on. These faiths are entangled in their religious ideologies too. The concept is not one of Western ideology but rather of fundamental human rights and non-discrimination. Secondly, categorizing the concept of gay marriage as 'Western' falsely assumes that sexual orientation is an adoptable lifestyle choice. It has to be understood that it is not a 'choice', but rather a 'nature'. Sexual orientation is a natural condition and attraction towards the same sex or opposite sex, both equally natural. Further, several theological Indian texts are evidential of the subsistence of persons with non-heterosexual sexual orientations in India. Ancient India, rather, recognized

a third type of nature of the person that included a multiplicity of minority gender identities and sexual orientations. Same-sex partners are not entitled to the same rights and protections as married couples. Same-sex couples may find it challenging to establish their rights or to win the support of the larger community as a result of this lack of legal recognition.

Procreation and maintaining the lineage are two of the primary goals of marriage, which are ultimately not possible for homosexual couples. However, that does not imply that individuals should be denied the freedom to marry whomever they want. The National Commission for Protection of Child Rights (NCPCR) estimates that between 2020 and 2021, at least 1,50,000 Indian children got orphaned or lost one of their parents. Additionally, the legalization of same-sex marriage would grant couples the right to adopt and orphan children with parents, family, and a home to live in. Allowing same-sex couples to marry is a matter of human rights and equality. Denying them the right to marry based on their sexual orientation is considered discriminatory by many people and organizations. Allowing same-sex couples to marry would provide them with the same legal benefits and protections as heterosexual couples, such as inheritance rights, access to healthcare, and the ability to make medical decisions for their partners.

IX. CONCLUSION

Allowing same-sex couples to marry in India would provide them with legal recognition and protection and would signify that their relationships are valued and respected by society. Marriage is an important institution that provides a framework for committed relationships, and allowing same-sex couples to marry would give them access to the same benefits and protections as heterosexual couples, such as inheritance rights, health insurance, and the ability to make medical decisions for their partners. Legalizing homosexual marriage would also send a message that discrimination based on sexual orientation is not acceptable in Indian society, and would promote greater acceptance and understanding of LGBTQ+ individuals and relationships. It would be a step towards greater equality and inclusivity and would provide same-sex couples with the opportunity to publicly celebrate and affirm their

love and commitment to each other. Being 'equal' citizens to India, it is a clear view of discrimination towards them. LGBT Community should have the 'right to institution of marriage' along with other rights attached to it; if not in Personal laws so as to not raise a societal uproar, then viably in the *Special Marriage Act, 1954*¹⁹ or a separate law or act be brought for the same. The object of the SMA, which provides for Court marriage, in 1954 specifically was to bring in its fold people who would be governed by a matrimonial relation apart from their personal law, safeguarding inter-caste and inter-religion marriages; then surely it is capable of being broadly read by modifying the language of the law and wherever 'husband and wife' is used, it should be made gender neutral by using the term "spouse", also replacing 'man and woman' from "person".

The court although allowed the 'right to love' to same-sex partners but 'right to marry' is still in question. And even if it is legalized by the Courts, the perspective of the society as a whole need to be changed and developed for accepting them as legal couples. Nevertheless, constitutional morality must prevail over social morality, required for a judicial reading down of the SMA to allow for legitimating same-sex marriages in India.²⁰

¹⁹ Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

²⁰ Bhumiika Gupta, The Case for Same-Sex Marriages in India, SSRN, Pg. 11, (2022).