



INDIA: FAILURE TO LEGALISE SAME-SEX MARRIAGE A 'SETBACK' FOR HUMAN RIGHTS

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Abstract

The Supreme Court's lexicon on privacy, autonomy, and constitutional morality has developed recently. The acknowledgment of various rights, including the right to privacy and the freedom to select a life partner, is the result of this. However, the Supreme Court provided a broad definition of the freedom to intimate contact in *Navtej Singh Johar v. Union of India*, a ruling that upheld the decriminalization of same-sex relationships. The article makes the case that marriage equality—recognizing same-sex marriage on an equal basis with traditional opposite-sex marriage—is the next logical step and that all the legal prerequisites have already been satisfied. According to the article, the limitation of the definition of marriage to "one man, one woman" is obviously arbitrary and violates Articles 14 and 15's ban on sex discrimination. The article acknowledges that arguments that same-sex marriage violates the sanctity of traditional opposite-sex marriage can be refuted by pointing out that the evolving concept of constitutional morality supersedes social or popular morality as a means of interpreting public morality as a restriction on fundamental rights. The argument is that 'one man, one woman' infringes Article 21's rights to privacy, autonomy, and dignity, as well as freedom of speech, including sexual orientation and gender identity. The article argues that personal laws are not religious in origin or character, and marriage equality should not be considered a violation of religious freedom based on the outdated 'essential religious practices' test. Finally, the article contends that the Hindu Marriage Act and the Special Marriage Act can be read to allow same-sex marriage.

Key Words: *Transgender, LGBTQ, Gender Identity, Sexual Orientation, Discrimination, Violation, Human Rights, Same sex marriage, Legal recognition, Homosexuals and Homosexuality, etc.*

Introduction

Same-sex marriage refers to the practice of marrying two men or two women. Although same-sex marriage is governed by law, religion, and custom in the majority of the world's countries, legal and societal responses range from celebration to punishment.

Some historians, most notably Yale professor and historian John Boswell (1947-94), suggest that the Roman Catholic Church accepted same-sex unions throughout medieval Europe, although others doubt this assertion. Scholars and the general public grew increasingly interested in the subject in the late twentieth century, as views about homosexuality and

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regulations governing homosexual behavior were liberalized, particularly in Western Europe and the United States.

The question of same-sex marriage frequently aroused emotional and political debate among proponents and opponents. By the early twenty-first century, several jurisdictions, both national and subnational, had legalized same-sex marriage; in others, constitutional measures had been adopted to prevent same-sex marriages from being sanctioned, or laws had been enacted that refused to recognize such marriages performed elsewhere. The fact that the same conduct was rated so differently by different groups highlights its significance as a societal issue in the early twenty-first century, as well as the extent to which cultural variation persisted both within and between countries.

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Despite the Supreme Court's refusal to allow same-sex unions, the Constitution Bench ruling is a powerful move towards silencing those who oppose it on the grounds that gender queerness and homosexuality are not Indian.

Chief Justice of India (CJI) D.Y. Chandrachud noted, "It is not queerness which is of foreign origin but the many shades of prejudice in India which are remnants of a colonial past." The verdict raises important questions about how people with unconventional gender identities or sexual orientation are still viewed as foreign, sophisticated, and elite. The Union administration even expressed this opinion in court throughout the same-sex marriage case's arguments. Five years after the supreme court decriminalized homosexuality, the Constitution Bench has made remarks that draw attention to state and society discrimination based on sexual orientation.

Why didn't same-sex marriage get legalized by the Supreme Court?

Non-heterosexual relationships are acknowledged by Justice Sanjay Kishan Kaul as an essential component of Indian culture and as a part of the "pluralistic social fabric." It was unanimous among the five judges on the Bench that queerness was not a phenomenon exclusive to the wealthy and elite English-speaking metropolitan population. The Chief Justice reasoned that because cities provide a degree of anonymity and access to resources, expressions of queerness are more evident in urban areas. Being queer is not exclusive or urban. The court declared in unison that anyone can be queer from any background or place in the world.

The idea that "homosexuality or gender queerness is not native to India" was explored by Chief Justice Chandrachud. He asserted that defining the term "Indian" is necessary to dispel this bias. In doing so, the Chief Justice noted that "anything, any event, or any practice is 'Indian' if it exists in India, occurs here, or is carried out by Indian citizens." Something that is Indian may have existed for eons or may have just recently emerged. Gender and sexual minorities are equally Indian to their cisgender and heterosexual fellow countrymen. The nation and its constitutional authorities, according to the Chief Justice, should not ignore

³ Writ Petition (Civil) No. 1011 of 2022

the growing demand for equality from the LGBTQIA population. He pointed out that their demand to legalize same-sex marriage shouldn't be written off as a cheap imitation of a notion from overseas.

The Supreme Court's ruling regarding same-sex unions

"The reaffirmation of an ancient identity rather than the declaration of a completely new one is what makes queerness more visible these days. Chief Justice Chandrachud noted, "An atmosphere that is supportive of LGBT people expressing themselves without fear of opprobrium has been fostered." He claimed that the British introduced Indians to their morality as well as their laws. He mentioned how the Criminal Tribes Act classified transsexual people as "eunuchs" and classified them as "habitual offenders."

The Act subjected transgender people to "enormous indignity," including allowing the government to do medical examinations on them, fining them for wearing clothing that "resembles a woman," performing music or dancing, and even nullifying their will.

What is the legality of same-sex marriage in India?

- The Indian Constitution does not expressly recognize marriage as a fundamental or constitutional right, but rather as a statutory right.
- Marriage is controlled by several statutory enactments, but its recognition as a basic right has only come about through legal decisions by India's Supreme Court. Article 141 of the Indian Constitution makes such a statement of law binding on all courts in the country.
- Previously, the Supreme Court viewed
 - same-sex marriage as a fundamental right (*Shafin Jahan v. Asokan K.M. and others 2018*:
 - ✓ The Supreme Court ruled that Article 21 of the Constitution includes the freedom to marry a person of one's choice, citing Article 16 of the Universal Declaration of Human Rights and the *Puttaswamy case*.
 - Article 16 (2) of the Indian constitution states that no one shall be discriminated against solely on the basis of religion, race, caste, gender, descent, place of birth, domicile, or any combination thereof.
 - ✓ The freedom to marry is inextricably linked to the liberty guaranteed by the Constitution as a fundamental right, as is each individual's ability to make decisions that are vital to the pursuit of happiness. Beliefs and faith, especially the decision to believe, are important to constitutional liberty.
 - The LGBTQ community is entitled to full constitutional rights (*Navtej Singh Johar and others v. Union of India 2018*).
 - ✓ The Supreme Court ruled that members of the LGBTQ community "are entitled, as all other citizens, to the full range of constitutional

rights, including the liberties guaranteed by the Constitution," as well as equal citizenship and "equal protection of the law."

What is the Special Marriage Act (SMA) of 1954?

- Marriages in India can be registered under the following personal laws: the Hindu Marriage Act of 1955, the Muslim Personal Law Application Act of 1937, or the Special Marriage Act of 1954.
- The Judiciary is responsible for protecting the rights of both husband and wife.
- The Special Marriage Act of 1954 allows for civil marriage between Indian citizens and Indian nationals living abroad, regardless of religion or faith.
- Marriages solemnized under this statute are controlled by the Special Marriage Act rather than personal laws.

Features:

- Allows people from diverse religious backgrounds to unite through marriage.
- Provides for the solemnization and registration of marriages in which neither the husband nor the woman are Hindus, Buddhists, Jains, or Sikhs.
- As a secular Act, it plays an important role in freeing individuals from traditional marriage obligations.

What are the arguments in favour of same-sex marriage?

- Equal Rights and Protection under the Law Every person, regardless of sexual orientation, has the right to marry and start a family.
 - Same-sex couples should enjoy the same legal rights and protections as heterosexual spouses.
 - Non-recognition of same-sex marriage constituted discrimination, undermining the dignity of LGBTQIA+ couples.
- Marriage strengthens families and communities by providing social and economic benefits to couples and their families, as well as to same-sex people.
- Cohabitation as a Fundamental Right: The Chief Justice of India (CJI) stated that cohabitation is a fundamental right, and it is the government's responsibility to formally recognize the societal consequences of such partnerships.
- The Supreme Court of India has stated that biological gender is not absolute and that gender is more nuanced than one's genitals. There is no absolute definition of male or woman.
- Global Acceptance: Same-sex marriage is legal in many nations throughout the world, and denying this right to citizens in a democratic country violates global standards
- Same sex marriage is legal in 32 countries.

What are the arguments against same-sex marriage?

Many religious and cultural organizations think that marriage should only occur between men and women. They say that modifying the traditional definition of marriage would violate the

fundamental foundations underlying their beliefs and values.

Procreation: Some say that the primary goal of marriage is procreation, and that same-sex couples are unable to have biological children.

They believe that same-sex marriage should be prohibited because it violates the natural order of things.

Legal concerns: Allowing same-sex marriage may result in legal complications such as inheritance, taxation, and property rights.

Some say that changing all rules and regulations to allow for same-sex marriage would be too difficult.

Issues with Adoption of Children: When queer couples adopt children, it can result in societal stigma, discrimination, and severe consequences for the child's emotional and psychological well-being, particularly in Indian society, where LGBTQIA+ acceptance is not ubiquitous.

What is the best way forward?

- **Raise awareness.** Awareness campaigns aim to promote equality and acceptance of all sexual orientations while also broadening public perception of the LGBTQIA+ community.
- **Legal Reforms:** Amendments to the Special Marriage Act of 1954 that allow same-sex couples to legally marry and enjoy the same rights and privileges as opposite-sex couples.
Meanwhile, establish a contract-like agreement so that homosexuals can enjoy the same rights as heterosexuals.
- **Dialogue and Engagement:** Talking with religious leaders and groups can help bridge the gap between traditional beliefs and contemporary attitudes toward same-sex couples.
- **Legal Challenges:** The Indian LGBTQIA+ community may challenge the validity of present legislation prohibiting same-sex marriage in court. Such legal battles can help set a precedent for the legalization of same-sex marriage.
- **Collaboration:** Legalizing same-sex marriage will require a concerted effort from all stakeholders, including the LGBTQIA+ community, the government, civil society, and religious leaders.

Working together, we can build a more inclusive society in which everyone, regardless of gender, has the freedom to love and marry whoever they choose.

Possible inclusion of same-sex marriages in personal laws.

In India, marriage is governed by personal rules based on religion. Hindus are governed.

Hindus have the Hindu Marriage Act of 1955, Christians have the Indian Christian Marriage Act of 1872, and Parsis have the Parsi Marriage and Divorce Act of 1936. Muslims have

uncodified personal laws. Marriage is a fundamental aspect of religion and is governed by its own laws.

The Hindu Marriage Act, 1955 (HMA, 1955) does not explicitly state that marriages must be between men and women. However, all conjugal rights emanating from marriage are to be applied to "husband" or "wife"¹⁵ (e.g. Sections 9,13), implying that even if same-sex weddings were permitted under the HMA, 1955.

There are no post-marriage protections for the couple, including restitution of conjugal rights, divorce, alimony and maintenance, legal guardianship, and kid rights (if one is adopted as a single parent). In the case of Arunkumar and Sreeja vs Inspector General of Registration and Ors., the Madras High Court addressed the question of whether a transgender woman can be deemed a 'bride'.

According to Section 5 of the HMA, 1955, any transgender or intersex person who identifies as a woman can be deemed a bride. Therefore, the union remains between a 'man' and a 'woman'. In *Abhijit Iyer v. Union of India and Others*, Mr. Abhijit Iyer petitioned for the registration of same-sex marriage under the HMA, 1955. He argued that the statute's language is gender-neutral and there is no stated prohibition on same-sex marriage. Non-recognition of the right to marry someone of one's choice violates fundamental rights outlined in Articles 14 and 19 of the Indian Constitution. The distinction was drawn between homosexuals

In terms of marital privileges, heterosexuals have contributed to the societal marginalization of homosexual relationships.

Despite the decriminalization of homosexuality, the Central Government informed the Delhi High Court that marriages in India can only be between heterosexuals (biological men and women). The Indian Christian Act of 1872 and the Hindu Marriage Act of 1955 share similar laws about marital privileges. This Act from the British era clearly states that marriage can only be between a husband and wife. Marriage is seen in Islam as a contract, or *Mithaqun Ghalithun* (a binding agreement). Marriage fulfills a man and woman's innate yearning for each other by fulfilling their procreative roles.¹⁹ Marriage is a contract between a man.

The agreement between a man and a woman involves a financial commitment and exclusive sexual access (by vaginal intercourse).²⁰ Homosexuals cannot legally marry or recognize their relationship since they cannot fulfill the marriage duty. According to the Quran, homosexual actions are not punishable by death. Prophet Muhammad also voiced disgust for gay relationships.

Need for a New Law for Same-Sex Marriage in India.

The above-mentioned laws do not explicitly recognize same-sex marriage, requiring new legislation.

legislation. Same-sex couples are eligible to benefit from the new law. Contrary to popular belief, heterosexual couples are discouraged from having pre-nuptial sex, whereas homosexual couples have limited sexual privileges and no marital rights. It is time to alter the very

foundation of marriage. The realization of women's rights challenges the notion that marriage is solely about childbearing. Women have the sexual right to decide whether or not to be mothers. Forced pregnancy is considered a crime against humanity under international law.²⁴ In *Suchita Shrivastava and others v. Chandigarh*.

The Supreme Court ruled in *Administration*²⁵ that a woman's right to reproductive choices is protected by Article 21 of the Indian Constitution. Marriage no longer requires procreation, as previously stated. On this note, same-sex marriage may be legalised.

Legalizing same-sex marriage will violate fundamental rights such as the right to life (Art 21), equality (Art 14), freedom of expression (Art 19(1)(a)), dignity (Art 21), choice of partner (Art 21), and more.

Right to privacy (Article 21). Article 15 of the Indian Constitution states that the state must not discriminate based on religion, race, caste, gender, or place of birth.

The legalisation of same-sex marriage can have twin benefits. Primarily, as various nations including India have adopted policies and enactments for population control, same-sex marriages would contribute to the sustainability of the environment by population control. Secondly, legalising same-sex marriage *inter alia* would lead to enacting the laws for adoption and maintenance. There are 30 million orphaned and abandoned children in India.

²⁶ Due to

stringent laws on adoption and a lack of adoption rights for same-sex couples, these children are deprived of happy family life. The Delhi High Court in *Lakshmi Bhayva Taneeru v. Union of India and others*²⁷ held that the right to meaningful family life is a part of the right to life. Legalizing the practice would require granting several marital privileges, making it difficult to incorporate all of them into personal laws. New legislation should include a clear explanation of the need for the law and its scope.

parties. Marriage rights include provisions for divorce, maintenance, adoption, succession, and inheritance. Parliament must clearly define who is responsible for providing support, legal guardianship of adopted children, and inheritance among same-sex couples.

The legalization of same-sex marriage: Is there progress?

Non-legalisation of same-sex marriage can cause persistent social stress and significant mental health issues.

problems. Research indicates that homosexual couples can be just as effective parents as straight couples.²⁸ Legalizing same-sex marriage may have consequences in countries such as India. India can adjust to changes, but can it reform marriage laws?

Live-in relationships are not equivalent to marriage. Marriage provides social, economic, and moral benefits to both parties. Homosexual couples face discrimination due to the absence of same-sex marriage laws. This stigmatizes homosexuality and perpetuates homophobia. Homosexual couples cannot enjoy the same privileges as heterosexual couples in a live-in relationship, including protection against

Domestic Violence, Maintenance, and Alimony²⁹. To ensure fundamental rights are protected, the couple must have access to all of the aforementioned rights.

Legalizing marriage would result in several marital rights, including adoption, divorce, maintenance, legal guardianship, custody, and inheritance, as well as economic rights like joint bank accounts and pensions.

Benefits for disabled people, and so on. Can homosexual couples handle divorce and marriage concerns through a prenuptial agreement (30)? The following are potential concerns that may develop after same-sex marriage becomes legal. One potential issue is that it could lead to illegal polyamorous marriages in India. Because legalizing one type of sexual distraction will result in a desire for legalizing marriage for all sexualities. Some couples use the term 'throuple' to describe a good and loving relationship among three individuals.

Three people love one another. Understanding certain concepts requires conclusive facts from researchers or scientists.

Conclusion

It's time to recognize that some people have different sexual preferences than heterosexuals, and that sexual choice is just one component of their identity.

They are just like any other heterosexual human being. The focus should be on social involvement that promotes inclusivity. Normalize this behaviour and eliminate the concept of shame.

Uniform legal protection for social, economic, and cultural rights can promote fairness. Legislation empowers individuals to raise concerns about abuse, violence, and prejudice, providing a critical voice.

It should be allowed or not, depending on the overall argument around same-sex marriage. This is a religious discussion, not a democratic one. After considering all of the arguments for and against legalizing same-sex marriage, I came to the conclusion that homosexuality is not an offense; it is simply a means of finding love, seeking physical fulfillment, or obtaining passion or enjoyment.

Aside from the obvious harm caused by limiting two gay men to a civil ceremony that provides them with the same rights and security as heterosexual couples, I see no rationale. Love is a promise and a loving shoe that announces the world's affection. How does this undermine or degrade the values of marriage, whether two men or two women want to express their love and commitment? I am assuming that passion and devotion are plainly exhibited.

We do not live in a time where a person's freedom of choice is prized, therefore India must not be a free country. Homosexuality, on the other hand, is neither modern nor alien to Indian society, and it has always existed, but with significantly less action. The greatest way to tackling homosexual marriages is broad and multifaceted.

However, it has to be seen how effective and feasible this method is. Furthermore, there is a growing feeling that our existing policy of not promoting homosexual marriage does not benefit

homosexuals or society as a whole. As a result, legalizing same-sex weddings is necessary to advance human rights.

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